

Questioning Multiculturalism

Indigenous Nations and Canadian Law

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Abstract

I evaluate Will Kymlicka's theory of multiculturalism in *Multicultural Citizenship: A Liberal Theory of Minority Rights*, and how it accounts for Indigenous nations in Canada. I ask whether any failures of multiculturalism can be attributed to either the normative or descriptive claims of his theory. I find points of failure in both claims, depending on the theme in question.

Chapter 1 introduces the project and outlines subsequent chapters. Chapter 2 presents an account of Kymlicka's multiculturalism (including why I chose Kymlicka's framework as my focus) and the guiding questions of the thesis. Chapter 3 presents major legislation, policy, and jurisprudence in Canada concerning Indigenous nations and multiculturalism in practice. Chapter 4 examines four major claims or themes found in Chapter 2 against the material in Chapter 3: citizenship in Indigenous nations; the characterization of treaties; exercising group-differentiated rights, and; the Canadian state's exercise of authority over Indigenous nations.

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Chapter 1 Introduction

1.1: The Beginning

The seed of this project was planted years ago from a sense I had that something was not quite working with multiculturalism in Canada and how it accounts for Indigenous nations, particularly through Canadian law and policy implemented by the Canadian government. This sense mostly arose from taking seriously that Indigenous nations are nations – they seek respect of their autonomy and sovereignty, and desire nation-to-nation negotiations with the Canadian state. From my basic understanding at the time, it seemed that multiculturalism, or at least the politics of recognition, was failing with regard to these demands.

Of course, as I address in the following pages, I am not the first or only person to take note of these issues and pursue them. However, I am primarily interested in the practical implementation of multiculturalism by the Canadian government, as opposed to focusing on the purely theoretical justifications for the politics of recognition and multiculturalism. This, as I explain in detail later, is why I have chosen Will Kymlicka's theory of multiculturalism as the framework for my analysis.

I was also motivated by my personal interactions surrounding these matters, suggesting to me that there exists a lack of awareness or misunderstanding regarding multiculturalism, Indigenous nations, and the legal and political landscape in Canada, even among those who are highly educated, and those who work for the federal government in decision-making roles. So, while what follows is primarily a work of political philosophy and intended for a philosophy-focused audience, I have written this work in such a way that, hopefully, a person who does not have a background in philosophy will be able to read this and come away with a better

understanding of these issues. At the same time, I hope to provide for those who are intimately familiar with this area of study a new perspective, for a more nuanced view of these issues.

1.2: A Note About Language

Language is a powerful tool, and the language we use is important. Language can have a significant impact on a reader's perception. In using the phrase 'Indigenous nations' throughout, I seek to affirm the claims of Indigenous nations to sovereignty and autonomy. What I mean by the term "Indigenous nations" are the nations which existed in the land now known as Canada prior to the arrival of the settlers and colonization. This is also meant to endorse for Indigenous peoples the validity of seeking nation-to-nation interaction with the Canadian state. I also wanted to allow for a more expansive reading or understanding of Indigenous nations; for example, the Métis and the Inuit are often left out of larger or academic conversations about Indigenous sovereignty, with more of a focus on First Nations and specifically reserve lands.¹ So, you will see that I use 'Indigenous nations,' 'Indigenous peoples,' and 'Indigenous communities' interchangeably, depending on which theorist or document I am discussing. These terms, though, are different from – but related – to the definition of "Indians" which for legal purposes refers to those who have legal Indian status under Canada's *Indian Act*; and "Aboriginal peoples" is the term used in Canada's *Constitution Act, 1982*, to refer to those who qualify for constitutional protection under Aboriginal rights, which are: "the Indian, Inuit and Métis peoples of Canada."²

¹ While I do not specifically address any circumstances unique to the Métis or the Inuit, I believe some of the analysis found in the third chapter could be useful in discussing their situations if further work was done to explicitly apply these concepts to their unique situations.

² *Canadian Charter of Rights and Freedoms*, s. 35(2), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

It is also important to note that over the years, colloquial language has gone through significant changes, so you may see Indigenous people referred to as ‘Indian,’ ‘Aboriginal,’ ‘Native,’ ‘Native American,’ ‘First Nations,’ or ‘Indigenous,’ depending on the source one is reading. All of this being said, when discussing particular theorists, caselaw, and policies, I have done my best to reflect the language used in these documents. This is both because we must always present an accurate account of the sources we discuss (even if the language used in the original document is not ideal), and because the language used in these works can sometimes be reflective of underlying beliefs or predispositions.

1.3: What to Expect

This thesis is comprised of three main parts. In the second chapter, I introduce Will Kymlicka’s framework of multiculturalism in detail (2.2), including how Kymlicka explicitly accounts for Indigenous nations in his theory (2.3). I also provide justification for why I selected Kymlicka’s framework as the basis from which to examine Canadian multiculturalism in practice, instead of focusing on other multicultural theorists (2.4). Lastly, I introduce the guiding questions of this thesis – namely, whether there are any failures of multiculturalism with regard to its accommodation of Indigenous nations, and if there are failures, whether they lie with the descriptive or normative claims of the theory (2.5). This chapter is meant to provide the reader with an adequate understanding of the theoretical framework of multiculturalism being used in this work, which will be assessed vis-à-vis the lived experience of Indigenous nations through government policy, legislation, and case law.

The third chapter is where I present major policies, legislation, and Supreme Court of Canada decisions, in order to impart an understanding of Canadian multiculturalism as it concerns

Indigenous nations. First, I discuss two of the most recognizably multicultural documents in Canada – the *Canadian Charter of Rights and Freedoms* (part of Canada’s constitution), and the *Canadian Multiculturalism Act* (3.2). Then, I consider the much-questioned *Indian Act* – a piece of legislation controlling all practical matters having to do with legal Indians and reserves in Canada – as well as an historic attempt to abolish this *Act*, and the Indigenous response to this attempt (3.3). Lastly, I present three major Supreme Court of Canada decisions on Aboriginal rights and title (3.4). This chapter should leave the reader with a picture of what the practical implementation of multiculturalism looks like in Canada – the material against which Kymlicka’s normative and descriptive claims can be measured.

In the fourth and final chapter, I take the foundational knowledge built in the previous two chapters, and put them into conversation with each other. That is, I examine four major claims or themes found in Kymlicka’s theory of multiculturalism discussed in Chapter 2 against the policy, law, and court decisions outlined in Chapter 3. These themes are: the regulation of citizenship in Indigenous nations (4.2); the characterization of treaties and their role in a deeper theory of justice (4.3); what happens when Indigenous nations try to exercise their group-differentiated rights (4.4), and; considerations about how the Canadian state exercises its power and authority over Indigenous nations (4.5). Finally, in light of the analysis of each of these aforementioned claims, I evaluate the normative and descriptive claims in each case, whether or not they are successful, and provide some concluding remarks (4.6). My overall conclusion is that points of failure can be found in both the normative and descriptive claims of multiculturalism, depending on the theme being discussed.

Chapter 2 Will Kymlicka's Multiculturalism

2.1: Introduction

This chapter presents Will Kymlicka's theory of multiculturalism – the framework of multiculturalism that is at the centre of my evaluation in this thesis. To introduce the framework, I provide an overview of the underlying principles Kymlicka insists must be respected in a defensible theory of group-differentiated rights (2.2.1). Following this, I discuss the two kinds of minority groups that can be accommodated in multicultural states, the kinds of group-differentiated rights accorded to each group, what limitations apply to these rights, and the arguments in defence of these rights (2.2.2 and 2.2.3). I will also explore an apparent shift in how Kymlicka accounts for different kinds of national minorities (2.2.4).

Then, I will focus on Kymlicka's discussion of how the theory reflects lived experience and clarify how Kymlicka explicitly accounts for Indigenous nations within his work – specifically how he claims Indigenous nations are accounted for within Canada (2.3). In the interest of defending my methodology, I will also discuss why I am not prioritizing the politics of recognition in order to show why I am committed to using Kymlicka's framework as the lens through which I will evaluate multiculturalism in Canada. (2.4).³ Finally, I will show how the structure of Kymlicka's theory gives way to the guiding questions of this thesis (2.5). The purpose of this chapter is to establish the philosophical foundation of the prescriptive work I will undertake Chapter 4.

³ By 'the politics of recognition' I mean the affirmation of an individual or group's identity through social and political institutions.

2.2: A General Overview of Will Kymlicka's Multiculturalism

2.2.1: Two Liberal Values

In *Multicultural Citizenship: A Liberal Theory of Minority Rights*⁴ (hereafter *MC*), Will Kymlicka seeks to present a comprehensive theory of multiculturalism that cuts through what he highlights as a fundamental problem facing most similar theories: ambiguity. While most theories of multiculturalism account for general pluralities of identity found within diverse citizenries, Kymlicka is explicit in warning against such generalizations and points to two distinct kinds of populations multiculturalism should account for: polyethnic states and multination states.

Polyethnic states are those having multiple ethnic groups. These states accept immigrants and do not demand that they abandon their unique ethnocultural identities. Multination states are those which contain more than one nation (or people) within its borders. A state can, of course, be both polyethnic and multinational at the same time. As the term 'multicultural' can denote either polyethnicity or the existence of national minorities, Kymlicka aims to outline a theory of group-differentiated rights that accounts for practical differences in the needs of these groups.⁵ This distinction between multination states and polyethnic states is a principal structural division that guides the rest of Kymlicka's theory. A premise by Kymlicka for the distinction between polyethnic groups and national minorities is a commitment to liberal values.

Kymlicka proposes a liberal theory of minority rights, that is, a theory which seeks to account for the unique needs of citizens in a multicultural (polyethnic, multination, or both) state by justifying the concept of group-differentiated rights. He argues that these rights are not opposed

⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996).

⁵ Group-differentiated rights are, put simply, rights that are specific to a minority group. These rights can target either polyethnic groups, national minorities, or both. Group-differentiated rights, while providing different rights to those in minority groups, are implemented towards the end of equitable citizenship – functionally, equality between minorities and the majority.

to liberal values – which prioritize the rights of individuals – but in actuality arise from these values. There are two liberal values Kymlicka insists must be respected to produce a defensible theory of group-differentiated rights.

First, a theory of minority rights must preserve the freedom to choose one's own conception of the good life. Whether these are beliefs we have held our entire lives or only just encountered, we must have the freedom to choose our own beliefs. There are two equally important and necessary conditions for a person to live a good life, no matter our convictions. The first condition is that "... we lead our life from the inside, in accordance with our beliefs about what gives value to life."⁶ How we go about our daily lives should be consistent with our internal beliefs, and we should not be compelled to live otherwise through fear of discrimination or punishment. The second condition to live a good life is that people must "... be free to question those beliefs, examine them in light of whatever information, examples, and arguments our culture can provide."⁷ People must not be prevented from knowing about other ways of life. Consequently, people must not be prevented from asking questions about or challenging their community's conception of the good life.

The second liberal value that must be respected in a theory of group-differentiated rights is allowing people the ability to revise and change their own ends, should one so choose. This follows very clearly from the second precondition for leading a good life – when we become aware of other ways of life and other conceptions of the good life, it is possible we could find this new information compelling enough to change our own beliefs and way of living, having reimagined our purpose in life. Importantly, we should have access to resources that provide unbiased

⁶ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 81.

⁷ *Ibid.*

information about different conceptions of the good life and be well-equipped to critically examine different conceptions of the good life (including our own).⁸ We must accept that changing our ends means we can be wrong. That we might be wrong justifies the necessity to access resources that allow us to re-assess our ends.⁹

Liberalism is the theoretical underpinning of the theory of multiculturalism outlined in *MC*, and Kymlicka insists that a theory of group-differentiated rights must be based on and cannot conflict with the two essential principles outlined above. In understanding the foundational principles of the theory, we can now return to the structure of the theory.

2.2.2: Polyethnic Groups

In the previous subsection I described the division in Kymlicka's theory of multiculturalism in terms of statehood, whether polyethnic or multination. Going forward I will discuss the categories of multiculturalism reported in *MC* in terms of the groups requiring accommodation from the larger state – polyethnic groups or national minorities.¹⁰

Polyethnic groups emerge as a result of large-scale immigration, where these immigrants have been allowed to maintain parts of their ethnic particularity in their new country. It is not always the case that immigrants are encouraged to maintain this unique sense of identity, and it is both the allowance by and encouragement of the majority government that promotes the existence

⁸ For example, a person might be raised as a staunch atheist, but find themselves in the midst of a religious revelation, feeling mistaken in their previous position. Similarly, a person could be raised within a religious institution and choose to leave that faith (either for another religion or for no religion at all). Neither of these situations should be prohibited or discouraged, and all information that could help either of these individuals make informed choices should be available to them.

⁹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 80.

¹⁰ As Canada is both a multinational and polyethnic state, it is not useful to frame the discussion of multiculturalism in *MC* primarily in terms of states being either polyethnic or multination, even given the clarification that a state can be both polyethnic and multination. What is important is the description of and suggested accommodations for each kind of group, as my intent is to closely examine the experience of one kind of national minority (Indigenous nations) within a particular state (Canada).

of polyethnic groups. The ability of ethnic minorities to maintain their unique ethnic identity is guaranteed through group-differentiated rights.

Though Kymlicka outlines three kinds of group-differentiated rights, only two of these rights apply to ethnic minorities: polyethnic rights and special representation rights. Polyethnic rights apply only to ethnic minorities and are characterized by the state's active involvement in promoting the preservation of certain aspects of the cultural particularity of minority groups in polyethnic states. Some of this promotion involves the "public funding of their cultural practices" including "the funding of ethnic associations, magazines, and festivals."¹¹ Beyond the positive right to maintain cultural practices with others who share one's ethnic identity, these rights also entail "exemption from laws and regulations that disadvantage [ethnic minorities] given, for example, their religious practices."¹² These rights are permanent as they are meant to protect (and not eradicate) cultural differences.¹³ There is also an assumption that new immigrants will continuously arrive – therefore, these rights will always be needed to ensure their just integration into the larger society.

Special representation rights are not meant to aid with the integration of ethnic minorities per se, but instead are meant to work towards ensuring that the political process is representative of minorities and their needs.¹⁴ These rights could be, for example, "guaranteed seats for ethnic ... groups within the central institutions of the larger state."¹⁵ The objective is to correct a presumed "systemic disadvantage within the political process" through removing barriers for participation or proportional representation of some kind.¹⁶ As special representation rights arise from a need to

¹¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 31.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid., 32.

¹⁵ Ibid., 9.

¹⁶ Ibid.

address oppression, they are meant to be temporary – the goal should be to rectify the disadvantage or oppression, eventually rendering such measures unnecessary.

Each group-differentiated right is aimed at external protection from the majority culture or the ability to impose internal restrictions on the group’s members (except for special representation rights, which are only used to seek external protection). External protections are meant to protect said minority from the effects of decisions made by the larger society.¹⁷ For example, the existence of special representation rights functions as an external protection for both national and ethnic minorities as these rights lessen the likelihood that minorities “will be ignored on decisions that are made on a country-wide basis” such as matters pertaining to religious holidays or other decisions that would affect the experience of public life by ethnic minorities.¹⁸ Each type of group-differentiated right responds differently to external pressures, as we will see below. This kind of protection is unique to multicultural states and does not appear in culturally or ethnically homogenous states.

Different from external protections, which Kymlicka upholds, are what he rejects: internal restrictions by the ethnic minority. Internal restrictions are claims of a group against its own members that are meant to protect the group from negative consequences that could arise from dissent within the group.¹⁹ In this case, the group “may seek the use of state power to restrict the liberty of its own members in the name of group solidarity.”²⁰ Unlike external protections, which are only used in multicultural states, internal restrictions can occur in both culturally homogenous and multicultural states.

¹⁷ Ibid., 35.

¹⁸ Ibid., 37.

¹⁹ Ibid., 35.

²⁰ Ibid., 36.

External protections sought for polyethnic rights are meant to “protect specific religious and cultural practices which might not be adequately supported through the market” or “which are disadvantaged (often unintentionally) by existing legislation...”²¹ On the other hand, internal restrictions involve the ethnic minority “seek[ing] the legal power to impose traditional cultural practices on their members.”²² Instead of supporting members of the minority to practice their cultural traditions or preventing people from experiencing unfair disadvantages (as with external protections), there is an attempt, through legal means, to prevent members of polyethnic groups from experiencing other ways of life, therefore binding them non-consensually to the larger group’s traditional practices.

Kymlicka insists that accepting the need for and endorsing external protections for minority groups is not an implicit endorsement of internal restrictions. Instead, he argues that the principles of liberalism make external protections necessary, while the use of internal restrictions would be obviously prohibited under liberal values.

An essential characteristic distinguishing the rights of ethnic minorities from those of national minorities is whether the group possesses a societal culture of its own. A societal culture is

... a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language.²³

Immigrants do not form homelands as distinctive peoples (or nations) in their new country. Though immigrants are encouraged to maintain aspects of their cultural particularity, there is a clear pre-existing expectation that they will integrate into the societal culture of the country they have immigrated to, which includes speaking the language of public life. The original societal cultures

²¹ Ibid., 38.

²² Ibid., 40.

²³ Ibid., 76.

of immigrants, then, are meant to enrich the larger society and majority culture of their new country through the addition of diverse perspectives and practices. Kymlicka notes that immigrants make a choice to leave behind “the set of institutionalized practices, conducted in their mother tongue” and “have uprooted themselves from the social practices” of their shared traditions and conventions.²⁴ The choice to leave one’s homeland and societal culture is (at least in part) why self-government rights do not apply to polyethnic groups.²⁵

Describing these rights is not, on its own, enough – there must be at least one convincing argument in favour these rights. That is, there should be compelling reasons for states to implement group-differentiated rights. These reasons should also be compelling to citizens who belong to the majority culture in a multicultural state. Kymlicka outlines three potential arguments for justifying the use of group-differentiated rights in a multicultural state. They are justifications based upon: equality, historical agreements, and the value of cultural diversity. While each argument provides its own reasons to accept the use of group-differentiated rights, Kymlicka believes that the latter two justifications cannot stand alone and are, in fact, predicated on the equality argument.

The equality argument is fundamentally an insistence that group-specific rights are needed to ensure all citizens are treated with equality – we must treat people differently (according to their unique situation and needs) to treat them equally.²⁶ In the case of polyethnic groups, the primary concern is to promote integration into the larger national society, specifically through “providing language training and fighting patterns of discrimination and prejudice.”²⁷ While there should be a focus on “rigorously enforcing the common rights of citizenship,” some group-differentiated

²⁴ Ibid., 77.

²⁵ See 1.2.3 for explanation of self-government rights.

²⁶ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 108.

²⁷ Ibid., 114.

rights arise from the equality argument.²⁸ These rights might include special allowances around public holidays – since legislation about closing on specific holidays disadvantages people who do not share the dominant religion of public life – or special allowances regarding dress codes.²⁹ Members of ethnic minorities can achieve equality in their cultural membership so long as these obstacles to accessing the majority culture are addressed.

Historical agreements between polyethnic groups and the government are not very common, though they do exist in some cases, as with the Hutterites in Canada, who immigrated under the pretense of exemptions “from certain laws regarding education, land ownership, and military service”.³⁰ When we discuss historical agreements with polyethnic groups, there is a concern that the historical agreements that were made with the group provided unique privileges that are explicitly denied to other immigrant groups now (and these unique privileges are not necessarily based on justifiable grounds in the modern day). This fuels a further concern that the agreements are no longer fair due to changing circumstances. Because of their rarity and the lack of underlying rationale based in justice, historical agreements are not a particularly convincing basis from which to argue for supporting group-differentiated rights for ethnic minorities.

The final argument to justify group-differentiated rights is through the value of cultural diversity. This argument takes whatever benefits the larger society (in other words, the majority culture) receives from cultural diversity and uses these benefits as the main justificatory premise. Since members of the majority culture benefit from the added diversity (whether that is new food, music, language, technologies, etc.), this means there is a personal or selfish motivation for members of the majority culture to adopt a supportive stance about group-differentiated rights. Of

²⁸ Ibid.

²⁹ Ibid., 114-115.

³⁰ Ibid., 119-120.

the two minority groups, this argument is much more persuasive for group-differentiated rights for ethnic minorities, since the added diversity from immigrants does not necessarily impose restrictions on members of the majority.³¹

While each argument provides some compelling reasons to embrace group-differentiated rights, Kymlicka believes that the equality argument is the only well-founded basis from which we can argue this point. The other two arguments do not provide a dependable conceptual foundation to compel their acceptance, whereas the equality argument does. It is the ability to ground these rights in what Kymlicka calls a ‘deeper theory of justice’ that provides an imperative for people to not only accept their implementation, but to expect their implementation as the path toward a just multicultural society.

So, we are left with a picture of two group-specific rights for ethnic minorities – special representation rights and polyethnic rights. While we must consider the power and importance of a societal culture, there is an understanding that immigrants make a choice to leave behind their native societal culture and through this choice agree to integrate into the societal culture of their new home country. Special representation rights and polyethnic rights emerge from the liberal tradition and respect the freedom to choose one’s own ends, and the freedom to revise and change those ends. We justify the implementation of these rights through a deeper theory of justice that prioritizes and seeks the equality of citizens, and recognize that the group-specific treatment of ethnic minorities is required in order to achieve and eventually protect this equality.

Now that we have a picture of the overall structure of the theory and the particular rights assigned to polyethnic groups given their unique circumstances, we can now look to national minorities. The group-differentiated rights Kymlicka outlines for national minorities follow a very

³¹ Ibid., 123.

similar structure, though there are significant differences in the scope of the group-specific rights intended for national minorities and the underlying justification for said rights.

2.2.3: *National Minorities*

Multination states are comprised of at least two national groups – the non-dominant groups being referred to as ‘national minorities.’ The larger multination state comes to be through voluntary federation or the forcible incorporation of minority nations. In *MC*, the discussion of national minorities is heavily focused on the majority culture, specifically on how the government of a multicultural state is responsible for providing the necessary means for national minorities to preserve their culture and govern aspects of their members’ lives. The majority nation (the government) is the power or institution that grants group-differentiated rights to national minorities.

The unique and further-reaching mechanisms of the group-differentiated rights available to national minorities proceed from the fact that national minorities possess a societal culture. National minorities existed separately and prior to the majority nation, and “At the time of their incorporation, each group constituted an ongoing societal culture, separate from the [majority] culture.”³² Kymlicka emphasizes that shared language and history are necessary elements for constituting a national minority, since these are the building blocks of a societal culture. In contrast to ethnic minorities, national groups exist on a homeland “since their language and historical narratives were already embodied in a full set of social practices and institutions, encompassing all aspects of social life.”³³ Though the majority nation or larger state does not always provide the group-differentiated rights needed to do so, many national minorities have struggled against the

³² *Ibid.*, 79.

³³ *Ibid.*

majority culture and asserted their existence as distinct societal cultures. That national minorities fight to maintain their separate identity is an indication that a societal culture helps to provide its members with a meaningful way of life.

Two kinds of group-differentiated rights apply to national minorities: self-government rights (which are unique to national minorities) and special representation rights (which in some sense apply to both ethnic and national minorities). Self-government rights arise where national minorities “demand some form of political autonomy or territorial jurisdiction, so as to ensure the full and free development of their cultures and the best interest of their people.”³⁴ While federalism is one method through which to recognize the right of national minorities to self-government, this can only happen if the national minority forms a majority within the given territory or subunit. Given their complicated nature, self-government rights are generally understood as “devolving political power to a political unit substantially controlled by the members of the national minority, and substantially corresponding to their historical homeland or territory.”³⁵ Any right that is justified by or grounded in self-government is understood to be permanent.³⁶

Special representation rights for national minorities are meant to address the worry that the political process is unrepresentative of the members of national minorities and their concerns. The remedies for these concerns are removal of barriers for participation or proportional representation of some kind, affecting matters such as land development, resource extraction, and constitutional matters.³⁷ Special representation rights are extended for national minorities in a way that they are

³⁴ Ibid., 27.

³⁵ Ibid., 30.

³⁶ Ibid., 33.

³⁷ Ibid., 32.

not for ethnic minorities, in that these rights guarantee a (limited) form of self-government. This kind of special representation right is permanent.³⁸

As is the case with polyethnic groups, the group-differentiated right unique to national minorities (self-government) are for the sake of external protection, not internal restriction. Self-government rights seek external protections in the sense that power is accorded to the national minority so that the larger society cannot make decisions on their behalf through majority rule. This is to protect aspects “of particular importance to their culture, such as issues of education, immigration, resource development, language, and family law”³⁹ from encroachment by the majority culture. Kymlicka also notes that self-government rights might be invoked to seek internal restrictions. Kymlicka holds that while it might be claimed that internal restrictions could be justified as a means of maintaining cultural purity and to thwart overstepping by the majority government, this should not be allowed.⁴⁰

Special representation rights for national minorities only provide external protections, and this is, again, done by protecting the minority from the larger society. This external protection would also guarantee representation on any governmental (or other) body that has a direct impact on decisions about their people and their unique rights (such as, Kymlicka says, the Supreme Court).⁴¹

The same three arguments that justify group-differentiated rights for polyethnic groups also apply to national minorities: the equality argument, historical agreements, and the value of cultural diversity. The effectiveness of each argument differs with respect to national minorities. In this case, the equality argument still arises from the principle that we must treat national groups differently in order to treat them equally, since different groups have different needs. However,

³⁸ Ibid., 32-33.

³⁹ Ibid., 38.

⁴⁰ Ibid., 39.

⁴¹ Ibid., 32-33.

the equality argument is not a mechanism to justify integrating national minorities into the larger society. Instead, the purpose is to promote equality through the availability of choices and the freedom to live within one's own societal culture. These choices include whether national minorities have an opportunity to maintain themselves as a distinct culture, since national minorities face threats to the viability of their societal culture from the majority culture.⁴² Not only is the ability of a national minority to maintain their societal culture important, but individual group members must also have the full range of choices available to them that members of the majority culture do (for example, being able to work and receive services in your own language, or choosing to forego particular traditions or cultural practices).⁴³ There is an appeal to the obligation of the majority to act in such a way that promotes equality through the preservation of the national minority's culture when the equality argument is used.

Historical agreements play a significant role in the justification of group-differentiated rights for national minorities (whereas they are very rare for polyethnic groups). Examples of historical agreements between national minorities and the larger society include "the treaty rights of Indigenous peoples, or the agreement by which two or more peoples agree to federate" and, given their origins and their nature, some of these agreements "have considerable legal force".⁴⁴ Though historical agreements could justify the same kinds of rights as the equality argument, they are still distinct from them in the sense that the equality argument leads to a positive right to funding, while the argument from historical agreements leads to a negative right to non-interference based on the terms of the given agreement(s).⁴⁵ There is also the case of colonization, which Kymlicka takes care to distinguish as giving rise to imposed terms, while federation or

⁴² Ibid., 109.

⁴³ Ibid., 111-113.

⁴⁴ Ibid., 116.

⁴⁵ Ibid., 117-119.

treaties are voluntary. Agreements that might have been born of involuntary circumstances such as colonization are, today, viewed with suspicion. But there are concerns that even voluntary historical agreements are “out of date” or “patently unfair.”⁴⁶ Still, Kymlicka notes that respecting historical agreements is crucial for maintaining trust and good standing not only with national minorities, but also with the members of the majority (even if members of the majority are not directly impacted by these agreements).⁴⁷

Lastly, the value of cultural diversity is not an ideal basis from which to justify group-differentiated rights for national minorities. Relying on the benefits incurred from cultural diversity appeals to the interests of the larger society, and it is not clear that the interests of the majority are advanced by group-differentiated rights for national minorities. This is because national minorities are seeking to uphold their own societal culture and are not seeking to integrate into and diversify the majority culture through the rights accorded to them. Kymlicka also asserts that the benefits incurred by the larger society from cultural diversity are not so great that self-interest would reliably hold as a justification, since the cost of these rights to some members of the majority can be significant.⁴⁸ Since this argument appeals to the self-interest of the majority, and the benefits are not overwhelmingly apparent, the majority would have few reasons to accept group-specific rights for national minorities. Thus, Kymlicka concludes that an appeal to group-specific rights through the benefits of cultural diversity must first be grounded in a deeper theory of justice, as with historical agreements.

Now we see the full scope of the theory Kymlicka outlined in *MC* – the conceptual foundations of the theory, its structure, the rights accorded to minority groups, and the arguments

⁴⁶ Ibid., 116.

⁴⁷ Ibid., 116.

⁴⁸ Ibid., 121-122.

in favour of the implementation of multicultural (both polyethnic and multination) policies. While the rights for polyethnic groups and national minorities exist within this single overarching structure, there are some notable differences in the scope of the group-differentiated rights for each minority group. While understanding how ethnic minorities are addressed in Kymlicka's theory is important to comprehend the larger theory of multiculturalism, I will focus primarily on national minorities going forward.⁴⁹

2.2.4: Kymlicka's Later Work

It is important to acknowledge that *MC* was published in 1995 and since this seminal work, Kymlicka continued to refine his theory. The most significant expansion of his theory of multiculturalism is presented in *Multicultural Odysseys: Navigating the New International Politics of Diversity* (hereafter *MO*), which was published in 2007.⁵⁰

MO is not of primary importance in this thesis due to its largely international focus – the aim of *MO* is to argue for the adoption of multicultural policies throughout the world, most especially where there is active resistance to or disdain for multiculturalism, in the non-Western world, where Kymlicka notes there are significant human rights abuses happening to minorities. In *MO*, the working order of multiculturalism in countries like Canada is taken for granted. Since the purpose of this thesis is focused on the work that is prior (theoretically, not just temporally) to the work done in *MO*, as I am evaluating multiculturalism in Canada, I made an informed choice not to prioritize *MO* as a source. I did not explicitly mention *MO* in the above exposition of the

⁴⁹ I may refer to ethnic minorities and their position within Kymlicka's theory as a means of clarifying a problem faced by national minorities. Addressing whether Kymlicka's theory justly accounts for ethnic minorities in Canada (though an important question) is outside the scope of this thesis.

⁵⁰ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007).

theory found in *MC*. However, it contains both elucidation of the kinds of values found in multicultural countries, and seemingly, a departure from the original structure of the theory – particularly the division between polyethnic groups and national minorities.

Whether we are speaking about polyethnicity or multinationality – there are several characteristics multicultural states should share or be working towards: (a) rejection of the notion that a state is comprised of only one national group⁵¹; (b) rejection of nation-building policies that include the forced assimilation – or, conversely, the exclusion of minorities – and official state adoption of recognition and accommodation of “the history, language, and culture”⁵² of minorities, and; (c) both acknowledgement of and willingness to remediate historic injustices that were carried out through government policy.⁵³ These principles and the actions required to implement them are natural extensions of the work done in *MC*. If a multicultural state intends to adopt a liberal approach to implementing group-differentiated rights, these three principles are necessary consequences. If any of these principles were violated, it is a clear indication that there is either a misunderstanding or rejection of the purpose of adopting multiculturalism as a state policy, and that this amounts to a failure on part of the state.

The most significant departure from the original structure of the theory has to do with how Kymlicka characterizes Indigenous peoples. In *MC*, Indigenous peoples are treated as national minorities. However, in *MO*, Indigenous peoples are treated as a unique entity in their own right, separate from what Kymlicka refers to as ‘substate/minority nationalisms.’ A substate/minority nationalism is “... a regionally concentrated group that conceives of itself as a nation within a larger state and mobilizes behind nationalist political parties to achieve recognition of its

⁵¹ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 65.

⁵² *Ibid.*, 66.

⁵³ *Ibid.*

nationhood, either in the form of an independent state” through secession, “or through territorial autonomy within the larger state.”⁵⁴ An example of a substate nationalism is Québec.

The act of distinguishing between Indigenous nations and other national minorities is sensible for some reasons, primarily in that Indigenous nations maintain claims to nationhood and sovereignty that pre-date, not only the existence of the majority state, but also other non-Indigenous minority nations. Kymlicka also presents nine policies that could be adopted by multicultural states that apply to Indigenous nations:

- (1) recognition of land rights/title;
- (2) recognition of self-government rights;
- (3) upholding historic treaties and/or signing new treaties;
- (4) recognition of cultural rights (language, hunting/fishing);
- (5) recognition of customary law;
- (6) guarantees of representation/consultation in the central government;
- (7) constitutional or legislative affirmation of the distinct status of indigenous peoples;
- (8) support/ratification for international instruments on indigenous rights;
- (9) affirmative action for the members of indigenous communities.⁵⁵

These policies are unique to Indigenous peoples and do not extend to other minority groups.

Similarly, Kymlicka outlines six policies that apply only to substate national groups:

- (1) federal or quasi-federal territorial autonomy;
- (2) official language status, either in the region or nationally;
- (3) guarantees of representation in the central government or on constitutional courts;
- (4) public funding of minority language universities/schools/media;
- (5) constitutional or parliamentary affirmation of ‘multinationalism’;
- (6) according international personality (e.g. allowing the substate region to sit on international bodies, or sign treaties, or have their own Olympic team).⁵⁶

Kymlicka also characterizes the language each group uses to describe their respective struggles for recognition and autonomy within a multicultural state as different from one another. In the case of Indigenous nations, Kymlicka indicates that the type of language preferred is that of “self-determination, treaty rights, and aboriginality or indigeneity ...”.⁵⁷ Minority national groups

⁵⁴ Ibid., 68.

⁵⁵ Ibid., 67.

⁵⁶ Ibid., 71.

⁵⁷ Ibid., 67.

“prefer the language of nationhood, self-determination, federalism, and power-sharing.”⁵⁸ Though there is clearly a shared value here – that of self-determination – there are more similarities between the national projects of substate national groups and Indigenous peoples than only self-determination.

For the purpose of this thesis, I will treat Indigenous nations and other substate national minorities as belonging to the same overarching category of national minorities (as is done in *MC*). In the same sense of the truth that ‘not every rectangle is a square, but every square is a rectangle’, it is not disingenuous to acknowledge that, while not every substate national group is an Indigenous nation, many Indigenous nations share many fundamental goals and move toward similar aspirations as non-Indigenous national minorities. We can look to the policies that are applicable to either Indigenous peoples or substate national groups, outlined above, to affirm this point.

Under the policies affecting Indigenous peoples, ‘recognition of customary law’ could be interpreted in more than one manner. On the face of it, there is the strict sense of customary law, where the word ‘customs’ on its own can suffice as a synonym, and the word ‘law’ does not refer to a legal tradition. Thus, this could be downplaying the concrete legal traditions of Indigenous nations, depending on the context or the intent with which the term is used. If we speak in terms of legal traditions, separate legal traditions are not necessarily pursued or upheld by non-Indigenous national minorities, but in some cases they are. For example, Québec uses the civil law system, unlike the rest of Anglo-Canada, which adheres to the common law system. So, when evaluating it charitably, the spirit of this policy would also apply to substate national groups.⁵⁹

⁵⁸ *Ibid.*, 71.

⁵⁹ Canada has three distinct legal traditions, connected to the nations within it – common law (associated with Anglophone Canada), civil law (associated with Québec), and Aboriginal law (varies with each nation).

Both ‘official language status, either in the region or nationally’ and ‘public funding of minority language universities/schools/media’ – two policies for substate national groups – have clear crossover with the aims of Indigenous nations. In the Indigenous language revival there has been a push, not only for official language recognition, but immersion language camps and schools have also been created.⁶⁰ There is also the use of Indigenous languages in media.⁶¹ While under the policies dedicated to Indigenous nations there is the ‘recognition of cultural rights (language, hunting/fishing)’ it is unclear what would constitute recognition of these rights other than the concrete action of support of language revival initiatives or official language status. Or, at the very least, the recognition of cultural rights would not exclude either of these possibilities, though it is important to note that the extent to which Indigenous nations want government funding for these initiatives might vary.

On the matter of representation in the federal government, Kymlicka notes policies for both Indigenous nations and substate national groups. For substate national groups, there could justifiably be ‘guarantees of representation in the central government or on constitutional courts’ whereas for Indigenous nations there could justifiably be ‘guarantees of representation/consultation in the central government.’ Evidently, there is a sort of convergence here, but there is an important difference in the language used that should be noted. For substate national groups, nothing less than concrete representation is sought. However, for Indigenous nations, the nebulous term ‘consultation’ is used as interchangeable with representation, and there is no discussion of representation on constitutional courts. This is despite the fact that many legal

⁶⁰ For example: Kehkimin immersion school for the Wolastoquey language, which opened in 2022, and; Inuktit is one of the official languages of Nunavut.

⁶¹ For example, Nuxalk Radio operates out of Bella Coola, British Columbia, and promotes fluency in the Nuxalk language. On a larger scale, APTN operates as a media outlet dedicated to telling Indigenous stories – both news media coverage, and the production of original entertainment content focusing on the stories and experiences of Indigenous people.

issues Indigenous nations face are constitutional in nature, and Indigenous nations have rallied around constitutional representation.⁶²

There is also the matter of the treatment of each group at the hands of the majority nation, or larger state. Kymlicka acknowledges that many of the historic policies of assimilation and erasure used against Indigenous peoples were also employed against substate minority nationalisms.⁶³ While the depths of these traumas and their extension into the present day differ in their scope and effect, there has been a type of shared suffering at the hands of the majority, having similar underlying justifications rooted in the pursuit of a culturally homogenous nation-state. That is not to say that experiences like the policy in Canada of residential schools, the 60s scoop, and ongoing violence against Indigenous peoples are not uniquely horrific experiences, and that they do not have a profound impact today – they are, and they do. And we cannot forget that persecution can also be perpetrated by non-Indigenous national minorities – though the perception of Indigenous nations and other substate national groups as threats (whether historically or presently) to the majority culture, is a shared experience that is worth acknowledging.⁶⁴

This, of course, is not an exhaustive analysis of the entire list of policies intended to accommodate substate nationalisms and Indigenous peoples. Nor am I suggesting that the experience of Indigenous nations and other substate national groups are interchangeable or identical.⁶⁵ Instead, the point is that enough similarities remain across these suggested policies and

⁶² See, for example: John Borrows, “Indigenous Freedom and Canadian Constitutionalism,” in *Freedom and Indigenous Constitutionalism*, (Toronto: University of Toronto Press, 2016), 103-127; John Borrows, “(Ab)Originalism and Canada’s Constitution,” in *Freedom and Indigenous Constitutionalism*, (Toronto: University of Toronto Press, 2016), 128-160; and Arthur Manuel and Grand Chief Ronald M. Derrickson, “The Constitution Express: A Grassroots Movements,” in *Unsettling Canada: A National Wake-up Call*, (Toronto: Between the Lines, 2015), 65-75.

⁶³ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 68.

⁶⁴ Why each group is perceived as a threat to the larger state is a more complex issue.

⁶⁵ And, further, the experience of different non-Indigenous substate national groups differ from each other, and Indigenous nations differ in their experiences too.

the aspirations of Indigenous peoples and substate nationalisms that using the structure presented in *MC* is not misguided, nor does it contradict the position found in *MO*.

Indeed, Kymlicka himself addresses the distinction between Indigenous peoples and other substate national groups in policy. He does not believe the distinction is justifiable and mounts a defence of using the language of national minorities to discuss Indigenous peoples. Both non-Indigenous ‘homeland minorities’⁶⁶ and Indigenous peoples seek rights of self-government and self-determination within the larger state.⁶⁷ Although in Canada (and the West generally), both European national minorities and Indigenous peoples “are homeland groups, but the former have been incorporated into a larger state dominated by a neighbouring people, where the latter have been colonized and settled by a distant colonial power.”⁶⁸ So here we see an acknowledgement of the origins of non-Indigenous homeland groups, but this does not do away with the national identity and projects of self-determination undertaken by both kinds of national minorities.

My treatment of Kymlicka’s work in *MO* may be surprising, because it may seem that the explicit distinction between Indigenous peoples and other substate national groups would make the claims of Indigenous peoples seem stronger than those of substate national groups. However, Québec (a substate national group) is treated as a federal group or counterpart to the Canadian state, whereas Indigenous nations are under the jurisdiction of the Canadian state. Québec maintains the legal mechanisms needed to assert their authority over matters pertaining to their

⁶⁶ Kymlicka uses the term ‘homeland minorities’ to describe both Indigenous peoples and non-Indigenous national minorities. Indigenous peoples in Canada live on their homelands – the territory of their ancestors, where their occupation of that space predates the country known as Canada today. However, Kymlicka also uses this label for “substate national groups [who] have been offered a significant degree of territorial autonomy, usually through some form of federal or quasi-federal devolution of power, as well as some form of official language status.” See: Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 177.

⁶⁷ Kymlicka discusses the problems of these definitions both in the larger international context, but also within the New World settler states. See: Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 264-291.

⁶⁸ *Ibid.*, 278.

national project and the survival of their culture, and to thwart overstepping by the Canadian state.⁶⁹ However, in contrast, the Canadian state maintains significant control over the internal affairs of Indigenous nations through, for example, the *Indian Act*.⁷⁰ That the Canadian state maintains this level of control over the internal affairs of Indigenous nations is of primary concern in this thesis, as this does not reflect Indigenous nations' assertions of sovereignty. My aim in this work is to respect the nature of Indigenous claims to sovereignty, while also evaluating Kymlicka's theory of multiculturalism. To move away from the language of national minorities and the structure of Kymlicka's theory in *MC* could, I believe, misrepresent the nature of the political aspirations of Indigenous nations.

Fundamentally, in my assessment of Kymlicka's theory, I will account for how Indigenous nations are accommodated, and the ways in which Indigenous peoples are used as examples of the theory in practice. Assessing Indigenous nations as national minorities, for the purpose of evaluating the structure of the theory found in *MC*, does not overlook the clarifications provided by Kymlicka in *MO*.⁷¹

⁶⁹ This is done through, for example, Québec's control over language laws within the province, and the use of the notwithstanding clause in the Canadian Charter of Rights and Freedoms.

⁷⁰ The *Indian Act* and other mechanisms of control the Canadian state uses in relation to Indigenous nations will become clearer in Chapters 3 and 4.

⁷¹ Going forward, my focus on Indigenous nations will not allow me to account for Québec's complex relationship with both the Canadian state and Indigenous nations. However, it is important to acknowledge that Québec explicitly rejects multiculturalism both as a tool of their own incorporation to the larger Canadian state, and as a model of diversity management within Québec. In place of multiculturalism, the model of interculturalism has instead been suggested. Interculturalism is characterized by its own set of values that are different from any model of multiculturalism, and in fact partly grounds its identity in the explicit rejection of multiculturalism. Gérard Bouchard is perhaps the most authoritative proponent of interculturalism and has done much to elucidate not only the core philosophy of the model, but also to imagine the implementation of these values. Early iterations of interculturalism did not concern themselves with accommodating Indigenous nations, as Bouchard acknowledges that interculturalism is meant to accommodate minorities within a single nation, and Indigenous nations seek nation-to-nation relations. However, this has started to change in recent years, and there are theorists who are working to better understand the relation between interculturalism, Québec, and Indigenous nations. All of this is to acknowledge that much more could be said about Québec and its relationship to multiculturalism and Indigenous nations, though the inherent limits of this project mean that I cannot do these problems justice. For further reading see: Gérard Bouchard, "What is Interculturalism?," *McGill Law Journal*, 56 no. 2 (2011): 445; Jérôme Gosselin-Tapp, *Refonder l'interculturalisme: Plaidoyer pour une alliance entre les peuples autochtones et la nation québécoise*. (Montréal: Les Presses de l'Université de Montréal, 2023).

Finally, it might be easy to assume that I am criticizing Kymlicka's framework itself when reading the following pages. As a result, it might seem strange or even uncharitable that I would focus on Kymlicka's framework as found in *MC* – after all, Kymlicka has shifted and refined his theory of multiculturalism since this work was published in 1995. However, it is vital to understand that this thesis is not a dedicated study of Kymlicka's political philosophy. Instead, I am using Kymlicka's framework as a *conduit* to examine the Canadian state's implementation of multiculturalism and how this manifests in policy and law. I have acknowledged that Kymlicka's position has shifted over time in this section, specifically highlighting his most recent expansion on his framework of multiculturalism, *Multicultural Odysseys*. These changes, however, are less relevant to the work I undertake in the following pages because this project is not a critique of Kymlicka's framework itself. Instead, I am using this theory to examine flaws with the Canadian state. The reason I focus on the theory found in *MC* is because I contend that this framework is the most reflective of the current state of affairs in Canada – of both the implementation of multiculturalism in Canada and the normative reasons the Canadian state maintains for its implementation, in both its successes and its failures.

2.3: The Canadian Context: How Indigenous peoples are accounted for in Kymlicka's multiculturalism

Throughout *MC*, Kymlicka makes ample use of Canada as an example of multicultural policies and values in action. Canada is a multicultural state in every sense of this word – both multination and polyethnic – and is exceptional (though not unique) in this regard, because it is officially recognized that Canada is both a nation of immigrants, and is comprised of three distinct

nations of people.⁷² While the general structure and content of the theory was established earlier in 2.2, what is of particular interest now is how Indigenous nations in Canada are referenced as representative of multiculturalism, specifically multinationality, in practice.

Canada's cultural framework is characterized as a "federation of three distinct national groups (English, French, and Aboriginals)."⁷³ The English are the majority nation, and "the original incorporation of the Québécois and Aboriginal communities into the Canadian political community was involuntary. Indian homelands were overrun by French settlers, who were then conquered by the English."⁷⁴ So, Indigenous peoples constitute one of the three national groups in Canada and are one of the two national minorities, alongside Québec.⁷⁵ A prerequisite for acknowledging that a group is a national minority is that the minority must possess a societal culture, which, we recall, constitutes an institutionally complete way of life for its members. To discuss what rights apply, Kymlicka explicitly rejects race-based standards of membership, but does not clarify this stance regarding Indigenous peoples in Canada, even given that membership in Indigenous nations is regulated by the government of Canada through the *Indian Act*.⁷⁶

Kymlicka provisionally confirms that Indigenous peoples possess a societal culture, while acknowledging the complexities of the historical reality of the abuses inflicted on Indigenous peoples, and the prevailing power imbalance that comes about (at least in part) as a result of these

⁷² Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 22.

⁷³ *Ibid.*, 12.

⁷⁴ *Ibid.*

⁷⁵ I use the word 'two' quite loosely here. It is important to note that the term 'Indigenous nations' refers to more than one national minority, as Indigenous peoples are not a monolith. Each Indigenous nation in Canada is unique, having a rich and complex history. For the sake of simplicity, I believe it is still appropriate to group Indigenous nations together under this moniker when speaking generally, as even in their distinctiveness, Indigenous nations share a number of fundamental common goals and a common history. Also important to note is that Canada is, at the same time, a polyethnic state, evidenced by the empirical fact of large-scale immigration, the international identity we project as a nation of immigrants, and government policies like the *Multiculturalism Act*.

⁷⁶ *Indian Act*, R.S.C., 1985, c. I-5.

abuses. Recall that what it means for the minority culture to be institutionally complete requires a number of prerequisites, some of which include occupation of a homeland, and having a shared language and history. But, Kymlicka acknowledges, there is not a long-standing historical precedent of respecting multinationality, and so through assimilationist policies “some indigenous peoples have been decimated in size, denied the right to maintain their own institutions, and progressively demoralized.”⁷⁷ Indigenous languages in Canada have suffered immensely, especially when considering fluency, and that Indigenous people mostly conduct their lives in either English or French. This is not the result of organic culture-sharing, but instead is the result of genocidal policies carried out by the government through residential schools⁷⁸, where the objective was complete extermination of Indigenous culture to ensure the assimilation of Indigenous peoples into the majority culture. One of the means of achieving this goal was orchestrating the loss of Indigenous languages within these institutions. Importantly, though, it is not necessarily the present condition of a culture that determines whether it is or can be a societal culture:

There is no reason to think that indigenous groups, for example, cannot become vibrant and diverse cultures, drawing on their cultural traditions while incorporating the best of the modern world, if given the requisite preconditions. It is the potentiality of societal cultures that matters, not just their current state, and it is even more difficult for outsiders to judge the potentiality of a culture than to judge its current state.⁷⁹

⁷⁷ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 100.

⁷⁸ Residential schools were institutions run by the government of Canada, often (but not always) in partnership with Christian churches (including Catholic, Anglican, and Presbyterian) where Indigenous children were forcibly removed from their homes and communities as a means of ‘civilizing’ and assimilating children into the majority culture. These institutions operated as a means toward the end of causing “Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada.” See: Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part I Origins to 1939* (Montreal: McGill-Queen’s University Press, 2015).

⁷⁹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 100-101.

Kymlicka does not make direct reference to residential schools or any other Canadian policies that have harmed Indigenous peoples, but he does conclude that loss of culture at the hands of a malicious majority nation does not disqualify Indigenous peoples from having a societal culture and being a national minority. The passage of time does not affect Kymlicka's view of societal cultures, and he insists that "the process of modernization does not change the fact that these nations still form separate societal cultures, with their own institutions, using their own languages."⁸⁰ This position seems to be an implicit rejection of the notion that Indigenous peoples must maintain a fixed status-quo or cultural purity to demand that the state implement group-differentiated rights.

Indigenous peoples, being national minorities, can make use of two kinds of group-differentiated rights: self-government and special representation rights. In Canada, self-government rights for Indigenous peoples are tied to reserves.⁸¹ Reserves are "a tract of land set aside under the *Indian Act* and treaty agreements for the exclusive use of an Indian band."⁸² Of note is that the land a reserve is situated on is owned by the Crown, which means that, while individuals on the reserve may have a right to occupy or possess portions of land, neither the individual nor the Indian band own the land in the sense of fee simple ownership. Kymlicka notes that "substantial powers have been devolved from the federal government to the tribal/band councils which govern each reserve."⁸³ Further, reserves are, while being under federal jurisdiction through the *Indian Act*, also situated within provincial borders. It is this complicated jurisdiction and the administrative challenges posed by each band's unique aspirations and demands which

⁸⁰ Ibid., 104.

⁸¹ Notwithstanding the creation of Nunavut out of part of the Northwest Territories as an Inuit-dominated territory.

⁸² Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality* (Port Coquitlam: Indigenous Relations Press, 2018), 24.

⁸³ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 29-30.

lead Kymlicka to conclude that “the exact scope and mechanisms of indigenous self-government in Canada ... therefore remain unclear.”⁸⁴ Even given the lack of clarity regarding the scope of these rights, Kymlicka does note that self-government rights give rise to a particular kind of special representation rights.

As is the case for ethnic minorities, special representation rights for national minorities can be justified by the experience of oppression. While special representation rights meant to aid ethnic minorities are not meant to be permanent (and are instead meant to remedy unfairness in such a way that eventually renders these rights unnecessary), there is a kind of special representation right for national minorities that appears as “a corollary of self-government” and, as a result, would be permanent.⁸⁵ Special representation rights that result from self-government are more specific, in that it would be “guaranteed representation on any body which can interpret or modify its powers of self-government (e.g. the Supreme Court).”⁸⁶ Importantly, this kind of special representation (particularly on the Supreme Court) is not implemented in Canada for Indigenous people. Though Kymlicka does not specifically address this fact, he does acknowledge the threat posed to self-government if changes to a national minority’s powers and rights could be chosen and implemented without the involvement or approval of the national minority.⁸⁷

Self-government rights can serve to either impose internal restrictions upon members of a minority group, or to provide external protection from the majority culture. Recall that Kymlicka rejects internal restrictions because they violate an individual’s ability to choose their own ends. He does express some concerns in this regard, citing internal restrictions that have been desired or enforced by Indian bands in Canada. The concerns Kymlicka voices have to do with the

⁸⁴ Ibid., 30.

⁸⁵ Ibid., 32.

⁸⁶ Ibid., 33.

⁸⁷ Ibid., 32.

willingness (or, as he expresses, the potential unwillingness) of Indian bands to adhere to human rights standards found in the majority culture, namely that “Indian bands in Canada have argued that their selfgoverning band councils should not be subject to judicial review under the Canadian Charter of Rights and Freedoms”⁸⁸ and the resulting worries regarding gender equality (which is protected under the *Charter*). The concern, then, is that self-government powers will allow for sex-based discrimination against Indigenous women. As a result “the Native Women’s Association of Canada ... has demanded that the decisions of Aboriginal governments be subject to the Canadian Charter.”⁸⁹

Nonetheless, concerns about the possibility of internal restrictions do not discount the external protections afforded to Indigenous peoples through group-differentiated rights. The most significant external protection that arises from self-government and special representation rights for Indigenous peoples that Kymlicka references is land holdings. Land rights for Indigenous peoples are necessitated by the fact that “the survival of indigenous cultures throughout the world is heavily dependent on protection of their land base.”⁹⁰ He acknowledges that Indigenous land is at risk of erosion and abuse by the majority culture, and so there is a need to safeguard the land (and, as a result, the societal culture). The form these land rights take is the reserve system, and Kymlicka concludes that “history has shown that the most effective way to protect indigenous communities from this external power is to establish reserves where the land is held in common and/or in trust, and cannot be alienated without the consent of the community as a whole.”⁹¹ So, despite the lack of clarity regarding the scope of self-government powers, we know that land holdings are the clearest example of these powers, and that they serve as an external protection for

⁸⁸ Ibid., 39.

⁸⁹ Ibid.

⁹⁰ Ibid., 43.

⁹¹ Ibid.

Indigenous peoples from the majority culture. Though Kymlicka does mention that there exists a possibility that land holdings by Indigenous peoples “could exceed what justice allows,”⁹² either in the amount of land held or in the event that external protection is no longer needed (so that it becomes unfair to non-Indigenous people).⁹³

The three arguments in favour of self-government and special representation rights for Indigenous peoples vary in how compelling they are. The implementation of Indigenous land rights through land holdings is in accord with the spirit of treating some differently (according to their different needs) in order to achieve equality. Accounting for group-differentiated rights for Indigenous peoples on the grounds of achieving equality is, for Kymlicka, the argument that best justifies their implementation. This is so both in terms of the liberal values at the core of his theory of multiculturalism – and in order to assure non-Indigenous people that the restrictions imposed on them as a result of these group-differentiated rights are, ultimately, in the pursuit of equality. If we look at, for example, Indigenous hunting or fishing rights (which are granted on the basis of self-government and through land rights at large), the nature of such external protections is that Indigenous peoples are given priority (or exclusivity) in making use of the resources required to exercise this right. As a result, non-Indigenous people face exclusion from or are not entitled to make use of these particular resources. Kymlicka characterizes this exclusion as a sacrifice made by non-members, though a defensible one, since “the sacrifice required of non-members by the existence of these rights is far less than the sacrifice members would face in the absence of such rights.”⁹⁴ The equality argument can justify group-differentiated rights only in the event that

⁹² Ibid., 110.

⁹³ Kymlicka does not elucidate what set of circumstances would constitute Indigenous peoples no longer needing external protection.

⁹⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 109.

national minorities (and so Indigenous peoples) face a disadvantage that these rights help to mitigate or redress. So, “the legitimate scope of these rights will vary” depending on the whether there is a disadvantage, or the kind of disadvantage that is present.⁹⁵

When speaking of the argument for group-differentiated rights from historical agreements, Indigenous treaty rights are listed as one of the primary examples of such agreements. These agreements move beyond casual or nebulous promises made to Indigenous peoples by the Canadian government: they constitute specific legal rights. Treaty agreements between Indigenous peoples and the Crown (the government of Canada) “reflect the terms under which these communities joined Canada” and the Canadian government has both a legal and moral obligation to uphold these agreements, insofar as “these agreements define the terms under which the Canadian state acquired authority over these groups.”⁹⁶

However, Kymlicka does express hesitation about using historical agreements to justify group-differentiated rights for Indigenous peoples, specifically citing fairness – both to Indigenous and non-Indigenous people – as a major concern. There are three ways the concerns about fairness can be described. First, there is concern about fairness at the time the negotiations occurred and the agreement was signed, because some of the historical agreements Indigenous peoples signed were done “under duress.”⁹⁷ Further, some Indigenous peoples did not sign treaties – because they were led to believe that such an agreement was not necessary to protect their rights, because agreeable terms could not be reached, or otherwise. Kymlicka indicates that relying solely on the argument from historical agreements would, for Indigenous peoples, be paramount to arbitrary punishment.⁹⁸

⁹⁵ Ibid., 109-110.

⁹⁶ Ibid., 117.

⁹⁷ Ibid., 119.

⁹⁸ Ibid.

There is also a concern about fairness in the present day. Circumstances can change from the time the agreement was made, and given these changes, Kymlicka notes that the result can be unfair, either to Indigenous peoples or to non-Indigenous people. In the case of treaties, “changes in the size and lifestyle of indigenous communities” could mean that the amount of land allotted to an Indigenous community would be too much, which would be unfair to non-Indigenous peoples, or too little, which would be unfair to Indigenous peoples.⁹⁹ The issue of changing circumstances leads to the third concern regarding interpretation of historical agreements. Given that some of these agreements were made considerably long ago, Kymlicka notes that it can be difficult to interpret them in the present day, and treaties are no exception to this challenge.¹⁰⁰ Treaty rights for Indigenous peoples are perhaps some of the strongest cases of historical agreements in Canada, and are heavily relied upon by Indigenous peoples to justify and defend their rights in the courts and to the public. But Kymlicka does not see this argument as more powerful or reliable than the equality argument, as “it is likely that the equality and historical arguments will yield similar policies.”¹⁰¹ Further, given that national minorities are demanding renegotiations of these agreements, we cannot rely on historical agreements alone to serve a justificatory purpose for group-differentiated rights (since they are subject to change), and so such agreements should ultimately be justified through the equality argument, working together in order to hold to a deeper theory of justice.¹⁰²

A further argument for group-differentiated rights based on cultural diversity is not compelling for any national minority, though this is true for Indigenous peoples for their own reasons. Recall that the argument from cultural diversity relies on appealing to the benefits incurred

⁹⁹ Ibid., 120.

¹⁰⁰ Ibid., 119.

¹⁰¹ Ibid., 118.

¹⁰² Ibid., 120.

by non-members as a means of garnering their support for the minority group. The benefit provided to non-Indigenous people through group-differentiated rights for Indigenous peoples is that of providing “alternative models of social organization that may be useful in adapting to new circumstances”. For example, this can be by way of combatting the effects of climate change with traditional Indigenous views of and practices involving the environment.¹⁰³ Such appeals to personal benefit are not grounded in a deeper theory of justice. As noted earlier, Kymlicka explains that self-government and special representation rights for Indigenous peoples can represent a sacrifice on the part of non-members. If we were to defend support for these rights by appealing to personal benefits incurred by non-Indigenous peoples, this support would be liable to evaporate in instances where the benefit is not apparent, or when it does not exist.

2.4: A Note on my Methodology

Will Kymlicka’s theory of multiculturalism is not the only theory of multiculturalism or theory purporting to manage cultural diversity within a populace. It is important to acknowledge this and explain my choice to focus on his theory as a method of evaluating multiculturalism in Canada.

When discussing multiculturalism in a Canadian context, it is difficult to escape literature and policies that are couched in terms of recognition. Charles Taylor’s seminal essay “The Politics of Recognition”¹⁰⁴ (hereafter *PoR*) is iconic in the context of multiculturalism in Canada. In fact, *PoR* could arguably be seen as synonymous with Canadian multiculturalism and the philosophical reasons for its practical implementation. In this essay, Taylor discusses the nature of recognition in both its personal and political iterations and highlights the substantial harm that can be caused

¹⁰³ Ibid., 121.

¹⁰⁴ Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25-73.

by cases of misrecognition, that is, demeaning and false images utilized as the norm to represent particular groups of people, specifically minorities.

Taylor briefly traces the history of the concept of recognition and how we came to use it in the sense that we do today within the political sphere – from the ancient notion of honour, to the intensification of the notion of individualized identity, to Jean-Jacques Rousseau’s moral philosophy, to Johann Gottfried von Herder’s idea that we are each unique in how we live as humans.¹⁰⁵ Each of these positions tracks significant new developments in how humans perceive our own personal identity, which lead us to assign moral weight to the relationship we have with our own selves. We find meaning within ourselves through finding our own voice, and in listening to that voice we are able to live authentically. Herder took this a step further in that he applied this notion of living authentically not only to individuals, but also to peoples.¹⁰⁶

Taylor notes that what is central to experiencing recognition is that our experiences as human beings are “fundamentally dialogical” – we define ourselves in relation to others, and it is not possible to define ourselves without the presence of others.¹⁰⁷ This is especially true in the modern age, because in ancient times “recognition was built into the socially derived identity by virtue of the very fact that it was based on social categories that everyone took for granted.”¹⁰⁸ These social categories are different from the kind of personal identity we are preoccupied with in the modern age, so “What has come about with the modern age is not the need for recognition but the conditions in which the attempt to be recognized can fail.”¹⁰⁹

¹⁰⁵ Ibid., 26-30.

¹⁰⁶ Ibid., 31.

¹⁰⁷ Ibid., 32.

¹⁰⁸ Ibid., 34.

¹⁰⁹ Ibid., 35.

According to Taylor, the most influential early consideration of recognition can be found in G.W.F. Hegel's work. Hegel's project of recognition can be traced to Rousseau's concerns with honor, esteem, dignity, reciprocity, and public recognition. Indeed, Rousseau's focus on the essential nature of mutual recognition is crucial in Hegel's work, as "we are unequal in power, and yet *all* dependent on others—not just the slave on the master, but also the master on the slave."¹¹⁰ It is these concerns that Hegel himself takes up in his dialectic of the master and the slave in his *Phenomenology of Spirit*, specifically in the chapter "Lordship and Bondage". This dialectic describes the interactions between a master and slave as a means of elucidating the innerworkings of the formation of identity and the conditions of human freedom. The slave, as a result of the depreciatory self-image constructed through interaction with the master, is misrecognized – the slave is left with a distorted self-identity and so does not possess the requisite means to realize freedom.

While Taylor acknowledges that recognition is a concern in personal relationships and the formation of individual identity, it is how the problem of recognition translates into the public sphere and politics that he is concerned with in *PoR*. The politics of equal recognition, for Taylor, has two connotations. One is of a universal nature, focused on the equality of citizens in their rights and entitlements.¹¹¹ The other is what Taylor calls a politics of difference – which does have a universalist basis, but seeks "to recognize [...] the unique identity of this individual or group, their distinctness from everyone else."¹¹² While Taylor finds the universalist politics of equal recognition more easily defensible, he dedicates significant effort to addressing the complexity, but ultimate defensibility of the politics of difference. To elucidate what the politics of difference

¹¹⁰ Ibid., 45.

¹¹¹ Ibid., 37.

¹¹² Ibid., 38.

look like in action, Taylor points to Québec—both to the demands made by Québec of the Canadian state, and the measures Québec takes within its own borders to ensure its own survival.

Even given the influential nature of Taylor’s work (both inside and outside of the academy), I think there is reason not to prioritize recognition and its inner workings as a tool to ensure good relations between Indigenous nations and settler states. My choice not to focus on recognition vis-à-vis Taylor as the theoretical basis of my work largely has to do with a contemporary piece of political philosophy which addresses the ways in which the politics of recognition fail Indigenous nations.

Glen Coulthard mounts a systematic refutation of the purported efficacy of recognition as it is used in discourse on multiculturalism in his book *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (hereafter *RSWM*).¹¹³ Coulthard begins by tracking the concept of recognition that is presently used by Canadian activists, theorists, and the government through time to its origins, to understand how it has been and continues to be employed in the modern settler colonial state of Canada. The concept of recognition Coulthard focuses on is from the chapter “Lordship and Bondage” from Hegel’s *Phenomenology of Spirit*.¹¹⁴ This, recall from above, plays a significant role in Taylor’s *PoR*. And this is no mistake – Coulthard is aware that the importance of Hegel’s master/slave dialectic in the modern Canadian discourse on multiculturalism is due to Taylor’s work. It is the modern politics of recognition that Coulthard seeks to criticize, and *PoR* contains the philosophical and political position that he is seeking to dismantle.

¹¹³ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Minneapolis: University of Minnesota Press, 2014)

¹¹⁴ Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit*, Translated by John David Dobbins and Peter Lawrence Fuss (Notre Dame: University of Notre Dame Press, 2019).

In order to show why we should not trust the politics of recognition, Coulthard turns to a theorist that Taylor himself makes reference to in *PoR*: Frantz Fanon. Taylor refers to Fanon's work, *The Wretched of the Earth*, to support his assertion that misrecognition begets domination, and genuine recognition brings about freedom:¹¹⁵

One of the key authors [...] is undoubtedly the late Frantz Fanon, whose influential *Les Damnés de la Terre* (*The Wretched of the Earth*) argued that the major weapon of the colonizers was the imposition of their image of the colonized on the subjugated people. These latter, in order to be free, must first of all purge themselves of these depreciating self-images. Fanon recommended violence as the way to this freedom, matching the original violence of the alien imposition. Not all those who have drawn from Fanon have followed him in this, but the notion that there is a struggle for a changed self-image, which takes place both within the subjugated and against the dominator, has been very widely applied.¹¹⁶

However, Coulthard asserts that in a full and contextualized reading of Fanon's work – especially considering his later work, *Black Skin, White Masks* – his position on recognition was decidedly not one of simple or straightforward endorsement.¹¹⁷ Instead, his position on recognition was far more nuanced. Fanon argued that while colonial states have historically relied on brute force as a method of ensuring their long-term stability, these states rely equally upon their ability to manipulate colonized populations into internalizing the (often racist) misrecognition that is projected onto them by the state.¹¹⁸ This assertion, which highlights the harm caused by misrecognition, does appear to complement Taylor's reference to Fanon and, most importantly, bolster Taylor's claims about recognition. But Coulthard notes a number of crucial elements that Taylor fails to account for in Fanon's work—elements which indicate that Fanon did not see recognition by the state as ultimately freeing for colonized people.

¹¹⁵ Frantz Fanon, *Les damnés de la terre* (Paris: Découverte/Poche, 2002).

¹¹⁶ Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 65.

¹¹⁷ Frantz Fanon, *Peau noire, masques blancs* (Paris: Editions du Seuil, 1971).

¹¹⁸ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 31-32.

First, while Taylor acknowledges that recognition itself can be understood in either personal or political terms, he does not confront what Coulthard refers to as the ‘dual structure’ of colonialism. There is the objective sense of colonialism, which comprises the institutions and generative structures in place to uphold colonial rule. Then, there are the results of these structures – this is the subjective sense of colonialism, where recognition (or misrecognition) happens. Coulthard asserts that Taylor focuses on the recognitive or subjective aspect of colonialism, while ignoring its objective reality.¹¹⁹

Taylor’s theory also contains an underlying assumption that Indigenous peoples’ flourishing is dependent on the state’s institutional accommodation through granting cultural recognition. Fanon argued that genuine mutual recognition is prevented by the fact that colonized people receive their freedom, not through struggle, but through a declaration by the colonial state which is then enacted by the state through granting limited political rights to the colonized. Fanon does not see this process as genuinely transformative. It is not only through violence (as Taylor suggests), but through struggle and conflict generally, that Fanon insists the colonized can shed this depreciatory colonial identity.¹²⁰ Conflict and struggle are essential for Fanon, because without them “the terms of recognition tend to remain in the possession of those in power to bestow on their inferiors in ways that they deem appropriate.”¹²¹ As a result, colonized people remain under total imperial rule and mistakenly believe that the recognition which was determined entirely by the colonial state is something that belongs to them or is within their power to control.

Considering the above, Coulthard notes that Taylor draws a “misguided sociological assumption” from Hegel’s master/slave dialectic, which he then applies to present-day discourses

¹¹⁹ Ibid., 34-35.

¹²⁰ Ibid., 38-39.

¹²¹ Ibid., 39.

on recognition.¹²² That is, he assumes that just as the slave is dependent on the master for recognition, so too is the master dependent on the slave. In fact, Coulthard points to the fact that, for Hegel, “this dependency is even more crucial for the master in the relationship, for unlike the slave he or she is unable to achieve independence and objective self-certainty through the object of his or her own labor.”¹²³ This assumption by Hegel goes uninterrogated in Taylor’s *PoR*. Coulthard objects to the idea that the master and slave are dependent on each other for mutual recognition on the basis that this kind of mutual dependency between a master and slave is most often not reflective of real-world struggles for recognition: “In these contexts, the “master” – that is, the colonial state and state society – does not require recognition from the previously self-determining communities upon which its territorial, economic, and social infrastructure is constituted. What it needs is land, labor, and resources.”¹²⁴ As a result of this material fact, Hegel’s dialectic breaks down in practice – there is no equal recognition between the master and the slave in the real world. The master (the colonial state) maintains his position of supremacy in relation to the slave (the colonized people). The presumed legitimacy of the colonial state supersedes all else, there is no equality in the power truly held by each party, ultimately “leaving the foundation of the colonial relationship relatively undisturbed.”¹²⁵

Coulthard acknowledges that Fanon’s view of power creates a very bleak outlook on the current state of affairs for Indigenous people in Canada. But all is not lost. It is true that Fanon did not see Hegel’s master/slave dialectic and the experience of recognition as emancipatory in lived colonial realities. However, Coulthard notes, Fanon did not wholly reject the recognition

¹²² Ibid.

¹²³ Ibid., 39-40.

¹²⁴ Ibid., 40.

¹²⁵ Ibid.

paradigm. Instead, this is where Fanon's views on struggle as a means of securing decolonization and freedom become relevant:

Rather than remaining dependent on their oppressors for their freedom and self-worth, Fanon recognized that the colonized must instead struggle to work through their alienation/subjectation against the objectifying gaze and assimilative lure of colonial recognition. [...] According to this view, the colonized must initiate the process of decolonization by first recognizing *themselves* as free, dignified, and distinct contributors to humanity. [...] Fanon equated this process of *self-recognition* with the praxis undertaken by the slave in Hegel's *Phenomenology of Spirit*, which Fanon saw as illustrating the necessity on the part of the oppressed to "turn away" from their other-oriented master-dependency, and to instead struggle for freedom on their own terms and in accordance with their own values.¹²⁶

Similarly to Fanon, Coulthard calls on Indigenous people to "selectively "turn away" from engaging the discourses and structure of settler-colonial power with the aim of transforming these sites from within."¹²⁷ This, by Coulthard's own admission, is totally contrary to the position by Anishnaabe philosopher Dale Turner, who, in his major work *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy*, calls on what he refers to as "word warriors" to improve the state of affairs of Indigenous peoples in Canada.¹²⁸ These word warriors are Indigenous people who, through becoming well-versed in and members of the Canadian state's institutions (particularly those of law and politics) affect change by shifting the structure and aims of these institutions from the inside. Coulthard explicitly rejects the idea that use of word warriors is instrumental and necessary for Indigenous peoples to achieve their decolonial goals. His reason for this is that he does not believe Turner adequately addresses the actual power of the colonial state. That is, while Turner attributes tangible power to the word warriors in their ability to influence and shift Canadian law and politics, he does not account for the power of the legal and political discourses of the state. Nor does he account for the capacity these discourses have to

¹²⁶ Ibid., 43.

¹²⁷ Ibid., 45.

¹²⁸ Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006)

assimilate the word warriors who are meant to, as individuals, oppose these discourses, and an entire institution.¹²⁹

The rest of *RSWM* is dedicated to discussing examples of the politics of recognition in action in Canada, and how this project of recognition is – not by accident, but by its very design – a colonial project that is working to ensure the longstanding goal of the Canadian state to eliminate Indigenous nations as nations, in order to secure unfettered access to Indigenous land and resources. Coulthard does this first through analyzing “the Dene Nation’s struggle for recognition and self-determination in the 1970s and early 1980s”¹³⁰ and how the land claims process, controlled by the Canadian state, functioned to weaken the national claims for Indigenous nations.¹³¹

Coulthard also considers the essentialist collective identity demanded of and projected onto Indigenous people by the state in their demands for recognition. He addresses the hypocrisy of the concerns levelled at Indigenous nations about how they adhere to essentialism, while the Canadian state’s essentialist legislation and policies are never adequately addressed by those who would dismiss Indigenous nations on the same grounds. In particular, he points to how, amidst the essentialist nature of the demands made of Indigenous nations, the history of government-imposed legislation affecting Indigenous women in particular is not addressed by proponents of the politics of recognition.¹³²

The matter of Indigenous anger and resentment at the refusal of the Canadian state to adequately acknowledge and honour the truth of Canada’s colonial history and present is also of

¹²⁹ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Minneapolis: University of Minnesota Press, 2014), 46-47.

¹³⁰ *Ibid.*, 52.

¹³¹ *Ibid.*, 51-78.

¹³² *Ibid.*, 79-103.

critical importance to Coulthard. He extensively discusses the Canadian state's desire to relegate colonialism to the past, as an unfortunate chapter in Canada's history – a moment in time that is now gone. He speaks about the business or industry of reconciliation, and how the idea of reconciliation has been co-opted by the Canadian state to square Indigenous assertions of sovereignty with the sovereignty of the Crown – in other words, that Indigenous assertions of sovereignty do not actually challenge the sovereignty of the Crown. Coulthard defends Indigenous anger as a righteous and justified reaction of moral indignation that has transformative potential.¹³³

Further, Coulthard presents Fanon's alternative politics of recognition; the negritude movement, which “emphasized the need for colonized people and communities to purge themselves of the internalized effects of systemic racism and colonial violence by rejecting assimilation and instead affirming the worth of their own identity-related difference.”¹³⁴ However, Coulthard notes that while Fanon was relatively clear about how colonized people could break free from misrecognition at the hands of a colonial state, he did not provide as much insight into how he believed colonized people could construct a viable alternative to the colonial politics of recognition. Fanon saw a number of limitations with the negritude movement, including the imposition of an essentialist conception of Black experience and issues with elitism. Interestingly, Fanon believed that the colonized could revitalize traditions that existed pre-colonization as a means of breaking free from misrecognition, but that these traditions were not enough to ensure the freedom and flourishing of colonized people. Instead, Fanon believed the colonized should focus on the transformation of their present material conditions so that a national culture comprised of new social, cultural, and economic relations could come into fruition.¹³⁵ Coulthard believes that

¹³³ Ibid., 105-129.

¹³⁴ Ibid., 131.

¹³⁵ Ibid., 131-149.

this is where Fanon's analysis reaches its limit, in terms of how applicable it is in the context of modern settler colonialism.¹³⁶

Whereas Fanon values the new over the old, Coulthard instead presents some positions on the use of tradition in modern contexts of decolonization from Indigenous scholars Leanne Betasamosake Simpson and Taiaiake Alfred. From these scholars, Coulthard draws out the position that Indigenous tradition should not be used or seen as an essentialist anchor to the past that prevents Indigenous nations from advancing the wellbeing of their people. Instead, traditions are a crucial foundation from which modern decolonial projects should arise, while transforming and shifting as needed for the betterment of Indigenous people – for example, regarding the perception of gender roles. Both Simpson and Alfred express qualms with the modern politics of recognition.¹³⁷

Coulthard considers the Idle No More (hereafter INM) protest movement to draw out lessons on Indigenous resurgence. The INM protest movement began as a public information campaign about Bill C-45 – a bill that would have a considerable and negative impact on Indigenous land and treaty rights – and developed into a nationwide protest movement, comprised of blockades and a protest on Parliament Hill in Ottawa. It was most active between the end of 2012 and into 2013. He highlights both the emancipatory and revolutionary potential of the movement, as well as the ideological and strategic disagreements that plagued the movement from within.¹³⁸ Coulthard draws out five lessons or theses on Indigenous resurgence from the INM movement. He insists on the necessity of direct action – and on the kind of disruptive, direct action that many non-Indigenous Canadians would find militant, threatening, and ultimately

¹³⁶ Ibid., 153.

¹³⁷ Ibid., 154-159.

¹³⁸ Ibid., 159-165.

unacceptable.¹³⁹ A primary function of the INM protests were economic disruption through the use of blockades – from this Coulthard argues that the rejection of capitalism is necessary for a successful Indigenous decolonial national project.¹⁴⁰ As the actions of INM took place within urban centres, and so relied upon urban Indigenous people, Coulthard addresses the need for cooperation and strategic alliance between Indigenous people who live in urban centres (who comprise more than half of Indigenous people in Canada) and Indigenous people on reserves. This is especially considering that reserves are not equipped (in terms of resources) to repatriate the number of Indigenous people residing in urban centres.¹⁴¹ Coulthard also emphasizes the need to address the systemic and symbolic nature of the violence Indigenous women face at the hands of the Canadian state, and how this violence has, in turn, been upheld and perpetuated by Indigenous men.¹⁴²

To conclude, Coulthard hearkens back to Turner’s calls for Indigenous people to engage the Canadian state more effectively. Coulthard rejects this demand once more on the basis that Indigenous people *have* engaged the Canadian state, but these attempts have been unsuccessful – not due to a lack of trying or the need for a shift in strategy by Indigenous people, but because the Canadian state refuses to compromise or engage in good faith with Indigenous nations. So, Coulthard encourages a strategy moving forward that looks beyond the nation-state:

What are the implications of this profound power disparity in our struggles for land and freedom? Does it require that we vacate the field of state negotiations and participation entirely? Of course not. Settler-colonialism has rendered us a radical minority in our own homelands, and this necessitates that we continue to engage with the state’s legal and political system. What our present condition does demand, however, is that we begin to approach our engagements with the settler-state legal apparatus with a degree of critical self-reflection, skepticism, and caution that has to date been largely absent in our efforts. It also demands that we begin to shift our attention away from the largely rights-based/recognition orientation that has emerged as a hegemonic over the last four decades, to a resurgent politics of recognition that seeks to practice decolonial, gender-emancipatory, and economically nonexploitative alternative structures of law and sovereign authority

¹³⁹ Ibid., 165-169.

¹⁴⁰ Ibid., 170-173.

¹⁴¹ Ibid., 173-176.

¹⁴² Ibid., 176-178.

grounded on a critical refashioning of the best of Indigenous legal and political traditions. It is only by privileging and grounding ourselves in these normative lifeways and resurgent practices that we have a hope of surviving our strategic engagements with the colonial state with integrity and as Indigenous peoples.¹⁴³

Considering all of the above, Coulthard's work in *RSWM* amounts to a devastating critique of both the theoretical foundation of recognition and the modern politics of recognition in practice. While I believe the arguments mounted in *RSWM* are sufficient to explain why I am not focusing on Taylor's framework as the baseline of multiculturalism in this thesis, there are a few more pertinent reasons I have elected to forego focusing on Taylor's *PoR* in favour of Kymlicka's framework of multiculturalism.

With reference to recognition as it pertains to national minorities, Taylor dedicates much more time to discussing Québec than Indigenous nations. He makes only a few brief mentions of Indigenous peoples. First, Taylor refers to Indigenous peoples to explain the negative effects of misrecognition on oppressed people, and how "since 1492 Europeans have projected an image of such people as somehow inferior, "uncivilized," and through the force of conquest have often been able to impose this image on the conquered."¹⁴⁴ Taylor also frames Indigenous self-government in terms of the politics of difference, in that "members of aboriginal bands will get certain rights and powers not enjoyed by other Canadians, if the demands for native self-government are finally agreed on ..."¹⁴⁵ He also makes passing reference to Aboriginal rights in the *Canadian Charter of Rights and Freedoms* as examples of rights accorded to collectivities in a larger discussion about rights for collectivities create anxieties in those who do not belong to that collectivity, but particularly with reference to language laws in Québec. Taylor's *PoR* has a much larger scope than Indigenous nations, and as a result he does not discuss specificities regarding what adequate

¹⁴³ Ibid., 179.

¹⁴⁴ Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 26.

¹⁴⁵ Ibid., 39-40.

recognition by the Canadian state would look like in terms of concrete policy. The manner in which he frames Indigenous self-government – as though no Indigenous nation has made clear demands of the Canadian state in relation to self-government, and as though Indigenous self-government is a one-size-fits-all kind of solution – does not accurately reflect the current state of affairs. As a result, these mentions of Indigenous peoples do not constitute a sufficient position from which I can then assess the implications for policy in a way that Coulthard has not already done.

While Coulthard delivers a sweeping and complete critique of Taylor’s *PoR* and its application, this is not where evaluations of multiculturalism in Canada should stop. Coulthard accuses Taylor of not taking into account the systems and institutions in place. But what of theories of multiculturalism that do take these matters into consideration, or that do purport to reflect the values of the institutions? This is where Kymlicka’s theory of multiculturalism becomes especially useful. Coulthard refers to Kymlicka’s theory of multiculturalism as one that is “tailored to demands for recognition in multinational societies ...”.¹⁴⁶ But Kymlicka does not centre the theoretical background of recognition as the foundation of his theory. Kymlicka may make use of the idea generally, but recognition, and what constitutes recognition, is not on its own Kymlicka’s motivation in *MC* – instead, his motivation is to account for minorities with group-differentiated rights in such a way that respects liberal values.¹⁴⁷

¹⁴⁶ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Minneapolis: University of Minnesota Press, 2014), 37.

¹⁴⁷ There is also Canadian philosopher James Tully, who has a large body of work focused on Canadian multiculturalism, particularly concerning reconciliation, recognition, and Indigenous nations. Tully’s works, generally speaking, are aimed at the creation of a public philosophy in Canada – that is, a philosophy that is accessible to the average person, that reflects their concerns and their lived reality. While I find Tully’s approach to be worthwhile – aiming away from armchair philosophizing and toward engaging the Canadian public – Kymlicka’s framework as found in *MC* provides the clearest means by which to evaluate the Canadian state’s policies on multiculturalism and Indigenous nations. For works by Tully concerning Indigenous issues in Canada, see: James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity*, (Cambridge: Cambridge University Press, 1995); James Tully, *Public Philosophy in a New Key, Volume 1: Democracy and Civic Freedom*, (Cambridge: Cambridge University Press, 2008).

Ultimately, I have chosen Will Kymlicka's approach to multiculturalism as the framework for my analysis because it most accurately reflects the current state of affairs in Canada. His focus on multinationality and practical examples of the rights he outlines – especially the use of Canada as an exemplary multicultural state – brings about a practical clarity that, for my purposes, is unmatched by other theories of multiculturalism.

2.5: Guiding Questions

I have sought to provide not only the overarching theory of multiculturalism found in *MC*, but also the specific ways in which Indigenous peoples are accounted for within this theory. There are two levels at which the theory operates, and this will be important to keep in mind going forward. First, there is the normative sense of the theory. Kymlicka argues in favour of the liberal theory of multiculturalism outlined in *MC*, insisting that implementing these values brings about justice for both minorities and for members of the majority culture in the larger multicultural state. He claims that there is a moral justification, not only for multicultural states to continue their pursuit of multinationality and polyethnicity, but also to encourage the adoption of this approach to minority rights in places where this is not yet an accepted practice.

Not only does Kymlicka provide a normative theory that mounts an argument in favour of his liberal theory of minority rights, but he also makes use of many examples where these values are in practice to demonstrate his claims. So, there is also a descriptive element to this theory. In this way, the descriptive claims provide a sort of roadmap for the normative claims, where we can see the values and rights presented by Kymlicka being lived out in reality. The descriptive nature of this theory of multiculturalism makes it more enticing to endorse for widespread implementation – after all, why shouldn't a state pursue an approach to minority rights that works well in practice? Canada is not the only multicultural state that Kymlicka refers to, but Canada plays a considerable

role in this descriptive component (whether speaking strictly about Indigenous peoples, Québec, or ethnic minorities), and it is crucial to examine how Canada is presented and question whether it is an accurate portrayal. If the characterization is not true or is in another way problematic, we should be interested in what this conveys about the theory: does it reflect a shortcoming only in the descriptive element of the theory (that a given point simply does not reflect the values in multiculturalism that it purports to)? Or is it a problem within the normative level of the theory that leads to problems or injustices when it is implemented? And even if the descriptive examples are reflective of reality, we should be interested in whether the examples are, indeed, evidence of the normative claims. The questions posed here are the guiding concerns of this thesis.

These questions are crucial to pursue concerning Indigenous nations. As the experience of Indigenous peoples in Canada has moved into the light of public consciousness in recent years, the concept of reconciliation – and how, as a country, Canada can achieve or move toward it – has been catapulted into mainstream usage. Indeed, Canada has now recognized holidays like National Indigenous Peoples Day and the National Day for Truth and Reconciliation. But although reconciliation has been a focus of interest in Canada, there are still significant troubles related to implementing multinational group-differentiated rights for Indigenous peoples. Conflict continues, not only between the government and Indigenous nations, but also between Indigenous and non-Indigenous people. Canada is among the most multicultural nations in the world – we have government policies, legislation, and jurisprudence that, at first glance, should provide the support needed for Indigenous nations to excel.¹⁴⁸ The language and values of multiculturalism are at the core of Canada's national identity. Still, dysfunction and strife remain.

¹⁴⁸ This is neither anecdotal nor hyperbolic – when compared to other countries and evaluated based on the number of multicultural policies implemented, Canada ranks among the highest. See: Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 68.

Much of the aim of *MO* is focused on bringing about changes in policy in non-multicultural states. But if these policies are not producing stability and amity in Canada – a beacon of multiculturalism – this is worthy of attention. We must be critical, especially given the push to diffuse these ideas in other parts of the world, because we cannot hope or expect that the tensions present in Canada would not be replicated elsewhere.

Now that the framework of multiculturalism has been established, I will look to how multinational values are embraced in policy, legislation, and jurisprudence regarding Indigenous peoples in Canada. Recounting the relevant examples of these aforementioned documents is the principal task of Chapter 3.

Chapter 3 Canadian Multiculturalism in Practice

3.1: Introduction

The accommodations for national minorities described by Kymlicka in *MC* are dependent on the majority nation's approval and implementation mainly through the federal government (both the executive and legislative branches) and the judiciary, but also through the governments of the provinces and territories. To evaluate Kymlicka's theory, it is necessary to have an idea of the measures in place to accommodate multinationality, particularly Indigenous nations in Canada for our purposes.

We will start by considering the Canadian government's position on multiculturalism, generally, first by looking to the *Canadian Charter of Rights and Freedoms* (3.2.1), and then by outlining the federal government's official policy of multiculturalism (3.2.2).

Canada also has more specific measures for multinationality for Indigenous nations – most notably the controversial *Indian Act*. We will examine this piece of legislation in both its present form and in consideration of some of its most significant amendments (3.3.1). We will also review the most controversial proposal to eliminate the *Act*, (3.3.2) and the Indigenous response to this attempt (3.3.3).

Another display of multinationality in practice is Indigenous jurisprudence from the Supreme Court of Canada. Three such cases will be considered; two of these cases are primarily concerned with control of land (3.4.1 and 3.4.3), whereas the other is primarily concerned with exercising a special right in relation to resources shared by Indigenous and non-Indigenous people

(3.4.2).¹⁴⁹ All of these examples will paint, at the very least, a basic picture of the current state of affairs in Canada.

3.2: Canadian Multiculturalism, Generally

3.2.1: *The Canadian Charter of Rights and Freedoms*

Generally, a “constitution of a society is an assortment of important rules, principles, and practices relating to the governance of society.”¹⁵⁰ In Canada, there are at least two senses in which the term ‘constitution’ is employed: It can refer “to all the rules by which a country has chosen to govern itself, regardless of where those rules might be found,” or to documents that have particular legal significance.¹⁵¹

Canada’s constitution has a storied history – it has been (and continues to be) the subject of intense legal and academic debate.¹⁵² As a former British colony, the founding constitution of Canada is found in Acts by the British Crown and the British Parliament, such as: the *Royal Proclamation of 1763*, the *Quebec Act, 1774*, the *British North America Act, 1867* (renamed the *Constitution Act, 1867*), and the *Manitoba Act, 1870*. Though Canada is no longer a British colony, these are still significant constitutional documents, and have been added to the *Constitution Act, 1982*, with the *Charter of Rights and Freedoms* as part of it. Notably, these foundations involve five major features: “parliamentary democracy, federalism, individual and group rights, Aboriginal

¹⁴⁹ Note that these cases were chosen both for the reason that the decisions were significant (whether in the sense that they were unexpected, provided new information, or elicited strong reactions by the public) and for the reason that the themes present in these cases feature some significant themes found in Kymlicka’s theory of multiculturalism, which we will discuss in Chapter 4 (though these cases are not necessarily more worthy of mention than some other SCC cases).

¹⁵⁰ The Constitutional Law Group, *Canadian Constitutional Law* (Toronto: Emond Publishing, 2017), 3.

¹⁵¹ *Ibid.*, 3-4.

¹⁵² The debates can reach so far as to ask whether constitutions are desirable or not. I will not be addressing such topics in this thesis. Instead, I am only highlighting that the Canadian constitution exists, as an empirical fact, and specifically what the *Canadian Charter of Rights and Freedoms* says.

rights, and the principle of constitutionalism.”¹⁵³ Their content is comprised of both written and unwritten elements, with the whole being recognized as a ‘living tree’ by the courts.¹⁵⁴ An example of an unwritten doctrine of the Canadian constitution includes responsible government, which makes “the executive subject to legislative branch of the government”.¹⁵⁵ On the living tree view, a constitution must “be allowed to grow and adapt to new contemporary circumstances and evolving beliefs about justice.”¹⁵⁶

With all of this in mind, there is one constitutional document that is particularly vital to refer to in this thesis, namely the *Canadian Charter of Rights and Freedoms* (the *Charter*).¹⁵⁷ Introduced in 1982, it changed the landscape of Canada’s constitution and solidified independence from the United Kingdom.

The *Charter* contains protected rights for citizens and groups in Canada and places limitations on the government. Neither these rights nor the limitations on the government are inalienable – the government maintains the ability to limit rights and freedoms under certain conditions, conditions that are meant to have an exceptionally high burden of proof, and such powers are not meant to be easily accessible to the government.

The rights outlined in the *Charter* take different forms – some are meant for individuals and others are meant for groups. Section 2 outlines four fundamental freedoms: freedom of

¹⁵³ The Constitutional Law Group, *Canadian Constitutional Law* (Toronto: Emond Publishing, 2017), 4. Note that there are further features that can be included, like, for example, the rule of law, and the principle of judicial independence.

¹⁵⁴ See: *Reference re Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867 [1928] SCR 276*.

¹⁵⁵ John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 112. This principle was very important prior to confederation, and has continued to play an important role in Canada’s unwritten constitution. Some other unwritten principles include: Federalism, democracy, and respect of minorities. However, the unwritten portions of Canada’s constitution are a large and highly contested area of legal scholarship. It is not pertinent to delve too deeply into constitutional scholarship due to the scope of this thesis.

¹⁵⁶ Wil Waluchow, “Constitutions as Living Trees: An Idiot Defends,” *The Canadian Journal of Law and Jurisprudence* 18, no. 2 (2005): 222.

¹⁵⁷ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

religion, freedom of expression (including freedom of the press), freedom of peaceful assembly, and freedom of association.¹⁵⁸ The *Charter* also guarantees voting rights and mobility rights, including the rights to move and gain livelihood,¹⁵⁹ general rights to life, liberty, and security of the person, rights regarding arrest, detention, imprisonment, and punishments (such as protection against unreasonable search or seizure).¹⁶⁰ The *Charter* also enshrines equality of the sexes,¹⁶¹ both of the official languages of Canada (English and French), and guarantees services and education in both languages – especially in the case of the linguistic minority in each province.¹⁶² Of course, this is not an exhaustive account of all the rights and limitations outlined in the *Charter*.

Regarding multiculturalism, Canada's multicultural identity is enshrined as a constitutionally protected value under s. 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."¹⁶³ This clause in the Charter, unlike most other ones, does not stipulate a right but instead an aim or a value to consider in assessing the application of the Charter generally. Notable also is that the language within the *Charter* is not couched in terms of "indigeneity", but instead the word "aboriginal" is used to refer to "the Indian, Inuit, and Métis peoples of Canada."¹⁶⁴

Section 25 stipulates that the rights outlined within the *Charter* "shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."¹⁶⁵ In other words, no other rights within the *Charter* can limit or do away with any of the rights pertaining to Aboriginal people, including the rights that follow

¹⁵⁸ *Ibid.*, s. 2.

¹⁵⁹ *Ibid.*, s. 3 and s. 6.

¹⁶⁰ *Ibid.*, s. 7, s. 8, s. 9, s. 10, s. 11.

¹⁶¹ *Ibid.*, s. 28.

¹⁶² *Ibid.*, s. 16 and s. 23.

¹⁶³ *Ibid.*, s. 27.

¹⁶⁴ *Canadian Charter of Rights and Freedoms*, s. 35(2), Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹⁶⁵ *Ibid.*, s. 25.

from the *Royal Proclamation of 1763* and any rights that currently exist as a result of land claims or any rights that will come into effect as a result of land claims in the future.

Additionally, section 35 reads as follows:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit, and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.¹⁶⁶

And section 35.1 specifies:

- 35.1** The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part,
- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
 - (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.¹⁶⁷

S. 35 is the most significant section of the *Charter* with regards to constitutionally protected Aboriginal rights, and is the most pertinent section in relation to the work in this thesis. The scope of s. 35 – how it should be interpreted and applied in each situation – is, as anything having to do with constitutional law in Canada, contested and debated.¹⁶⁸ But ultimately, what is essential to understand for our present purposes, is that Aboriginal rights are included within Canada's constitution – and, further, that Indigenous legal traditions do form a constitutive role in Canada's legal landscape. In terms of explicit recognition of Indigenous peoples within the constitution, we

¹⁶⁶ Ibid., s. 35.

¹⁶⁷ Ibid., s. 35.1.

¹⁶⁸ Discussing the complexities of constitutional law in Canada regarding Indigenous nations could itself be a thesis, and indeed could span a lifetime of academic work.

can look to sections 25, 35, and 35.1 of the *Charter*.¹⁶⁹ S. 35.1 outlines the process by which Aboriginal rights can be amended within the constitution.

Regarding the application of s. 35, many landmark cases have made their way through the Supreme Court of Canada that are constitutional in nature – in other words, they deal directly with the rights outlined in the *Charter*, especially s. 35.¹⁷⁰ While any section of the *Charter* could be discussed in relation to Indigenous nations or persons, what is most pertinent for the purpose of this work is that the *Charter* acknowledges not only multiculturalism as a protected value, but also that Aboriginal rights in Canada are constitutionally protected.

3.2.2: *Canadian Multiculturalism Act*

The *Canadian Multiculturalism Act*¹⁷¹ (hereafter *CMA*) is legislation meant to promote “the preservation and enhancement of multiculturalism in Canada.”¹⁷² The *CMA* outlines not only the government of Canada’s official policy of multiculturalism in Canada, but also the mandate of its implementation.

In the *CMA*, ‘multiculturalism’ is used to refer to the fact of ethnocultural diversity in Canada and acknowledges that this fact is a crucial and fundamental characteristic of Canada’s national identity.¹⁷³ Other parts of the policy include recognition of the contribution of distinct cultural and racial groups to Canadian history and society¹⁷⁴; ensuring the equal treatment and protection of citizens while maintaining diversity¹⁷⁵; encouraging all institutions in Canada to be

¹⁶⁹ There is also 91(24) of the *Constitution Act, 1867*, which “gave the federal government exclusive legislative authority relative to ‘Indians and the lands reserved to Indians.’” See: John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 106-7.

¹⁷⁰ A selection of these cases is presented later in this chapter.

¹⁷¹ *Canadian Multiculturalism Act*, R.S.C., 1985, c. 24 (4th Supp.)

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, s. 3(1)(b).

¹⁷⁴ *Ibid.*, s. 3(1)(d).

¹⁷⁵ *Ibid.*, s. 3(1)(e).

respectful of the multicultural reality of Canada¹⁷⁶, and; encouraging the use of languages other than the official languages – English and French – while continuing to support the use of English and French.¹⁷⁷ Beyond these general measures, there is a section dedicated to federal institutions, which includes: ensuring equal opportunities of employment and advancement for people of all backgrounds; promoting policies, programs, and practices that enhance respect for diversity and the ability of people from diverse backgrounds to contribute to the advancement of Canada, and; collection of statistical data in order to develop the aforementioned policies, programs, and practices in such a way that fulfills the needs of Canada’s multicultural society.¹⁷⁸

Given its broad terms, there is no singular approach to implementation, but the *CMA* does contain a section dedicated to the mandate of the policy. These approaches to implementation include political and academic measures, such as the projection of Canada’s multiculturalism both domestically and internationally, and the promotion of research on Canadian multiculturalism.¹⁷⁹ Others are more practical, and aimed at domestic relations within the country, like encouraging cooperation between different cultural communities in Canada to prevent ghettoization; supporting communities with activities meant to overcome barriers based on discrimination due to racial, national, or ethnic origin; assisting with the proliferation of any language that is part of the multicultural fabric of Canada; and supporting any individual or group in preserving and promoting multiculturalism in Canada.¹⁸⁰

The *CMA* is a clear commitment to multiculturalism by the government of Canada. More than this, it alludes to expectations of Canadian citizens to incorporate this policy into their lives

¹⁷⁶ Ibid., s. 3(1)(f).

¹⁷⁷ Ibid., s. 3(1)(i) and (j).

¹⁷⁸ Ibid., s. 3(2).

¹⁷⁹ Ibid., s. 5(1)(a) and (b).

¹⁸⁰ Ibid., s. 5(1)(c), (g), (f), and (h).

and, as a result, Canadian institutions. These expectations follow directly from our national identity, and this is an identity the government intends to preserve, develop further, and fortify.

This policy is not meant to account for Indigenous nations, though, as it excludes “any Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people.”¹⁸¹ Kymlicka notes that much of the criticism aimed at policies of multiculturalism in Canada develops from misunderstanding these policies, with misguided expectations that policies meant to account for polyethnicity are also applicable to national minorities.¹⁸²

Still, Kymlicka acknowledges that the term ‘multiculturalism’ – both colloquially and academically – is used to refer to both polyethnicity and multinationality. So here, we see the resulting ambiguity Kymlicka refers to as motivation for his theory of multiculturalism.¹⁸³ Even given that the *CMA* does not include Indigenous nations within its policy, it must be presented when discussing Canadian multinationality because it is a piece of the legislative fabric that forms Canadian multiculturalism. Further, when discussing concerns about the government offering cultural recognition to Indigenous nations in lieu of nation-to-nation relations, this is the kind of policy in place that is purported to support such a move.¹⁸⁴

¹⁸¹ *Ibid.*, s. 2(d).

¹⁸² Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Oxford University Press, 1996), 10.

¹⁸³ *Ibid.*, 17.

¹⁸⁴ Recall from Chapter 2 that this is among the concerns highlighted in *Red Skin, White Masks*. We must be aware of the possibility of the government wishing to treat national minorities instead as ethnic minorities. We will see an example of such an attempt later in this chapter when we look to the *White Paper*.

3.3: Canada's Indian Act: A Legislative Quagmire

3.3.1: *The Indian Act*

The *Indian Act*¹⁸⁵ is perhaps the most significant piece of legislation concerning Indigenous persons and nations in Canada, as it functions to centralize the control of most, if not all, aspects of Indigenous people's lives in Canada.¹⁸⁶ The restrictions, regulations, and rights outlined in the *Act* revolve around group-specific measures that apply to 'legal Indians'. The term 'legal Indian' refers to those belonging to an Indian band, and a band is "with reference to a reserve or surrendered lands ... for whose use and benefit the reserve or surrendered lands were set apart."¹⁸⁷ The *Act* was introduced in 1867 and is still in effect today. Administration of the *Indian Act* is overseen by the federal government, specifically Crown-Indigenous Relations and Northern Affairs Canada, and Indigenous Services Canada.¹⁸⁸ While there have been some notable amendments to the *Act*, it is worthwhile to understand not only its state in the present day, but also the evolution it has undergone and the historical context surrounding some of these changes.

The control the *Indian Act* has over Indigenous nations begins at a foundational level, by determining who qualifies as a legal Indian (and so who has membership in an Indigenous nation). The control of membership or citizenship of Indigenous nations – referred to in the *Act* as "Indian bands" – is done both through the maintenance of an official Indian registry, and through the dictation of who qualifies for membership in an Indigenous nation. The standard of who qualifies for membership in an Indigenous nation is based on familial descent. There are two tiers of registration under the *Indian Act* – those who are registered under section 6(1) and those who are

¹⁸⁵ *Indian Act*, R.S.C., 1985, c. I-5.

¹⁸⁶ Including, but not limited to: matters of land, membership/citizenship, money, and family.

¹⁸⁷ *Indian Act*, R.S.C., 1985, c. I-5, s. 2.

¹⁸⁸ These departments were created as a result of dissolving the federal department of Indigenous and Northern Affairs Canada into two separate departments. Historically, other names for this department include: Department of Indian Affairs; Indian and Northern Affairs Canada, and; Aboriginal Affairs and Northern Development Canada.

registered under section 6(2).¹⁸⁹ If a person is registered under 6(1), this means both of their parents are registered Indians.¹⁹⁰ If a person is registered under 6(2), only one of their parents is a registered Indian under 6(1), while the other parent is not a status Indian. If an individual registered under 6(2) has a child with a person who is not a status Indian, that child does not qualify for status. This is what is known as the “second-generation cut-off.” As more status Indians have children with non-status individuals, there will likely be significantly fewer children who qualify for Indian status as time goes on.¹⁹¹

The *Act* also created and controls all matters having to do with reserves, which, as we recall, are “... a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band ...”.¹⁹² These lands, as they are held in trust by the government, are subject to heavy regulation and control by the federal government, and Indian bands can in many instances be overruled by the federal government on matters pertaining to land (and anything else covered under the *Indian Act*). This includes the ability to seize or appropriate lands on reserves for public purposes.¹⁹³ Further, there is no “real property” on reserves. This means that while Indigenous people are entitled to live in houses on reserves, the individual or family occupying the house does not own the title to the house itself nor the parcel of land the house is built on.

¹⁸⁹ *Indian Act*, R.S.C., 1985, c. I-5, s. 6(1) and 6(2).

¹⁹⁰ This means their parents could both be registered under 6(1), both be registered under 6(2), or it could be the case that one parent is registered under 6(1) and the other is registered under 6(2).

¹⁹¹ Note that I am avoiding use of phrases like “has Indigenous parents” – Indigeneity exists beyond registration through the *Indian Act*. There are many unregistered Indigenous people in Canada who do qualify for registration since registration is not automatic upon birth of a qualifying child. Further, Métis and Inuit people do not qualify for registration under the *Indian Act*, though Inuit and Métis peoples are Indigenous.

¹⁹² *Indian Act*, R.S.C., 1985, c. I-5, s. 2.

¹⁹³ *Ibid.*, s. 35.

Prior to the *Indian Act*, Indigenous nations had their own systems of governance.¹⁹⁴ It is not pertinent to describe all (or pinpoint any one of) the different systems of governance at the present moment, as these are unique to each nation. However, the *Act* has imposed the chief and council governance system on Indigenous nations.¹⁹⁵ The governance system in place under the *Indian Act* resembles that of municipal governments in the rest of Canada – where a mayor is elected along with city or town councillors – but instead it is a chief and band councillors. The length of the election cycle has been amended a number of times, but currently rests on a two-year election cycle. And while the role of the chief and council is to oversee matters regarding the reserve and services provided within it, all moneys meant for Indian use and benefit are still held in trust and controlled by the government.

Control of membership, the creation and control of reserves, and the imposition of the chief and council election system are the three most recognizable facets of the *Indian Act* in effect today – at least in terms of immediate relevance to this work. But the *Indian Act* casts an exceptionally wide net, and some of the other matters controlled by it include: schools, wills, and descent of property.¹⁹⁶ When discussing the *Act*, it is difficult to speak of its current form without any reference to past provisions, even if they have been removed in amendments. This is because these provisions have had profound and long-lasting effects that continue into the present day.

The *Indian Act* was the central piece of legislation that created, implemented, and dictated the operation of residential schools in Canada. Residential schools were institutions run by the government of Canada, often (but not always) in partnership with Christian churches (including Roman Catholic, Anglican, United, Methodist, and Presbyterian) where Indigenous children were

¹⁹⁴ The use of past tense in this sentence does not indicate that these systems of governance no longer exist or are now obsolete. Instead, that these systems of governance were complete and sophisticated prior to colonization.

¹⁹⁵ *Indian Act*, R.S.C., 1985, c. I-5, s. 74.

¹⁹⁶ *Ibid.*, s. 114, s. 45, s. 42.

forcibly removed from their homes and communities as a means of ‘civilizing’ and assimilating children into the majority culture. They were officially established in 1883 (with precursors existing as early as 1867) and ran until 1996.¹⁹⁷ These institutions operated as a means toward the end of causing “Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada.”¹⁹⁸ It is no exaggeration to refer to the project of residential schools as genocide – the Truth and Reconciliation Commission of Canada in 2015 found that Canada was guilty of committing all the hallmarks of cultural genocide against Indigenous people. The most significant of these hallmarks, a key pursuit of residential schools, is that “families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.”¹⁹⁹ Resistance to these policies, especially during the time when attendance at these institutions was mandatory, was difficult, if not impossible. If parents or guardians did not relinquish their children and send them to a residential school, the Indian agent, the North-West Mounted Police,²⁰⁰ or both, would forcibly remove the child, and parents would be subject to fines and imprisonment. Attendance was mandatory at residential schools until the 1960s, and the last residential school closed its doors in 1996. Considering the length of time that residential schools were in operation, one cannot understate the profound effect that forcibly removing children from their parents and subjecting them to abuse and inhumane conditions has on people. Although residential schools are no longer in operation, the *Indian Act* still regulates education on reserves today.²⁰¹

There was an important amendment to section 6 that took place in 1985 regarding the retention of status for women. It used to be the case that if a status Indian woman were to marry a

¹⁹⁷ Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part I Origins to 1939* (Montreal: McGill-Queen’s University Press, 2015), 4.

¹⁹⁸ See: Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part I Origins to 1939* (Montreal: McGill-Queen’s University Press, 2015), 3.

¹⁹⁹ Ibid.

²⁰⁰ What would eventually become the Royal Canadian Mounted Police (RCMP).

²⁰¹ *Indian Act*, R.S.C., 1985, c. I-5, s. 114.

non-Indian man, she would lose her status. Her children would also not qualify for status. Whereas a non-status woman who married a status Indian man would then acquire status, and their children would also qualify for status. With the introduction of the *Canadian Charter of Rights and Freedoms* and the guarantees of gender equality, it was clear that this provision of the *Indian Act* violated the *Charter* rights of Indigenous women. So, this provision was amended. However, status was not automatically reinstated for those women whose status was lost through their marriage to non-Indians. There was a process whereby these women could apply to have their status reinstated, but the cost and the process in itself was prohibitive for many.

There is much to be said about the *Indian Act*, its provisions (past and present), and how it shapes the lives and politics of Indigenous peoples in Canada, and the Canadian public's perception of Indigenous peoples.²⁰² It would not be surprising if many people, upon learning about the *Indian Act*, were perplexed about why it is still in place. However, the idea of repealing it is not novel, nor is it straightforward. A significant point of discussion in contemporary Indigenous academic circles (and amongst Indigenous people generally) is whether it should be repealed, and how that would be accomplished. While it is clear that much of the *Indian Act* works against the interests of Indigenous nations and people, outright elimination of it would not provide relief from some of the most significant issues facing Indigenous nations today.²⁰³ In fact, there was an attempt to end the *Indian Act* in 1969. Looking at the attempt itself, and the response to this attempt by Indigenous people, will elucidate the complexity of managing a modern-day response to the *Indian Act*.

²⁰² And, though it goes without saying, much of what could be said about the *Indian Act* is not very positive.

²⁰³ This is especially true given that Indigenous nations who did not sign treaties rely on the *Indian Act* as the basis of their right to and measures of self-government. While it is possible for Indigenous nations to negotiate and implement self-government outside of the *Indian Act*, those that do often rely on pre-existing treaties to guide this process.

3.3.2: *The White Paper*

*The Statement of the Government of Canada on Indian Policy, 1969*²⁰⁴, also known as the White Paper, was a policy paper put forward by Jean Chrétien, the Minister of Indian Affairs, during Pierre Trudeau's time as Prime Minister. The objective of this policy paper was to commence the process of eliminating the distinct legal and political status of Indians in Canada, with the stated intent of these policy suggestions being to bring about the "full social, economic and political participation in Canadian life"²⁰⁵ of status Indians. The proposed policy gave a five-year timeframe for implementation (save for matters having to do with land negotiations, which the government expected would take more time to work through).

The White Paper has two key components. It contains a general policy framework – guiding principles or elements for the government to adhere to in policy – and the tangible steps the government would need to take in order to enact each element of the policy. The suggested framework contains six elements. In presenting each element, the Minister justifies why adopting each one is necessary and what steps would be taken in order to implement each element.

First, the Minister suggested that the "legislative and constitutional bases of discrimination must be removed."²⁰⁶ The government took the position that the group-specific measures for Indians that were in place at the time the White Paper was written (including the *Indian Act* and the rights that followed from treaties) were racially discriminatory – that Indians are set apart and treated differently because of their race. The Minister suggested the complete elimination of group-specific legislation for Indians. In the short term, this would like look like the elimination of the

²⁰⁴ Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy, 1969*. Ottawa, Ontario, 1969.

²⁰⁵ *Ibid.*, under 2 The New Policy.

²⁰⁶ *Ibid.*, under 1 The Legal Structure.

Indian Act and use of transitional legislation. In the long term, these measures would aim toward the removal of “the specific references to Indians from the constitution.”²⁰⁷

The second element is the requirement “that there be positive recognition by everyone of the unique contribution of Indian culture to Canadian life.”²⁰⁸ This is the least concrete of the six elements since, as the Minister himself indicates, “Governments can set examples, but they cannot change the hearts of men.”²⁰⁹ Ultimately, this element relies on the notion that Indians are not truly appreciated or made to feel welcome in Canadian society, and that the average Canadian would benefit from Indigenous peoples’ incorporation into broader Canadian culture. Historically, status Indians were made to choose between living on reserves and losing their status by being assimilated into Canadian society. But the Minister suggested that Indians do not have to lose their cultural heritage and distinction to become contributing members of Canadian society.

Next, the Minister proposed that services should “come through the same channels and from the same government agencies for all Canadians.”²¹⁰ Recall that the *Indian Act* and all of the services regulated within are managed by the federal government – even such services that are, for non-Indian (or, put otherwise, non-status) Canadians, regulated and administered by provincial governments, such as healthcare and education.²¹¹ The Minister maintained that “separation of people follows from separate service”²¹² and notes that “Services ought not to flow from separate agencies established to serve particular groups, especially not to groups that are identified ethnically.”²¹³ The suggested solution is that Indians should be provided with service through the

²⁰⁷ Ibid.

²⁰⁸ Ibid., under 2 The New Policy.

²⁰⁹ Ibid., under Foreword.

²¹⁰ Ibid., under 3 Programs and Services.

²¹¹ At the time the White Paper was proposed, matters pertaining to the *Indian Act* were managed by the Department of Indian Affairs and Northern Development.

²¹² Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy, 1969*. Ottawa, Ontario, 1969, under 3 Programs and Services.

²¹³ Ibid.

same channels as all other Canadians. This would be achieved, as with the first element, with the elimination of all group-specific legislation for Indians – first, with the elimination of the *Indian Act* and disbanding of the Department of Indian Affairs and Northern Development. All remaining responsibilities that are not resolved through these measures would be transferred to other federal departments for a transitional phase.

The fourth element of the White Paper is that “*Those who are furthest behind must be helped most.*”²¹⁴ The Minister noted that, even in the event that the previous policy elements were adopted and so would ensure legal equality and equal services, Indians would not be on equal footing with other Canadians in their social and economic conditions. The Minister insisted that reserves – their location and (supposed) limited opportunities for development – are a major contributing factor to the economic and social hardship that Indians face. Moving to a system of fee simple ownership and, as a result, allowing for regional development would give Indians with more upward mobility the opportunity to “help themselves”²¹⁵ and allow the government to focus on delivering programs that focus on those most in need.

On the matter of treaties and claims (land or otherwise), the Minister noted that “Lawful obligations must be recognized.”²¹⁶ The Minister acknowledged that treaties do exist, but declared that the terms and effects of the treaties were not well understood – that treaties offer only “limited and minimal promises,”²¹⁷ and that the treaties were never meant to (or are not able to) perpetually extend into the future. The Minister also noted that treaties do not affect all status Indians (only

²¹⁴ Ibid., under 4 Enriched Services.

²¹⁵ The language of ‘empowerment’ and the insistence that Indigenous people must ‘help themselves’ is used throughout the White Paper – giving the distinct impression that these policy proposals are not only meant to account for deficiencies within existing government policy, but that they are also meant to remedy underlying ‘cultural problems’ seen as unique to Indigenous people.

²¹⁶ Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy, 1969*. Ottawa, Ontario, 1969, under 5 Claims and Treaties.

²¹⁷ Ibid.

about half), which the Minister used as justification to insist that treaties are ill-equipped to serve the needs of Indians since they are not universally applicable. Beyond treaties, other claims exist – to land, and “other grievances [that] have been asserted in more general terms”²¹⁸ – though their importance and legitimacy is called into question. Still, the Minister acknowledged that treaties are in place, and suggested that grievances surrounding treaties would be resolved through remediation, a process of trying to find a common understanding between Indian people and the government. This process would involve examining the provisions of treaties to determine their status – whether the promises have already been fulfilled, whether the treaty (or any of its provisions) continues to be relevant, and whether some treaties might be found to be irrelevant and so should be terminated, through mutual agreement. The process of negotiating the termination of the treaties would be accompanied by another process developed as a result of the last element of the policy – transferring the control of land to individuals. It is through these two processes (negotiation of treaty terms and transferring the control of land) that the treaties will be “equitably ended.”²¹⁹

The last element of the new policy concerned reserves and their management, specifically that “Control of Indian lands should be transferred to the Indian people.”²²⁰ Recall that reserves are lands held in trust, and the title of the lands reserves are situated on is held by the Crown (either in right of Canada or one of the provinces). Through the powers vested in the government by the *Indian Act*, all “administrative control and legislative authority are ... vested exclusively in the Government and the Parliament of Canada.”²²¹ This land system, controlled through the *Indian*

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid., under 6 Indian Lands.

²²¹ Ibid.

Act, “lacks flexibility and inhibits development.”²²² And the Minister asserted that Indian bands and people are unhappy and disenfranchised because they “do not have control of their lands except as the Government allows.”²²³ The suggested remedy for this issue is to do away with the reserve system (which follows from the elimination of the *Indian Act*), and instead shifting to “the full holding of title in fee simple”²²⁴ – that is, the same property ownership system used on non-Indian lands in Canada. In order to move to this system, the government proposed the creation of an Indian Lands Act which would ensure that “full management would be in the hands of the bands and, if the bands wish, they or individuals would be able to take title to their lands without restrictions.”²²⁵ In practice, this would look like dividing reserve lands into parcels of private property, purchasable by anyone and subject to all conventional provincial regulations and taxes.

The White Paper can be described, simply, as a policy document which sought to terminate the unique legal status of Indians and all the rights hitherto guaranteed. At first glance, the White Paper makes use of many elements of progressive thought by employing the language of recognition, equality, and diversity, and even elements of social justice (in modern terms). But beyond this immediate appearance, both the delivery and the fundamental content of the White Paper were not received kindly. The shortcomings of the White Paper are not only apparent today with the gift of hindsight and present-day moral standards. When this policy was put forth, the government did not predict the response of Indigenous leadership. Instead of enthusiastic agreement, the government had to contend with forceful Indigenous opposition.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

3.3.3: *The Red Paper*

Published in 1970, “Citizens Plus”²²⁶ – also known as the Red Paper – was a counter-policy document proposed by the Indian Chiefs of Alberta (hereafter ICA) in direct response to the White Paper. The Red Paper amounted to a total rejection of the White Paper as it had been proposed by the Minister. As a counter-policy document, it contains three distinct aims, and has an exceptionally wide scope that reaches beyond directly addressing the White Paper.

First, the Red Paper confronts many of the assertions and suggestions made by the Minister in the White Paper. The authors reject the assertion that the recommendations in the White Paper were a result of consultations with Indians. To be clear – the process of consultation did take place, in the sense that meetings between the government and Indigenous leaders were held. However, what is at issue are the conclusions drawn by the government from these meetings. The ICA asserts that the government’s interpretations of the requests surrounding control of land were uncharitable, and that there was no request to break reserve lands into fee simple parcels of land.²²⁷

The ICA cites two significant problems with the government’s suggestion that the only way to allow for Indian management of reserve lands is to break the land into purchasable parcels. First, reserve lands are not owned by the Crown – they are held in trust by the Crown for Indian bands, who hold the legal title for and therefore are the owners of the land.²²⁸ Second, is that the government “is making the assumption that Indians can have control of the land only if they take ownership in the way that ordinary property is owned.”²²⁹ The authors of the Red Paper call into question the legitimacy of this claim, noting that they have received legal advice to the effect that

²²⁶ Indian Chiefs of Alberta, “Citizens Plus,” *aboriginal policy studies* 1, no. 2 (2011): 188-281.

²²⁷ *Ibid.*, 189-190.

²²⁸ *Ibid.*, 197-8.

²²⁹ *Ibid.*, 198.

“the Indian Act could be changed to give Indians control of lands without changing the fact that the title is now held in trust.”²³⁰

The ICA also asserts that Indian status, at least in some sense, must be preserved – because this status guarantees group-specific rights that Indians would not be guaranteed otherwise. The government’s insistence that the mere existence of Indian status is paramount to racial segregation is rejected by the authors. The authors refer to an understanding of equality that moves beyond identical treatment of all people. They cite a concept of equality that rejects identical treatment (referred to as “absolute equality”) as a desirable or defensible approach to minority management. Instead, equality in practice may in fact necessitate differential treatment in the case of minorities.²³¹ The authors conclude, with the support of L.C. Green’s work, that Indian status must be preserved because it guarantees indispensable rights that Indian people would lose if status was done away with.²³² The rights that would be lost in the elimination of status are indispensable, and “the recognition of Indian status is essential for justice.”²³³

Further, the authors dispute the government’s characterization of the treaties in the White Paper, and find “that the government has never bothered to learn what the treaties are and has a distorted picture of them.”²³⁴ The ICA notes that the promises made by the Indigenous signatories of the treaties have been upheld, that they have lived up to the obligations required. The treaties are “historic, moral and legal obligations”²³⁵ so the government cannot shirk its obligations through a dishonest characterization of these agreements. The authors also assert that the treaties are more than the written documents; they comprise also the oral negotiations that live only in

²³⁰ Ibid.

²³¹ Indian Chiefs of Alberta, “Citizens Plus,” *aboriginal policy studies* 1, no. 2 (2011): 193.

²³² L.C. Green, “Canada’s Indians; federal policy, international and constitutional law,” n.p. (1969). It is worth noting that this refined notion of equality is, of course, also present in Kymlicka’s work.

²³³ Indian Chiefs of Alberta, “Citizens Plus,” *aboriginal policy studies* 1, no. 2 (2011): 192.

²³⁴ Ibid., 196.

²³⁵ Ibid.

memory. Both elements (written and oral) were considered to comprise the obligations of the government by the Indigenous signatories of these treaties. On interpretation of the treaties, the Red Paper insists that treaties must be modernized and should not be read literally: “The intent and spirit of the treaties must be our guide, not the precise letter of a foreign language. Treaties that run forever must have room for the changes in the conditions of life.”²³⁶ For example, the promises of medicine chests in the treaties would amount to promises of healthcare in the present day.

In addition to addressing the concrete issues, the authors of the Red Paper also address some of the more nebulous aspects of the White Paper. Regarding recognition of the contribution of Indigenous people to Canadian life: “We say that these are nice sounding words, which are intended to mislead everybody. The only way to maintain our culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights.”²³⁷ The authors express support of cultural pluralism in Canada but note that allowing for cultural diversity for all of Canada’s citizens includes allowing Indigenous people to pass their culture to their children. An essential factor to do so is continuing to honour the treaties, as they are legal measures that guarantee protection. Without these agreements, Indigenous people are liable to being absorbed into the body politic of Canada in such a way that does away with their distinctiveness.²³⁸

The first aim of the Red Paper also contains specific demands of the government in relation to the above issues with the White Paper. These demands include the appointment of a full-time Minister of Indian Affairs (as opposed to this being only part of a Minister’s portfolio)²³⁹ and the

²³⁶ Ibid.

²³⁷ Ibid., 194.

²³⁸ This is not a comprehensive list of all the refutations the authors of the Red Paper present, but a selection of the most pertinent objections.

²³⁹ Indian Chiefs of Alberta, “Citizens Plus,” *aboriginal policy studies* 1, no. 2 (2011): 198.

official recognition of the legally binding nature of the treaties by the government and the entrenchment of the treaties in the Canadian constitution.²⁴⁰ The ICA also rejects the elimination of the *Indian Act* and the disbanding of the Indian Affairs department. They do, however, wish to address the paternalistic nature of the *Indian Act* and the sweeping powers conferred on the Minister through it.²⁴¹ To do away with this paternalism, the authors suggest that “The Indian Act can therefore be rewritten to establish the legal basis for tribal government in all matters usually delegated to local government.”²⁴² Further, the ICA asserts that “giving up our Indian identity is not necessary for economic development.”²⁴³ And on the issue of economic development, the authors note that the involvement of private enterprise will be crucial for success, and that social and economic programs should be developed locally, as opposed to in Ottawa.²⁴⁴ There are also areas of employment that are in need of development: jobs and vocations that would contribute to the self-sustainability (and self-government) of the community, and jobs in private industry.²⁴⁵

The second aim of the Red Paper was to provide a comprehensive historical background of the numbered treaties relevant to the Indian bands of Alberta for the government’s review. These were the numbered treaties: Treaty Six (1876), Treaty Seven (1877), and Treaty Eight (1899). The background of the treaties includes information about the negotiation process leading up to the signing and the terms agreed to in each treaty, as well as the historical context.²⁴⁶ The sections pertaining to this aim are in direct response to the Minister’s assertions that the treaties were not legally binding, not specific enough in their demands, or not relevant to the present day. These sections serve to remind the government of their continued obligations to fulfill these three treaties.

²⁴⁰ Ibid., 198-9.

²⁴¹ Ibid., 200-1.

²⁴² Ibid., 201.

²⁴³ Ibid., 202.

²⁴⁴ Ibid., 203.

²⁴⁵ Ibid., 204.

²⁴⁶ Ibid., 211-23.

Lastly, the Red Paper contains suggestions for programs that would allow the government to fulfill its treaty obligations to those represented by the Indian Chiefs of Alberta. These suggestions are primarily in the areas of education (and retainment of Indigenous students within education) and job training. Among the programs suggested is the Alberta Indian Development System (hereafter AIDS), which had been designed to tackle not only symptoms of socioeconomic struggle, but also the root cause:

Useful and productive employment through economic development is the objective, but employment is not a program in itself. A serious program must help the Indian people both on an individual and community basis to attack their fundamental conditions within a framework of development that co-ordinates action on employment with four other central elements; self-government, education, housing and a sense of socio-cultural community. It is essential to build self-sufficiency and self-determination within communities themselves.²⁴⁷

Another proposed program is the Home Education Learn Program (hereafter HELP). The HELP program is “a grass-roots manpower program aimed at developing ... areas of personal concern”²⁴⁸ HELP, while also being a job training program, would aim to tackle underlying disenfranchisement and harmful attitudes about vocational training. The contents of the program include, among others: operational attitude, motivation and incentive programs; seminars, workshops, and conferences; assessment and evaluation programs; academic re-orientation and upgrading; counselling, and; job placement.²⁴⁹ Not only are the structures and contents of these programs outlined, but they also provide a preliminary breakdown of the budget required for their execution.²⁵⁰

The government was forced to withdraw the White Paper in 1970, due in large part to the adamant and principled rejection by Indigenous leaders through the Red Paper. In response to the

²⁴⁷ Ibid., 225.

²⁴⁸ Ibid., 235.

²⁴⁹ Ibid., 236.

²⁵⁰ Ibid., 237-9.

withdrawal, it is reported that Prime Minister Pierre Trudeau declared “we’ll keep them in the ghetto as long as they want.”²⁵¹ As we already know, the *Indian Act* is still in place today, and though some notable amendments have been made, none of these amendments addressed the primary concerns expressed by the authors of the Red Paper regarding control of land or other matters. Disputes regarding treaty obligations and land claims move beyond political negotiations and into the sphere of litigation when the government does not fulfill its obligations to Indigenous nations, and Indigenous nations must appeal to a higher authority – sometimes the highest legal authority in the country, the Supreme Court of Canada.

3.4: Indigenous Jurisprudence in the Supreme Court of Canada

3.4.1: *Delgamuukw v British Columbia*

The case of *Delgamuukw v British Columbia*²⁵² saw the Supreme Court of Canada (hereafter SCC) deliver a more expansive definition of Aboriginal title. This definition widened the scope of what was previously thought to constitute Aboriginal title, though it did pose some notable limitations.²⁵³ While the SCC decision was delivered in 1997, litigation began in 1984 when Delgamuukw (also known as Earl Muldoe) “filed suit in the British Columbia Supreme Court to force the province to recognize the existing Gitksan and Wet’suwet’en title to their traditional territories.”²⁵⁴ This action was brought before the British Columbia Supreme Court –

²⁵¹ Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality* (Port Coquitlam, BC: Indigenous Relations Press, 2018), 92.

²⁵² *Delgamuukw v British Columbia*, [1997] 3 SCR 1010

²⁵³ Prior to this case, Aboriginal title was found to have existed prior to colonization in another landmark SCC decision *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313. So, while the definition of Aboriginal title and the test for it is clarified in the case of *Delgamuukw v British Columbia*, the *Calder* case is the case in which it was determined that Aboriginal title existed in Canada prior to the assertion of Crown sovereignty, and that Aboriginal title could be extinguished under certain conditions.

²⁵⁴ Alfred Joseph and Delgam Uukw, *The Spirit in The Land: Statements of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme Court of British Columbia, 1987-1990* (Gabriola, B.C.: Reflections, 1992), 1.

and then the Court of Appeal, and then to the Supreme Court of Canada – because the province of British Columbia refused to engage in a political negotiation over this land claim with the Gitksan and Wet’suwet’en people.

The original claim was a joint claim by Gitksan and Wet’suwet’en hereditary chiefs on behalf of a total combined 71 Houses for ownership of and jurisdiction over “separate portions of 58,000 square kilometres in British Columbia” that were “divided into 133 individual territories.”²⁵⁵ The Province of British Columbia, in the counterclaim, asserted that the Gitksan and Wet’suwet’en should only seek financial compensation, or that they had no right to the land. To prove their connection to the land in question, the Gitksan made use of their *adaawk* – “a collection of sacred oral tradition about their ancestors, histories and territories.”²⁵⁶ And the Wet’suwet’en made use of their *kungax*, “a spiritual song or dance or performance which ties them to their land.”²⁵⁷ Further evidence of their connection to the land in question was the feast hall shared by the Gitksan and Wet’suwet’en where they “tell and retell their stories and identify their territories to remind themselves of the sacred connections that they have with their lands.”²⁵⁸ The purpose of the feast hall is both spiritual and political.

The trial judge maintained that oral traditions did not constitute evidence for the claim. The primary evidence presented at trial to prove the Gitksan and Wet’suwet’en’s connection to the lands in question were the *adaawk* and the *kungax*, respectively. As a result, the claim for jurisdiction over and ownership of the land in question was dismissed. The Gitksan and Wet’suwet’en appealed the decision, and the British Columbia Court of Appeal rejected the trial judge’s ruling. Then, the matter was taken to the Supreme Court of Canada.

²⁵⁵ *Delgamuukw v British Columbia*, 1997, p. 1011.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*, 1012.

The SCC ruling addresses a number of issues – for example, regarding the facts of the original case and that the trial judge was wrong to dismiss oral tradition as evidence given the principles of evidence evaluation that were determined in *R v Van der Peet*.²⁵⁹ But primarily, the majority ruling laid out a definition of and constitutional test for Aboriginal title.

Aboriginal title is “the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures.”²⁶⁰ This includes the ability to exploit natural resources and engage in modern-day uses of the land. Use is not limited to those that are historically traditional. Aboriginal title includes rights that exist outside of specific rights outlined in treaties or other statutes. There is an important limitation on the use of lands subject to Aboriginal title, which is that “lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.”²⁶¹ In other words, those who hold Aboriginal title cannot destroy the land or use it in such a way that it prevents or ends the ability of future generations of Indigenous people who will share the title to enjoy and make use of the land.

Further, Aboriginal title is unique (described legally as *sui generis*), in being held communally, and is not subject to the same laws and regulations of fee simple ownership. This kind of title “is inalienable and cannot be transferred, sold or surrendered to anyone other than the

²⁵⁹ *R v Van der Peet* [1996] 2 SCR 507 is a SCC case which dealt with the definition of Aboriginal rights, but also discussed the kinds of evidence which may be submitted to prove a claim of Aboriginal rights. On the issue of evidence which does not fit the typical standards of evidence they found: “A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts.”

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*, 1015.

Crown.”²⁶² Not only is Aboriginal title recognized in the common law, but it is also protected through s. 35(1) in the *Constitution Act, 1982*, which states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”²⁶³

So, constitutionally protected Aboriginal rights are not only limited to title. The *Delgamuukw* majority opinion describes these rights as existing on a spectrum. There are “aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right”²⁶⁴ that take place on the land, but title to the land the activities take place on is not held because the activity may take place on the land but is not tied to a particular piece of land. There is also the “site-specific right to engage in a particular activity.”²⁶⁵ This happens when activity takes place on and is related to a *specific* piece of land, and although there is insufficient evidence to demonstrate title to the land, the right to engage in that activity on that site may be protected, even if full title cannot be granted. Finally, there is Aboriginal title itself, which, as mentioned earlier, is a right to the land itself – and the “land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1).”²⁶⁶

Given that Aboriginal rights and Aboriginal title are not, strictly speaking, one and the same, there are different constitutional tests for each.²⁶⁷ A three-part test is necessary to determine whether a given group can claim Aboriginal title.

²⁶² *Ibid.*, 1014.

²⁶³ *Canadian Charter of Rights and Freedoms*, s 35, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

²⁶⁴ *Delgamuukw v British Columbia*, 1997, p. 1016.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Aboriginal title is a sub-category of Aboriginal rights that deals only with land. Aboriginal rights are “a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right” and “to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive.” See: *R v Van der Peet* [1996] 2 SCR 507.

First, “the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title.”²⁶⁸ Occupation is of primary importance to establish title, and present occupation can be used as evidence of occupation pre-sovereignty.

Next, “if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation.”²⁶⁹ However, this continuity does not have to be unbroken – for example, it is possible that a nation may occupy land presently, and have occupied it pre-sovereignty, but for some reason may not have occupied the area uninterrupted between pre-sovereignty and the present day. Such a situation does not preclude the possibility of title.

Finally, due to the nature of Aboriginal title (that it is the right to exclusive use of the land in question) “occupation must have been exclusive”²⁷⁰ at the moment the Crown asserted sovereignty. This does not exclude the possibility of joint title between more than one Indigenous nation because “joint title can arise from shared exclusivity.”²⁷¹

Even in the event that the test is satisfied and Aboriginal title is established, it is not absolute. Both the federal and provincial governments can infringe constitutionally recognized Aboriginal rights. The test of justification to infringe on aboriginal title contains two conditions. First, that the infringement “furthers a compelling and substantial legislative objective.”²⁷² The objectives listed include natural resource development, general economic development, protection of the environment, and “the building of infrastructure and the settlement of foreign populations to

²⁶⁸ Ibid., 1017.

²⁶⁹ Ibid., 1018.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid., 1021.

support those aims”.²⁷³ Second, the infringement must be “consistent with the special fiduciary relationship between the Crown and the aboriginal peoples.”²⁷⁴ The fiduciary relationship the Crown owes Indigenous peoples could be fulfilled in the event that Indigenous peoples are involved with decisions made in respect to their lands and that the government consults Indigenous peoples. In most cases, there must be more than mere consultation. It is also expected that infringing Aboriginal title would beget fair compensation to the title holders for the infringement. Further, on the topic of extinguishment of Aboriginal title, while provinces may infringe on Aboriginal title, they do not possess the authority to extinguish it.

In the end, no decision was rendered by the Supreme Court regarding the specific title claims that were made in *Delgamuukw* by the Gitksan and Wet’suwet’en and the claim to self-government. This was due to the factual issues and the way the claim had been modified when it was brought to appeal (amalgamating the claims into two communal claims by nations instead of claims for the specific pieces of land by specific Houses). But a new trial was ordered based on the trial judge’s dismissal of oral tradition as evidence of Aboriginal title. It was also found that the province of British Columbia did not extinguish Aboriginal title to the land in question.

Still, the decision rendered was historic because it contained a comprehensive definition of Aboriginal title and constitutional tests to determine Aboriginal title, and the grounds to justify infringement. As a result of this case, Aboriginal title is defined as a right to the land itself – not only a right to activities that take place on the land, and the uses of the land are not limited to historically traditional ones.

²⁷³ Ibid.

²⁷⁴ Ibid.

3.4.2: *R v Marshall*

The *Marshall* cases²⁷⁵, as with many other SCC cases pertaining to Indigenous nations, are primarily concerned with exercising Aboriginal rights. In the *Marshall* decision, what was in question was how treaty rights respond to changing circumstances, particularly whether changing circumstances mean the extinguishment of treaty rights or if they remain relevant in the present day.

In the original trial case, Donald Marshall, Jr. was charged with three offences after catching and selling eels during the close season.²⁷⁶ The offences he was charged with were “the selling of eels without a license, fishing without a license and fishing during the close season with illegal nets”.²⁷⁷ All of these charges were violations of federal fishery regulations.

Mr. Marshall did not deny or dispute the facts of the case. That is, he freely admitted to having caught and sold the eels in question. However, he asserted that his actions, though they violated federal fishery regulations, were not illegal because his actions were protected as at treaty right. He asserted that, as a Mi’kmaq person, he had the right to fish to provide for himself under his treaty rights found in the Peace and Friendship Treaties of 1760-1 between the British and the Mi’kmaq.

As negotiations for the treaty took place, the Mi’kmaq people requested the creation of truckhouses where they could bring their goods to trade with the British for the necessaries on which they had come to rely, a request which the British granted. However, the written treaty

²⁷⁵ *R v Marshall*, [1999] 3 SCR 456; *R v Marshall*, [1999] 3 SCR 533

²⁷⁶ Donald Marshall Jr. was a particularly interesting man – not only because his father was the Chief of Membertou First Nation in Sydney, Nova Scotia, but because he was wrongfully convicted of murder. He spent a decade in prison for a crime he did not commit before he was acquitted and released. The overturning of his murder conviction led to changes regarding evidence disclosure in criminal trials. The proceedings of the SCC case took place after his release from prison.

²⁷⁷ *R v Marshall*, 1999, p. 456.

document did not reflect the import of this promise.²⁷⁸ The trial judge found that the trade clause restricting the Mi'kmaq from trading outside of the truckhouse system was “framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals,” and it was also the case “that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade.”²⁷⁹ However, the truckhouse system eventually ceased to exist in the 1780s. The trial judge concluded that the trading rights outlined in the treaty ended when the truckhouse system became defunct – in other words, the rights outlined in the treaty relied upon the existence of the trading system. When the trading system disappeared, so also did, according to the judge, the rights of the Mi'kmaq that were attached to them. So, Mr. Marshall was convicted. All three convictions were upheld by the Court of Appeal.

The SCC did not concur with the lower courts' rulings and found that Mr. Marshall should be acquitted of all charges. The SCC found the Court of Appeal “erred in rejecting the use of extrinsic evidence in the absence of ambiguity.”²⁸⁰ Extrinsic evidence refers to significant information (both factual and contextual) having to do with the process of contract finalization. In this case, there were forms of evidence beyond the treaty document itself that indicated more favourable terms for the Mi'kmaq were agreed to in the oral negotiations, though they were omitted from the final written document, namely in the British-drafted minutes of the treaty negotiations being a significant form of such evidence. Though there was no ambiguity in the written treaty (which is what would typically lead a court to consider extrinsic evidence), the SCC believed there were three grounds on which rejection of extrinsic evidence was an error.

²⁷⁸ Ibid., 456-7.

²⁷⁹ Ibid., 457.

²⁸⁰ Ibid.

First, even in the case of modern contracts, a written agreement may not encompass the entirety of a contract, and extrinsic evidence outside of the written contract would be accepted as part of the terms of agreement. Second, even in the case that a “treaty document purports to contain all the terms,” so that there exists no ambiguity in the treaty document, this does not mean that evidence of the “historical and cultural context of a treaty” cannot be received.²⁸¹ And finally, “where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.”²⁸²

Beyond the trial judge’s errors in denying the use of extrinsic evidence, the SCC rendered an interpretation of the trade clause in question in the treaty: “The surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities ...”.²⁸³ We also see the use of the concept of a moderate livelihood to describe this right.²⁸⁴ The SCC also noted that there cannot be inconsistencies with expectations in the law. In other cases, unwritten agreements would be respected in the upholding of contracts. In the case of the Crown’s dealings with the Mi’kmaq, the idea that the same standard would not apply was not an acceptable inconsistency.

There are, though, important limitations on the rights conferred on Mi’kmaq people by the treaty, which is that they are “limited to securing “necessaries” (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth.”²⁸⁵ Further, the rights found under the Peace and Friendship Treaties

²⁸¹ Ibid.

²⁸² Ibid., 457-8.

²⁸³ Ibid., 459.

²⁸⁴ See paragraph below on the limitations imposed on the treaty right for further explanation of the concept of a moderate livelihood.

²⁸⁵ *R v Marshall*, 1999, p. 459.

1760-1 were constitutionally protected rights under s. 35 of the *Constitution Act, 1982*. The SCC noted that, as with all constitutional rights, there exists the possibility that the government could infringe these rights (in this case – the *Badger* test would have to be applied)²⁸⁶. But, while the treaty right could be infringed if justification under the *Badger* test was met, it is also possible to regulate the treaty right in such a way that accommodates the right and does not violate it.

Still, *R v. Marshall* did not end with this first judgment. An intervener in the primary SCC case – the West Nova Fishermen’s Coalition (the Coalition) – ultimately sought a rehearing of the appeal and “a further trial limited to the issue whether the application of the fisheries regulation to the exercise of a Mi’kmaq treaty right could be justified on conservation or other grounds.”²⁸⁷ Their primary concern was how the *Marshall* ruling would impact the commercial lobster fishery in Nova Scotia.

The SCC dismissed this application on the grounds that the Coalition misunderstood the scope of the Marshall decision. The Coalition’s application was mostly concerned with the Marshall decision’s effect on the lobster fishery, but the original trial case did not make use of licensing restrictions nor the close season in order to justify limiting the rights contained within the treaty in question – specifically the right of Donald Marshall, Jr. to conduct his eel fishery. Accordingly, the Marshall decision does not address the lobster fishery, nor specifics on the use of licensing restrictions or the close season. Of course, this does not mean that these restrictions cannot be used to regulate any kind of moderate livelihood fishery. Instead, the SCC highlights that:

²⁸⁶ In *R v Badger* [1996] 1 SCR 771, the SCC determined principles that must be adhered to when interpreting a treaty. This includes: “... a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.”

²⁸⁷ *R v Marshall*, [1999] 3 SCR 533

The federal and provincial governments have the authority within their respective legislative fields to regulate the exercise of a treaty right where justified on conservation or other grounds. ... The paramount regulatory authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups. Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights. The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified on conservation or other grounds.²⁸⁸

Fisheries and Oceans Canada (hereafter DFO) – the federal regulatory body for matters pertaining to Canada’s fisheries and oceans resources – has yet to develop regulations for moderate livelihood fisheries in light of the ruling in 1999, though the development of such regulations was recommended by the Court. This has left Mi’kmaq people with the knowledge that they do have the right to a moderate livelihood through fishing, but without any federal guidance on how this should be done so as to prevent upheaval – both through reactions by the DFO and the non-Indigenous communities and individuals connected to the fisheries.²⁸⁹

3.4.3: *Tsilhqot’in Nation v British Columbia*

The Tsilhqot’in Nation is an Indigenous nation comprised of six bands in central British Columbia. In this ruling,²⁹⁰ which is the most recent of all the SCC cases we will look at in this work, the primary issue dealt with is the duty to consult when there is an unresolved land claim – the unresolved land claim being “a claim for Aboriginal title ... on behalf of all Tsilhqot’in people”.²⁹¹

Specifically at issue in this case was that the government of British Columbia “granted a commercial logging licence on land considered by the Tsilhqot’in to be part of their traditional

²⁸⁸ Ibid., 535.

²⁸⁹ The rulings in the *Marshall* cases and their implications came to another head just over 20 years after the initial SCC decision. More on this in Chapter 4.

²⁹⁰ *Tsilhqot’in Nation v British Columbia*, [2014] 2 SCR 256

²⁹¹ Ibid., 259.

territory”²⁹² in 1983. One band of the Tsilhqot’in Nation sought to prevent this commercial venture on their traditional territory by seeking “a declaration prohibiting commercial logging on the land”²⁹³ and by engaging in talks with the Province. The talks were unsuccessful, and the claim was amended as a claim for Aboriginal title. Thus, the claim found its way to the Supreme Court of British Columbia.

The Supreme Court of British Columbia granted Aboriginal title based on the fact that “occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area”.²⁹⁴ In this case, both the federal and provincial governments opposed the claim and though the Supreme Court of British Columbia ruled in favour of the Tsilhqot’in Nation, the case was taken to the British Columbia Court of Appeal, where the judgement was overturned. The British Columbia Court of Appeal denied the title claim based on a much narrower test of Aboriginal title than the test established in the *Delgamuukw* case, asserting that there was a need to establish “site-specific occupation” through “proof that the Aboriginal group’s ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty”.²⁹⁵

The SCC found that the trial judge did not err in their ruling, and that the appeal judgement was incorrect. Regarding the first point, the trial judge was found to have applied the correct test for Aboriginal title to the evidence in the case.²⁹⁶ The evidence showed that the Tsilhqot’in maintained exclusivity before the assertion of sovereignty by the Crown through the prevention of others using the land and requiring “permission from outsiders who wished to pass over it”²⁹⁷, and

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Recall the test for Aboriginal title in the *Delgamuukw* case, see 3.4.1.

²⁹⁷ *Tsilhqot’in Nation v British Columbia*, 2014, p. 260.

that the land in question was regularly used by the Tsilhqot'in. Further, continuous occupation was established due to the proximity between the sites of recent and historic occupation, and title to land is not determined by sites of settlement. The error of the British Columbia Court of Appeal was "primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title."²⁹⁸ As a result, the Court of Appeal incorrectly determined that the Tsilhqot'in did not establish title. Even more, the Province did not establish that the original trial judge erred in granting title.

Also at issue was the matter of the government's duty to consult Indigenous peoples for the use of lands that are subject to a title claim. The government's fiduciary duty in matters of land begins before Aboriginal title is established, and "the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups."²⁹⁹ The SCC takes care to note that the nature of the requisite consultation and accommodation will be different depending on each unique circumstance. In the case that Aboriginal title is established, the Crown has procedural duties that it must fulfill. And if the Crown is going to undertake any incursions on Aboriginal title lands, the constitutional test regarding s. 35 of the *Constitution Act, 1982* – found in the *Delgamuukw* case – must be met. The SCC noted, though, that "allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group."³⁰⁰

Beyond the land claim in question, this case is also concerned with an alleged breach by the Province in its duty to consult the Tsilhqot'in. Once the land claim was initiated, the Province

²⁹⁸ Ibid.

²⁹⁹ Ibid., 261.

³⁰⁰ Ibid.

continued to issue private timber licenses. This is not a general regulatory matter regarding the land – as with acting toward the end of conservation, for example – but is instead about private, commercial ventures on land that is under dispute. While the Province maintained that the *Forest Act* – provincial legislation having to do with management of Crown land in British Columbia – applied to the land in question, the Court determined that “Now that title has been established ... the timber on it no longer falls within the definition of “Crown timber” and the Forest Act no longer applies.”³⁰¹

As a result, the SCC found that “a declaration of Aboriginal title over the area requested should be granted”³⁰². Further, “The honour of the Crown required that the Province consult the Tsilhqot’in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot’in.”³⁰³ This case is closely related to the *Delgamuukw* decision – this is another case where we see the test of Aboriginal title that was developed in the *Delgamuukw* decision applied. We also see a further development – whereby more information is given on the duty to consult in relation to infringing Aboriginal title.

3.5: A Glimpse of Reality

To accurately evaluate Kymlicka’s theory of multiculturalism as it pertains to Indigenous nations in Canada, it is imperative to know what measures are in place to accommodate or account for Indigenous nations. The purpose of this chapter was to present some of these foundational measures and provide a more detailed awareness of the reality Kymlicka often refers to in support of his theory.

³⁰¹ *Tsilhqot’in Nation v British Columbia*, 2014, p. 262.

³⁰² *Ibid.*, 260.

³⁰³ *Ibid.*, 262.

I previously discussed the constitutional nature of multiculturalism and associated values, as these appear in the *Charter of Rights and Freedoms*, but concretely multiculturalism (as both a value and a practice) is an official government policy. Multiculturalism is part of a national image that the Canadian government works to maintain both domestically and abroad. Constitutional documents and policies not only provide insight into desired civic attitudes and values, but also provide actionable rights, and standards the government should be held to.

We also looked at the *Indian Act*, one of the most complex pieces of legislation directed at Indigenous nations in Canada. I presented not only its current state, but also some key historical aspects of the *Act*, and the complicated nature of its continued implementation. It contains both elements of protection and oppression, and this seems almost irreconcilable with the colloquial image of Canada as a multicultural haven. The solution to the problems with the *Act*, though, is not necessarily its elimination. This is where we begin to see pragmatic cracks develop in an idealistic façade.

An even more illuminating example of multinationality in practice with Indigenous nations is jurisprudence from the SCC. The cases we looked at in this chapter tell a complicated story about the government's position on multinationality in practice. These cases arrived at the highest court in the country because amicable negotiations did not result in the resolution of land claims, and because Indigenous nations have been duly exercising their treaty rights.³⁰⁴

The above examples are an indispensable point of departure for examining both the descriptive and normative elements of Kymlicka's theory. We must have an honest and reasonably detailed picture of the state of multiculturalism, and particularly multinationality, in practice in

³⁰⁴ And it is not as if the Supreme Court of Canada will not hear more cases having to do with Aboriginal rights and Aboriginal title – the cases addressed in this chapter are only a brief look at a long and continued tradition of necessary intervention by the Supreme Court.

Canada. Otherwise, it would be impossible to undertake a fair and grounded evaluation. This evaluation, the primary task of this thesis, is the focus of Chapter 4.

Chapter 4 When Theory Meets Practice

4.1: Introduction

In Chapter 2, I presented the framework of multiculturalism I am using in this work – found in Will Kymlicka’s *Multicultural Citizenship* – and a brief defence of this choice. I considered apparent shifts in Kymlicka’s subsequent work, and I also presented the questions that would be guiding this project. In Chapter 3, I presented a selection of significant legislation and events, a brief map of Indigenous legal experiences and history in Canada as it relates to multiculturalism. This included: the *Canadian Charter of Rights and Freedoms* and the *Multiculturalism Act*; the *Indian Act*, the attempt to abolish the *Indian Act*, and the Indigenous response to this; and a selection of three Supreme Court of Canada cases. The purpose of the two previous chapters was foundational in nature – to present the theory of multiculturalism and some of Canada’s legislation affecting Indigenous nations, in order to measure elements of each against the other.

This final chapter is where the foundational work done in Chapters 2 and 3 will be brought into conversation. To consider the guiding questions outlined in the first chapter, we will examine several points of interest in Kymlicka’s theory of multiculturalism against law, policy and history in Canada concerning Indigenous nations. We will do this through four separate, but interrelated case studies or essays about some of the crucial themes in *MC*. First, we will examine Kymlicka’s assertions about citizenship in national minorities (4.2). Then, we will assess Kymlicka’s characterization of treaties and whether they are part of a deeper theory of justice (4.3). Next, we will explore how Kymlicka depicts the exercise of group-differentiated rights (4.4), particularly the exercise of self-government rights by Indigenous nations in relation to two events: the aftermath of the *Marshall* decision and Sipekne’katik First Nation’s moderate livelihood fishery

(4.4.3) and the Wet'suwet'en Coastal GasLink pipeline conflict (4.4.4); these two events were not previously addressed in the thesis. We will also examine the underlying justification of the use of authority by the Canadian state (4.5) – first, by addressing the underlying presumption of Canada's legitimacy by Kymlicka in his theory of multiculturalism (4.5.1) and by considering what the future of Indigenous resistance in Canada may look like, given the use of power by the Canadian state (4.5.2). Finally, we will return to the two guiding questions outlined in the first chapter (under 2.5), and ask whether Kymlicka's theory of multiculturalism succeeds or fails in relation to each of the points of interest discussed in this chapter, and I will offer my concluding remarks (4.6).

4.2: On Citizenship

Kymlicka addresses the regulation of membership in national minorities only generally, and mostly in terms of what such regulation should not entail. Recall from 2.3 that Kymlicka explicitly rejects race-based standards of membership:

Such descent-based approaches to national membership have obvious racist overtones, and are manifestly unjust. It is indeed one of the tests of a liberal conception of minority rights that it defines national membership in terms of integration into a cultural community, rather than descent. National membership should be open in principle to anyone, regardless of race or colour, who is willing to learn the language and history of the society and participate in its social and political institutions.³⁰⁵

Any national minority that regulates membership based on race is not respecting the necessary liberal values Kymlicka insists must be present in a multicultural state. We can see he insists that it should be possible for a person of any race to be a member of any given nation, and this includes national minorities. This is in the same sense that it must be possible for a person to become a citizen of Canada, regardless of race. Further, Kymlicka never specifically addresses the matter of

³⁰⁵ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 23.

citizenship of Indigenous nations in concrete terms. But when the standards of membership Kymlicka refers to and the standards of membership for Indigenous nations in practice are measured against one another, troubling inconsistencies appear.

The official standards to qualify as a legal Indian with membership in an Indian band in Canada can be found in the *Indian Act*. Recall from 3.3.1 that qualifying for legal Indian status is based on familial, or racial, descent, and is found under sections 6(1) and 6(2). If a person is registered under 6(1), both of their parents are registered Indians (whether under 6(1) or 6(2)). If a person is registered under 6(2), only one of their parents is a registered Indian under 6(1), while the other parent is not a status Indian. If an individual registered under 6(2) has a child with a person who is not a status Indian, that child does not qualify for status. A person who does not have parents who are legal Indians does not qualify for membership. In other words, it is not possible to become a member of an Indian band if you are not of Indigenous (racial) descent. What's more, it is not a matter of having any Indigenous ancestor, but is a matter of your genetic proximity to your ancestors. This is commonly referred to as the concept of 'blood quantum' – a person must possess a sufficient quantity of Indian ancestry to be entitled to status. It is not possible for somebody who does not possess enough Indigenous blood (as defined by the Canadian state) to become a legal member of an Indigenous nation, no matter if they learn the language and history, and participate in the social and political institutions of the nation – including if they are raised in an Indigenous household on a reserve.

There is also the matter of the historical patrilineality of Indian status prior to the amendment in Bill C-31. Recall that prior to this amendment, Indian women who married non-Indian men lost their status and therefore could not register their children. This was so even if the

woman was registered under 6(1), and so her children would have fulfilled the requirements for membership other than the sexist provision which prevented them from doing so.

It would follow, then, that Kymlicka would reject this standard of membership. It would also follow that Indigenous nations are violating essential liberal values and so would not qualify for support or be seen as sufficiently liberal under Kymlicka's theory. This is so although, again, he never addresses this issue in *MC*. However, our evaluation of the matter of membership should not end at the insinuation that Indigenous nations appear to be falling short of liberal values, and that Kymlicka does not address this matter. The matter of membership is of foundational importance to Kymlicka's theory of multiculturalism. To understand what is at stake, we must examine these standards more closely.

First, it is essential to note that the standards of membership found in 6(1) and 6(2) of the *Indian Act* were not created by Indigenous nations. These standards, as they have existed historically and continue to exist today, were created by the Canadian state and imposed on Indigenous nations.³⁰⁶ Kymlicka expresses concern about Indigenous nations imposing internal restrictions on its members, in particular with regard to human rights and gender equality. But he never addresses the imposition of standards by the Canadian state that violate the very standards he insists upon as necessary for national minorities to ensure the freedom and dignity of its members. Exclusively, the focus of Kymlicka's scrutiny regarding the violation of liberal standards, is national minorities (or polyethnic groups).

What follows from the fact that the Canadian state has imposed these standards is the question of *why* the Canadian state would do this. This question is critical, and it is complex. Descent-based membership poses a unique problem rooted – first and foremost – in the desire

³⁰⁶ John Borrows also warns against the temptation to treat these imposed standards of membership as tradition by Indigenous communities in "Seven Generations, Seven Teachings: Ending the Indian Act." More on this below.

people have to live freely (and what should be their right to do so). Given that the rights accorded to legal Indians by the Canadian state are based on a model of descent, having children with a non-Indigenous person effectively diminishes the purity of one's descent. There then logically comes a time where a person no longer possesses a sufficient amount of 'Indigenous blood' to obtain status, even if the person was raised in community. Unless communities remain completely insular (which is not likely to happen in a globalized world or, if they do, are seen as oppressive), the current registration system necessitates that there will be fewer legal Indians as time goes on.

If all of the unique rights accorded to Indigenous peoples rest on a descent-based approach to membership, what this compelled disappearance amounts to is essential to understand in concrete terms. A brief glance toward the rights that would be lost in this event provide vital insight. Among the most valuable rights Indigenous nations could lose are those that guarantee control of and access to homelands and natural resources.

One does not have to search very rigorously to glean that a great many SCC cases that deal with Aboriginal rights (including treaty rights) involve land and resources. For example, look back to the cases outlined in 3.4. *Delgamuukw v British Columbia* was a case concerning land claims made by the Gitksan and Wet'suwet'en, and had to do with the definition of Aboriginal title and the corresponding constitutional test to determine it. *R v Marshall* was concerned with the ability of the Mi'kmaq to exercise their treaty right to a moderate livelihood that was laid out in the Peace and Friendship Treaties of 1760-1. This right to a moderate livelihood was, in explicit terms within the trial, regarding the ability to harvest and sell eel in the close season without a DFO-issued license. *Tsilhqot'in Nation v British Columbia*, similarly to the *Delgamuukw* case, dealt with Aboriginal title, except in this case the action was launched specifically in response to encroachment by a private company, with the blessing of the province of British Columbia, on

land that was subject to an active land claims process. Each one of these SCC cases is concerned with land and resources, and the rights associated with them.³⁰⁷

Naturally, the question of how citizenship in Indigenous nations should instead be regulated emerges. I do not purport to have specific recommendations on this matter other than the requirements for citizenship should ultimately be determined by each nation. However, there is much more to be said about how citizenship should *not* be regulated. Clearly, the most significant barrier to self-determination of citizenship is the legislation which regulates the current standards of membership, the *Indian Act*. So, to achieve this self-determination, the *Indian Act* must be confronted.

John Borrows addresses the *Indian Act* in relation to the matter of citizenship in the essay “Seven Generations, Seven Teachings: Ending the Indian Act”.³⁰⁸ In this paper, Borrows criticizes the core principles and functions of the *Indian Act*, and addresses the complexities (but achievability) of ending this legislation.³⁰⁹ He begins by noting the *Indian Act*’s ultimate function – assimilation – and asserting that it “is meant to sever the generations. The *Act* is working its purpose, through provisions concerning land, elections, membership, commerce and education. It cuts us from those future relationships.”³¹⁰ Borrows focuses on goodness as the central tenet that should guide Indigenous nations on seeking the elimination of the *Indian Act*.³¹¹

³⁰⁷ While this is only three cases, rest assured that this is not a sampling bias. There are many more cases concerned with matters of land and resources, including: *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313; *R v Van der Peet*, [1996] 2 SCR 507; *R v N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672; *R v Gladstone*, [1996] 2 SCR 723, *R v Sparrow* [1990], 1 SCR 1075; and many more.

³⁰⁸ John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (West Vancouver, BC: National Centre for First Nations Governance, 2008)

³⁰⁹ Borrows uses the Seven Grandfather Teachings of the Anishinaabek (humility, bravery, honesty, wisdom, truth, respect, and love) to guide his interrogation. He finds that the *Indian Act* fails in respect to each of these teachings.

³¹⁰ John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (West Vancouver, BC: National Centre for First Nations Governance, 2008), 3.

³¹¹ Note that I use Borrows as a key interlocutor with Kymlicka’s positions in this chapter. The reason for this is because of the nature of Borrows’ work as an Anishinaabe jurist – his work is focused on ensuring the wellbeing of Indigenous nations within the Canadian legal system, and as a legal expert is qualified to suggest alternative interpretation to law. He is aware of both the shortcomings of legal theorizing and the challenges faced by Indigenous

As was previously discussed in 3.3.2, there has been an attempt to eliminate the *Indian Act* – the White Paper, proposed by the Canadian government. All the Canadian state offered in place of the *Indian Act* were, essentially, polyethnic rights. Indigenous nations would have been eliminated as nations, and instead Indigenous people would be treated as a disadvantaged racial minority. Indigenous people strongly opposed and successfully resisted this attempt by the Canadian state, and it serves as a powerful reminder for Borrows’ assertion that “the *Indian Act* could be rescinded through power that does not rest on goodness. ... If the *Indian Act* were replaced through a corrupt or authoritarian exercise of power, we would have change, but it would not likely be for the better. It would also not be healing.”³¹² As was evidenced by the response to the White Paper and the proposal itself, the intent of those who drafted it did not come from a place of goodness and the outcome of its implementation would not have been healing. Recall that the White Paper sought the total elimination of the *Indian Act* under the state’s declaration that the *Act* is inherently discriminatory. However, the outcome of the implementation of the White Paper would have been exceedingly unjust, as the authors of the Red Paper argued. Borrows actually warns against such tactics:

Some of our critics would seek to dismantle our entire communities under the guise of dismantling the *Indian Act*. We must be very wary of these false allies. Drawing on their support to get rid of the *Indian Act* comes with an exceedingly high cost. They would use the removal of the *Indian Act* to remove First Nations communities in Canada. Their Trojan Horse-type tactics must be made plainly clear.³¹³

So, any proposal to eliminate the *Indian Act* in concrete terms, specifically those that are proposed by the Canadian state, should be met with a healthy dose of skepticism. Skepticism is essential to successfully navigate the complexity of removing the *Indian Act* as a piece of paternalistic,

nations when Canadian law is operating in practice. And while Borrows is aware of the importance of principle, he is also committed to contextualized evaluations of whatever matter he happens to be discussing.

³¹² Ibid., 8.

³¹³ Ibid., 17.

discriminatory, essentialist piece of legislation, while still preserving Indigenous nations as nations.

Borrows maintains a similar position to Kymlicka regarding the idea of race-based membership, in that he explicitly rejects the *Indian Act* (and in fact any law) “being applied solely along racial lines” because “This practice is usually discriminatory and subordinates groups or individuals within society.”³¹⁴ Instead, Borrows asserts that Indigenous “identity and citizenship should flow from the political and cultural character of our societies.”³¹⁵ He also addresses those who have internalized the colonial standards imposed by the *Indian Act* – that is, Indigenous people who have adopted the position that their nations constitute a race. Borrows cautions against replicating and perpetuating the same harmful standards of the *Act*. The solution to this predicament, Borrows asserts, is that Indigenous nations should declare that the rights they have and seek are not a matter of race. Instead, they are “political, cultural, legal, spiritual and sociological” rights and, critically, “Others can enjoy these rights and participate with us in their enjoyment if they agree to strive to follow the highest principles found within our constitutions, customs, languages and grandfather teachings.”³¹⁶ Defending rights in these terms eliminates unwarranted accusations that the rights Indigenous nations wish to uphold are racially exclusionary, and so ultimately unjust.

Generally speaking, I agree with Borrows’ assertions regarding race-based standards of membership through the *Indian Act*. I do not believe that racism is the key issue to frame in critiques of the Canadian state pertaining to discussion about sovereignty and group-differentiated rights for Indigenous nations in Canada. It is important to engage in discussions about experiences

³¹⁴ Ibid., 29.

³¹⁵ Ibid.

³¹⁶ Ibid., 30.

of racism and discrimination faced by Indigenous people, and there is much to be said about institutional and systemic racism in Canada. This manifests in many different ways for Indigenous people, including (but not limited to): police brutality, medical mistreatment, and higher rates of apprehension by child welfare services. However, when discussing the long-term goals of the Canadian state, discussions centering racism can be used to cleverly subvert and undermine the national projects of Indigenous nations. The most pertinent example being the White Paper, which sought to treat Indigenous peoples as disadvantaged racial minorities instead of as nations, and framed the problems Indigenous peoples face in Canada as being one primarily rooted in experiences of racism.

Borrows also discusses the destructive nature of the *Indian Act* toward the most essential of human experiences – love. The manner in which the *Indian Act* severs the generations from each other through its demands for racial purity is contrary to and obstructs love: “Love forges and welds family ties in the present and through the generations. ... Love would promote legislation and community approaches that recognized and affirmed family relationships, like husband and wife, parent and child, grandparent and grandchild, aunts and nephew, uncles and nieces, cousins, siblings and other kinship bonds.”³¹⁷ It would be unthinkable for a non-Indigenous Canadian family to be prevented from sharing a national identity due to their racial background. Perhaps more aptly, citizens of Québec – another national minority – are not denied membership due to race.³¹⁸ This legislation stands firmly in the way of freedom, and indeed in the way of freedom as Kymlicka himself asserts must be present in a liberal society. Though Borrows does acknowledge

³¹⁷ John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (West Vancouver, BC: National Centre for First Nations Governance, 2008), 14.

³¹⁸ Note that I am not suggesting that people do not experience racism in Québec – but the experience of racism is not the same as total denial of membership based on race. Québec accepts non-white immigrants. Their integration and experiences as Québécois is a separate matter.

the complexities that could arise from the process of opening up membership to a wider range of people than is currently possible, and that “If there is concern about the floodgates of membership swamping small communities we can devise rules for adopting others into our communities or granting them membership.”³¹⁹

Additionally, Borrows addresses some underlying philosophical concerns regarding the mobility of Indigenous nations and their treatment in law as a result of this mobility, and what lessons we can draw from this on the matter of citizenship in his book *Freedom & Indigenous Constitutionalism*.³²⁰ In the first chapter, entitled “Physical Philosophy: Mobility and Indigenous Freedom,” Borrows focuses on the movement of Indigenous peoples through time and space, and how the concept of mobility (used interchangeably with ‘movement’) can be used to examine the political, legal, and social challenges faced by Indigenous peoples. He uses the metric of freedom and the ability to live a good life to guide his interrogation.

Mobility has long been an Indigenous practice, both historically and into the present day. Settler states like Canada disregard or undermine Indigenous practices of mobility because these practices challenge the current and historical limits of Canadian law and politics.³²¹ When Borrows speaks of mobility, he has in mind two senses of the word. There is physical mobility, which is characterized by movement across land and through time. Then, there is conceptual or philosophical mobility. Philosophical mobility is the ability to affect and be affected by other cultures, the ability to share with others and shift ideology and tradition over time. It is the ability to leave behind and pick up new cultural practices and traditions as necessary or as desired.³²² Still,

³¹⁹ John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (West Vancouver, BC: National Centre for First Nations Governance, 2008), 30.

³²⁰ John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016)

³²¹ *Ibid.*, 21.

³²² *Ibid.*, 21-22.

Borrows notes, the philosophical mobility that Indigenous peoples engage in is not indicative of ideological rootlessness and “For example, Anishinaabe people often try to understand the future by remembering the past.”³²³

These two kinds of mobility, while distinct from one another, do not exist in isolation. Physical movement transforms philosophical beliefs – as any nation moves through space and time, interaction with others and changing landscapes will bring about changes to beliefs, values, and traditions. In relation to the transformation of beliefs, Borrows rejects the notion of an essentialized, authentic Indigeneity. He asserts that there is no pure form of an Indigenous person or nation, but courts and scholars have invariably assigned essentialist criteria of evaluation to both Indigenous people and nations.³²⁴ Essentialist narratives and criteria have mischaracterized Indigenous mobility in most settler states’ socio-political and legal frameworks. Indeed, the two kinds of mobility that Borrows discusses are the antithesis of essentialist conceptions of Indigeneity.

Borrows presents a thesis he calls ‘Damned if we move, damned if we don’t’ to show how most legal systems frame Indigenous mobility to restrict or eliminate Indigenous freedom. He asserts that the definition of Indigenous rights within the Canadian legal system is built upon a foundation of contradictory approaches to mobility.

Indigenous peoples are damned if they move in the sense that Indigenous people “must prove their practices accord with a preconceived ideal form,” or they are deemed too philosophically or physically mobile to demand recognition of their rights.³²⁵ For example, Indigenous peoples are not allowed to claim customs adopted as a result of interactions with other

³²³ Ibid., 22.

³²⁴ Ibid., 20, 24.

³²⁵ Ibid., 30.

cultures or peoples as Aboriginal rights. Or, if an Indigenous nation has moved within a confined territory, but never settled in one spot for long enough or made proper use of the land (according to the criteria determined in jurisprudence), then they are deemed to have an insufficient claim to title. On the other hand, Indigenous peoples are damned if they do not move, as there are times when Indigenous people are deemed to be too unchanging, stuck in the past, or archaic to demand recognition of their rights. This false perception that Indigenous peoples are stuck in the past is, interestingly, inextricably tied up with the perception that Indigenous peoples are too mobile, since “if Indigenous peoples in Canada adopt new practices in response to colonial intrusions, these innovations are not protected as rights.”³²⁶ What this means is that the only group-specific rights Indigenous peoples can hold onto and exercise are those that existed at the time of contact with settlers. As a result, the rights Indigenous peoples seek to protect – these rights and traditions that are not allowed to evolve with the movement of time – are viewed as belonging to a bygone era. These contradictory views freeze Indigenous rights in time.

Some clear examples of the above issues with mobility manifest in the interpretation and application of law in Canada regarding Aboriginal title and Aboriginal rights. Recall from 3.4.1 the constitutional test for Aboriginal title in *Delgamuukw v British Columbia*, which demands that Indigenous nations must have exclusively occupied the land they claim title to at the time the Crown asserted sovereignty. This standard sets contact or sovereignty as the defining moment of legitimate Indigenous tradition in the eyes of the law. Any departure from the traditions that were in place at contact are viewed as a deviation from ‘true’ Indigenous tradition. This synthetically freezes Indigenous nations distinctly in the past, whereas other nations and cultures are able to

³²⁶ Ibid., 31.

adapt and change according to their circumstances without having their authenticity called into question, or even denied.

Borrows makes two significant suggestions for how Indigenous mobility can be affirmed in such a way as to empower Indigenous nations. The first is that Indigenous nations “should be permitted to regulate and integrate non-Indigenous peoples on a territorial basis within their communities.”³²⁷ The second is to implement “better ways of regulating formal political relations between First Nations Indigenous and other governments” in order to allow free and amicable association between these political units.³²⁸

The first suggestion is one that is of particular interest here and should be expanded on. Borrows again rejects race-based standards of citizenship in this work, though here he does so in relation to the concept of mobility:

Traditions which construct Indigenous societies on an abstract, racialized basis can freeze ideas about who is authentically Indigenous. Such ideas condition us to expect ‘real’ Indigenous peoples to be racially ‘pure.’ This can lead to the diminishment of the community’s jurisdiction if ‘blood’ or ancestry becomes too remote from an idealized fullness as people travel through the generations. This is an inappropriate constraint – a false horizon. This view limits mobility by construing Indigenous peoples as ‘pure’ on the moment of European arrival, with a consequent reduction of ‘purity’ as they travel beyond this point in time.³²⁹

Borrows notes that race is overwhelmingly rejected as a standard of non-Indigenous liberal political societies or communities, and this should not be different for Indigenous nations – Indigeneity should not be determined by blood. Borrows insists that Indigenous peoples are not a race, but nations. So, Indigenous nations should be allowed to integrate those who would not at present be considered Indigenous due to the race-based standards of membership by granting them citizenship, so long as both the nation and the person consent to this and that there is a process whereby “Indigenous peoples’ laws and values are strengthened and not undermined in the process

³²⁷ Ibid., 40.

³²⁸ Ibid.

³²⁹ Ibid., 42.

of accepting others into their societies.”³³⁰ The current standards of membership in Indigenous nations punish Indigenous people for genetically journeying over time by having children with those outside of their communities, and the result of this will be that Indigenous nations are stopped from moving through time into the future.³³¹ While Borrows does not explicitly say so in this chapter, it is reasonable to assume this approach to citizenship would include automatically granting citizenship to children whose families are already citizens.

So, while there is no definitive, singular answer to how citizenship within Indigenous nations should be regulated, there are many avenues that could be taken. Any of these justifiable avenues will have a number of aspects in common: true self-determination for each nation as it sees fit; respecting Indigenous physical and philosophical mobility; explicitly rejecting race-based standards of membership, and; strengthening and respecting relationships of love and kinship.³³² Ironically, the Canadian state’s current and historical approach to its regulation of Indigenous citizenship through the *Indian Act* does none of these things.

It is worth returning to Borrows’ meditation on love in “Seven Generations, Seven Teachings: Ending the Indian Act” where he speaks about the Tlicho Nation’s self-determination of citizenship as was negotiated in a land claims agreement in 2005:

These agreements allow communities to have anyone become a member “if that person is accepted pursuant to the community acceptance process in the constitution”. The *Tlicho Constitution* (section 4) states that citizenship is within the exclusive jurisdiction of their government and that the Tlicho Assembly can set out criteria for citizenship by a general assembly motion. These provisions are so much healthier than the *Indian Act*, which gives us no choice. They permit the community to set its own rules concerning membership, and thus preserve a vital aspect of self-determination. At the same time, they make room for others who are not defined as Indian by the federal government. If a community is building itself to be good and keeping love as a central motivating force, many more people will join us. If growth occurs under this grandfather law, our clans and culture will be strengthened. Love grows in an atmosphere where people are welcomed and given messages that they belong. Love withers when people are told they have no status despite being the spouse, parent, child, grandparent, aunt, uncle, cousin, nephew, niece of the people who mean the most to

³³⁰ Ibid.

³³¹ Ibid., 43.

³³² This is not an exhaustive list by any means, though I do believe they are some of the most valuable lessons we can take from John Borrows’ assertions on this matter.

you in life. Love should rise to the surface and be clearly identified as a goal in our conversations and actions around the *Indian Act's* failures.³³³

There is something that Borrows notes in the passage above that is valuable to emphasize – that Indigenous nations will grow in number and become stronger; if there are processes for incorporating new citizens into Indigenous nations then “many more people will join us.” If the Canadian state continues to regulate Indigenous citizenship in such a way that it leads to the diminishment of the number of citizens of Indigenous nations over time, this could very well spell disaster for Indigenous nations as far as their very survival is concerned. These same concerns exist if, as Borrows warns against, Indigenous nations choose to uphold the standards of citizenship that have been imposed on them by the Canadian state, especially if they believe that these standards constitute tradition.³³⁴ Put simply, a nation needs citizens to survive. We should be concerned with the outcome of a shrinking citizenry, and why this outcome could be seen as desirable by the Canadian state and, at the same time, why this would be detrimental to Indigenous nations.

The disappearance of the legal Indian (whether through the inevitable outcome of race-based standards of membership, or through a Trojan Horse-style move that construes Indigenous nations as a disadvantaged racial minority) would render obsolete many of the legal problems the Canadian state currently faces. It would eliminate the obligation to deliver federally mandated and regulated Indigenous services. It would eliminate any legal obstacles for the provincial or federal governments to make use of Crown land toward the end of revenue or development. It would mean that the legal obligation of the Canadian state to uphold and honour treaties, engage in land claims

³³³ John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (West Vancouver, BC: National Centre for First Nations Governance, 2008), 14-15.

³³⁴ This is reminiscent of Frantz Fanon’s – and so Glen Coulthard’s – concern about colonized people adopting the viewpoint of the demeaning view of themselves and oppressive tactics used against them by the colonial state as natural, found in 2.4.

processes, and honour constitutional Aboriginal rights would vanish. These possible ends should always animate discussion surrounding Indigenous rights. If there are no Indigenous citizens, there are no people to whom these rights apply. It is not enough for any person or institution to agree that the *Indian Act* must be abolished – indeed, the Canadian state has, historically, responded to calls for reform and recognition with the Trojan Horse-type tactics Borrowas himself warns against, as was found in the White Paper. Any conversation about the regulation of citizenship in Indigenous nations will always lead to the *Indian Act*, so long as it remains in place. But any discussion about the elimination of the *Indian Act* should guard against the elimination of Indigenous nations as nations, aim toward self-determination and sovereignty, and accept nothing less.

Ultimately, the matter of regulation of citizenship and its consequences is a far more significant issue than its treatment by Kymlicka in *MC* would lead his readers to believe. Not only does he fail to ask why a multicultural state like Canada would impose such illiberal constraints on a national minority, but he also fails to acknowledge the imposition of race-based standards of membership on Indigenous nations by the Canadian state in any manner. Kymlicka's failure to ask why the Canadian state would impose such standards is especially interesting when considering that he voices repeated concerns about national minorities imposing unfair internal restrictions on their own members. This concern either vanishes in relation to the larger multicultural state, or is seen as justifiable – it is unclear which is the case. His silence on this matter leads to larger questions about the presumed legitimacy and moral righteousness of the Canadian state (or any multicultural state) within his theory. These presumptions will be addressed later in this chapter.

4.3: On Treaties

As discussed in 2.2.3 and 2.3, Kymlicka presents treaties between the Canadian state and Indigenous nations as a primary example of historical agreements made between a state and a national minority in *MC*. His references to treaties take place within a larger conversation regarding the justification of group-differentiated rights. These three arguments are: the equality argument, the argument from historical agreements, and the argument from the benefits of cultural diversity. Under the equality argument, group-differentiated rights for national minorities are justified under the premise that such rights – differential treatment – are necessary to ensure equality between national minorities and members of the majority nation.

Historical agreements, which include treaties, are agreements made between a majority nation and a national minority. Treaties made between the Canadian state and Indigenous nations are presented as a primary example of historical agreements in *MC*. Treaties constitute legal rights, and in fact for Kymlicka, “define the terms under which the Canadian state acquired authority over these groups.”³³⁵ Therefore, Kymlicka says, the Canadian state has both a legal and a moral obligation to uphold these agreements. Respecting treaties is crucial to maintain good standing, not only with national minorities, but also members of the majority nation.³³⁶

Still, Kymlicka concludes that historical agreements are not, on their own, sufficient to justify group-differentiated rights for national minorities. Instead, he suggests that treaties may be justified through the equality argument. This is because, for reasons that will be discussed below, historical agreements ultimately do not hold to a deeper theory of justice in the same way that the equality argument does, and the two arguments will yield similar policies. He also characterizes

³³⁵ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 114.

³³⁶ *Ibid.*, 116.

treaties as leading to negative rights of non-interference, whereas the equality argument leads to positive rights to, among other things, funding.³³⁷

However, I intend to show that treaties should not be treated as separate from the equality argument. Unlike Kymlicka, it is not because I think historical agreements contain inherent flaws that indicate a deeper theory of justice is missing. Instead, treaties are an essential element of the equality argument, and a deeper theory of justice can *only* be achieved if they are properly accounted for. To understand what I mean by this, let us examine the concerns Kymlicka expresses about treaties in greater detail. There are three major concerns Kymlicka points to as reason for why he draws this conclusion, all having to do with the notion of fairness.

First, Kymlicka expresses concerns about fairness at the time the agreements were negotiated and signed – that they could have been signed under duress or perhaps that the terms in the agreements were not just or not honestly characterized by the state. This concern also extends to Indigenous nations who did not sign treaties at the same time these other agreements were made. Relying only or even primarily on the argument from historical agreements to justify group-differentiated rights would be paramount to arbitrary punishment of Indigenous nations who did not sign treaties. Then, there is concern about fairness in the present day, given the fact that circumstances can change after agreements are made. Kymlicka asserts these changing circumstances can render these agreements unfair in the present day, either to Indigenous nations or to members of the majority nation. For example, he refers to land allotments outlined in treaties that could be unfair due to “changes in the size and lifestyle of indigenous communities.”³³⁸ Finally, Kymlicka expresses concerns about fairness when interpreting treaties in the present day.

³³⁷ Ibid., 117-119.

³³⁸ Ibid., 120.

He notes that because these agreements were made long ago, interpreting what was intended in present day terms can be exceedingly difficult.

To analyze these claims about treaties, we must understand that treaties, as legal agreements, are a kind of contract.³³⁹ If, in regard to a particular treaty, there are concerns about a party having signed under duress or about the terms of the treaty not being accurately portrayed, Canada has modern contract law processes to deal with such problems. Let us consider *R v Marshall*, which is a case that deals primarily with the treaty rights found in the Peace and Friendship Treaties of 1760-1. As we saw in 3.4.2, the *Marshall* ruling refers to modern contract law standards as a guide for dealing with the exact issue of disputed terms in a written treaty. In relation to whether extrinsic evidence should be considered when there is disagreement about the written document, the SCC found that

Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Secondly, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.³⁴⁰

So, we can see that the SCC compares the negotiation and interpretation of historic treaties to modern contracts. Though the representatives of the Crown were dishonest about the terms contained within the treaty (promising the means to trade and obtain necessities but omitting this entirely from the written contract), this did not absolve the Crown from the responsibility of upholding the terms of the oral agreement. Moreover, bad contracts have been and will continue to be made in Canada outside of the context of treaties. Our solution in this situation is not to throw the entire concept of contracts into question but is instead to use the legal tools at our disposal to

³³⁹ I want to emphasize that by “a kind of contract” I do not mean that treaties are similar to contracts. Treaties are contracts, which are a type of legal agreement.

³⁴⁰ *R v Marshall*, 1999, p. 457-8.

remediate the situation and deal with dishonest signatories. Dishonesty by the Crown in the process of treaty negotiations with Indigenous nations should not render treaties themselves suspect or lead to the assertion that they should be abandoned.

Of course, it is fortunate that the Mi'kmaq did in fact have a treaty and the extrinsic evidence of the negotiations to refer to as proof of their rights in the *Marshall* case. It is true that there are many Indigenous nations who did not sign treaties. However, Kymlicka's reference to this fact as evidence that treaties cannot serve a justificatory purpose in the implementation of group-differentiated rights is reminiscent of the reasoning employed in the White Paper to dismiss the legitimacy of treaties. Due to the fact that treaties affect only about half of all status Indians, and therefore are not universally applicable, the Minister concluded that treaties are "ill-equipped" to serve the needs of Indians.³⁴¹ Kymlicka concludes that relying on historical agreements would amount to arbitrary punishment of those Indigenous nations who did not sign treaties. But does this downplaying of the importance of treaties not amount to arbitrary punishment of those Indigenous nations who *did* sign agreements? The Indigenous signatories of treaties believed that signing these treaties was the best course of action to secure the well-being of their people. If these agreements are characterized as obsolete, suspect, or not legally binding by the state and by theorists based on the fact that other nations did not sign their own treaties, this flies in the face of justice and equality. Simply referring to treaties as lawful obligations is not enough to escape criticism when the characterization of these agreements obfuscates whether treaties are legitimate or should be taken seriously.

Moreover, treaties are not some kind of long-forgotten or obsolete practice. Not only do modern contracts exist in abundance and in many different contexts, but treaties in particular are

³⁴¹ Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy, 1969*. Ottawa, Ontario, 1969, under 5 Claims and Treaties.

still negotiated and signed in the present day. This is particularly true in the area of trade – look, for example, to regulatory bodies like the World Trade Organization, that deals with modern international treaties, like the TRIPS Agreement.³⁴² Consider also the treaties Canada has signed with other nations, like the North American Free Trade Agreement (NAFTA) or, more recently, the Canada-United States-Mexico Agreement (CUSMA).³⁴³ New treaties with Indigenous nations could be negotiated and signed. Of course, I do not mean to suggest that this would be a straightforward or simple process, given that the demands and desires of each Indigenous nation would differ from one another. Just as I would not venture to suggest that the negotiation of international treaties is a simple matter. But complexity is not, on its own, sufficient to declare that negotiating new treaties is impossible. It is not sufficient to treat already-existing treaties with suspicion based on the fact that some Indigenous nations did not sign treaties, when new treaties – with fair and honest terms, that the Canadian state could act honourably to uphold – could be brought into existence.

Time passes, and circumstances change. How those changing circumstances affect the terms of a legal agreement is a relevant consideration. In fact, changing circumstances were one of the primary concerns in the *Marshall* case. Recall that, in relation to the Peace and Friendship Treaties, a truckhouse system for trading and bartering was created by the Crown for the Mi'kmaq (this was part of the oral agreement, though it did not make it into the written treaty). The truckhouse system ceased to exist in the 1780s. While in the original trial the judge declared that the disappearance of the truckhouse system made it so that the rights attached to the truckhouses also disappeared, the SCC did not agree with this. Instead, in relation to the changing

³⁴² Which is an agreement between all of the members of the World Trade Organization regarding patents in the field of technology.

³⁴³ Both of these agreements were (in the case of NAFTA) and are (in the case of CUSMA) concerned with free trade between Canada, the United States, and Mexico.

circumstances, the SCC found that the promise of the truckhouses amounted to more than only the truckhouse itself. The spirit of the oral terms of the agreement guaranteed the right to a moderate livelihood, which the Canadian state had the obligation to uphold, no matter the status of the truckhouses. Getting to the spirit of an agreement made several hundred years ago is no simple matter, and Kymlicka asserts that it is difficult to interpret long-existing treaties in the present day. But the interpretation of any legal agreement or in fact any law written a considerable amount of time in the past may be difficult to interpret. Treaties are not unique in this regard. It is not, however, impossible to render fair and honourable interpretations – and difficulty is hardly the measure by which we should declare that treaties do not hold to a deeper theory of justice.

What is more, changing circumstances and potential difficulty with modern day interpretation are not, on their own, enough to render other laws or legal agreements obsolete in Canada (at least not without serious consideration and justification). For example, the *Constitution Act, 1867* is one of the founding documents of Canada's constitution. This document is what established the division of powers in Canada. I cannot imagine that Kymlicka would argue for reconsideration of, for example, the division of powers in Canada (or the reconsideration of any law or legal agreement) only on the grounds that Canadian society has changed considerably since the time it became law. Treaties should not be regarded differently than other laws in this respect. The idea that time passing and society changing would de facto lead to the uncritical and automatic dismissal of laws or legal agreements would be considered ludicrous in many other contexts. Further, considering that Canada has signed a great many international treaties that remain in effect today, I do not imagine Kymlicka would suggest that we view those agreements with suspicion based only on the passage of time and changing circumstances.

In relation to the Canadian constitution, remember, we have adopted a “living tree” approach to interpretation. Using the living tree approach to constitutional matters in Canada is often characterized as a dynamic approach and framework that works towards justice, but this same sort of approach in relation to Indigenous treaties seems to be treated as indicative of instability and calls the legitimacy of these agreements into question. This is not an acceptable inconsistency. In response to shifting circumstances, the authors of the Red Paper suggested that the intent and spirit of treaties should be used as a guide in present day interpretation of the terms of the agreement.³⁴⁴ Such a suggestion is not necessarily contrary to the interpretation of law in Canada.

Then, there is the matter of the basic characterization of treaties in *MC*. Kymlicka takes care to distinguish treaties and agreements as voluntary, whereas colonization is an involuntary experience. While I would agree with his characterization of colonization, such a sharp distinction between colonization and historical agreements is ahistorical. All Indigenous nations that signed treaties did so within the context of colonization. The implication, then, seems to be that no treaties qualify as defensible agreements that should be upheld. But such a view strips nations of agency and leads to paternalistic views on the ability of Indigenous nations to sign agreements with the Canadian state in the present day. As mentioned above, Indigenous nations signed treaties with the hope that these agreements would guarantee rights for and the wellbeing of their people into the future, likely knowing that the hegemonic power exerted by the Crown was not something that could simply be ignored. Casting suspicion on treaties for a reason they were negotiated and signed in the first place leads to a conclusion that largely benefits the Canadian state – that treaties should not be taken seriously or that they should ultimately be abandoned. This is especially concerning

³⁴⁴ Indian Chiefs of Alberta, “Citizens Plus,” *aboriginal policy studies* 1, no. 2 (2011): 196.

when considering that the request to re-negotiate treaties in the present day is a point of criticism for Kymlicka.

Kymlicka characterizes Indigenous demands for re-negotiation of treaties as an indication that treaties cannot serve as a justification for group-differentiated rights and do not hold to a deeper theory of justice, since these agreements are subject to change.³⁴⁵ But allowing for the re-negotiation of treaties would be consistent with a deeper theory of justice. If an Indigenous nation requests re-negotiation of the terms of a treaty, they are not looking to do away with the agreement entirely. It is possible to recognize that the terms of treaties may change with re-negotiations, while acknowledging that keeping the treaty itself in place provides a certain level of protection for Indigenous nations that they wish to preserve. This is similar to the *Indian Act*, where we can see that the specifics of some treaties may be in need of serious reconsideration, but doing away with these agreements entirely would lead to much more harm than good. In fact, in the same way the Canadian state sought to abolish the *Indian Act* in the White Paper, the state also sought to undermine the perception of treaties as legitimate and ongoing legal agreements toward the end of abandoning treaties.

Perhaps the most confounding aspect of Kymlicka's characterization of treaties is in relation to the authority of the Canadian state. He notes that these agreements are the means by which the state acquired authority over the groups it signed agreements with. If these agreements serve no justificatory purpose for group-differentiated rights, or they are defunct due to the concerns Kymlicka expresses (discussed above), how exactly does the Canadian state maintain its claim to authority over said groups? It would seem that the Canadian state loses its claim to authority if these agreements are illegitimate or suspect. As the authors of the Red Paper asserted,

³⁴⁵ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 120.

Indigenous signatories delivered on their terms of the agreement by, for example, granting access to land and resources. In return, the Canadian government has a historic, moral, and legal obligation to fulfill treaty obligations.³⁴⁶

And with regard to the *kind* of rights treaties confer on Indigenous signatories, Kymlicka asserts the equality argument leads to positive rights to funding (among other things), whereas the argument from historical agreement leads to negative rights to non-interference. However, the rights outlined in treaties do not only constitute negative rights. In fact, the *Marshall* decision contained the following about the treaty rights surrounding the truckhouses:

While this “trade clause” is framed in negative terms as a restraint on the ability of the Mi’kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade.³⁴⁷

Further, treaties are not tied to the exercise of self-government in *MC*. Instead, Kymlicka ties self-government rights to reserves and, therefore, the *Indian Act*. While the *Indian Act* is a piece of legislation that protects the legal status of Indians in Canada, it would be false to assert that treaties do not contain self-government rights in the manner that Kymlicka describes them, which is to allot significant powers of autonomy and self-determination to a national minority. Moreover, as discussed in 4.2, the *Indian Act* contains significant shortfalls. In the previous section, I discussed how this is primarily the case in regards to citizenship, but John Borrows outlines how the *Indian Act* is archaic and harmful to Indigenous nations with respect to many aspects of self-government.³⁴⁸

Considering all the above, it appears that historical agreements should be part of a deeper theory of justice. Kymlicka is correct that treaties should not, on their own, be the measure of all

³⁴⁶ Indian Chiefs of Alberta, “Citizens Plus,” *aboriginal policy studies* 1, no. 2 (2011): 196.

³⁴⁷ *R v Marshall*, 1999, p. 457.

³⁴⁸ John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (West Vancouver, BC: National Centre for First Nations Governance, 2008)

things, since there are nations who did not sign treaties. However, this does not do away with the importance of existing treaties, nor does it say anything about the possibility of negotiating new treaties, or re-negotiating the terms of already-existing treaties. We can discuss or critically approach concerns about the context and terms of different treaties without assuming that all treaties should be done away with. Regularly in Canada, bad contracts are made – contracts are drawn up in bad faith, signatories are not made fully aware of the terms of the contract, signatories are misled about the contents of a contract, etc. But we do not suggest that contracts should be done away with entirely. We recognize that we can approach the individual problems of any given contract, without casting aspersions on the practice itself. To dismiss treaties based only on the concerns Kymlicka outlines appears to violate the essence of the equality argument. For the reasons discussed in this section, dismissing treaties does not lead to equality with members of the majority. So, treaties (and historical agreements generally) should be considered an essential element of the equality argument.

Still, it is important to acknowledge that treaties are not perfect and do not constitute total protection. International treaties are regularly broken outside of the context of Indigenous nations. But in the case of international treaties, signatories who break these agreements are typically subject to fines, tariffs, or arbitration as a consequence of their broken promises. The Canadian state engages with Indigenous nations in bad faith when it makes the choice to break treaties, because there is knowledge that Indigenous nations cannot sanction or punish the Canadian state in the same way that, for example, the United States could in the event of a broken treaty. But Indigenous nations are aware of this power imbalance, and do find other ways to resist and counter the Canadian state amidst their attempts to exercise their rights, including through methods of

direct action. Both the efforts of Indigenous nations to exercise their rights, and their resistance to the Canadian state's hegemony, will be the subjects of following sections.

4.4: On Exercising Rights

4.4.1: Introduction

Of central importance in Kymlicka's theory of multiculturalism are the different types of group-differentiated rights he prescribes to each kind of minority group. Rights that would apply to Indigenous nations include the exercise self-government rights and a type of special representation right that appears as a corollary of self-government rights. But what is the content of these rights, which of these rights are available to Indigenous nations in practice, and what happens when Indigenous nations try to exercise their unique rights? All of these matters will be addressed in this section.

4.4.2: The Group-Differentiated Rights Available to Indigenous Nations

There are two kinds of group-differentiated rights outlined in *MC* that Indigenous nations, as national minorities, could be looking to exercise. As discussed in 2.2.3 and 2.3, the first is self-government rights, which are defined by the demand of national minorities for political autonomy or territorial jurisdiction towards the end of securing the continuation of their culture and the wellbeing of their people.³⁴⁹ Self-government rights take place in the context of a political unit that is substantially controlled by the national minority, and these rights correspond to a historical homeland or territory, and are understood to be permanent.³⁵⁰ This political unit, for Kymlicka, is

³⁴⁹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 27.

³⁵⁰ *Ibid.*, 30-31.

the reserve, and he insists that “substantial powers have been devolved from the federal government to the tribal/band councils which govern each reserve.”³⁵¹

But Kymlicka does not clearly define the control that national minorities are meant to exert over their affairs, and he does not speak about what the substantial powers the chief and band councils even are in specific terms. Nor does he acknowledge or address that the federal government maintains ultimate authority regarding any matter covered under the *Indian Act*, which is the piece of legislation that dictates governance on reserves. For example, we have already addressed the level of control the federal government maintains in relation to citizenship in 3.3 and 4.2. Or, perhaps more relevant to the concept of land, which Kymlicka ties to self-government rights, reserve lands are subject to heavy regulation and control by the federal government. Indian bands can be overruled by the federal government on matters pertaining to land, including the ability to seize or appropriate lands on reserves for public purposes.³⁵²

In practice, Kymlicka asserts that self-government rights for Indigenous nations are tied to reserves, which are tracts of land set aside in trust by the federal government for the use and benefit of Indian bands. And while self-government rights could potentially serve to pose internal restrictions on or grant external protections to national minorities, he insists that the most significant external protection that arises from self-government for Indigenous nations are these land holdings. This is because the survival of Indigenous cultures is dependent on the protection of Indigenous homelands.³⁵³ The form these land rights take, he says, are reserves. Kymlicka even

³⁵¹ Ibid., 29-30.

³⁵² *Indian Act*, R.S.C., 1985, c. I-5, s. 35.

³⁵³ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 43.

insists that reserves, where the land is held in trust and cannot be alienated without the consent of the community, are the most effective method to protect Indigenous nations.³⁵⁴

Kymlicka's characterization of self-government rights as tied to reserves is exceedingly narrow, and as a result is not reflective of the rights currently in place, nor of the aspirations of Indigenous nations. Self-government rights, as they are described in *MC*, do not take treaties or land claims into account. As briefly addressed in 4.3, treaties and the rights contained within them are an essential component in the larger picture of self-government rights. The Red Paper is an instance where we can see this attachment to treaties as part of a larger picture of self-government rights firmly asserted. The authors presented a more expansive view of self-government rights – one that is more reflective of reality – than Kymlicka does in *MC*. The content of the Red Paper was primarily concerned with the ability of Indigenous nations to exercise their self-government rights. This was both in relation to maintaining the distinct legal status of Indigenous peoples (and the group-differentiated rights associated with this legal status) through the *Indian Act*, as well as upholding treaties and the rights contained within them. Neither of these components were expendable, and neither were characterized as more or less important than the other. Just as the authors of the Red Paper sought to defend the distinct legal status of Indians in Canada, so too did they assert that treaties must be upheld. Such an assertion is sensible, given that the terms of treaties are often concerned with the exercise of rights in relation to land through hunting, the use of natural resources, and so on.

I do agree with the notion that land plays an essential role in self-government rights for Indigenous nations. But to tie the concept of land and self-government rights only to reserves is far too restricted, and this is not only in consideration of treaties. Land, and Indigenous nations'

³⁵⁴ Ibid.

relation to land, is far more expansive than reserves. Another significant manifestation of self-government rights in relation to land are land or title claims, which are where Indigenous nations seek legal or political acknowledgement of their jurisdiction over their lands. The lands covered under these agreements, while being part of traditional territories and homelands, are not the same as reserves. In fact, land claims often address the issue of insufficient land, since many reserves are situated on exceedingly small portions of land in comparison to the total expanse of a nation's traditional territory. Land claims are also a manifestation of the desire of Indigenous nations to claim back land that was never surrendered to the Crown in the first place in order to re-assert their stewardship of the land, reinvigorate or expand traditional land-based practices, and to engage in land-based economic activities to combat economic destitution.

Further, while Kymlicka asserts that land holdings are the most important external protection for Indigenous nations against the majority nation, he still takes care to note that Indigenous land holdings could "exceed what justice allows."³⁵⁵ However, he never elaborates on what he believes would constitute excessive (and so unjust) land holdings for Indigenous nations, except to say that this assessment would be prompted by the change in lifestyle and of population.³⁵⁶ It is curious that he, on one hand, asserts that land holdings are the most significant external protection afforded to Indigenous nations, yet he takes great care to emphasize the need to impose restrictions on this protection – the arbiter of said restriction being the institution that Indigenous nations require protection from. This is not unreflective of reality, given that the federal government does maintain veto power with regard to land on reserves. But it is an interesting move in a theory about group-differentiated rights, which is meant to be focused on the protection of national minorities from encroachment by the majority nation. While it is not unusual or even

³⁵⁵ Ibid., 110.

³⁵⁶ Ibid., 120.

undesirable that rights would have limitations, it is both unfortunate and perplexing that Kymlicka would not provide ample clarification about such a limitation, especially considering that a frequent colloquial objection to self-government rights for Indigenous nations by non-Indigenous Canadians is that Indigenous nations are taking (or, worse, being given for free) more than what is just.

Special representation rights for national minorities, which arise as a corollary of self-government rights, are meant to guarantee representation for a national minority on any body that could modify or interpret their self-government rights.³⁵⁷ While special representation rights for Indigenous nations would be important, Kymlicka does not expand greatly on what these rights would look like for Indigenous nations in practice. The most significant body that has control over self-government rights for Indigenous nations of Canada would be the SCC, since this body is the ultimate legal authority in Canada regarding the interpretation of constitutional aboriginal rights, aboriginal title, and even treaty rights. Another body that exerts the most significant amount of control over and the ability to change self-government rights is the federal government, since it maintains control of reserves through the *Indian Act*. There are no measures in place to guarantee Indigenous representation on these bodies. It is also unclear what form, exactly, this representation would take. Would one Indigenous representative be sufficient? Or would one representative from each nation be more likely to produce just results? But then, it is unclear how that many representatives would work in the context of the aforementioned bodies. Ultimately, Kymlicka himself does not focus on this kind of right for Indigenous nations. So, when discussing how Indigenous nations exercise their rights, it is not possible here to address special representation rights, in the way Kymlicka describes them, further.

³⁵⁷ Ibid., 33.

Given that Indigenous nations do not possess special representation rights in the way that Kymlicka describes (because Indigenous nations do not have guaranteed representation on the SCC or in the relevant areas of the federal government), I will focus on self-government rights going forward. While all of the above critiques of how Kymlicka characterizes self-government rights stand on their own, I believe it is especially useful to look at two instances where Indigenous nations have sought to exercise self-government rights: the moderate livelihood fishery of Sipekne'katik First Nation in Nova Scotia, and the resistance against the Coastal GasLink pipeline by the Wet'suwet'en. The consequences of these assertions of sovereignty are illuminating, and reveal much about the experience of Indigenous nations when they wish to exercise self-government rights.

4.4.3: The Consequences of the Marshall Decision: Then and Now

Our discussion about the *Marshall* decision has, thus far, focused on the facts of the case and the ruling itself. But understanding the local result of the decision – both in the immediate aftermath of the decision in 1999 and what happened just over twenty years later – is an illuminating case study in what happens when Indigenous nations attempt to exercise self-government rights, even those that have been affirmed by the highest court in the country.

It would likely be an understatement to say that the *Marshall* decision took the Canadian state, and indeed the entire non-Indigenous community connected to the commercial fishery in the Maritimes, by surprise. This decision by the SCC affirmed Indigenous – in particular, Mi'kmaq and Maliseet – treaty rights in a way that even legal experts did not overwhelmingly anticipate at the time. While the SCC's first ruling in this case was truly expansive, the Court surprised all involved parties by delivering a second ruling months later. This ruling, remember, was where the

SCC “denied the West Nova Fishermen’s Association’s motion for a rehearing and a stay of the Court’s original opinion.”³⁵⁸ However, the ruling was unusual due to the fact that the Court “unexpectedly issued a ‘clarification’ of the first decision’s meaning.”³⁵⁹ The clarification affected the scope of the first ruling by noting that the fishery rights outlined did not necessarily extend beyond eels, and that Indigenous fisheries could be subject to regulation by the Canadian government’s Department of Fisheries and Oceans (DFO).³⁶⁰ Still, the second Marshall ruling does not explicitly preclude engagement in the fishery beyond only eels. The second Marshall ruling was a dramatic resiling of the SCC’s expansive first ruling and was seen as an expression of favoritism towards non-Indigenous interests in the fishery. It was also generally understood that the second ruling was the SCC’s response to enduring conflict in the region.

Non-Indigenous anger at both the initial ruling and the consequences of the second ruling manifested in an outbreak of violence and persisting conflict that would last for, all in all, about four years, and can be referred to as the Burnt Church crisis. This crisis mostly centered around the community of Burnt Church First Nation (also known as Esgenoôpetitj) in New Brunswick, though it did extend into a larger conflict in the region. As soon as the first ruling was delivered, the community took to the water in the autumn of 1999 to exercise their re-affirmed treaty rights to fish. This included dropping lobster traps into Miramichi Bay that did not have DFO-issued tags. Propelled by the idea that Indigenous participation in the fishery posed a threat to their livelihoods and to the ecological balance of the fishery, “150 non-Native fishermen took to the water and destroyed approximately 3,000 Native lobster traps”³⁶¹. Not only did the non-Indigenous fishermen destroy the traps, but they did so while “dressing up in Indian warpaint, donning fake

³⁵⁸ John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 80.

³⁵⁹ *Ibid.*

³⁶⁰ *R v Marshall*, [1999] 3 SCR 533

³⁶¹ John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 79.

Indian regalia, dancing, whooping, and tomahawk-chopping into the air while issuing racist taunts.”³⁶² Community members of Esgenoôpetitj then occupied the Burnt Church wharf, and the violence continued to escalate – culminating in the beating of an Indigenous youth with a baseball bat, the burning of both trucks and boats, and the sustaining of property damage by both Indigenous and non-Indigenous people.³⁶³

Then came the delivery of the second *Marshall* ruling, which seemed to challenge the constitutionality of the Esgenoôpetitj’s actions surrounding the traps they set in the fall of 1999.

This is because:

The very act of restating its conclusions reframed and reinterpreted the original decision’s meaning, because it emphasized some points at the expense of others. Furthermore, the Court’s ‘clarification’ added more information and detail to its former reasons. This had the effect of limiting the conclusions Indigenous peoples might draw from the *Marshall I* case, thereby expanding the powers that governments and non-Native fishers could claim flowed from it to their advantage. The Supreme Court’s recontextualization of Mi’kmaq rights largely favoured non-Mi’kmaq interests and changed the balance of power following the decision.³⁶⁴

Still, the Esgenoôpetitj attempted to engage in negotiations with the federal government. The goal of these negotiations, for the community of Burnt Church, was to implement treaty fishing rights to the extent that it allowed for independent entry into the lobster fishery. In other words, the Esgenoôpetitj maintained that they did not need to submit to regulations by the DFO or obtain the Canadian state’s permission to engage in the lobster fishery because of the treaty rights outlined in the *Marshall* case. The fisheries minister, conversely, insisted that Indigenous fisheries had to submit to DFO regulations and obtain government permission to harvest. Neither party was willing to negotiate on these terms, and so the Esgenoôpetitj left the negotiations and drafted their own

³⁶² *Ibid.*, 80.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*, 81.

laws, including a fishery act and a management plan, “which advanced more traditional and sovereign views of the Mi’kmaq fishery.”³⁶⁵

Again, Burnt Church First Nation took to the water and set their traps in May of 2000. Conflict again broke out, though this time it was different since, as Borrows notes: “Non-Native people no longer had to resort to direct action – the Canadian government largely took up their cause and stood in their place.”³⁶⁶ A series of violent encounters took place between the end of August and the end of September in 2000, which included: the injury of a fishery officer by a thrown rock, the swamping and sinking of two Indigenous boats by government officials, the seizure of four boats and arrest of “sixteen Mi’kmaq people, including the Burnt Church band chief.”³⁶⁷ After a strict deadline was set by the fisheries minister for the removal of the Mi’kmaq lobster traps and not all complied, “three non-Native people were arrested and fire-arms were seized after shots were fired on the water.”³⁶⁸

Following the violent fishery season of 2000, the Canadian government adopted several strategies to pressure Esgenoôpetitj to cooperate with the DFO going forward. These strategies included having the band’s finances monitored by a third-party manager, negotiating with other bands regionally, and, interestingly, “the federal government issued lobster fisheries licences to Mi’kmaq fishers without their consent so that federal rules coincided with Mi’kmaq self-determined licensing, issued by their own communities ... making it appear that Mi’kmaq fishers were acting under federal authority.”³⁶⁹ After several years, Burnt Church First Nation signed an agreement-in-principle with the federal government “worth about \$20 million over two years”,

³⁶⁵ Ibid.

³⁶⁶ Ibid., 82.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

accepting to harvest under the authority of DFO.³⁷⁰ The reasons for this policy change include the election of a new chief and council, and the difficulty of maintaining an aggressive stance towards the federal government in the wake of the September 11th terrorist attacks in 2001.³⁷¹

As mentioned above, the federal government did undertake the process of negotiating deals with and involving other Mi'kmaq and Maliseet communities in the mainstream commercial fishery in the Maritimes. These measures began in February of 2000, with the creation of the Marshall Response Initiative and the allocation of \$160 million to said initiative.³⁷² This money was, in part, used to distribute licences, boats, and other equipment to help Indigenous communities with the initial cost of entering the fishery. Of particular interest is the process by which the federal government obtained the already-existing licences to redistribute to Indigenous communities, which proved to be so agreeable that it “resulted in more than 1400 fishers offering to relinquish their licences to the government for distribution to First Nations.”³⁷³ The Marshall Response Initiative ran from 2000 to 2007, at which time the Atlantic Integrated Commercial Fisheries Initiative (hereafter AICFI) was introduced. The AICFI was in some ways a continuation of the work of the Marshall Response Initiative, expanded even further as it “sought to improve on management of communal commercial fishing enterprises and to diversify the economic basis of the First Nations communities.”³⁷⁴ This included the management of other business ventures connected to the fishery like, for example, processing.

³⁷⁰ Ibid., 83.

³⁷¹ Ibid.

³⁷² Ken Coates, “The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet,” *The MacDonald-Laurier Institute*, October 2019, 15.

³⁷³ Ibid.

³⁷⁴ Ibid., 16.

Another notable development in relation to the funding and other measures in place through the AICFI is the exceptional increase in own-source revenue, which is money that is generated by Indigenous nations in business ventures – money that is not distributed by the federal government. Own-source revenue is especially transformative for Indigenous nations because, unlike funding from the federal government, communities do not need to obtain permission to both receive and distribute this money as they see fit. Community leaders are able to bypass a lengthy, complex, and unreliable application process for funding. This allows for an immediate impact on the community, both in terms of the quality of the projects completed and the timeline these projects are completed in. The own-source revenue generated by Mi'kmaq and Maliseet communities that entered the commercial fishery across all four provinces (New Brunswick, Nova Scotia, Québec, and Prince Edward Island) totalled \$151 998 930 between 1999 and 2016.³⁷⁵

While the outcome of Mi'kmaq and Maliseet involvement in the commercial fishery has been largely positive, it is also important to note that this involvement came at an expense, especially in relation to the goals of the Esgenoôpetitj activists in the early 2000s because

... the agreement pressed the government's advantage in advancing its implicit alliance with non-Native fishers, ensuring that Mi'kmaq fishers did not achieve substantial change in the wider fishery's allocation and regulation. While this agreement produced peace and led to benefits within the Mi'kmaq community and beyond, this outcome did not satisfy those who saw sovereignty and tradition as lying at the heart of this dispute.³⁷⁶

Though the involvement in the mainstream commercial fishery has generated significant strides in the upward mobility and the overall wellbeing of communities, there was no agreement by the Canadian state to allow for a full-time Indigenous fishery guided by Mi'kmaq law, governance, and conservation practices. Neither was there an agreement to engage in an equitable co-

³⁷⁵ Ibid., 21.

³⁷⁶ John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 83.

management of full-time Indigenous fisheries. Instead, the Mi'kmaq and Maliseet were granted access to the commercial fishery, under the authority of the Canadian state.

Further, remember that the community of Burnt Church took particular issue with the “moderate livelihood” stipulation of the first *Marshall* ruling, which had not been further defined or clarified in the second ruling. The issue of the ill-defined (or, in fact, undefined) notion of the moderate livelihood has remained to this day. The desire for a sovereign full-time Indigenous-managed fishery, not subject to DFO regulation – though still undertaking conservation research and practices – remained for two decades following the initial Marshall ruling. The government has never legislated and has never come to an agreement about the prospect of an Indigenous “moderate livelihood fishery” – moderate livelihood fishery being a fishery that allows Indigenous peoples to harvest year-round and sell that catch for financial gain. The DFO instead created and issued the Food, Social, and Ceremonial (FSC) licences – which are distributed to First Nations to harvest year-round for, as the name suggests, ceremonial and food purposes, though these catches cannot be sold and the licences are ultimately controlled by the DFO.

As historian Ken Coates wrote twenty years after the Marshall decision, regarding the re-emergence of violence in the region:

Imagine the reaction you'd have if you – a Canadian in any field – were told by the courts and the government that you could earn only a “moderate livelihood.” Imagine that on top of this, you're told that there is no definition of “moderate livelihood” – that it'll be worked out over time. Your howls of protest would be loud and intense, and rightly so.³⁷⁷

So, twenty years after the initial ruling, Sipekne'katik First Nation chose to launch their own fishery in 2020 under the guidance of Chief Michael Sack. In a near instant, the violence that had gripped the region in the wake of the *Marshall* decision reared its head again, just as it had in Burnt

³⁷⁷ Ken Coates, “Canada’s courts and governments have themselves to blame for the lobster-fishery dispute,” *The Globe and Mail* (Toronto, ON), October 15 2020, <https://www.theglobeandmail.com/opinion/article-canadas-courts-and-governments-have-themselves-to-blame-for-the/> .

Church twenty years before. Again, Mi'kmaq people were subject to extreme opposition and abuse by non-Indigenous people connected to the commercial fishery in the area. These incidents included dozens of boats of non-Indigenous people lying in wait in the bay and likely cutting buoys.³⁷⁸ A mob estimated to be as large as 200 people swarmed and heavily vandalized two processing facilities – one in Middle West Pubnico, and the other in New Edinburgh. The incident at the facility in Middle West Pubnico is particularly startling, because several people were forced to take cover inside of the facility while a vehicle belonging to an Indigenous man was destroyed by the mob outside, with individuals urinating on the vehicle, cutting electrical wires, smashing the windows, and tampering with the fuel tank. Eventually the individuals in the lobster pound were forced to flee the premises by the mob, who then destroyed a lobster catch estimated to be worth over \$40 000.³⁷⁹ The violence was so extreme that Chief Michael Sack declared a state of emergency.³⁸⁰ In publications as recent as 2019, there had been an air of optimism that non-Indigenous hostility had lessened as the years passed after the *Marshall* decision – that Indigenous entry into the commercial fishery had a profound and positive effect on the working relationship and general disposition of non-Indigenous people toward their Indigenous counterparts in the fishery.³⁸¹ But the events surrounding the launch of the Sipekne'katik moderate livelihood fishery seemed, in many ways, to be a repetition of the past, a resurfacing of still-unresolved resentment, manifesting in full-blown violence.

³⁷⁸ Angel Moore and Trina Roache, “Fisheries conflict: Mi'kmaq Chiefs declare state of emergency,” *APTN National News* (Winnipeg, MB), September 18 2020, <https://www.aptnnews.ca/national-news/fisheries-conflict-mikmaw-chiefs-declare-state-of-emergency/>

³⁷⁹ Alexander Quon, “Sipekne'katik First Nation calls for PM, RCMP to act after violence against moderate livelihood fishery,” *Global News* (Vancouver, BC) October 15 2020, <https://globalnews.ca/news/7398439/mikmaw-moderate-livelihood-fishery-violence/>

³⁸⁰ Angel Moore and Trina Roache, “Fisheries conflict: Mi'kmaq Chiefs declare state of emergency,” *APTN National News* (Winnipeg, MB), September 18 2020, <https://www.aptnnews.ca/national-news/fisheries-conflict-mikmaw-chiefs-declare-state-of-emergency/>

³⁸¹ Ken Coates, “The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet,” *The MacDonald-Laurier Institute*, October 2019, 36-39.

While the outright violence towards the Sipekne'katik fishers has subsided, the issue of the moderate livelihood and ability to exercise their self-government rights through an independent and sovereign fishery remains. One interesting development in relation to the commercial fishery, however, is the partnership billion-dollar purchase of Clearwater Seafoods by a coalition of seven Mi'kmaq First Nations (led by Membertou First Nation) and British Columbia company Premium Brands.³⁸² This purchase is a success story in a certain sense, as it will lead to further upward mobility of communities as they make use of the own-source revenue that will be generated. But this still does not solve the problem of exercising self-government rights and the violence faced by Indigenous people when they attempt to exercise this right. As for Sipekne'katik First Nation, they are still determined to engage in a moderate livelihood fishery, and as recently as 2021 were conducting their own conservation and management research the fishery waters.³⁸³ But with the notion of a moderate livelihood remaining undefined and the federal government refusing to engage in co-management of commercial and sovereign treaty fisheries, Indigenous nations are left without control of their own affairs in relation to the fishery. Unless something changes, it is not unlikely that we will eventually be faced with another Burnt Church or Sipekne'katik crisis.

4.4.4: Wet'suwet'en Pipeline Conflict

The conflict surrounding the construction of the Coastal GasLink pipeline on Wet'suwet'en territory in British Columbia culminated in nation-wide protests that gripped Canada in 2020. The

³⁸² To further demonstrate the scale of this purchase: Clearwater Seafoods is among the largest seafood companies in Canada.

³⁸³ Nicola Seguin, "In wake of opposition to Mi'kmaw fishery, Sipekne'katik First Nation is studying impact of its lobster season," *CBC News* (Halifax, NS) October 2021, <https://www.cbc.ca/news/canada/nova-scotia/sipeknekatik-lobster-study-1.6196508>

opposition to the pipeline, as well as the protests that resulted, were a direct extension of the *Delgamuukw* case decided by the SCC well over twenty years earlier.

Prior to the initial title claim, the Wet'suwet'en had been living through decades of development projects that were flooding their homelands, which was "destroying homes, sacred burial grounds, and culturally important archaeological sites."³⁸⁴ The Wet'suwet'en resisted the expansion of these projects through the use of blockades and other forms of civil disobedience in the 70s and 80s. What the Wet'suwet'en (along with the Gitksan) were seeking was jurisdiction over their territory, in order to protect their lands and prevent further encroachment by both the government and private resource developers. The courts were seen as a last resort to achieve this goal. The Wet'suwet'en and Gitksan eventually made the decision to launch a title claim in order to assert their rights.³⁸⁵ The first case was not successful, since the trial judge wholly rejected the *kungax* and *adaawk*, the oral histories which were the evidence of occupation submitted by the Gitksan and Wet'suwet'en. The Wet'suwet'en and Gitksan appealed the decision, and the case was heard by the SCC.

The *Delgamuukw* case, as earlier discussed, was a precedent-setting case because of the expansive definition of Aboriginal title that was rendered in relation to s. 35 of the *Constitution Act, 1982*. Aboriginal title is "the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."³⁸⁶ Included in the definition of Aboriginal title is the limitation that the use of these lands cannot be destroyed or

³⁸⁴ Brett Forester, "The Delgamuukw decision: Putting the Wet'suwet'en conflict in perspective," *APTN National News* (Winnipeg, MB), March 4 2020, <https://www.aptnnews.ca/national-news/the-delgamuukw-decision-putting-the-wetsuweten-conflict-in-perspective/>

³⁸⁵ *Ibid.*

³⁸⁶ *Delgamuukw v British Columbia*, 1997, p. 1012.

used in such a way by the Indigenous nation that would prevent the land's use in the future, because this would be irreconcilable with the inherent nature of Aboriginal title.³⁸⁷ The constitutional test for Aboriginal title contains three parts – the Indigenous nation claiming title must be able to prove occupancy at the time the Crown asserted sovereignty; if present occupation is used to prove occupation pre-sovereignty, there must be a (not necessarily unbroken) continuity between past and present occupation, and; the occupancy of the Indigenous nation must have been exclusive at the time of Crown's assertion of sovereignty (though this does not exclude the possibility of joint title).³⁸⁸

The SCC also outlined the conditions under which the federal government could infringe Aboriginal title, in the event that such title is established. That is, the infringement would have to further “a compelling and substantial legislative objective” and the federal government would have to consult and involve Indigenous nations in decisions made in relation to their lands, as well as provide fair compensation to the nations whose lands are affected by the infringement.³⁸⁹

While this was, as noted, a landmark decision that solidified Aboriginal title as being protected under s. 35 of the *Constitution Act, 1982*, the SCC was unable to rule on the specific title claims made by the Gitksan and Wet'suwet'en due to procedural issues. Instead, a new trial would have to take place to make this determination. Notably, though, the ruling discouraged the pursuit of a new title claim in the courts and instead suggested that good faith negotiations were the best path forward, and would be most likely to lead to reconciliation. Given the prohibitive expense of launching a title claim with the provincial court and then a constitutional claim with the SCC, the Gitksan and Wet'suwet'en chose not to pursue another title claim through the courts, and agreed

³⁸⁷ Ibid., 1015.

³⁸⁸ Ibid., 1017-1018.

³⁸⁹ Ibid., 1021.

to engage in treaty negotiations with the federal government (separately, through their own offices). However, it quickly became apparent that the government did not intend to negotiate the totality of the land covered under the original title claim. Not only was the government unwilling to relinquish the totality of the land, but they were not even willing to negotiate about most or even half of the land. Instead, the government was only “willing to negotiate ... 4 to 6 percent of the total land that was covered under the original claim.”³⁹⁰ The government took the position in the consequent negotiations after the *Delgamuukw* case that because title had not been proven to the land (through another title claim case in the courts), they were not obligated to negotiate the entirety of the claimed territory.³⁹¹ Eventually, twenty-three years after the *Delgamuukw* case, a draft arrangement on rights was signed with Wet’suwet’en hereditary chiefs.

However, that agreement does not cover the Coastal GasLink pipeline, which is a “\$6.6-billion TC Energy project that would carry fracked natural gas across northern B.C. to a liquification facility in Kitimat on the coast.”³⁹² The land that this pipeline crosses over is part of the original land claim from the *Delgamuukw* case. All except one of the six elected Wet’suwet’en chiefs agreed to the project. However, all of the hereditary chiefs opposed the project – one of these hereditary chiefs also being the elected chief who rejected the construction of the pipeline. In the Wet’suwet’en nation, there are elected chiefs under the *Indian Act*’s chief and council form of governance. Their traditional governance, though, is still intact, which is led by their hereditary chiefs. The two kinds of governance are not necessarily mutually exclusive – hereditary chiefs have regularly held the elected chief positions. The chiefs who oppose the project “cite

³⁹⁰ Brett Forester, “The Delgamuukw decision: When the ‘invisible people’ won recognition,” *APTN National News* (Winnipeg, MB), March 10 2020, <https://www.aptnnews.ca/national-news/the-delgamuukw-decision-when-the-invisible-people-won-recognition/>

³⁹¹ *Ibid.*

³⁹² *Ibid.*

Delgamuukw when they argue that they are title-holders and stewards over the disputed land. The proposed route does not cross through reserve land but the southern portion of the territory claimed in Delgamuukw.”³⁹³ So, this situation is complicated by the fact that there is an internal disagreement about jurisdiction. Seemingly, the *Indian Act* chiefs are making decisions for lands that are – technically speaking – not within their jurisdiction, since the pipeline does not cross any reserve lands.

Still, it is important to understand that the Wet’suwet’en hereditary chiefs did not, in fact, outright reject the Coastal GasLink pipeline (hereafter CGL). What the hereditary chiefs objected to was the route of the pipeline suggested by CGL. The reason they rejected the route of the pipeline proposed by CGL is that it would cut directly through “ecologically important and culturally pristine areas.”³⁹⁴ The Wet’suwet’en hereditary chiefs suggested several alternate routes to CGL that they would find acceptable – all of which would go through areas that have already been subject to disturbances and damage by other resource projects. The most notable of these suggestions was the “McDonnell Lake route,” which would have seen the pipeline take a detour to pass further north than the original intended route. CGL cited several reasons for rejecting the route, including: increasing “the pipeline’s length by as much as 89 kilometres, upping both the environmental impact and as much as \$800 million in capital costs”; and it would route the pipeline closer to four urban communities; it would require CGL to consult another four First Nations.³⁹⁵ Interestingly, the route that was ultimately selected by CGL was previously rejected by another

³⁹³ Ibid.

³⁹⁴ Andrew Kurjata, “Why Coastal GasLink says it rejected a pipeline route endorsed by Wet’suwet’en hereditary chiefs,” *CBC News* (Prince George, BC), February 16 2020, <https://www.cbc.ca/news/canada/british-columbia/wetsuweten-coastal-gaslink-pipeline-alternative-path-1.5464945>

³⁹⁵ Ibid.

pipeline company because it posed a “high risk of erosion, slides and the need to construct numerous new access roads.”³⁹⁶

Two fortified checkpoints were established by the Wet’suwet’en on their territory in response to CGL’s rejection of the alternate routes – Unist’ot’en camp and Gidimt’en camp.³⁹⁷ These checkpoints were meant to regulate access to the land, and so the Wet’suwet’en prevented those working for CGL to pass through. The Wet’suwet’en also served an eviction notice to CGL – indicating that the company did not have consent to continue their work on the traditional territory. The Supreme Court of British Columbia eventually issued an injunction to the Wet’suwet’en in December of 2019, demanding that they cease impeding the construction of the pipeline. Then, on February 6th through to the 8th of 2020, the RCMP conducted a militarized raid on Gidimt’en camp, where fourteen people were arrested. The picture of the situation, from an official statement released by the Unist’ot’en camp, was bleak:

Unist’ot’en is outraged over the use of excessive force by the RCMP, including the unnecessary use of heavily armed tactical teams deployed by helicopters to surround Gidimt’en camp at 44 km, use of snipers, and deployment of K9 units. ...

Throughout the enforcement of CGL’s injunction, media and legal observers were illegally corralled and threatened with detention and arrest for doing their jobs. Freedom of the press is protected under Canadian law but journalists were prevented from documenting the RCMP militarized raids on Gidimt’en territories. The RCMP attempted to evict residents from Chief Woos’s cabin. The RCMP and Coastal GasLink also partially dismantled Gidimt’en camp infrastructure and property. This property belongs to the Gidimt’en Clan and the RCMP has no legal authority to destroy it.³⁹⁸

What erupted in the wake of the Wet’suwet’en’s opposition to the pipeline and the ensuing militarized raid by the RCMP was a nation-wide solidarity protest movement that brought the country’s most significant passenger and freight rail corridor to a complete halt for weeks. As the

³⁹⁶ Ibid.

³⁹⁷ Unist’ot’en camp also has a healing centre, which has been there since 2010.

³⁹⁸ See: <https://unistoten.camp/unistoten-responds-to-illegal-raid-of-gidimten-camps-calls-for-protection-of-healing-centre/>

Wet'suwet'en continued to resist at the Unist'ot'en camp, and brought their resistance into the urban areas of BC, the Tyendinaga Mohawk in Ontario erected a blockade on the CN Rail tracks that cross through their territory (which resulted in the arrest of at least 10 people). These are the most prominent examples of direct action in relation to this matter, but suffice it to say that many others across the country were participating in blockading other ports, legislatures, and roads. These actions were so effective that Prime Minister Justin Trudeau was forced "to cancel a Caribbean leg of an international [government travel] charm offensive and convene the Incident Response Group, which only meets in the event of a national crisis."³⁹⁹ Eventually, the Mohawk dismantled the rail blockade they erected. But the struggle continues into the present day, albeit not as prominently featured in media as it was in 2020. Both Unist'ot'en and Gidimt'en camps remain intact, but CGL has continued construction through the disputed area – though they have received five stop-work orders to date, due to violations and the environmental impact of the construction.

4.4.5: Rights in Practice

It seems, then, that exercising rights is not so straightforward. But this is not necessarily for the reasons one might think. In *MC Kymlicka*, due to the jurisdictional complications surrounding self-government rights for Indigenous nations, concludes that "the exact scope and mechanisms of indigenous self-government ... therefore remain unclear."⁴⁰⁰ Of course, he is speaking in relation to jurisdictional confusion, but this might also lead us to believe that the

³⁹⁹ Brett Forester, "The Delgamuukw decision: When the 'invisible people' won recognition," *APTN National News* (Winnipeg, MB), March 10 2020, <https://www.aptnnews.ca/national-news/the-delgamuukw-decision-when-the-invisible-people-won-recognition/>

⁴⁰⁰ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 30.

demands of Indigenous nations in relation to their self-government rights are unclear. Instead, I suggest what is involved are just nuances.

The complexity involved in discussions about exercising self-government rights are due to a number of reasons. This includes the fact that the specific details of self-government rights will vary nation to nation. They will also change depending on whether we are talking about treaty rights, the rights outlined in the *Indian Act*, the rights related to traditional governance, land claims, and so forth. Allowing for these nuances, there is nothing inherently unclear or unmanageable about the differences in the forms these rights take. In fact, I suspect we would find that the demands made by Indigenous nations in relation to their self-government rights are often clear.

Both the Mi'kmaq and the Wet'suwet'en, in their respective cases, were seeking to exercise their self-government rights. As I have argued that treaties should be considered part of self-government rights, so too should title claims (and the associated rights) be considered an exercise of self-government in the case of the Wet'suwet'en. Land claims fall outside of reserves, which Kymlicka explicitly connects to self-government rights. However, title claims do seem to fall under the general definition of self-government rights that Kymlicka himself describes. Indigenous nations launch title claims or seek land claims agreements in order to assert their authority over their territories – and to have that authority respected. The land claim and the assertion of sovereignty by the Wet'suwet'en falls under Kymlicka's definition of self-government rights because they are seeking external protection from capitalist encroachment by CGL, and, by proxy, the Canadian government and the RCMP. They are seeking to maintain authority over their lands in relation to approving, negotiating, and denying resource projects that will affect their lives and well-being. Much other Wet'suwet'en land has been damaged by resource projects, so fears regarding the protection of their land and the need for external protection are justified and real. As

Kymlicka himself maintains, land is among the most important matters in relation to self-government rights. Further, the Wet'suwet'en conflict is an example of the jurisdictional confusion Kymlicka writes about – there is a fundamental disagreement between *Indian Act* chiefs and the traditional hereditary chiefs. The government and CGL are giving preference to the consent of the *Indian Act* chiefs, and the public has expressed both confusion and outrage at the idea that hereditary leaders would be considered legitimate in Canada.⁴⁰¹ But even this move by the government is inconsistent, given that the Canadian state has acknowledged the legitimacy of Wet'suwet'en traditional governance by engaging in negotiations with them prior to the conflict in 2020. And in the case of Sipekne'katik First Nation and their moderate fishery, they were attempting to exercise their self-government rights in relation to their right to a moderate livelihood through the fishery. This right was guaranteed in a treaty that was then re-affirmed by the SCC.

The complications encountered by Indigenous nations as they exercise their self-government rights do not necessarily arise from a lack of clarity in the demands of Indigenous nations. Sipekne'katik was clear about their desire to launch a full-time fishery to economically sustain their people, and they were clear that their motivation to do so was the lack of communication, negotiation, and legislation by the Canadian government in the twenty years since the *Marshall* decision. The Wet'suwet'en were clear that they rejected the proposed route of the pipeline and made several alternate suggestions that they would find acceptable. The confusion and complexity in these situations cannot be solely or even primarily placed on the shoulders of Indigenous nations. Instead, it is obfuscation by the Canadian government and private enterprise that create tension and confusion. That different Indigenous nations differ in the specifics of their self-government rights does not indicate that the rights themselves are unclear, only that each

⁴⁰¹ Very ironic, given that Canada's head of state is the British monarchy, which is a form of hereditary leadership.

nation may occupy a different kind of landscape (landlocked or on the coast, situated in the far north, etc.), have signed different historical agreements, have different values and methods of traditional governance, and so on. None of these nuances discounts or delegitimizes their assertions of self-government.

Finally, among the most significant problems (as we saw above) is that Indigenous nations have, and continue, to run the risk of being arrested and convicted of a crime for exercising their self-government rights. Not only this, but Indigenous peoples have been and continue to be subjected to violence at the hands of both the state and individual Canadian citizens for exercising their self-government rights. This problem, as we will see in the next section, raises further concerns about legitimacy and the ability of Indigenous nations to resist the Canadian state.

4.5: The Exercise of Power Over Indigenous Nations by the Canadian State

For our final case study, we will examine two interconnected problems: the presumed legitimacy of the Canadian state by Kymlicka in *MC* as a foundational premise of his theory, and the future of Indigenous resistance in Canada, which is a method by which the presumption of the legitimacy of the Canadian state is challenged.

4.5.1: On the Presumed Legitimacy of the Canadian State

In each of the preceding sections in this chapter, there has been a question that consistently appears which has to do with the legitimacy of the Canadian state. What I mean by this is, there is an underlying assumption in Kymlicka's theory of multiculturalism – also found in the practice of multiculturalism in Canada – which is that the ultimate authority exercised by the Canadian state often goes unquestioned and is presumed to be both a legitimate and righteous exercise of power.

This authority is both political and moral in nature: political in the sense that the Canadian state controls the institutions responsible for the implementation of multicultural policies, and moral in the sense that the Canadian state is presumably capable of wielding this political power in such a way that does not cause harm to Indigenous nations.

In fact, Kymlicka notes several senses in which the power of Indigenous nations should actually be limited so as to yield to the ultimate authority of the Canadian state. We can see this in relation to two of the major concerns he discusses. First, Kymlicka expresses apprehension about land holdings – that it is possible they could exceed what justice allows.⁴⁰² Recall from 4.3, he does not clearly state what would constitute an unjust amount of land. But there is more to be said on this point, especially in relation to Kymlicka’s discussion about external protections for Indigenous nations. As discussed in 2.2.3 and 2.3, the purpose of providing group-differentiated rights is external protection. That is, defensible group-differentiated rights should provide protection to Indigenous nations from encroachment by the majority nation and allow for the continuation of Indigenous nations’ culture and ways of life.

Clearly, though, there is a limit to this protection (even if it is unclear what exactly the parameters of this limit are). This limit regarding land holdings does not extend to the Canadian state or non-Indigenous Canadians. What I mean by this is that Kymlicka assumes an inherent right to the possession of and ability to control the use of these resources. I must clarify that I am not speaking in strictly legal terms here. Of course, the Canadian state maintains the ultimate authority in relation to the control of land and other resources. Instead, what I am highlighting here is that the underlying *justification* for this structure is uninterrogated – Indigenous nations are left in a position where they must request and fight for the rights to their lands, and continuously justify

⁴⁰² Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 110.

the scope of the rights they have, both to the general public (to maintain public support) and to the government (which has the power to limit their rights).

Even more interesting, Kymlicka does not interrogate an apparent conflict of interest when it comes to the control of land (and other group-differentiated rights). Indigenous nations, through land holdings, seek to protect themselves from encroachment by the Canadian state. But the institution Indigenous nations are seeking protection from is also the institution regulating that right, exercising ultimate authority regarding decisions about land holdings.

In the interest of charity and being realistic, it is not necessarily impossible that a state could self-impose restraints. Whether the Canadian state is capable of or – perhaps more accurately – willing to self-impose restraints, however, is a separate question. Good faith negotiations are often referred to as the most viable path toward reconciliation between the Canadian state and Indigenous nations, as we saw in the SCC cases reviewed in 3.4. The *Marshall* decision did not explicitly refer to ‘good faith negotiations,’ but it did discuss the honour of the Crown in relation to treaty negotiations. Of central importance was that the oral and written terms of the treaty in question were not the same. More favourable terms were promised in the oral negotiations, but omitted from the written treaty. The SCC declared that “it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.”⁴⁰³ This is because the honour of the Crown is always at stake in its dealings with Indigenous nations, and the honour of the Crown dictates that it must intend to fulfill the promises it makes. After all, it would be difficult to engage in good faith negotiations if one could not trust the Crown’s word.

Good faith negotiations are explicitly referenced in both the *Delgamuukw* and *Tsilhqot’in* cases. In the *Delgamuukw* decision, the SCC explicitly discouraged further litigation and instead

⁴⁰³ *R v Marshall*, 1999, p. 457-8.

encouraged good faith negotiations between the government and Indigenous nations to resolve the land claim:

... this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow* at p. 1105, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place”. [...] Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court that we will achieve [...] “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.⁴⁰⁴

Negotiations surrounding the land in question in the *Delgamuukw* case, as we discussed in 4.4.4, broke down when it became clear to the Wet’suwet’en that the government was not willing to negotiate the vast majority of the land due to the fact that the Wet’suwet’en did not establish their title through the courts. We should also not forget that the reason the *Tsilhqot’in* case was launched (first in the provincial court in British Columbia, and then heard by the SCC) was because of a breakdown in negotiations between the provincial government and the Tsilhqot’in nation regarding the granting of commercial logging licences. Further, in matters regarding title claims, “the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups.”⁴⁰⁵ In this case, the government had failed its fiduciary duty by continuing to issue commercial logging licences after the title claim had been launched.

The promise of good faith negotiations should ease concerns that the Canadian state might not play fair in resolving disagreements or negotiating agreements on matters pertaining to self-government rights. However, the promise of good faith negotiations to Indigenous nations, and whether these negotiations are actually conducted in good faith, are two different matters. Each of

⁴⁰⁴ *Delgamuukw v British Columbia*, 1997, p. 1123-4.

⁴⁰⁵ *Tsilhqot’in Nation v British Columbia*, 2014, p. 261.

the above SCC cases contains conditions under which the Canadian state can justify infringing on the rights of Indigenous nations. In the *Marshall* case the SCC noted that, as with all constitutional Aboriginal rights, there exists the possibility that the rights outlined in the Peace and Friendship Treaties of 1760-1 could be infringed.⁴⁰⁶ The SCC also found that the rights in these treaties could be subject to further regulation by the government. In both the *Delgamuukw* and *Tsilhqot'in* cases, the same constitutional test that must be met to infringe Aboriginal title was discussed. The test contains two conditions: first, that the infringement must “[further] a compelling and substantial legislative objective.”⁴⁰⁷ Possible legislative objectives include natural resource development, general economic development, protection of the environment, and “the building of infrastructure and the settlement of foreign populations to support those aims”.⁴⁰⁸ The second condition is that the infringement must be “consistent with the special fiduciary relationship between the Crown and the aboriginal peoples.”⁴⁰⁹ That is, Indigenous peoples must be involved with decisions made about their lands and consultation must take place. Further, fair compensation must be given to those whose title is being infringed.

Something we should consider in discussions about good faith negotiations is the ability of Indigenous nations to say no to the Canadian state in the case of matters pertaining to Aboriginal title. Given that the Canadian state possesses the means to infringe these rights, are Indigenous nations ever in a position where they can deny a government or industry project and have this denial respected? This would be entirely dependent on the desire of the Canadian government to respect this denial, and not use the means provided to them by the law to overrule the desire of Indigenous nations to continue with a project (where they have a pre-determined desired outcome

⁴⁰⁶ In this case, the test found in *R v Badger* [1996] 1 SCR 771 would apply.

⁴⁰⁷ *Delgamuukw v British Columbia*, 1997, p. 1021.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

of negotiations). As we saw in the case of the Wet'suwet'en, even offers of negotiation (and not the outright denial of a project) were not enough for the state. True self-government would include the ability of Indigenous nations to say no and to have that assertion respected by the Canadian state. Any less than this and it is clear that these rights, as they are administered by the government, are contingent on their consistency with the aims and projects of the Canadian state – not administered based on a deeper theory of justice.

Next, Kymlicka notes concerns about the ability of Indigenous nations to respect human rights. Particularly, he highlights worries about sexism and the oppression of women by Indigenous nations through the use of internal restrictions.⁴¹⁰ Group-differentiated rights, remember, could serve to pose restrictions on a national minority's members – though Kymlicka says any group-differentiated right that is seeking an internal restriction would not be acceptable. He cites the opposition of Indigenous nations to adhere to the *Canadian Charter of Rights and Freedoms* as a sign that these concerns are justifiable.⁴¹¹ Coulthard addresses these concerns about sexism in *RSWM* – particularly a misunderstanding of why Indigenous nations might have opposed or argued against measures to ensure gender equality that are controlled by the Canadian state. Indigenous nations have justified such a position “on the grounds that First Nations governments, not the colonial settler state, have the fundamental right to determine in accordance with their own cultures and political traditions regulations that govern membership in Indigenous communities.”⁴¹² To this point, it is important to understand that opposition to something like the *Charter* is not a sign that Indigenous nations are seeking to freely engage in human rights violations – the opposition is not

⁴¹⁰ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Oxford University Press, 1996), 39.

⁴¹¹ Ibid.

⁴¹² Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Minneapolis: University of Minnesota Press, 2014), 91.

necessarily to the content of the *Charter*. Instead, the opposition is to the power that is given to the Canadian state through such means. Of course, though, the legitimate desire of Indigenous nations to control their own standards of membership does not discount the fact that in practice, “the sovereignty argument has been indelibly shaped by the sexist grammar of state Indian legislation over time.”⁴¹³

The effect of past or current state legislation on Indigenous nations is a related concern that Kymlicka does not address. He fails to account for the way in which the Canadian state is responsible, at least in part, for the concerns he expresses about sexism and Indigenous nations. Not only did the Canadian state disrupt and discount traditional modes of governance for Indigenous nations (especially notable when the nation was matriarchal in structure), but it also imposed deeply sexist legislation on Indigenous peoples through the *Indian Act*. As discussed in 3.3.1, there existed a longstanding provision of the *Indian Act* that stripped Indigenous women of their status in the event that they married a non-Indian man. This provision of the *Indian Act* was in place until 1985. In *MC* there is no critical reflection on the hypocrisy of the Canadian state and multicultural theorists to assert that Indigenous nations struggle with sexism when the state played a role in normalizing these standards to begin with.

The lack of critical reflection on whether the Canadian state possesses the requisite character to justly manage group-differentiated rights for Indigenous nations is due to a foundational presumption in Kymlicka’s theory of multiculturalism in *MC*. The presumption is that the Canadian state, quite simply, is capable of managing group-differentiated rights for Indigenous nations in a way that brings about justice. In other words, the presumption is that the Canadian state’s claim to authority over Indigenous nations is legitimate. Kymlicka does not explicitly

⁴¹³ Ibid., 92.

interrogate – or even defend – this foundational premise; it is simply a given in the theory. However, is Kymlicka’s presumption of the legitimacy of the Canadian state defensible?

The matters discussed in this section thus far are mostly concerned with the exercise of authority and power by the Canadian state. But authority and legitimacy are connected, since the just exercise of authority by a state relies upon its legitimacy, and so its ability to defend its exercise of authority over its subjects. The subject of Indigenous opposition to the Canadian state’s legitimacy is a central theme in Coulthard’s *RSM*, and he criticizes the politics of recognition for the presumption that the colonial state is justified in acting as an arbiter of political good for Indigenous nations:

... the colonial imposition of patriarchal governance structures in First Nations communities has so damaged customary gender roles that the colonial state apparatus is now required to intervene in the political life of First Nations communities to ensure that Indigenous women’s rights are honored and upheld. Here, the legitimacy of a substantive right to Indigenous autonomy and self-determination is perversely undercut by the very success of the colonial project itself. The adverse effects of colonization demand more colonial intervention.⁴¹⁴

Coulthard’s criticisms of the politics of recognition astutely emphasize the irony and hypocrisy of the colonial intervention that is often seen as necessary by multicultural theorists.⁴¹⁵ These criticisms, too, are applicable to Kymlicka’s presumption about the legitimacy of the Canadian state. The Canadian state creates instability and wreaks havoc within Indigenous nations due to their colonial intervention, this intervention causes longstanding problems, the colonial state

⁴¹⁴ Ibid., 99-100.

⁴¹⁵ I must also acknowledge that this view on customary gender roles is not one that is universally shared by Indigenous people and scholars. It is important that those within academia refrain from assigning a romanticized (and so ultimately untrue) view of gender relations in Indigenous nations prior to colonization. Still, I contend that we can hold two views at once: on one hand, it is true gender relations might not have been perfect in Indigenous nations prior to colonization; on the other hand, it is equally true that the imposition of the sexist and patriarchal standards found in the *Indian Act* have had a profoundly negative impact on Indigenous peoples, and that these harmful standards were institutionalized and then imposed on Indigenous nations by Canada. For more on the nuances of assessing gender relations within Indigenous nations, see: Emily Snyder, Val Napoleon & John Borrows “Gender and Violence: Drawing on Indigenous Legal Resources,” *UBC Law Review* 48, no. 2 (2015): 593-654.

justifies further intervention to allegedly fix the problems it created – it is an unending cycle of intervention. But still, there is more to be said.

Bernard Williams provides a constructive tool for evaluating the legitimacy of any state – framed primarily in political terms, not in historical nor moral terms (though it does not preclude historical or moral considerations), which can shed further light on why Indigenous nations might oppose the legitimacy of the Canadian state. This tool is the Basic Legitimation Demand (BLD), found in the first chapter of *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, where Williams outlines the means by which a state can claim its authority to be legitimate.

Williams holds that a legitimate state is one that answers the first question for its citizens. The first question is Hobbesian in nature – it is “the securing of order, protection, safety, trust, and the conditions of cooperation.”⁴¹⁶ Though an answer to the first question is not necessarily eternal – in other words, it is possible for a state to have answered the first question for its citizens at one point in time, but to fail at answering the question at a later time. However, answering the first question is not only a necessary condition of legitimacy, but also necessary to pose any other political questions.⁴¹⁷

For a state to meet the Basic Legitimation Demand is to provide an “acceptable” answer to the first question, where “the state has to offer a justification of its power to each subject.”⁴¹⁸ But what does it look like when a state does not meet the BLD? Williams proposes a situation for consideration:

⁴¹⁶ Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*. (Princeton: Princeton University Press, 2005), 3.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*, 4.

Suppose a group of subjects of the state—within its borders, required to obey its officials, and so forth—who are radically disadvantaged relative to others. At the limit, they have virtually no protection at all, from the operations of either officials or other subjects. They are no better off than enemies of the state. ...

Well, there is nothing to be said *to this group* to explain why they shouldn't revolt.⁴¹⁹

Indigenous peoples fit Williams' definition of being radically disadvantaged. First, Indigenous peoples are subjects of the Canadian state insofar as they are people who are under the power of the state, subject to its laws and institutions.⁴²⁰ And, importantly, Indigenous peoples are disadvantaged in relation to what a person could fear, which is characterized as “what someone would reasonably be afraid of if it were likely to happen to him/her in the basic Hobbesian terms of coercion, pain, torture, humiliation, suffering, death.”⁴²¹ To say that this definition applies to Indigenous peoples is not hyperbolic. Consider residential schools,⁴²² the alarmingly high rate of apprehension of Indigenous children by the state,⁴²³ the inordinate levels of police brutality,⁴²⁴ the weaponized use of police forces and government power, to name a few. To this point, consider the militarized raid of Wet'suwet'en Gidimt'en camp by the RCMP discussed in 3.4.4. Further, this disadvantage in relation to fear is not only at the hands of state – it is also a fear that exists in relation to other subjects of the Canadian state. This is clearly the case for Indigenous peoples in the case of the Mi'kmaq and the moderate livelihood fisheries, as we saw in 3.4.3. When we consider what Williams says about the state justifying its own exercise of authority, it seems the Canadian state fails at justifying its authority to Indigenous peoples. Why, then, should Indigenous

⁴¹⁹ Ibid., 5.

⁴²⁰ Ibid., 4.

⁴²¹ Ibid.

⁴²² Mentioned in 2.3 and 3.3.1, these were institutions where children were not only forcibly separated from their families, but also subject to physical and sexual abuse on a regular basis, and thousands of children died in these institutions.

⁴²³ The government apprehending Indigenous children at an exceptionally high rate and adopting them into non-Indigenous homes is now known as the '60s scoop', though many argue that the government is still engaged in this practice today. For more information, see: https://indigenousfoundations.web.arts.ubc.ca/sixties_scoop/

⁴²⁴ Consider the shocking practice of what have been called 'starlight tours': where police take (sometimes intoxicated) Indigenous people and drop them far outside of city bounds, often in the dead of winter. For more information, see: <https://gladue.usask.ca/node/2860>

peoples not revolt and resist the exercise of power by the state? And it is not only a matter of why Indigenous peoples should or should not resist, but that this resistance is actually justified under these conditions, according to Williams.

Williams also notes that a liberal state would impose additional standards on the BLD beyond its basic form. First, liberals would insist that “Rationalization of disadvantage in terms of race and gender are invalid.”⁴²⁵ Recall from 4.2 where I addressed the control of citizenship in Indigenous nations, the Canadian state fails in this regard. The next liberal condition is that “Hierarchical structures which generate disadvantage are not self-legitimizing. Once the question of their legitimacy is raised, it cannot be answered simply by their existence”⁴²⁶ The Canadian state’s continued intervention in the affairs of Indigenous nations (in all of the ways that have been described in each of the previous sections of this chapter) and the inability of the Canadian state to respect the wishes of Indigenous nations are both evidence of such hierarchical structures. The Canadian state maintains ultimate authority only because it has exercised this authority since the conception of the state – because it is here, and it is more powerful – not because it offers any deeper justification to Indigenous nations about its authority.⁴²⁷ And, Williams writes, “if the supposed legitimation is seen to be baseless, the situation is one of more coercive power.”⁴²⁸

The closest Kymlicka comes to addressing the legitimacy of the state is in relation to treaties, though this is tenuous because while he writes that these agreements are the means by

⁴²⁵ Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*. (Princeton: Princeton University Press, 2005), 7.

⁴²⁶ *Ibid.*

⁴²⁷ Legally, the legitimacy of the Canadian state’s exercise of power is justified through legal concepts like the Doctrine of Discovery and Terra Nullius – rooted in the idea that there was no pre-existing authority before the arrival of the settlers, and that the land was functionally unoccupied. This, we know, is based on the erroneous idea that Indigenous nations did not form complete and legitimate nations or societies. While the existence of concepts like the Doctrine of Discovery and Terra Nullius may have been seen as legitimate justification historically, it is becoming increasingly clear that they are not, in fact, sound justifications.

⁴²⁸ Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*. (Princeton: Princeton University Press, 2005), 7.

which the state can claim authority over Indigenous nations, recall that he also casts suspicion on treaties by insisting that they do not belong to a deeper theory of justice. Kymlicka assumes that the first question is answered by the Canadian state for Indigenous nations, in Williams' terms.⁴²⁹ However, this assumption is not well-founded, so far as I can ascertain. At a minimum, Kymlicka would need to provide a much more robust defense of the Canadian state's claim to ultimate authority over Indigenous nations. Under what political (or even moral) authority – though these are certainly two separate questions – does the Canadian state claim it answers the first question for Indigenous nations? I believe it is clear from the totality of the discussion in this chapter thus far that the Canadian state does not provide a satisfactory answer. Now that we better understand *why* Indigenous nations would oppose the legitimacy of the Canadian state, it is worth considering what form this opposition takes – and what the future of this opposition may look like in Canada.

4.5.2: The Future of Indigenous Resistance in Canada

Indigenous resistance to the Canadian state is expansive – there are many ways Indigenous nations resist the state's unchecked exercise of authority, and it would not be disingenuous to say that the continued existence of Indigenous nations and communities is, in itself, an act of resistance. But to the average Canadian citizen, Indigenous resistance is likely most recognizable in the form of direct action (the use of public protest) or civil disobedience. More than this, though, direct action is a necessary and long-standing practice for Indigenous nations, since it is through

⁴²⁹ I will note that some might find my use of Williams' BLD as a tool to evaluate Kymlicka's presumption of the Canadian state's legitimacy surprising, for the reason that Williams is a political realist, whereas Kymlicka would likely fall into the camp of a political moralist. When engaging with political theory as a moralist, it adds a layer of complication in the sense that there is, in addition to worrying about meeting the political needs of a society or maintaining political stability, a sense in which these problems are also of a moral nature. When discussing political theory from a realist perspective, that extra consideration is not present. Given this, one might anticipate that a moralist political theory like Kymlicka's would exceed any expectations contained in the BLD. However, even void of moral considerations, Kymlicka's framework still fails to meet the BLD. And, at minimum, both Williams and Kymlicka operate within the position of liberalism.

direct action that Indigenous nations can bring attention to their struggles and resist the exercise of unmitigated power by the Canadian state. Direct action, especially when it is undertaken by Indigenous nations, is often a topic of contention in public discourse in Canada.

John Borrows dedicates an entire chapter in *Freedom and Indigenous Constitutionalism* to discussing what he refers to as ‘civil (dis)obedience’ undertaken by Indigenous nations to advance their interests.⁴³⁰ Borrows writes the term this way – ‘(dis)obedience’ – to show that what could be characterized as civil disobedience in the eyes of the Canadian state is actually obedience or adherence to Indigenous law, and “Furthermore, in some situations so-called civil disobedience could also be characterized as obedience to Canadian law ‘as it should be,’ if such laws applied Indigenous legal principles or the state’s own highest standards.”⁴³¹ He acknowledges that freedom cannot always be obtained through discussions within the confines of institutions because these institutions sometimes impede instead of increasing or promoting freedom. When these institutions impede freedom, Indigenous peoples will operate outside of them and use direct action to oppose their domination by the Canadian state.⁴³²

It is important to note that Borrows does not express an unwavering and uncritical support of direct action. Instead, he treats the practice of Indigenous civil (dis)obedience as one that must be undertaken and evaluated on a case-by-case basis. Civil (dis)obedience is context-dependent to Borrows because direct action sometimes contributes to freedom (which should be the goal and outcome of direct action), and sometimes it does not. Borrows views acts of civil (dis)obedience that do not contribute to the freedom both of Indigenous and non-Indigenous people critically. His

⁴³⁰ John Borrows, “Civil (Dis)Obedience, Freedom, and Democracy,” in *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 50-102.

⁴³¹ John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 53.

⁴³² *Ibid.*, 50-2.

critical stance also extends to how the Canadian government reacts to “Indigenous dissent in Canada, often forcing it to the margins where it is made illegal and ineffectual.”⁴³³

Borrows also advocates for the sparing use of civil (dis)obedience because “It is not an easy tool to deploy, because it often generates grave misunderstandings and toxic backlash. Direct action is never unilateral. It is always inserted into a wider context which cannot be controlled by the group initiating it.”⁴³⁴ For Borrows, continued civil (dis)obedience by Indigenous nations indicates that they will not sit idly by and insist on involvement in their own political affairs. While civil (dis)obedience and resistance to the Canadian state does not always bring about ideal outcomes, there is a sense in which, for Borrows, it is a necessary part of Indigenous political life – at least for the time being, so long as oppression remains.

Of course, direct action is not a uniquely Indigenous exercise. Non-Indigenous people in Canada can also undertake large scale and disruptive protests in the name of their own causes, whatever those may be. How the Canadian government responds to non-Indigenous civil disobedience and direct action, particularly in recent years, is worthy of our consideration.

In January of 2022 a protest movement called the ‘Freedom Convoy 2022’ (hereafter the Convoy) descended on Parliament Hill and the surrounding neighbourhoods in Ottawa. The scale of this protest was large and wide-ranging – it was comprised of thousands of participants from across the country, mostly long-haul truckers and their supporters who had travelled in a convoy to Parliament Hill, primarily from western Canada. The impetus for the protest was dissatisfaction with the Canadian government’s Covid-19 policies, particularly mandatory Covid-19 vaccinations as a condition of employment for long-haul truckers. Upon the arrival of the Convoy, the people of Ottawa were plunged into a month of round-the-clock chaos and disruption. The protest also

⁴³³ Ibid., 102.

⁴³⁴ Ibid., 54.

expanded outside of Ottawa to include disruptions at two international border crossings with the United States – one in Windsor, Ontario, and one in Coutts, Alberta.

After repeated and sustained failures to disperse the protest, the events surrounding the Convoy culminated in the first-ever invocation of the *Emergencies Act* by Prime Minister Justin Trudeau on February 14, 2022. The *Emergencies Act* is a piece of legislation that is “used to authorize the taking of special temporary measures to ensure safety and security during national emergencies”.⁴³⁵ It is meant for use in times where the sovereignty of Canada is threatened, and in situations where no other law in Canada can be used to resolve the emergency. Of note is that the *Emergencies Act* replaced the *War Measures Act*, which served a similar purpose and had been invoked only three times: during World War I, World War II, and during the 1970 October Crisis in Québec. The invocation came after convening the Incident Response Group – a government committee comprised of the Prime Minister and other cabinet members that meets in relation to national crises – on February 10, 12, and 13 of 2022. In the Declaration of Public Order Emergency, the justifications for invoking the *Emergencies Act* were as follows:

- i. the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,
- ii. the adverse effects on the Canadian economy – recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) – and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,
- iii. the adverse effects resulting from the impacts of the blockades on Canada’s relationship with its trading partners, including the United States (U.S.), that are detrimental to the interests of Canada,
- iv. the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

⁴³⁵ *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.)

v. the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians.⁴³⁶

Direct measures that were taken against participants in the Convoy as a result of the *Emergencies Act* were: the immediate suspension of licences and vehicle insurance, and the seizure or freezing of personal assets including money within private banking institutions, among others. While constitutional legal groups and experts in Canada – including the Canadian Civil Liberties Association – decried the government’s use of the *Emergencies Act*, an inquiry which concluded in February of 2023 found the threshold for its invocation was met and therefore its use was ultimately justifiable. This means its invocation in February of 2022 is precedent-setting. That is, should the government wish to invoke the *Emergencies Act* again, the justifications used to invoke it could be used as justification for future use of the *Emergencies Act* to end other acts of civil disobedience.

While we have discussed examples of Indigenous direct action and civil (dis)obedience already, there is one more instance worth our consideration, which Coulthard presents at length in *RSWM*. The Idle No More movement (which was most prominent between 2012-2013) began as an information campaign about Bill C-45, which was a mammoth budget implementation bill that proposed considerable changes to federal legislation that threatened Aboriginal land and treaty rights through making access to reserve lands for resource development companies much easier and lessening environmental protections for waterways.⁴³⁷ The education campaign was initially led by Jessica Gordon, Sylvia McAdam, Sheelah McLean, and Nina Wilson, but through the use of social media – particularly Twitter – and a coinciding hunger strike by Chief Theresa Spence of

⁴³⁶ Canada, Department of Justice, *February 14, 2022 Declaration of Public Order Emergency: Explanation pursuant to subsection 58(1) of the Emergencies Act*, February 14, 2022, 1-2, https://www.justice.gc.ca/eng/csjsjc/pdf/Section58_explanation_EN.pdf

⁴³⁷ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Minneapolis: University of Minnesota Press, 2014), 160.

the Attawapiskat Cree nation (who indicated her support for Idle No More as one part of her motivation), Idle No More expanded into a nationwide grassroots protest movement.⁴³⁸ The early days of the movement were defined by publicly accessible education events and surprise “round-dancing and drumming in public spaces like shopping malls, street intersections, and legislature grounds ...”⁴³⁹ After a few weeks of these efforts, the approach of the Idle No More movement became increasingly difficult to ignore, and:

On December 21 an Idle No More protest involving thousands of Indigenous people and their supporters descended on Parliament Hill in Ottawa. During roughly the same time, Idle No More tactics began to diversify to include the use of blockades and temporary train and traffic stoppages, the most publicized of which involved a two-week railway blockade established in late December by the Aamjiwnaag First Nation near Sarnia, Ontario.⁴⁴⁰

Coulthard notes that media reaction to the Idle No More protests was incredibly divisive, with some prominent figures in Canadian media characterizing the movement and its supporters or their positions as unarticulated, disorganized, and committing an act of terrorism.⁴⁴¹ Prime Minister Stephen Harper, unable to ignore the events that were unfolding, requested a meeting with the Assembly of First Nations for January 11, 2013. In relation to concerns about this meeting – namely that the meeting was not going to result in real change, in particular change to Bill C-45 – more protests erupted on January 16, 2013, “including railway barricades erected in Manitoba, Ontario, and British Columbia; highway and bridge stoppages in British Columbia, Ontario, New Brunswick, and Alberta ...” in addition to the other forms of protest that had been used since the beginning.⁴⁴² The scale of this protest – that it was sustained for well over a month in its most active phase, and that it was comprised of a large-scale protest on the ground in Ottawa, as well as

⁴³⁸ Ibid.

⁴³⁹ Ibid., 161.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid., 161-2.

⁴⁴² Ibid., 164.

nationwide land-based direct action and significant disruption of critical infrastructure – is of particular note. At the time of writing this, these central events of the Idle No More protest took place ten years ago.

What, for my purposes, do these two incidents, about the Convoy and Idle No More, have to do with one another? It is important for me to emphasize from the outset that what follows in this section is not a comparison that likens the *causes* of the Convoy and the Idle No More movement (or any other act of Indigenous civil (dis)obedience) to one another. The Convoy was a reaction to a particular situation, a moment in time, whereas direct action and civil (dis)obedience undertaken by Indigenous nations is resistance to a sustained assault on their autonomy, their rights, and their existence as nations that has been ongoing since the arrival of the settlers. What I am interested in, however, are the potential ramifications of the invocation of the *Emergencies Act* in response to a large, multi-location, sustained act of civil disobedience, and what kind of impact it could have on the ability of Indigenous nations to oppose the Canadian state in the future.

The common law system is the legal system used across provinces and territories in Canada and regarding federal matters, save for matters within Québec, where the civil law system is used. One of the main distinguishing features between the common law and civil law systems is the use (or absence) of precedent. In the civil law system, ordinances and codified statutes determine the outcome of a case. In the common law, precedent is all-important: that is, the decisions made in past legal cases help to determine the outcome of future legal decisions. This is why it can be very shocking when a ruling or use of law breaks with precedent (in other words, is not consistent with previous rulings), or when a precedent-setting event occurs. A precedent-setting ruling or use of law is where there existed no precedent beforehand, and this is the first (and only – at least for a time) case that can guide subsequent decisions in similar caselaw.

The invocation of the *Emergencies Act* was precedent-setting – it had never before been used since it had replaced the *War Measures Act* in 1988. That it remained unused for so long was actually a feature of the *Emergencies Act*. After all, it was meant for use in wartime – in a time where the sovereignty of Canada was threatened in such a way that no other law in Canada could ensure the stability of the country.⁴⁴³ In making use of this law for the first time, the federal government has set the stage for its use again in the future.⁴⁴⁴ Given the first use of the *Emergencies Act* was in response to acts of civil disobedience, and given that direct action and civil (dis)obedience are common practices in Indigenous resistance, it is worthwhile to look more closely at the reasons cited by the state for its invocation and ask if these reasons (or at least similar reasons) could be employed in justifying the use of these measures against Indigenous nations – especially in the event of a nationwide protest movement like Idle No More.⁴⁴⁵

Let us return to the reasons provided for the use of the *Emergencies Act* in the Declaration of Public Order Emergency. While five unique justifications are given for the use of the act, four common themes can be found throughout. The act of blockading or disrupting critical infrastructure by people or vehicles is referenced under i. and ii. Critical infrastructure would include (among other things) railways, highways, and ports of entry to Canada – these are essential services and facilities, without which the country cannot properly function. The breakdown in the chain of distribution – which is reliant on critical infrastructure – and so the disruption of the distribution of essential goods and the ability to deliver essential services, is referenced under iv., which relates to concerns about the economic impacts of the disruption of critical infrastructure.

⁴⁴³ Examples of such events would include invasion by a foreign state or involvement in a global war the scale of the World Wars.

⁴⁴⁴ This is especially true given the outcome of the inquiry – that its use was ultimately justifiable.

⁴⁴⁵ When I say ‘like’ Idle No More, there are a few conditions I have in mind: that an element of the protest takes place on Parliament Hill in Ottawa, and that there is sustained blockading of critical infrastructures like (but not limited to) critical infrastructure like highways or railways.

The economic impact of blockades – either domestically or internationally (specifically in trade relations with the United States) – is explicitly referenced in four of the five justifications provided (i., ii., iii., and iv.). The economic impact of Indigenous acts of civil (dis)obedience is often a purposeful function of the acts undertaken – this was the case both in the railway blockade erected by the Mohawk in relation to the Wet’suwet’en pipeline protests, as well as the railway and highway blockades associated with the Idle No More protest movement. It is difficult, if not impossible, for Canadian citizens to ignore or for the Canadian government to exercise authority over Indigenous nations with impunity when critical infrastructure is impeded. These kinds of consequences are sometimes the most effective tool to bring widespread attention to the problem at hand.

The government also cites concerns about violence in points i. and v. While I would not characterize the Idle No More protest movement as violent, it is not uncommon for direct action and civil (dis)obedience by Indigenous peoples to be *characterized* as violent by the state or by non-Indigenous Canadians. Coulthard’s recounting had remarked that actions related to the Idle No More protest were characterized as terrorism in popular media. It is also not uncommon for the state, or non-Indigenous people, to react to Indigenous civil disobedience in a violent manner (and so this can colour the entire protest as violent in the eyes of the media and the public generally). Think, for example, of the militarized raid conducted by the RCMP in relation to the Wet’suwet’en pipeline protests, or the reaction of non-Indigenous Canadians in response to the Marshall ruling and the Sipekne’katik moderate livelihood fishery.

Further, it is important to understand the sense in which the word ‘violence’ is being used by the government. Let us return to the first justification again, but in greater detail. Under this justification, the government places emphasis on the use of and refusal to remove blockades in

multiple locations across the country, and the use of these blockades in such a way that “are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada”.⁴⁴⁶As it is used within the Declaration of Public Order Emergency, the term ‘serious violence’ includes the disruption of critical infrastructure. If the blockading and disruption of critical infrastructure is considered violence, and is considered violent enough to warrant the level of intervention granted by the *Emergencies Act*, acts of civil (dis)obedience by Indigenous nations could easily be subject to this definition. Further, it is not disingenuous to say that the act of civil (dis)obedience and the use of blockades of critical infrastructure by Indigenous nations are conducted to bring about political change in Canada.

That each of the reasons cited for the invocation of the *Emergencies Act* could be applied to the Idle No More protest movement should be cause for concern. If a protest movement possessing the scale and tactics of the Idle No More protest was to happen today, we must wonder if the government would move to invoke the *Emergencies Act* in response.⁴⁴⁷ Remember that the first step to invoking the *Emergencies Act* was convening the Incident Response Group. The Incident Response Group was also convened in relation to the Wet’suwet’en pipeline conflict in 2020 – so we already see Indigenous civil (dis)obedience that blockades critical infrastructure has been treated as a national emergency or crisis by the government.

An obvious opposition to these concerns can be found in a contextual evaluation of Indigenous civil (dis)obedience – that the cause of Indigenous nations is righteous and justified,

⁴⁴⁶ Canada, Department of Justice, *February 14, 2022 Declaration of Public Order Emergency: Explanation pursuant to subsection 58(1) of the Emergencies Act*, February 14, 2022, 1, https://www.justice.gc.ca/eng/csjsjc/pdf/Section58_explanation_EN.pdf

⁴⁴⁷ We have no reason to doubt that such a widescale act of Indigenous civil (dis)obedience could occur again in the near future.

whereas the actions of the Convoy was neither righteous nor justified.⁴⁴⁸ The just nature of Indigenous civil (dis)obedience, then, must mean that the Canadian state should not automatically invoke the *Emergencies Act* in response. But the law often works in principles, not contextualized evaluations. It is not clear that the Canadian state would look to engage in a contextualized evaluation of direct action and civil disobedience the scale of the Idle No More movement or the Wet'suwet'en pipeline conflict protests in a post-*Emergencies Act* Canada. The state already has the implicit blessing of Canadian citizens to invoke these measures to put an end to actions that significantly disrupt the lives of Canadian citizens and pose a threat to the economy through the disruption of critical infrastructure.

The contextual information that Canadian progressives erroneously believe would protect Indigenous civil disobedience and direct action from such measures by the Canadian government is not information we can assume the Canadian government would consider. We also cannot assume that, if this information were considered, that it would generate a more favourable outcome for Indigenous peoples engaged in frontline direct action. This position also assumes that the Canadian state maintains an implicitly good or altruistic attitude towards Indigenous nations, which is not a wise or realistic assumption.⁴⁴⁹

⁴⁴⁸ I would not venture to attempt to argue in favour of the Convoy. These comparisons are not meant to function to convince anyone that the Convoy was a righteous action, as that is not a belief that I hold. There are, as with any form of direct action, many more contextual elements to discussing the Convoy (that there is not enough room to dissect here) that cannot be ignored in a discussion about the Convoy itself.

⁴⁴⁹ The contents of this chapter (and indeed all three main body chapters) provide ample warning against such an assumption. Another tangentially related opposition is that the Canadian government already oversteps and abuses Indigenous nations, therefore the invocation of the *Emergencies Act* against a different group should not be of concern to Indigenous nations, since the government will disregard their own laws and standards of conduct anyway. I would caution anyone against assuming the ill-treatment of Indigenous nations by the government could not escalate or become worse. While the government might routinely violate its own standards of conduct in relation to Indigenous nations, the last thing needed is another entirely legal avenue by which they can violate and punish Indigenous peoples engaged in civil (dis)obedience.

All of this is not to say that the Canadian government is guaranteed to invoke the *Emergencies Act* in response to Indigenous civil (dis)obedience. It is not possible to speak with such certainty. No matter the possibility of the *Emergencies Act*, Indigenous nations have and will continue to resist and oppose assertions of unmitigated power by the Canadian state, and fight for their interests. Instead, my intention is to elucidate the possibilities that exist when the state makes use of laws that, at first glance, do not seem to apply to Indigenous nations. The means used to end the Convoy may have consequences, and we may be living with these consequences someday in ways that people do not anticipate are possible.

4.6: The Normative and Descriptive Claims of Kymlicka's Multiculturalism: Final Remarks

In this final chapter we have travelled through four separate – but interrelated – themes found in Kymlicka's multiculturalism, and critically examined how Indigenous nations are accounted for. This critical examination was based on the theoretical and practical groundwork done in the first and second chapters. These four matters, generally speaking, were regarding: citizenship in Indigenous nations; the characterization of treaties; exercising group-differentiated rights, and; the exercise of authority by the Canadian state (particularly the legitimacy of that authority). My aim, recall from 2.5, has been to ascertain whether any failures of the theory to adequately account for Indigenous nations can be attributed to the normative claims of the theory, or with the descriptive claims.

Kymlicka's normative claims involve the deeper justifications in favour of the liberal theory of multicultural outlined in *MC*. Kymlicka insists that implementing multiculturalism brings about justice for both minorities – whether that is national minorities or ethnic minorities – and for members of the majority culture. So, for Kymlicka, multiculturalism is a moral good that

we should continue to implement and should be pursued in places where this is not yet the norm. And while Kymlicka provides a deeper justification for why we should implement and practice multiculturalism, a cornerstone of Kymlicka's theory of multiculturalism is that he also refers to these values in practice, to demonstrate that multiculturalism is both achievable and desirable. These references are what I refer to as the descriptive element of his theory. In this concluding section, I will discuss each of the case studies in this chapter in relation to the normative and descriptive claims of Kymlicka's multiculturalism.

In *MC*, the normative assertions about the regulation of membership of national minorities are based on the fundamental notion that regulating membership on the basis of race is unjust and indefensible. Instead, Kymlicka asserts that membership in a national minority (or any national community) should be open to anyone who is willing to integrate into the community by learning the history and language, and participate, as others do, in its institutions. In principle, this is a normative assertion that should bring about justice for Indigenous nations, since this stance does not arbitrarily exclude members based on their genetic descent, and allows Indigenous nations to incorporate members as any other nation would. John Borrows – an Anishinaabe jurist – argues at length and across multiple works in favour of this normative assertion. Borrows maintains that the current approach to Indigenous citizenship generates unjust results through the way it arbitrarily shatters family and community bonds. He also argues for the ability of Indigenous nations to integrate and grant membership to those who are not ethnically Indigenous, and so would not meet the current standards of membership.

However, if we ask whether this normative assertion on citizenship is applied to Indigenous nations in practice, we find this is not so. Kymlicka does not consider or address that the membership of Indigenous nations in Canada is regulated based on race. Crucial to note is that

these standards of membership are imposed on Indigenous nations by the Canadian state – which is also not addressed by Kymlicka. So, this descriptive failure can be attributed to the Canadian government and should not be used as a point of criticism of Indigenous nations.

Making use of historical agreements – and so treaties – as a means to justify group-differentiated rights for Indigenous nations is not constitutive of a deeper theory of justice to Kymlicka. I argued against this on several grounds: time passing and circumstances changing is not enough to dismiss other legal contracts in Canada; dismissing treaties due to dishonesty on part of the Crown or the fact that some Indigenous nations did not sign treaties amounts to arbitrary punishment of Indigenous nations. Instead, treaties should be treated as an integral part of the equality argument, which Kymlicka relies on to justify group-differentiated rights. So, then, Kymlicka’s normative assertions about historical agreements fail, because they do not bring about a just outcome for Indigenous nations.

If we evaluate Kymlicka’s descriptive assertions about treaties, however, we find both failure and success (though I am not sure if it is the kind of success he sought). Kymlicka mischaracterizes treaties by downplaying or understating their significance, which is not reflective of reality since Indigenous nations perceive their treaty rights as an indispensable component of their self-government rights. There is also an inconsistency in Kymlicka’s normative assertion that bleeds into his descriptive claims – while he discredits treaties in his normative claims, he simultaneously asserts that these agreements are the means by which the Canadian government obtained authority over Indigenous nations. Kymlicka’s descriptive claims about treaties are successful in the sense that his normative assertions about treaties are presently and historically reflected in the attitude and policies of the Canadian state. Recall, of course, the characterization of treaties in the White Paper, or the attitude of the original trial judge in the *Marshall* case, who

asserted that changing circumstances resulted in the disappearance of the rights outlined in the Peace and Friendship treaties that were at issue during trial.

In *MC*, the normative claims in favour of group-differentiated rights for Indigenous nations consist primarily in the function of these rights to provide external protection to Indigenous nations from or against the majority culture. That group-differentiated rights provide this protection is reason to implement them, because it leads to justice for Indigenous nations. This assertion, on its face, is not disagreeable. Kymlicka does, however, note that these rights – specifically those having to do with land – ‘could exceed what justice allows’ but does not elaborate on what would constitute an excessive possession of land by Indigenous nations and what specific limitations would be warranted.

Where Kymlicka asserts that the scope and specifics of self-government rights for Indigenous nations are unclear, it would be more accurate to say that group-differentiated rights in practice are a complex matter. Generally speaking, Kymlicka overstates the level of power granted to Indigenous nations through self-government rights by the Canadian government through the *Indian Act*, since he does not discuss the limitations posed on Indigenous nations through the *Act*. He also does not include treaties in his account of self-government rights, and ties the exercise of self-government rights primarily to reserves. Neither of these assertions are reflective of the actual state of affairs. We also examined two instances where Indigenous nations encountered serious obstacles when trying to exercise their self-government rights. First, in relation to the *Marshall* decision, that the rights in question were affirmed by the SCC did not provide the Mi’kmaq – neither Burnt Church immediately following the SCC decision, nor Sipekne’katik in 2020 – with external protection from non-Indigenous Canadians or the government. Second, the Wet’suwet’en wished to exercise self-government rights over their traditional territories, which have been the

subject of decades-long land claims litigation and negotiations. The hereditary chiefs sought a compromise regarding the route of the pipeline, wishing to redirect it through already-disturbed land to avoid damaging untouched and culturally significant tracts of land. The culmination of this situation was a militarized raid conducted by the RCMP and Coastal GasLink has continued on with construction of the pipeline. So, while in theory Indigenous nations have access to powerful self-government rights, in practice it is much more difficult to access and practice these rights unimpeded.

Finally, Kymlicka's normative assertions about the legitimacy of the Canadian state are not so much assertions, as they are foundational presumptions. He does not provide a justification for the exercise of power and ultimate authority of the Canadian state over Indigenous nations. He assumes that the Canadian state possesses the requisite moral and political character needed to justly act as the arbiter of group-differentiated rights. This foundational presumption means that Kymlicka never addresses historical and present-day wrongs committed against Indigenous nations – wrongs that violate the very standards the Canadian government purports to respect, standards that Indigenous nations are held to. Further, I used Bernard Williams' Basic Legitimation Demand to provide further insight into why Indigenous nations (rightfully) resist the legitimacy of and exercise of authority by the Canadian state.

In a descriptive sense, Kymlicka's presumption of the legitimacy of the Canadian state is consistent with how multiculturalism – particularly multinationality as it affects Indigenous nations – plays out in Canada. We can see this in the SCC cases we reviewed, the legislation discussed, and the state's (and indeed non-Indigenous Canadians) reaction to the assertion of rights by Indigenous nations and their resistance to the authority of the Canadian state. There is, in practice, a prevailing and foundational belief that the Canadian state possesses the requisite

political and moral standing to justly assert its authority over Indigenous nations, while offering not so much as an answer to the first political question in return.

When I first began writing this project, a friend and colleague of mine asked me if I saw myself as a “fact doctor” or as a “value doctor.” He asked this because, he said, multiculturalism can be both a fact and a value (and this, of course, is apparent in Kymlicka’s theory). That is, did I believe the problems with multiculturalism lie with its implementation or with the values it purports to uphold. My answer to that question then and now are similar: I am both and neither. In evaluating both the normative and descriptive claims made by Kymlicka, I have sought to investigate and diagnose the problems in both areas. Though, it is important to acknowledge that I have tried to diagnose an illness in this work, and have not necessarily attempted to treat it.

If we look at the relationship between the Canadian state and Indigenous nations, I do not believe it is an overstatement to characterize it as a deep and festering wound. My concern, as I started this project, was that the use of multiculturalism in Canada has been akin to putting a small bandage on top of a large, untreated wound. What I have tried to do in the preceding pages is to pull off the bandage, look beneath, and ask what the cause is. After all, you can only effectively treat a problem if you fully understand its cause.⁴⁵⁰ It could even be that the method being used as a healing tool (in this case, multiculturalism) is actually making the problem worse. It is only in finding the cause of the problem (that is, whether the fault lies with principles or application) that we can then begin to fix it.

As for whether the problem lies primarily with the principles or application of multiculturalism, I hope this work has shown that these problems are so much more complex than

⁴⁵⁰ I do not mean this to suggest that I am the only person who has been interested in this question, only that I believe conversations surrounding multiculturalism in practice can often lack awareness of what the problems they are trying to solve for Indigenous nations are.

one might initially believe them to be. The outcome of the work in this chapter has confirmed this – in some instances, the normative claims made by Kymlicka are successful, and in others, they are not. The same can be said about the descriptive claims. Still, there are many more concerns I would have liked to address, but could not, due to the constraints inherent to a project of this nature. These matters include: the significance Kymlicka places on language in his definition of a societal culture; the concept of consultation; how the claims of polyethnic or immigrant groups potentially conflict with the claims of Indigenous nations, and; the relation between Québec and the Canadian state, as well as the relation between Québec and Indigenous nations – to name only a few.⁴⁵¹ Eventually addressing these matters will be essential to gain an even better understanding of the challenges plaguing multiculturalism in practice as it relates to Indigenous nations. Just as the problems are themselves complex and full of nuance, so too are the solutions. I do not purport to have one ultimate solution to the problems discussed here, nor do I have a laundry list of detailed, actionable steps at this time, beyond some of the basic conclusions drawn in this chapter. Such a position might not make for compelling or exciting political philosophy, but I do believe it is honest. For now, my hope is that this work can act as a forthright snapshot of a larger and more complex picture – that those who are new to these problems walk away with a better understanding of these issues and more empathy for those affected by them; and that those who are already aware may be able to deepen their understanding of these problems and consider, perhaps, a different perspective.

⁴⁵¹ Addressing these concerns would have easily doubled the length of this work. I also would have liked to include a much larger sampling of SCC cases.

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