Settler Modes of (Re)production: Indigenous Territorial Claims in Australia and Canada

by

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Abstract

This thesis is guided by an inquiry into the state responses to Australia's *Mabo v Queensland 1992* and Canada's *Calder v British Columbia 1973* rulings in the struggle for Indigenous rights to self-government. Australia's Cape York Peninsula and Canada's Nisga'a Nation serve as case studies for this thesis, to answer the research questions: What consequences came out of the *Mabo* and *Calder* cases for Indigenous territorial claims in Australia and Canada? And how does the settler state reterritorialize and limit Indigenous rights to self–government? Utilizing Henri Lefebvre's concepts of homogenization and fragmentation, this thesis finds the settler state is continuously reinventing the structures of *terra nullius* (vacant lands) to preserve political and economic stability. Lefebvre introduces us to the concept of reterritorialization, as state mechanisms used to reconfiguration of social, political, and economic relationships to ensure Indigenous rights to self–government are limited. In the aftermath of the *Mabo* and *Calder* decisions, this thesis traces the settler state's mechanisms to gain political and economic certainty by removing Indigenous rights to self–government. My findings reveal Australia's 'bundle of rights' approach under the Native Title Act further limits Indigenous rights of self–government relative to Canada's comprehensive land claims process.

Preface

This thesis is submitted for the Master's Degree in Political Science at the University of Alberta. This study was completed under the supervision of Dr. Isabel Altamirano–Jimenez.

This work is, to the best of my knowledge, original except where references are made.

To my mom, Beant Kaur Toor, for teaching me the power of education, no matter your circumstance. This is for you. And the ever–caring Diego, for all your support.

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Contents

List of Abbreviations

ABD	Aurukun Bauxite Developments Company
AKM	Avanti Kitsault Mining
BC	British Columbia
CYP	Cape York Peninsula
CYPHA	Cape York Peninsula Heritage Act
CYPLUS	Cape York Peninsula Land Use Strategy
DCT	Distinctive Cultural Test
ILUA	Indigenous Land Use Agreements
IPA	Indigenous Protected Areas
NFA	Nisga'a Final Agreement
NTRB	Native Title Representative Bodies
NTA	Native Title Act
PBC	Prescribed Body Corporation
RNTBC	Registered Native Title Bodies Corporate
SMP	State Mode(s) of Production
TWS	The Wilderness Society
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization

Introduction

A recent news article published by the Guardian entitled, *'It's the same story': How Australia and Canada are twinning on bad outcomes for Indigenous people*, referenced the "twinning" processes of English settler colonialism in Australia and Canada (Wahlquist, 2016). Wahlquist argues that Australia and Canada tell the "same story" of the Indigenous experience, referencing the violent and destructive assimilation policies that displace Indigenous peoples and their traditional territories. While the grievances are many, Indigenous peoples in Australia and Canada also share the similar stories of persistent and relentless efforts to reclaim territorial ownership. The "same story" referenced in the article is particularly telling of the mobility and transformations English settler colonial states must undergo to preserve its hegemony (Veracini 2011). Drawing inspiration from the similar systems of disavowal and dispossession, this thesis seeks to uncover the "same story" by exploring and comparatively analyzing the processes and tools used by Canada and Australia to undercut Indigenous territorial claims. This will tell us much about the mechanisms used by the settler state to disempower Indigenous peoples.

Reclaiming territory is at the heart of Indigenous grievances against the settler state. This is due to the idea that settling land is an "act that is inevitably premised on the perception of 'empty lands'" and "is based on the systemic disavowal of indigenous presences" (Veracini 2011, 4). From the onset of European arrival in Australia and Canada, Indigenous peoples have effortlessly fought for rights over their traditional lands and customs. Yet, one of the most contentious issues of settler state territoriality is the persistent challenge of Indigenous authority. Indigenous rights present a complex contradiction to contemporary settler states' occupation of previously inhabited lands. Indigenous ownership of land and water ways was "clearly defined

and mutually respected" and governed by a complex Indigenous legal structure (Molloy 2000, 113). Upon European arrival, Indigenous system of law were denied by European settlers because it differed from their legal system (Molloy 2000, 113). An astounding element of the settler state is its capacity to reconfigure rights, authority, ownership, and historical truths for its own benefit. As argued by Howitt (2009, 141) settler states react to Indigenous territorial claims by constructing "new social and political geographies" that benefit the state. In other words, the state, holds an important role in the development of environments that sustain mutually beneficial economic, political, and social relationships. The manner that the state reconfigures Indigenous-state relations for their benefit is precisely the focus of this thesis. I found the experiences of Indigenous peoples' territorial claims in Australia and Canada to be compelling examples of the settler states capacity to remold itself.

In Punjabi, we refer to Indigenous peoples of North America as *Thai-kay* the literal translation is "older brother of my father". As an endearing term this exemplifies the respectful relationship with our elder and as our relative, providing Punjabi peoples with a unique connection with Indigenous peoples of North America who were once referred to as Indian. As a Punjabi Canadian I grew up observing different intersections of racism and discrimination facing Indigenous peoples. It was not until I decided to uncover the many contours of settler colonialism that I understood the depth of the colonial legacy. With careful consideration, my interests rest on the methods used by the state to reduce, limit, and disavow Indigenous claims of self–government. Thus this thesis is guided by two questions: What consequences came out of the *Mabo* and *Calder* cases for Indigenous territorial claims in Australia and Canada? And how does the settler state reterritorialize and limit Indigenous rights to self–government?

Questions concerning Indigenous authority and settler colonialism has remained on the side-lines of the discipline of Political Science. In other words, the discipline has not taken "indigenous politics or settler colonialism seriously" as it has with other mainstream areas of study (Bruyneel 2012, 36). In addition, the state has been an understudied concept with the except of Skocpol's (1985) initiative to renew interest in the state (more will be said of this in Chapter 2). The limited attention given to the state, specifically the settler colonial state in mainstream Political Science (Bruyneel 2012, 36) inspired the aforementioned questions that guide this thesis. It is vital to understand the operation of European settler colonial states (Canada, Australia, New Zealand and the United States) that make up a large portion of the world's economy and political authority.

While I believe Political Science must ask new and "un-addressed" questions (Bruyneel 2012, 36) my questions are by no means unique and have been asked by researchers before me. This thesis, however, examines the settler colonial state in a new lens provided by Henri Lefebvre's concept of reterritorialization. Lefebvre's literature on reterritorialization and the role of the state provide this study with the tools to break down complex and convoluted state processes that seek to reproduce social and political hierarchy. States often engage in problematizing and then concocting technical solutions that often do not fulfill the promises outlined, but do modify social relations as a means of disguising their overarching authority (Li 2007, 6–7). Using Lefebvre's concept of reterritorialization, this thesis will map the process of the state in responding to challenges, problematizing Indigenous title, and concocting solutions that reconfigure the dimensions and hierarchy of the settler state.

The settler state, from the onset of consolidation, has relied upon the 'production of space' (Lefebvre 1964–1986/2009) to assert dominance. In this study I trace the reactions and responses to the *Mabo v Queensland 1992* and the *Calder v British Columbia 1973* decisions (hereby referred to as *Mabo* and *Calder*) that subsequently struck down the rationale of *terra nullius* (vacant lands) and, in a domino effect, instigated major legislative changes to Indigenous titles in Australia and Canada. While the literature has focused on the economic implications of Indigenous territorial claims (Altman 2001, Hale 2008a, Langton 2006, Jackson and Curry 2004, O'Fairchealaigh and Carbett 2005), the priority of this thesis is to understand how the state responds to the outcomes of the *Mabo* and *Calder* cases in Australia and Canada. I will go on to argue that contemporary manifestations of settler authority are strengthened by erasing and fragmenting elements of Indigenous self–government.

Beginning with the *Mabo* and *Calder* rulings, what becomes familiar is the state's use of policies and procedures that extinguish and fragment Indigenous self-government. Australia and Canada's Indigenous territorial claims are used to paint the scene and to analyze the power of the settler state to reterritorialize contested spaces and to reconstruct colonial geographies by removing Indigenous rights to self–government (Lefebvre 1964–1986/2009). One way the settler state accomplishes this is by reasserting a narrow understanding of Indigenous title that can be "returned" by the Crown (Howitt 2009, 144). Depending upon the issue at hand, whether it is a threat or opportunity, territorial structures are reorganized for the state to reorient responses (Li 2007, 7; Brenner 1999). This thesis will highlight the mechanisms of reterritorialization used by the state to enhance knowledge on the settler state's role in reconstructing territorial organization in order to mediate political and economic challenges (Brenner and Elden 2009a, 123). Using Australia and Canada as two case studies, this thesis will trace the efforts by the state to limit and

disavow Indigenous rights to self–government occurring as a result of contemporary land policies that are said to accommodate Indigenous self–government (Singh 2014).

1.2. Australia and Canada: Comparative Case Studies

This thesis relies upon two similar systems of settler colonial states, Australia and Canada, namely because of the significance of the *Mabo* and *Calder* rulings as each stirred a domino effect of legislation that reconfigured Indigenous title, territory, and rights to self–government. The comparison, thus, shows an uncanny resemblance of state activity to fix Indigenous title in a manner that does not interrupt the investment, industry, and political legitimacy in each region. The *Mabo* and *Calder* cases in Australia and Canada, respectively, arose out of the disputed logic of *terra nullius* (vacant lands) that was instituted in the 15th century international law of the Doctrine of Discovery (Reid 2010, 336). According to Russell (2005, 32–33), the Doctrine was commonly used throughout history, including Christian and papal law, European imperialism, through to contemporary domestic laws where elements of the Doctrine can be found in treaties and judicial decisions. Although Indigenous peoples in Australia and Canada developed and managed complex governing structures within their territories, the Doctrine of Discovery constructed Indigenous territories as unoccupied or unowned for the purposes of European settlement and sovereignty (Harris 2002) in what Russell (2005, 32) calls a "nice piece of legal magic".

Coming out of Roman Catholic law, the right of discovery was a legal precedent that allotted papal authority to colonize and civilize the inhabitants of the New World in a missionary effort to export the Christian faith (Russell 2005, 33). This expression of Roman Catholic law was critical to the development of international principles to "mediate rivalries among European states vying for sovereignty rights in the New World" (Reid 2010, 336). Residents of the New

World were found to have "no legal principles" related to ownership, sovereignty, and governance when European settlers arrived (Reid, 2010, 336). The Doctrine of Discovery thus finds its roots in a theological justification for a solution to a 15th century political problem.

Although much of its religious roots are forgotten, the Doctrine continues to be used as a racialized justification of European supremacy. In the age of European imperialism, the settlers relied upon the concept of *terra nullius* to disregard pre–established Indigenous systems of governance (Reid 2010, 340). With this, European settlers in Australia and Canada deemed the territories as empty spaces due to the fact that Indigenous peoples were not fulfilling European standards of property. Espousing John Locke's notion of property, settlers in both Australia and Canada believed that their occupation was based on a discovery of unowned land (Locke 1690; Harris 2002, 49). Ownership, under European assumptions, is "established through mixing one's labour with the land" (Russell 2005, 41). Therefore, Indigenous concepts of land and ownership did not fit into the "moral and economic rationale by which the governing class and intelligentsia justified Europeans taking possession of land" (Russell 2005, 85).

Unlike other settler colonial states (i.e., Canada, the USA, and New Zealand), when Europeans arrived in Australia, they never engaged in policies of treaty or friendship–making. Australian colonials viewed treaty making as a violation of the "Crown's exclusive right of pre–emption over native land" (Russell 2005, 84). During the first few years of contact, Australian settlers did not recognize Indigenous rights and territories. Eventually, non–recognition developed into the policy of Australia's settler state, until that is, the *Mabo* decision (Russell 2005). Through the racialized logic of discovery, settlers in Australia believed that their civilizing missions would greatly benefit the Indigenous peoples of the land. Australia has had a long line of legal disputes in which the state attempts to rationalize the "legal fiction" of *terra*

nullius (Russell 2005, 81). None of the disputes are comparable to the *Mabo* decision that struck down the Doctrine of Discovery. The importance of the *Mabo* case is inarguably *the* decision that initiated statewide action on Indigenous title.

Explorers in Canada, on the other hand, implemented the Royal Proclamation of 1763, which, as noted by Reid (2010, 336) indicates "underlying [Indigenous] title was assumed by the British Crown in 1763." In Canada, the Royal Proclamation of 1763 is not merely a colonial legacy; as noted by Reid (2010, 342), it is "the legal force that defines the limits of all land claims issues to this day." The significance of the Proclamation cannot be understated: settlers continue to uphold the Proclamation as a decree for appropriating Indigenous title. British colonials administered the Proclamation as a means to gain territory in the New World. Colonials believed that the Proclamation validated Crown ownership in return for protecting Indigenous right to occupy and use lands. However, Indigenous peoples believed they were entering into a mutually beneficial nation–to–nation relationship. They quickly realized how wrong they were (Blackburn 2007, 623). The treaties often resulted in harmful policies that sought the assimilation and containment of Indigenous peoples. More will be said on this in Chapter Three.

In *Calder,* the courts used the Proclamation to justify the Crown's authority to grant Indigenous rights and lands, despite never having extinguished Indigenous sovereignty. The general notion of the courts is that "[t]itle to land is, according to the Proclamation, an Aboriginal right that is inherently limited" (Reid 2010, 352). The Crown holds the final decision on what parameters of rights are to be recognized by the state. Although much of Canada, upon confederation, consolidated lands through treaty making, the province of British Columbia (BC) believed the Proclamation did not apply to the region, and for this reason, the province continued to uphold the rational of *terra nullius.* As such, until recently, like much of Australia, the

province did not recognize Indigenous title and did not settle questions regarding lands and rights. Australia and Canada are relevant case studies primarily because both states have passed legislation that would reconfigure Indigenous title after significant periods of non–negotiation. Although the rulings took place in different time periods, as *Mabo* concluded in 1992 and the *Calder* case was decided in 1973, the resulting land claim agreements were negotiated only two years apart from one another; with the Wik and Wik Way of Australia gaining title following their successful appeal in 1998 and Canada's Nisga'a agreement concluding in 2000.

Challenges to the normative structures in Australia and Canada were brought out by the aforementioned judicial decisions, laying the path for reconciliation for Indigenous peoples in both countries. The policy of non–recognition in Australia and Canada was similarly adopted through the Doctrine of Discovery and later with assimilation policies. By relying on the logic of *terra nullius,* Australia and Canada formed similar roots of political legitimacy (Russell 2005, 8). Both Australia and parts of Canada fit into a unique category of settler colonial states — the former colonies of imperial powers, whom never returned the lands to the original inhabitants of the territory and instead settlement was justified through the logic of *terra nullius* (Russell 2005, 101-102; Reid 2010, 342). That is until the territoriality of the settler state was challenged and the logic of occupation was questioned in the *Mabo* and *Calder* cases, marking noteworthy advancements to the Indigenous territorial claims in Australia and Canada— a thorough summary of each ruling will be provided in Chapters Three and Four.

Indigenous claims of self–government, with some exceptions, fit into two general camps of activism. One fixates on a top–down approach, where institutions, structures, and the state are pressured to accommodate culturally distinct groups (Singh 2014, 47). The other approach the analysis through a bottom–up process where activists resist cultural imperialism (Singh 2014,

48). While Singh (2014) refers to recognition as a cultural justice movement, this study will emphasize the state responses to territorial claims that continue to contain Indigenous self–government. It is important to note that while Canada provides Constitutional recognition Australia does not. Thus the term recognition is only referenced in the Canadian case study. That being said, the settler states of Australia and Canada make immense efforts to control spatiality, by obscuring "reality by eroding the difference between the real and the imagined, fact and fiction" and by "swallowing the past and re–creating its own fantastic reality" (Soja 2014, 1). The construction of spatiality, specifically the spaces of Indigenous peoples, is integral to the legitimacy of the settler state. The settler state sought to 'manage' Indigenous peoples with a variety of policies, including the reserve system that contained Indigenous peoples, assimilation policies that sought to align Indigenous peoples with the dominant settler society, and more recently, to reconfigure Indigenous territorial claims in order to limit the possibility of self–government.

Henri Lefebvre's (1964–1986/2009) concept of state modes of production through homogenization and fragmentation is used in conjunction with settler colonialism to assess the settler state's larger incentive to reterritorialize Indigenous lands to stabilize the geography for the purposes of economic investment and political authority. There were many moments in Australia and Canada where Indigenous resistance incited activism and vulnerability. For instance, Australia's Yirrkala 'bark petition' in 1963 was a petition by the Yolngu people who sought to "protect their land from development of bauxite mine" (Russell 2005, 156). Although the Yolngu people failed in their efforts, it sparked a wave of Indigenous activism that included the demand for equal pay, Northern Territory land claim and demanding more recognition (Russell 2005, 156). The Oka crisis in Canada was also a unique case that followed the Meech

Lake accord and the implementation of Constitutional protection under Section 35 (1). After the Meech Lake accord the government of Canada recognized Indigenous rights but failed to uphold such rights and in a "near decade-long escalation of Native frustration with the colonial state" this frustration resulted in aggressive land-based action (Coulthard 2015, 116). While Indigenous peoples of both Australia and Canada have resisted settler colonial authority with events like the Yirrkala 'bark petition' in Australia (Russell 2005, 156) and Canada's Oka crisis (Coulthard 2015, 116-117), among many others, the 'watershed' moment in both states was *Mabo* and *Calder*.

As a result of legislating colonial geographies, Australia's Wik and Wik Way peoples and Canada's Nisga'a Nation were unable to carve out meaningful self–government. The two examples of land recognition are used in this thesis to showcase the policies used by Australia and Canada to limit self–government. As a non–Indigenous writer I will refrain from the already rich literature on defining self–government, nationhood, tribal sovereignty and self–determination. Moreover, I am careful not to conflate the concepts of self–government and self–determination. Self–determination, under United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the idea that Indigenous peoples are "equally entitled to control their own destinies" (Anaya 2000, 75). Indigenous peoples in this regard are members of a collective or nationhood that identify as an Indigenous nation and who share common norms and values (Cornell 2015; Dalton 2006).

The manner through which Indigenous peoples control their destinies, can be adopted in multiple manners depending upon the norms and values of the Indigenous community. Self–determination has multiple meanings, wherein Indigenous communities define the rights and authority necessary to build a strong and seemingly autonomous self–government. In other

words, self–government is the actual "*doing"* of the rights and authority of self–determination (Cornell 2015, 2). Self–government is the "embodiment of the right to self–determination" (Dalton 2006, 12). This embodiment is dependent upon the type of self–government adopted. Wherein "decision making, law making capabilities, varying degrees of autonomy including a relation to a land base or territory" can vary depending upon the rights needed to "ensure that Indigenous peoples live according to their own norms and values" (Dalton 2006, 12).

To unpack this definition for the purposes of my study, I will address the tools provided to the Wik and Wik Way of Australia and the Nisga'a Nation of Canada to engage in cooperative decision making and govern over the development of their lands and resources. Given the parameters of this study I cannot appropriately address the capacity of rights provided to Indigenous communities for the manage cultural heritage, traditional knowledge, social services. For this reason, the following case studies will expand on a two key characteristics of self–government that is defined by Anaya (2000, 151): autonomy and participation in institutional decision making. These two areas of self–government are identified by me as critical measures of a cooperative relationship within a federalist structure. Although Indigenous peoples of Australia and Canada cannot be entirely autonomous, this study will explore the rights provided to the Wik and Nisga'a Nations to maintain and develop their traditional lands, resources, and laws. Examples of this, which will be expanded upon in Chapters Three and Four, include the right to title and resources and the autonomy to exercise such rights over title and resources by manufacturing for commercial and community needs.

Inclusion in institutional decision making processes will be analyzed by critiquing the models of government that were developed in the aftermath of the *Mabo* and *Calder.* In Australia this includes the Native Title Representative Bodies (Prescribed Body Corporation (PBC) and

Registered Native Title Bodies Corporation (RNTBC)) and in Canada my main focus will be the Nisga'a Final Agreement (NFA). Australia's Native Title Act (NTA) and Canada's comprehensive land claims policy initiated two stark models of land title. The NTA in Australia developed a multi–tenure land policy, which produced numerous styles of Indigenous title ranging from land use agreements (with corporations and governments) to conservation cites. In comparison, Canada implemented a structure of Indigenous title that would produce a calculated model of recognition. The NFA is arguably the go–to model of land recognition in Canada, one that set the example for all future negotiations. In both case studies, I will show the manner that Australia and Canada took to disavow Indigenous self–government.

There are of course limitations to the case study method, in that the case studies cannot provide an inclusive understanding of all Indigenous recognition cases. Not all Indigenous peoples' interactions with the settler state are the same as the two communities mentioned in this thesis. That being said, the two examples of land claims in Australia and Canada are presented here due to the fact that each showcases the many contours of the ever changing settler colonial state, which are used to present Indigenous title in opposition to economic development and to limit Indigenous rights to self–governance. By critiquing Australia, I am able to understand the convoluted land claims process under the NTA where overlapping pastoral claims further limit Indigenous title. In Canada, the Nisga'a Nation exemplifies the ideal model of land rights. In other words, both case studies provide this study with the layers and complexities that many Indigenous communities face. Though not generalizable by any means, these two case studies provide enough context for rich analysis.

Although there are vital differences in the deployment of settler colonial policies in Australia and Canada, the two case studies will outline the means that each settler state used to

re–create colonial geographies. State reterritorialization naturalizes colonial spaces by reconfiguring the unequal power relations between Indigenous peoples, the exogenous others, and the dominant settler colonizers (Veracini 2011a, 2). This triangular relationship blurs the structures of settler domination and seeks to homogenize social relations under a common belief that Indigenous self–governance presents a challenge to economic, political, and social stability. The settler mode of reproduction maintains its hold on Indigenous territories through careful social engineering, whereby social relationships of non–Indigenous peoples become empowered while Indigenous peoples are disempowered. In Chapters Three and Four, I will explain how the state deploys the rational of ecological management and business interests to contain and oversee Indigenous mobility, rights to resources, and territory. It is, therefore, important to study Indigenous territorial claims in terms of its spatial consequences, specifically, the reterritorialization of Indigenous rights under modern land claims in Australia and Canada.

This thesis will use Brenner's (1999) definition of reterritorialization to describe the mechanisms of the state that undermine Indigenous rights of self–government in Australia and Canada. Brenner defines reterritorialization as the reconfiguration of "forms of territorial organization" (1999, 432) that enhances state authority for political and economic ends (1998, 431–432). According to Brenner (1999, 433), theories of the state rarely unpack the spatial implications of the state and, therefore, end up with a limited understanding of its parameters. The construction of a centralized notion of the state as a single unit of analysis, limits the understanding of the 'production of space' (Lefebvre 1964–1986/2009), which allots the state power to shape the political spaces of engagement (Robins 2010, 258–261; Hakli 2013, 343). In accordance with Brenner (1998; 1999) and Lefebvre (1964–1986/2009), I believe reterritorialization is the manner through which settler states can reconstruct political and

economic settings to limit Indigenous rights of self–government — more will be said on this in the next chapter.

I will trace state responses following the *Mabo* and *Calder* cases where the high court's decision, in Australia and Canada, struck down the logic of *terra nullius.* The rulings were also assessed for specifications on what Indigenous title and rights would be accommodated by the Crown. However, both court cases gave few inclinations of the rights of Indigenous peoples, the courts only decided that Indigenous peoples could negotiate title. This led me to two major policies, the NTA of Australia and the comprehensive land claims process in Canada. To provide real world examples of such policies in action, I turn to the Wik and Wik Way of the Aurukun Shire in Australia and the Nisga'a Nation in Canada. The cases of Australia and Canada serve as examples of settler states that have undergone intense transformations that seek to limit self–government following the aforementioned court decisions.

1.3. Document Analysis

Using a document analysis approach and a comparative case study, this thesis seeks to gather insight into the mechanisms of the state to recreate colonial geographies through reterritorialization and dispossession. Although this study will compare two similar models of settler states, it will do so beginning with the evaluation of the *Calder* and *Mabo* cases. Nonetheless, due to the nature of this research, there are qualitative limitations to this study. Simply put, the following case studies cannot be made as a generalized experience of all Indigenous peoples. Indigenous peoples do not fit one mold, nor do their interests and rights. As a non–Indigenous writer, I acknowledge that there may be problems in the way that my research attempts to understand the diversity of Indigenous perspectives. As Gibson (1999, 52) notes,

> Much valid criticism has been directed towards the tendencies of politicians and academics to homogenise, for the purposes of argument, indigenous peoples' diverse opinions and aspirations.

To avoid reductive notions of Indigenous struggles, this study will conduct a thorough document analysis of the aforementioned legal decisions and the state`s responses to Indigenous territorial claims.

Document analysis is the intensive examination of documents, both independently and in relation to each other, to elicit a thorough understanding of a phenomenon, institution, or topic (Bowen 2009). In the Chapters Three and Four, document analysis will be used in correlation with comparative case study research methods to provide a bridge between documentation and the real world manifestations. Because this thesis seeks to understand the responses of the state, a majority of the analysis will focus on consequences of the *Mabo* and *Calder* cases. To gather insight into the reterritorialization process evident in each settler state, the documents gathered will be assessed and data will be organized through two overarching themes: homogenization by manifesting (un)certainty and fragmenting of Indigenous rights to self–government through policies of misrecognition.

The conclusion that Indigenous rights to self–government are reduced by the state, is drawn after carefully assessing land claim legislations, legal decisions, legislative acts, and regional reports. The range of documents analyzed were intended to reduce "biases that can exist in a single study" (Bowen 2009, 28). The combination of document analysis and a comparative case study approach will link the documents to a historical and legal movement of settler statehood in two similar case studies.

In regards to the NFA, I read through the significant Chapters on land title and resource management to critique the autonomy and decision making capacity provided to the Nisga'a Nation (Chapters 2–5, 8–11, 21 and the Appendix). In addition, I also assessed the *Constitutional*

Act, 1982, c 11., and public documents published by Avanti Kitsault Mine Limited. On the other hand, it was more challenging to find agreements in Australia's Cape York Peninsula (CYP). This is due to the fact that Australian Indigenous peoples almost always have a confidentiality clause that limits public access to agreements as, in their view, the knowledge within the agreements can be used against their communities (O'Faircheallaigh and Carbett, 2005). For this reason, I used various legislative acts, government documents, reports by not–for–profit organizations, and secondary sources to complete my data. The following documents were used to paint a full picture of the Wik and Wik Way's experiences: Cape York Peninsula Heritage Act (CYPHA) 2007, Wild Rivers Act 2005, Forestry Act 1959, Aurukun Shire Planning Scheme (version 3), Department of Natural Resources and Mines report on Leasing Aboriginal Deeds of Grant in Trust Land 2013, and Aurukin Shire Annual Report 2013–14.

Upon reading the documents, I took note of the methods used by the state to disempower Indigenous rights to self–government. This included the use of Ministerial power to override Indigenous authority, conservation goals that subsided Indigenous interests, and market projection that did not include Indigenous involvement. In regards to economic development, I gathered much insight on primary sources and reports (governmental and non–governmental) that found that Indigenous resources were either depleted or unmarketable — not to mention the methods of rejecting Indigenous development strategies.

Document analysis places significant emphasis on interpretation that can result in subjective analysis (Bowen 2009; Brenner, Elden, and Moore 2009b). This presents difficulties to incorporate rigid or hard scientific approaches to study state responses to Indigenous territorial claims. While many can argue that this can pose a problem, the interpretative approach allows a nuanced analysis that is necessary to understand the processes present in each locality (Brenner

2009b). Given the limitations of this research, much of my conclusions are drawn after analyzing the aforementioned primary sources which can be interpreted in a multitude of ways. It goes without saying that such an approach does contain some weaknesses, including the overall need to generalize based on two very particular case studies, but a comparative approach is useful when linking common themes of dispossession, fragmentation, and extinguishment.

1.4. Outline

Analysis of state responses to *Mabo* and *Calder* first requires a deeper understanding of 'the state'. Chapter Two will trace the literature on 'the state' in Political Science and to make the argument that Lefebvre's (1964–1986/2009) concepts related to reterritorialization — fragmentation and homogenization — are useful to map the settler state's responses. In short, my Chapter Two will make the case that Lefebvre's concept of reterritorialization is a useful lens to understand the scope of the state and the transformative capacity of the state to shift its "territorial organization" to respond to multiple crises. In Chapters Three and Four, I will trace the responses of the settler state following the *Mabo* and *Calder* rulings that challenged the longstanding notion of *terra nullius* (vacant lands). Chapters Three and Four will highlight my case studies and are organized in general themes to assist in comparison and analysis. These themes are organized as follows: first, I will provide historical context and outline the impact of European arrival; second, I will review and briefly summarize the background and rulings of the *Mabo* and *Calder* cases. At the end of Chapters Three and Four I will look at state reterritorialization, by examining social factions and legislation. In recent years, both settler states have initiated talks with Indigenous communities to transfer title. The however, result is ongoing reproduction of colonial geography that seeks to limit Indigenous rights of self–

government. The goal of the settler state is to manifest business or market certainty, all the while dispossessing Indigenous peoples' lands and access to resources.

In Chapter Three I examine the *Mabo* case and its impact in the development of the NTA with a regional focus on the Cape York Peninsula's (CYP) multi–tenure land structure. This Chapter will review the panic–filled rhetoric that engulfed Australia in the aftermath of the *Mabo* case, specifically as it applied to the economic and resource development on Indigenous territory. By assessing the Wik and Wik Way title in CYP, I find that Indigenous rights to self–government are much more limited in comparison to Canada. Under the NTA, for instance, the Australian state secures access to mineral resources and retains a hold of governing structures upon Indigenous territories. Australia develops a multi–tenure land model where "every instance of native title is different" (Lochead 2004, 19). This model, sought to accommodate all 'stakeholders' of the land including the overlapping pastoral leases on Indigenous traditional lands. Yet, in each variation of Indigenous land tenure, the settler state retained ownership of resources and governance by disassociating Indigenous title with sovereignty and claims to country. Non–Indigenous claims and access to resources, however, were largely unaffected.

Canada, on the other hand, has established the comprehensive land claims process that in theory develops a self–government agreement between the settler state and Indigenous nation(s). As will be noted in Chapter Four, the self–governing agreement structure within Canada's comprehensive claims process has in some regards provided tools for self–government while the settler state retains much of the authority over Indigenous territories and resources. To assess Canada's reaction, I will critique the crisis management rhetoric espoused by the state, specifically the multi–question referendum following comprehensive land claims in Canada. With the help of a biased referendum, Canada has employed a reluctant land claims process that

calculates territorial and resource allocation based on geopolitical importance and population size of an Indigenous community.

Although some Indigenous communities have received some benefits from territorial restructuring, this has not been the case for Australia's Wik and Wik Way peoples and to a lesser degree, Canada's Nisga'a Nation. In Australia and Canada, maintaining power relations is intimately tied to the malleability of economic and political spaces. In each case, however, the settler regime wields its influence over resources, territory, and governance. The result is that Indigenous peoples hold very few rights to (re)negotiate development, even when policies of reterritorialization are detrimental to Indigenous livelihoods and sacred spaces. In other words, Indigenous peoples have few capacities to overcome "deeply rooted structural disadvantages" (Leitner and Sheppard 2009, 231). This relationship between the settler state and Indigenous communities is characteristically uneven and entrenched within a colonial structure of dispossession.

Moreover, I will note that in each case the state's response produces immense contradictions of preservation and extraction. This is due to the fact that accommodation is a tricky procedure where Indigenous communities cannot steer to far away from their status as 'keepers of the land' without compromising their right to voice concerns or initiate development projects that may threaten their relationship with their land and cultural practices. The tension, however, is critical for Australia and Canada as states retains the authority to veto projects that may benefit Indigenous communities and threaten investments. This dilemma will be elaborated on in Chapters Three and Four.

The concluding Chapter will summarize with discussion of the mechanisms used by the settler state. It will argue that the settler state utilizes (un)certainty by emphasizing worries and

anxieties over Indigenous recognition. Territorial claims and rights–based recognition are viewed as a threat to livelihood, reinforcing the racialized notion of Indigenous peoples as primitive or unproductive members of society. Indigenous self–government is constructed to invite contested spatial struggles, for its challenges to the settler state and the state's economic goals. The settler state has the final say as to which rights are worthy of protection and which are extinguished, modified or fragmented (Eisenberg 2013; Borrows 2001).

Theoretical Framework

The following sections will highlight the importance of deconstructing the state as a concept that must remain at the center of Political Science and that can be studied using spatial theories. To begin, it is important to review common misconceptions of the state that limit our understanding of the state's role in social and economic relations. Lefebvre (1964–1986/2009) and Brenner (1999; 2009) break the normative assumptions of the state that are central to International Political Economy, Political Science, and general theories of the state. When assessing Australia and Canada, it is useful to re–conceptualize the relationship between Indigenous nations' and the settler state in spatial terms. As I will show, the work of critical geographers and geographic political economists have done much to demonstrate the spatial dimensions of state and society. In this thesis Indigenous territorial claims are conceptualized as a spatial struggle that is a result of the state's active removal of Indigenous rights to self–government through policies of reterritorialization.

In what Lefebvre (1964–1986/2009, 186–187) refers to as the 'production of space', the state holds enormous power to reconfigure territorial organizations for their benefit. Space is constructed, according to Lefebvre, through the political, social, and economic forces that seek to regularize and commodify space. Lefebvre's discourse on the production of space, particularly how the state reterritorializes (through homogenization and fragmentation) are useful theoretical concepts to assess the dimension of the state. I will begin by briefly outlining the literature of 'the state' in Political Science before presenting my theoretical focus on Lefebvre's concepts: homogenization and fragmentation as elements of the state modes of production to that are used for "economic or strategic [political] benefit" (Howitt 2003, 139).

2.1. Theories of the State

The state has traditionally been confined to the Weberian notion of the state, as that which holds a monopoly over the legitimate use of physical force over a fixed territory (Weber 1958, 78). The state, as a structure, is assumed to be unchanging and acts as a container of social, political, economic, and military activities (Agnew 1994). Many have disputed Weber's definition of the state for inadequately conceptualizing the state (i.e., Evans, Rueschemeyer, Skocpol 1985; Mitchell 1991), a debate which will not be reviewed here. Rather, Weber's state definition becomes a starting point to discuss the implications of reductionist concepts of the state and institutions because it lacks a clear explanation of how modern state capacities are built and sustained (Evans et al., 1985, 59). Moreover, Weber's definition of the state lacks a conceptual definition of "the actual contours" of the state (Mitchell 1991, 82).

The intellectual project to uncover the state was essentially abandoned by Almond (1988), who set a precedent with his active removal of the term, 'the state', in his literature. Almond (1988, 855) argued the state was an undefinable concept and should be rejected altogether and that attention should be given to the *political systems* of government. Almond's influence was vast. Shortly after, theorizing about the state was discussed less frequently (Mitchell 1991). The state was reconsidered in Political Science in the 1980s by Evans, Rueschemeyer, and Skocpol (1985), with the *Bringing the State Back In* projects, in which the debate about the distinctions and overlaps of the state and society brought the term, 'the state', back into the forefront of academic literature.

Evans, Rueschemeyer, and Skocpol (1985, 28) lead a movement to propose an intellectual project to define the state as a "central place in explanations of social change and politics." Skocpol (Evans et al., 1985) makes immense effort to disprove Marxian and neo–

Marxian state definitions. Marxist and neo–Marxists argue that the state is an apparatus of the capital modes of production. Skocpol (Evans et al., 1985, 5) takes issue with Marxist theory of the state because "autonomous state actions are thus ruled out by definitional fiat" and generalizations are made "in extremely abstract ways–about features or functions shared by *all* states." Although the overlap of the state and society remains ever–changing and malleable, Skocpol's project to bring analytic attention to the state was an important one. However, Skocpol's solutions are as problematic as the state theories that she critiques. Skocpol (Evans et al., 1985) defines the state as autonomous and as a container of social and economic activities. Modern states cannot be understood by merely its territorial form, nor as Almond would have it, as a container of *political systems*.

The argument that the state can economic and social activities, is simplistic. Agnew (1994, 76–77) challenges the dominant assumption that the state is a static and single unit of sovereign space where analysis relies on separating the internal and external workings of state and societies, and where states are viewed "as existing prior to and as a container of society". Such assumptions "dehistoricize and decontextualize process of state formation and disintegration" (Agnew 1994, 59). Much of Agnew's (1994; 2005) work focuses on desegregating state space and economic development, as a far reaching and transitional economic project. According to Agnew (1994, 72) it is important to analyze the social and political constructions of the state through a spatial analysis. As such, I suggest utilizing Lefebvre (1964–1986/2009), and Brenner's (1999; 2009) more nuanced and fluid understanding of the state, where the state holds the capacity to reterritorialize for the purposes of governance, intervention, and to manifest stable geographies. Moreover, it is important to distinguish this thesis deals with structural analysis of the state as oppose to Agnew's (1994) territorial focus.

In recent times, the social sciences have undergone a "spatial revolution" (Keil and Mahon 2009, 4) that engages in discussions about state space as social constructions. Given the rigid understanding of the state in terms of the Westphalian model of the nation–state (Keil and Mahon 2009, 3), the renewed attention to spatiality is a welcomed change. The taken–for–granted 'metaphors' (Smith and Katz 1993) of the state prior to the spatial turn, had not considered the political production of space. Rather, space was considered to be 'where' social activities took place (Smith and Katz 1993, 73). According to Massey (1992), space is often mistaken as a physical container. The following section will highlight Lefebvre's explanation of space as a social and political construct where states can reterritorialize territorial organizations to react to multiple crises (Brenner 1999, 432; Keil and Mahon 2009, 3).

2.2. Space: Fragmentation and Homogenization

Space as a neutral place has long been contested by geographers, sociologists, and political scientists. However, space as a tool for political analysis is less frequently considered. Lefebvre (1964–1986/2009) argues that space in its most natural form is political because it is always manipulated for political and economic ends. According to Lefebvre (1964–1986/2009, 173):

> Within a certain ideology, nature is today still understood as a simple matter of knowledge and as an object of technology, as an easily understood concept and as a technical problem. It is dominated and mastered. To the extent that it is dominated and mastered, it disappears. Now, suddenly, it is realized that in the process of being mastered, nature was ravaged and threatened with annihilation, which in turn threatened the human realm which, although still bound by nature, caused its annihilation. From this came the necessity of a strategy of intervention. Nature becomes politicized.

Borders, cities, and land development projects, are geographically organized spaces that restructure sociopolitical hierarchies and reorder networks (Brenner 1999, 434). According to Lefebvre (1964–1986/2009, 274), it is the duty of the researcher to expose the social, economic,

or political policies that assist in reterritorialization. Lefebvre (1964–1986/2009) argues state space is manipulated by hegemonic structures for political and economic ends that create large disparities in spatial relationships. These political and economic objectives by the state seek to secure a supremacy over space (Lefebvre 1964–1986/2009). This "permanent intervention" shapes state space and facilitates the production of space (Lefebvre 1964–1986/2009, 192). According to Lefebvre state space encompasses spaces where everyday life is experienced, where rapid institutionalization occurs and where abstractions are used by the state to weave through crises (Brenner 1997, 141-142). Said another way, the state's investments in spatial (re)organization is intended to produce viable economic, political, and social goals that assist in the overall project of states' to expand its power.

The breadth of Lefebvre's discussion on production of state space came with his explanation of State Modes of Production (SMP), where Lefebvre borrows Marx's notion of the capitalist mode of production. Although Lefebvre was influenced by Marxist theory, he did not adhere to classic Marxism (Brenner *et al.* 2009b, 9). Lefebvre disagreed with Marx and Marxist conclusions on space as the sum of all economies and marketplaces. He believed Marxism disregarded the transformability of the state and capitalism (Lefebvre 1964–1986/2009). Lefebvre cautions readers that "the economic is not independent of the political, it is neither cause nor reason; it depends on it" (Elden 2004, 217). Thus, economic structures did not come before or after the production of the state; rather, the state was born out of the consequences of political and social forces, giving rise to an unequal economic structure (Elden 2004, 217). To ensure market predictability, the state holds an important role in producing and supporting the development of geopolitical regions by reconfiguring territorial organization (Brenner 1999).

According to Lefebvre (1964–1986/2009; Brenner 1997), a productive undertaking of state analysis can only be accomplished through a careful reading of the modes of producing state authority and reaffirming such power relations to maintain sovereign structures. Such reframing occurs when the state reorganizes socio–spatial configurations (Brenner 2009, 38). Spatial realization can provoke social movements that seek to rearrange "how various spatialities are co–implicated with one another and how the social and the spatial co–evolve in contentious politics" (Leithner and Sheppard 2009, 232). Social space, in this regard, can predetermine political authority, networks of influence, and access to resources.

To avoid the complete collapse of structures that maintain state authority, Lefebvre argues that states engage in the production of space, by rearranging and reconfiguring spatial relationships. Reterritorialization, is used to explain the rapid institutionalization and rationalization of territorial accumulation (Brenner 1997, 141–142; Brenner 1999, 432). Lefebvre's study of reterritorialization demonstrates the spatial transformations that are apparent in the state's use of homogenization, fragmentation, and hierarchization (Brenner 1997, 142; Lefebvre 1964–1986/2009, 210–220). The concept of reterritorialization is focused on manifesting social cohesion, or homogenization, in periods of rapid political change (Brenner 1997, 142). The outcome is the creation of abstractions of space, where contested spaces are refurbished to reduce differences that allow states new avenues of intervention (Brenner *et al.* 2009b). The mechanism of reterritorialization listed above, according to Lefebvre produce inherently violent spaces due to the contradictions and erosion of difference that "can only be conceived in relation to space" (Brenner *et al.* 2009b, 204).

To study the production of space I will use Lefebvre's two concepts of homogenization and fragmentation to understand the settler state's reterritorialization following *Mabo* and *Calder*. First, the state sought to eliminate differences using homogenizing techniques. In order to enact policies that seek to weaken Indigenous rights of self–government, the state relied on the sentiment of conservationists, industrialists, and general public hesitation, to problematize Indigenous recognition as a preemptive measure before introducing harmful policies of reterritorialization. The implementation of such adverse programs was made possible through intense homogenizing efforts by the settler state. Efforts include the reduction of Indigenous peoples as mere stakeholders in negotiations, efforts to motivate tensions against Indigenous title holders, and favoring networks that uphold the settler colonial hierarchy. The land claims process was entrenched within a system of settler dominance that ensured the production of colonial geographies by fragmenting and homogenizing Indigenous territorial claims.

To read through the homogenizing for forces of the state, this thesis will focus primarily on the state's attempts to socially engineer responses to Indigenous land title. This is done in starkly different ways in Australia and Canada. Canada (specifically the province of British Columbia) engaged in a multi–question referendum and Australia takes part in hysteria–producing campaigns. Efforts by Australia and Canada to reduce differences and homogenize the landscape was intended to ensure investor certainty and transfer few managerial rights to Indigenous peoples seeking self-government (i.e., Short 2007; Rossiter and Wood 2005; Elections BC 2002). This conclusion, however, is not new, as Short (2007) and Rossiter and Wood (2005) have already noted, negative depictions of Indigenous rights shape the platform on which the state could implement critical policies that limit Indigenous authority and to tighten their hold over Indigenous territories.

The second theme that is important to answer the research questions is to assess the documents to determine how and in what manner Indigenous rights to self–government are fragmented. That is, to assess the primary resources — i.e., the agreements, legislations, acts, and reports —for evidence that the state has weakened Indigenous rights to self–government. Evidence of fragmentation of rights that were most relevant to this thesis was the manner the state appropriated title through extinguishment, rights to resources, and the degree to which Indigenous peoples can oversee the management of their lands and resources. In other words, I assessed the documents to understand how Indigenous peoples can use their lands and resources to make sense of the interaction between Indigenous peoples and the settler state on a case–to–case basis.

Fragmentation of Indigenous territory and self–government, in this regard, is a tool of state powers to disassociate Indigenous claims to sovereignty, rights to territory and resources, and self–government. It is important to note that Indigenous law and governance operate in a holistic nature, where law, cosmos, and family are deeply interconnected. To break apart one is to break apart the complex governing structure and ties to Indigenous identity (Borrows 1997/98, 46). Thus it is extremely harmful to ask Indigenous societies to decontextualize their laws and structures of governance to fit into a foreign structure, undermining and fragmenting their authority. Through the assessment of the two overarching strategies of accommodation, Canada's comprehensive land claims process and Australia's NTA, it becomes apparent that the "design of programs" is a "deliberate measure to contain" challenges to the state (Li 2007, 7). In other words, the reterritorialization policies are dedicated to the destruction of Indigenous rights to of self–government.

Fragmentation, in this study, refers to the decontextualization of Indigenous rights and identities, and the overt desegregation of Indigenous of self–government. Fragmentation is often referred to in terms of the judicial consequences of a rights–based method. The rights–based method "does not reorient our conceptualization of power outside of a law, right and sovereignty paradigm to think about Indigenous sovereignty and power in different ways" (Moreton–Robinson 2006, 385). This thesis reflects upon the power of the state to reconfigure contested territorial claims to limit Indigenous self–government. To engage in a holistic understanding of the state, this study assesses the judiciary as a tool of the state. Critical to my findings are the modes used by the state to reconstruct settler hierarchy. In other words, fragmentation is the means by which homogenization, and ultimately, reterritorialization is programmed. The state relies on fragmentation to disorient challenges to territoriality and authority. The outcome of both homogenization and fragmentation, as this thesis will show, is to increase (un)certainty for settler legitimacy. (Un)certainty is purposefully used as a term to express the benefits of chaotic or contradictory environments in the program of fragmenting Indigenous rights to self–government. For example, (un)certainty is used by the state to halt Indigenous led development projects that may undermine the settler state's capacity to manage resource extraction and investment. (Un)certainty, can be produced or used to assist in the overall project of reterritorializing state authority.

At first blush, the state's accommodation of Indigenous rights through common law are seemingly innocent, almost procedural. Through closer analysis, it becomes clear that the composition of the settler state remains unimpeded after the *Mabo* and *Calder* cases. Following the rulings, Australia and Canada could have taken two general paths: to allow the courts to determine which rights would be recognized, or to preemptively enact legislation that would

limit Indigenous rights of self–government. Both took the latter approach, which resulted in the enactment of the Native Title Act (NTA) in Australia and the comprehensive land claims process in Canada. The events that followed involved intensive homogenizing tactics to regularize Indigenous spaces, by de–politicizing and by disaggregating Indigenous claims and authority. That being said, Lefebvre's spatial analysis cannot be applied to all social research because not all political issues are spatial struggles. Also, spatial analysis cannot be used independently of class, gender, racial, or Indigenous perspectives. As noted in the introduction, it is vital to incorporate Lefebvre's concepts with the literature on settler colonialism and modern processes of reterritorialization.

Australia's Multi–Tenure Land Model

3.1. Introduction

Australia's Indigenous societies have only recently gained pathways to territorial claims with the advances of the *Mabo* case. The court decision to strike down *terra nullius* (vacant lands) created a domino effect among the other branches of government which then led to legislation to recognize Indigenous territories. The *Mabo* case was significant for challenging settler legitimacy and the structures which uphold settler colonialism. And while the *Mabo* case reaffirms settler authority, in many ways it is a critical step forward for Indigenous peoples to reclaim historical truths and spatial justice.

At first glance, the restructuring of territory might be read as a positive impact for Indigenous owners (Altman 2011). To solidify power and economic interests, however, the government of Australia has responded by reconfiguring resource and territorial ownership for its benefit. Ultimately contributing to the dispossession of Indigenous rights of self–government. Appropriation of spaces attempts to preserve structural arrangements which are beneficial to the settler state and which contains Indigenous peoples to a dominant structure that continues to reinforce the logic of *terra nullius* (Davies 2003, 37–38). Indigenous territorial claims are overwhelmingly spatial challenges that seek to rearrange Indigenous peoples' material, economic and political positions. Spatial movements, according to Soja (2010), deal with the manifestations of social struggles. The reclamation of territory is an important part of Indigenous self–government, which can lead to securing access to resources, equalizing decision making authority, and the recognition of Indigenous rights (Davies 2003, 37). Despite the successful appeal in *Mabo*, Indigenous peoples have not seen a major shift from the institutions of *terra nullius* (Davies 2003, 38) and other settler colonial policies.

The objective of this Chapter is to expose the methods of colonial reproduction entrenched within Australia's reterritorialization. The settler state consolidated its territory and expanded its hierarchy by manifesting an image of empty spaces and by implementing policies that would ensure territorial and resource ownership to the Crown, extinguishing Indigenous rights of ownership (Howitt 2009, 145). As noted by Howitt (2009, 145) empty spaces were categorically used to describe colonial "heroic narratives of possession, settlement, and development". In addition, the settler state institutes policies of misrecognition and fragmentation to limit Indigenous rights of self–government. Since the *Mabo* decision that exposed and challenged the logic of settler territory, Australia has responded by aligning and manifesting social causes that to paint Indigenous ownership as that which will hinder economic and individual prosperity. Through resource management and extinguishment of Indigenous rights, the settler state realigns colonial geographies, differing little from 19th century colonial land policies (Rossiter 2004, 153). The state micromanages its responses to Indigenous territorial claims to develop a structure where Indigenous peoples are dominated and dependent of the state. This is accomplished by limiting Indigenous rights to self–government through homogenization and fragmentation to ensure geographical stability, access to resources, and investment in the economy is uninterrupted (Brenner 1997, 144; Wilson 2013, 368; Lefebvre 1964–1986/2009, 187–188).

According to Lefebvre (1964–1986/2009, 197), the engendered and disavowed histories of the repressed become an essential element to the process of homogenization that eventually leads to fragmentation of Indigenous rights. This case study will begin in a time of tension in Australia when Indigenous territorial claims attempts to rearrange the historic relationship. The *Mabo* decision is regarded as a turning point for the Indigenous rights, spearheading a national

incentive to consolidate Indigenous titles and rights (Tehan 1998; Hsieh 2011; O'Connor 1992). Australia's response is operated through two key methods of reterritorialization: homogenizing and fragmenting. In this regard, this Chapter will lay out first the homogenizing forces; these are found within the state definitions of recognition, development, and Indigenous authority, specifically, the localized tactics deployed to entice opposition to Indigenous territorial claims and present solutions which uphold settler dominance (Short 2007). Wherein,

> the homogenizing forces of economic globalization and strong nation-states, it is becoming increasingly clear that the affluence produced by international capitalism comes at the expense of both the ecosystem and cultural vitality of small peoples whose ways of life depend on local environments (Short 2007, 858).

The key to homogeneity is the recognition of Indigenous rights which do not disrupt the settler modes of reproduction. To maintain a level of certainty, the state adopts a narrow understanding of Indigenous recognition by granting usufruct rights — that does not impede upon settler authority and development.

Arguably, fragmenting rights and territorial claims contributes to the ongoing assertion of colonial spaces which haunts Indigenous peoples. Fragmentation, as a mechanism of control, relies on creating social unrest where the state's application of further dispossessing Indigenous peoples is viewed as necessary for economic development. 'Unproductive' Indigenous spaces are commodified through ecological management and commercial development to reconstruct the space into investor friendly sites. In the case of Australia, what is noted below is the act of pinning pastoral holders and mining companies against Indigenous peoples (Short 2008, 70). In the panic of the *Mabo* ruling, Australia sought to secure access for developers (namely forestry, mining, and pastoralists) while redeveloping Indigenous territories into national parks and protected zones and limiting Indigenous communities' access to marketable resources, and tools to safeguard sacred sites (Altman 2011, 4).

This Chapter will begin with a brief summary of settler colonial policies that continue to shape the relationship between Indigenous peoples and Australia, followed by brief summary of the *Mabo* decision. The final sections will delve into the state responses to *Mabo*. This Chapter will focus on two state schema which maintain the hierarchy of settler colonialism: homogenization and fragmentation. The settler state homogenizes non–Indigenous factions to create hysteria over Indigenous recognition where the state implies Indigenous spatial justice is a threat to development and prosperity. To remedy the situation, the state implements a development strategy which only furthers the fragmentation of Indigenous territory and rights. These strategies include the multi–tenure land developed under the Native Title Act (NTA). With a close look at the Cape York Peninsula's (CYP) Wik, Wik Way and Kugu peoples of the Aurukun Shire (henceforth referred to as Wik), this study seeks to expose the policies of reterritorialization using Lefebvre's concepts of homogenization and fragmentation.

The CYP region presents a complex case study, in that the region is not only being transformed and reallocated into a World Heritage site but has implemented uneven co–management regimes. Such regimes, as will be argued below, exemplify the fragmentation of Indigenous rights to self–government, by decontextualizing Indigenous law as mere usufruct rights. Australia uses demographic tensions in CYP between Indigenous and non–Indigenous populations to homogenize the region for economic certainty and devalue Indigenous interests. Through the misrecognition of Indigenous rights, the state can implement policies that produce land regimes where Indigenous self–government suffer as a result. Utilizing the concerns of non–Indigenous factions including pastoralists, conservationists, and industrialists, the settler state is able to secure certainty for businesses and re–establish settler colonial geographies.

3.2. The Making of Settler Space

Imperial British powers arrived in Australia between 1600 and 1700. The arrival marked the beginning of ongoing dispossession of Indigenous nations lands through violence, and assimilation. European settlers in Australia actively removed Indigenous peoples from their families, country, languages, and religions in an effort to assimilate the population (Hollinsworth 1996, 115). Despite colonial efforts, Indigenous nations remain a challenge for the settler authorities. By resisting assimilation, Indigenous populations present a contradiction of *belonging* which the settler state must continuously rationalize (Hollinsworth 1996, 116; Bruyneel 2015). Australian settlers sought to vindicate sovereignty by employing the logic of *terra nullius*. Since 1889, the Privy Council has upheld the assumption of *terra nullius,* starting with *Cooper v Stuart* (which resulted in the creation of the Australian reserve system) until *Mabo* (Hocking 2002, 160).

Cooper v Stuart emphasized the racialized Doctrine of *terra nullius* to produce a false representation of Australia as an unoccupied territory. According to O'Connor (1992, 255):

> The proposition that the common law of a settled colony did not recognise native title also depended upon the *terra nullius* doctrine, which had been transposed from the international law of the eighteenth century into common law of property. If an inhabited colony could be *terra nullius* for the purpose of acquisition of sovereignty that would be recognised by other European powers, it was thought to follow that there could be no sufficiently organised system of native law and tenure to admit of recognition by the common law. The domestic application of the Doctrine was linked to its purpose in international law.

Australia's territorialization began with the denial of pre–existing sovereigns and legal structures of independent Indigenous nations. Colonial powers relied upon international norms to justify the civilizing missions and the consolidation of settler state territory (Evans 2009, 12–13). Territorial dominance in a settler occupied space requires continued reordering of territorial

organizations, often beginning with the appropriation of space followed by a long history of assimilation policies.

Of the extensive list of assimilationist strategies, arguably the most harmful and impactful was when Indigenous children were forcibly taken from their parents and communities and moved into Christian households and schools (Hollinsworth 1996, 116). The removal was intended to impose Christian values and erase Indigenous languages (Hollinsworth 1996). The Stolen Generation, as it is now referred to, disconnected Indigenous children from their land, languages, religions and communities. This caused significant ramifications which would greatly impact the following generations. Adding to the disconnect, the state isolated Indigenous communities from non–Indigenous populations and their traditional territories by segregating Indigenous peoples to reserves where they lived, attended separate schools, had their own hospitals, and were denied the right to own property (Hollinsworth 1996, 115). Techniques of segregation and assimilation fragmented Indigenous populations by placing them in reserve systems, not only separating them from non–Indigenous peoples but from each other, their laws and languages. The act of state–enforced fragmentation and assimilation has been assailed "as one of the forms of violence against human identity" (Maddison 2013, 291).

To propagate dependency, the state also denied equal pay for Indigenous pastoralists until 1965 (Hollinsworth 1996, 117). As a result, small and large companies moved off reserve lands, furthering Indigenous communities' impoverishment (Hollinsworth 1996, 117). Depending on the state for fiscal allowances, employment and governance chain Indigenous communities to a perpetual cycle of poverty (Hollinsworth 1996; Campbell and Hunt 2013). The state's disregard for complex Indigenous governing and economic structures maintains and undervalues Indigenous rights found in land and law (Altman 2001).

Indigenous Australians maintain intricate socio–political and economic structures wherein:

> transactions manifest economic as well as other social, moral, religious relations, and express obligations such as rank or status, alliance, kinship, and other relationships of reciprocity (Langton 2006, 309).

The settler state's denial of Indigenous systems continuously paints Indigenous authority as less than desirable, presuming Indigenous economic and political life to be primitive or backward. Indigenous pre–colonial economic structures were far–reaching, crossing oceanic divides. Until at least the 18th century Indigenous peoples maintained strong trading ties with the Chinese, Portuguese and Dutch (Langton 2006, 308). Indigenous economic structures are "essential to the full functioning of Aboriginal polities" (Langton 2006, 310). Thus, reducing Indigenous markets to mere practices of gift giving undermines Indigenous economies and reproduces the idea of the hunter gatherer or the primitive *other* (Langton 2006, 309). This is to say, Indigenous communities were unproductive and did not craft complex economies that were based upon profit (Langton 2006, 309). The devaluation of Indigenous economic structures becomes a state–enforced mechanism to directly devalue the culture, histories, structures, and social organization of Indigenous peoples. Australia seeks to perpetuate the 'othering' of Indigenous people as a means to consolidate territory and authority. The settler state hinges on the need to disavow histories that showcase sovereign domains and rights to self–government in order to reproduce spatial dominance and control. That is to say, Australia contains Indigenous rights as mere usufruct rights that are desegregated from rights of sovereignty and government. For settler states, the production of space is never–ending, moving through contradictions and abstractions of spaces that began upon arrival and that continue to pose problems post–*Mabo*. In spite of

striking down *terra nullius,* the Crown maintains a hold of the underlying title where Indigenous governance is absent upon return of territory (Howitt 2009, 144).

3.3.1. The *Mabo* Case: A Moment of Contradiction

The settler state's mechanism for production and territorial authority directly manages and maintains a skewed version of history, remaking false encounters and perpetuating the representation of the "unsettled, nomadic, rootless, etc.," (Wolfe 2006, 396). The Merriam community – Mer in Indigenous language – seeking recognition of rights and ownership the community took Australia to court (Beckett 1995, 16). Although the *Mabo* case concluded with the striking down of *terra nullius* and with the recognition of Mer title on traditional lands, the implications of this decision have been far from beneficial for Indigenous peoples. The definition of ownership was largely decontextualized from rights of self-government and upheld Australia's hierarchical position. In an effort to reterritorialize, the Australia's reaction to the judicial decision is an unprecedented surge of territorial reforms which seek to reconfigure Indigenous rights to self–government for settler intervention and to preserve colonial geographies. In other words, post *Mabo* the rights and interests of non-Indigenous peoples was protected while Indigenous ownership and claims were reduced to mere usufruct rights. The remaining sections of this Chapter will assess territorial reform policies in the aftermath of the *Mabo* decision.

Mabo v Queensland 1992 involved three individuals from the Murray Island, led by Eddie Koiki Mabo, who believed they held ownership over the total area of the island located in the eastern Torres Strait (O'Connor 1992, 251). The case asked if the rationale of *terra nullius* justified Australian settlement and if the Anglo–Saxon common law could accommodate the recognition of Indigenous title (O'Connor 1992). *Mabo* and his accompanying plaintiffs rested

their position on two key arguments: 1) the continued occupation of traditional territory by the Mer community and; 2) that the preservation of Indigenous governing structures disproved the argument of *terra nullius* (O'Connor 1992, 254; Beckett 1995, 19). The first argument went without challenge; the second, however, dominated the debates.

The Queensland government contested the Mer community's position by arguing that the government had claim over the islands through annexation by conquest and cession (O'Connor 1992, 254). Before the first trial got underway, the Queensland government acted swiftly to pass the *Queensland Coast Island Declaratory Act of 1985,* which claimed authority over Indigenous territory was extinguished upon annexation (O'Connor 1992, 252). In the first of the two court cases, *Mabo* No. 1 resulted in the High Court's overturning the *Queensland Coast Island Declaratory Act 1985* because the government had violated the *Racial Discrimination Act of 1975* (Beckett 1995, 19; Hanks 1993; Matthew 1998). The second case hinged upon the activities of imperial Britain, where settlers marked territorial expansion through violent acquisition of Indigenous territory or by forcing Indigenous peoples to relinquish their territory through cession (O'Connor 1992, 252). However, because Indigenous peoples were viewed as less than human and without legal institutions, no cession was required on the part of the colonial settlers (Russell 2005, 70-71). In the 1980s, the Mer community rejected the Queensland government's attempts to enter into a Deed of Grant in Trust (Brennan 1995, 215).

The Deed of Grant in Trust was established by the Queensland government to relinquish portions of Indigenous territory for public and private use. The deed granted by the Governor–in–Council transferred Indigenous territories into fee simple holdings. According to Brennan (1995, 82):

> These public purposes would usually be the provision of government services to the community, including education, health and police. But land would be

> resumed for public purposes unrelated to community concerns and without community consent.

Eventually, the Queensland government introduced the *Queensland Coast Islands Declaratory Act* to "extinguish – without compensation – any and all traditional land rights that might exist" (Russell 2005, 207). The Mer community was the only Torres Island Indigenous community to reject the deed. According to the courts, the act of rejecting the deed did not prove ownership. The plaintiffs were then tasked to provide detailed accounts of the continuity of traditional modes of governance and legal structures, which caused strife within and outside the courts (Beckett 1995). While the continued occupancy was not a contested issue, the community's link to the territory, law, and customs of their ancestors was hotly debated. The Mer community's connection to the Indigenous communities on the mainland also become a point of controversy as some suggested the Indigenous peoples of the Torres Strait Island had little resemblance to the Indigenous peoples on the mainland of Australia. This, however, was largely untrue (Beckett 1995, 16–18).

Nonetheless, the *Mabo* case, termed as a cautious decision by Russell (2005), provided grounds to denounce *terra nullius*. In a four to three ruling, despite overturning *terra nullius,* the judgment did not reassess settler legitimacy and Indigenous claims to self–governance. Instead, Justice Brennan stated that "the acquisition of territory is chiefly the province of international law" and thus the courts did not comment on the legitimacy of the settler state (Brennan 1993, 208). Justice Brennan cited that the Crown can grant and extinguish title with or without compensation if there is a statutory warrant for land. Statutory warrant, according to Justice Brennan, includes grants of freehold or leasehold or for Crown use, for roads or public works, similar to the aforementioned Deed of Grant in Trust policy (Brennan 1993, 210; Hanks 1993). Justice Brennan's only provision was that the Crown's acts were not in violation of the

Commonwealth, including the *Racial Discrimination Act 1975* (Hank 1993). The court decision, without hesitation, validated the hierarchy of the settler legal structure. The ruling disregarded Indigenous authority and rights to self–government.

According to the High Court of Australia, Indigenous groups who have claims to ownership must fulfill a means test to authenticate their ongoing traditions, customs, and laws. The success of the *Mabo* decision was due in large part to Eddie Mabo's training and capacity to speak the language of liberal law (Beckett 1995, 27). *Mabo* provided evidence that the laws and traditions involving leadership, kinship, and patrilineal property ownership remained influential in the everyday practices of the Mer community (Beckett 1995, 27). Placing the burden of proof on Indigenous peoples has invited much criticism, from the reliance on a colonial anthropological literature to ultimately excusing the settler state from providing equal proof and justification for settler occupation (Eisenberg 2011).

According to Povinelli (2002, 54), the ongoing need to defend and link tradition(s) to modern economic and political systems could tarnish present and future generational claims to land. To suggest that a community, culture, society or legal structure is unaffected by external influence "underestimates the resilience of indigenous cultural reproduction" and "tends to a romantic essentialism which revives the fiction of the unchanging primitive" (Beckett 1995, 29). Once historic social, political and legal structures are proven unchanged, Indigenous title holders must also assert their capacity to govern in the modern world. Caught between two worlds, the past and present, Indigenous identity as suggested by Povinelli (2002, 55) is impossible and unreachable for contemporary Indigenous peoples living in settler states. While subtle in technique, the judicial branch of the settler state utilizes legal discourse to prevent the actualization of Indigenous rights to self–government. After the *Mabo* case and the

implementation of the NTA, Australia paved the way for the development of uneven colonial geographies that, while accommodating Indigenous title, confined Indigenous rights to self–governance.

The remaining portion of this Chapter will assess the strategies of transformation, using Lefebvre's state schema: homogenization and fragmentation, which in turn retains the hierarchy of the settler state. To illustrate the process of homogenization after the *Mabo* case, I outline a state–led campaign to foment the fear of Indigenous recognition. This was necessary for the state to implement a shared "will to improve" (Li 2007) after the *Mabo* case, the result of which was the further dispossession of Indigenous peoples. Below is an outline of such mechanisms used in the reform policies established by the Australian settler state as the medium to reterritorialize and extinguish Indigenous rights.

3.3.2. Manifesting (Un)Certainty

Social engineering and displacement of Indigenous peoples is an ongoing process of settler colonialism (Veracini 2012). Spatial representation of settler power is made explicit through the displacement of Indigenous peoples as it "produces a localized sovereign capacity" and "allows a sovereign assertion without the need for a revolutionary break" (Veracini 2012, 344). The settler state replicates colonial geographies by setting the conditions of improvement, most often a precursor to fragmenting or dispossessing Indigenous rights of self–government. To gain approval and to incentivize such provisions, the settler state takes part in certainty making and crisis aversion tactics. In Queensland, the government fostered panic among different social factions and aligned interests, with local groups "actively reshaping the discourses within which their struggles are constituted" (Howitt 2008, 141). However, such political struggles result in an "us–versus–them" dichotomy that the state has used to continue to extinguish Indigenous rights.

One manner that this is accomplished is by depicting Indigenous peoples in opposition to social and economic development or as enemies of conservation. Instead Indigenous peoples rights to exercise commercial development or implement policies that protect their lands are limited entirely whilst upholding settler hierarchy, wherein Australia has the final say over Indigenous territorial rights.

The *Wik* trial determined that overlapping territory did not extinguish Indigenous title unless there was "reasonable compensation." The trial stirred up a national crisis in which mining and pastoral economies were threatened by Indigenous title (Short 2007, 863). This caused considerable tension in the region of Cape York, where mining and pastoral activities have been a way of life since European occupation. Moreover, the peninsula contains important mining leases, specifically lease *7024,* located on the Wik and Wik Way peoples' traditional territory. This, in addition to declining Asian markets, combined to create an environment in which the state could pit non–Indigenous claims against Indigenous claims. Australia touted economic and political fears often enticing more scrutiny against Indigenous territorial claims (Short 2008, 74).

Prior to the amendments in 1998, the NTA was criticized for its arduous and cumbersome process of issuing Indigenous title. Under pressure from industrialists (specifically, mining companies), the NTA introduced significant amendments to speed up the process (Short 2007, 863–864). Title belonging to non–Indigenous peoples went largely unaffected as a result of the NTA. As noted by Pearson:

> The blackfellas keep whatever is left over, the white–fellas keep everything they've already gained and the big area in between you have to share, but in sharing, the Crown title prevails over native title" (quoted by Davies 2003, 26; original 1998).

Indigenous title was deemed extinguished if compensation for the land was "reasonable" and if other titles existed (including commercial, exclusive agricultural/pastoral, residential and community purpose) (Burke 1998, 338; also see s. 237 of the NTA). The amendments also granted ministerial and state rights to override negotiations (Burke 1998, 342). Moreover, once negotiations were complete, Indigenous peoples were given a mere two months to object (Burke 1998, 342). The state's heavy–handedness predetermined the land policies and the regulatory mechanisms of reterritorialization.

As noted by Short (2008, 71), the settler state drafted a national crisis campaign which underwrote Indigenous access to lands, resources, and spatial justice. The national crisis pitted pastoralists, conservationists, industry leaders, and Indigenous peoples against each other, prolonging reconciliation and land claims (Short 2008, 70). As a result of public pressure and weak negotiating power, Indigenous claimants (such as the Wik peoples) received few benefits from the NTA. Moreover, following the 1998 amendments, the Crown secured ownership of all marketable resources including fishing, logging, and mineral extraction (Slater 2013).

Pastoralists, prior to the amendments, allowed some Indigenous peoples to roam their traditional territory and employed Indigenous laborers for their expertise (Smith 2010). According to Smith (2010, 27), Indigenous peoples in CYP are regarded as the "backbone of the region's pastoral industry" and coexisted with pastoral communities. However, after the *Wik* decision, pastoralists in the community were unclear about their future in the peninsula. The state touted Indigenous territorial claims as the problem which, as the state told it, would produce economic depression (Short 2007, 865). Despite indications that Indigenous title would not negatively impact economic performance, the settler state continued to publicly undermine Indigenous title that eventually led to reterritorializing processes that would remove Indigenous

rights to self–government (Short 2008, 73). Australia used this opportunity to regain spatial dominance by shifting the once co–existent relationship between pastoral and Indigenous peoples to a struggle between the two social groups over title. By placing a wedge between pastoral groups and Indigenous owners, Australia bolstered authority by relinquishing Indigenous pastoral identity. Indigenous peoples thought of in terms of their inherent primitiveness stood in the face of economic productivity and threatened the biodiversity of the peninsula (Langton 2012; Slate 2013). As a consequence of uncertainty making and protected zones, Indigenous peoples were isolated into "community use areas" on pastoral leases and national parks (*Cape York Heritage Act 2007* part 3.2), resulting in the reduction of Indigenous title and access to employment (Smith 2010).

Pastoralists and Indigenous peoples, for example, had co–existed but are now pitted against each other to reframe the spatial representation of the peninsula, moving further away from Indigenous rights to self–government and closer to a model that heralded the history and inhabitance of European pastoralists. Pastoralists occupy and contribute to the Lockean notion of property, whereby their activities increased the value and productive capacity of the region. Pastoralists, according to Smith (2010, 35):

> ... [S]eem to ignore or deny the exploitative nature of relationships in which they are able to use both imbalances of power, including close ties with local police, and Aboriginal conventions of interaction to their advantage. Some also claim that Aboriginal people were quite happy in their relationships with pastoralists until "do–gooders" … "started putting ideas in Aboriginal people's heads."

Indigenous attempts to adjust the structures that disadvantage Indigenous peoples would undermine the taken–for–granted privileges held by pastoral groups. There are many examples of this privileging, including the reluctance to involve Indigenous peoples in negotiations over cattle grazing and land management (Smith 2010). Australia also angered many traditional

owners (who still had not had their title formally recognized) by naming a creek after a white pastoralist's son (Smith 2010, 34). Collectively, Australia's privileging of non–Indigenous pastoralists and conservation groups has undermined Indigenous contributions to the local economy and conservation. Essentially, Indigenous peoples are viewed to have made no contribution to the land, reaffirming the Lockean assumptions embedded within the concept of *terra nullius* (Smith 2010, 36-37).

This was accomplished by consolidating pastoral interests and conservationist agendas. Indigenous exclusion was the by–product of fragmenting spatial interests and relying on sentiments which perpetuated *terra nullius* and the primitiveness of Indigenous culture, customs and laws (Skilton *et al.* 2014; Logan 2013). Promises of joint management were severely impaired after the Wild Life Act and the CYP Heritage Act (CYPHA) were enacted. These acts gave way to a highly uneven development strategy which took away Indigenous rights to marketable resources (Altman 2011, 4).

Prior to the *Mabo* case, the Queensland government preemptively de–politicized by attempting to disassociate Indigenous claims and by remolding the peninsula into national parks. At first, the creation of national parks was an attempt to avoid Indigenous title claims (Holmes 2012). Later it was a means to gain certainty over land regimes, profit, and Indigenous peoples. In 1997, the Queensland government began negotiating with Indigenous title holders on the stipulation that parcels or in some cases the entire territory of Indigenous peoples would be protected as national parks with strict ecological management provisions (Holmes 2012; 2014). However, this produced ongoing political tension between accommodating Indigenous rights and economic interests in extractive industries and ecological management techniques. While the impact of Indigenous title on region's economy is still disputed, the settler state utilized worries

to reduce Indigenous authority and to oversee economic development. Indigenous rights to self–government came under severe threat as conservation groups and the settler state aligned their interests to transform the region into a World Heritage site. Again, in a top–down approach, environmentalists and the settler state took on a socio–political driven agenda of ecological management and "heritage–making" to convert the CYP into a World Heritage site (Skilton *et al.* 2014, 149).

Under the CYPHA 2007, the settler state entered into an agreement with Indigenous communities, including the Wik of Aurukun Shire, on the condition that land tenure would only be reterritorialized with the understanding that all or part of the region would be dedicated as a National Park (Cape York Peninsula Aboriginal Land) (Cape York Peninsula Heritage Act 2007, s. 83). In haste, the Queensland government dedicated regions of the peninsula to national parks to prevent transfers to Indigenous peoples (Holmes 2011a; 2011b). After the *Mabo* decision, the Queensland government was forced to return previously dedicated national parks to their traditional owners. Returns are complete on the stipulation that Indigenous lands will be titled as protected zones and Indigenous Land Use Agreements (ILUA). Unfortunately, these two land forms return little management responsibilities to Indigenous owners (O'Faircheallaigh 2006).

Under the CYPHA, transformation of Indigenous title into a National Park requires meticulous oversight by the Environment Minister and the Vegetation Management Minister. Each minister can dismiss community projects initiated by Indigenous leaders, whether for social or economic development, merely by making the assumption that the project undermines conservation efforts in the region (Cape York Peninsula Heritage Act 2007, s.18). In short, all a minister has to do is say, "I believe this project threatens the conservation or biodiversity of the region". The Queensland government has used the ploys of conservation and a World Heritage

title to reduce Indigenous involvement to outliers of the community. As such, the settler state once again reconfigures Indigenous title while retaining the underlying ownership and control of the land. The act of converting Indigenous lands into National Parks allows the Queensland government to reaffirm its territorial authority and keep its metaphorical eye on Indigenous communities. Everything from employment, mobility, and development to, finances, training, and professionalization is monitored by the settler state. In the few instances in which Indigenous participation in government is fruitful, participants and organizations must undergo a professionalization process to meet the Anglo–Australia standards of governance (Langton and Palmer 2003, 6).

The strongest evidence of the state's efforts to solidify conservationist interests is the Queensland government's establishment of two advisory committees, neither of which had Indigenous representation and involvement (Skilton *et al.* 2014, 152-153). The Cape York Peninsula Regional Advisory Committee is made up of conservationists, pastoralists, mining, and tourist industry representatives and local governments. The Cape York Peninsula Regional Scientific and Cultural Advisory Committee brought together the voices of ecologists, environmental scientists, anthropologists and land management specialists (Skilton *et al.* 2014, 152). As a means to meet the United Nations Educational, Scientific and Cultural Organization's (UNESCO) criteria, Indigenous knowledge and Western knowledge were placed in opposition. The requirements of UNESCO reinforced the idea that science and community are separate and are "reified in the structure and function of these committees" (Skilton *et al.* 2014, 153). Environmentalists, in this manner, disregarded inclusive and holistic traditional knowledge systems in their regional planning and heritage making efforts. During consultation processes, Indigenous representatives expressed dismay over the mechanisms of environmentalists and state

actors who superimposed already developed and agreed–upon policies onto traditional territories of Indigenous peoples (Slater 2013: Lloyd, Van Nimwegen, and Boyd 2005).

UNESCO cited the tension between conservationists and developers when it rejected the region's request for World Heritage status (Logan 2013; UNESCO has not yet awarded the peninsula a World Heritage site; Picone 2015). Specifically, UNESCO was troubled by the growing mining extraction within the region. Mining industries have had a long–standing presence in the region. CYP sits on a hotbed of valuable minerals including coal, bauxite, kaolin and mineral sands (Raggatt 2012). Uneven social relationships and power is most evident when discussing the agreement making process between extractive industries and Indigenous communities, who negotiated agreements not out of legal necessity per–se but, as O'Faircheallaigh (2006) notes, out of "corporate social responsibility." Indigenous communities, including the Wik peoples, continue to be deeply dependent on the state's welfare system and the structures of representation are significantly under–resourced (including severe funding cuts and conditional ownership under the NTA which will be elaborated on in the next section) (O'Faircheallaigh 2006, 5). Due to this fact negotiation with mining companies are often welcomed (Hollingsworth 1996; O'Faircheallaigh 2006). Extractive industries benefit from agreement–making because agreements reduce political and social risks which may hinder production. As such, industries make a considerable effort to learn about Indigenous communities' needs and interests before entering into agreements with Indigenous communities (O'Faircheallaigh 2006, 5). As mentioned above, the amendments to the NTA create an environment in which Indigenous representation and inclusion in ILUAs are very limiting. Moreover, with the authority to do so, extractive industries draw up agreements that does not disrupt extraction and capital investment. Therefore, Indigenous people's regulatory mechanisms

are profoundly limited (O'Faircheallaigh 2006, 4-5). Due to unequal negotiating powers, Indigenous peoples must enter into agreements that reduce their authority and fragment their rights and access to lands (O'Faircheallaigh 2006). Indigenous title under the CYPHA was then supported by the implementation of the Wild Rivers Act, which emphasizes ecological management strategies that are used to contain and prevent Indigenous mobility. Basic rights of access are denied to Indigenous peoples due to the rationalization of ecology, which is a fundamental theme in the Wild Rivers Act.

The Wild Rivers Act pitted what Holmes (2011b) refers to as green versus black politics, against one another to produce a space viable for UNESCO's World Heritage status. Backed by the environmental group The Wilderness Society (TWS), the Queensland government pushed forward legislation which, on the surface, was intended to improve the water quality in the region. As noted by Holmes (2011b 63), the Queensland government used the act to "end uncertainty and enable all parties to move ahead on land–related matters." Yet, the government failed to consult Indigenous peoples and, therefore, the fact that the act failed to mention the intent to consolidate Indigenous title came as no surprise (Holmes 2011b). The act itself is focused on preserving waterways and biodiversity, relieving space for ecological management zones. For Indigenous peoples, this meant a reduction in catchment and made it increasingly difficult to gain approval for community development projects (Holmes 2011b; Altman 2011, 4). All development projects would undergo Ministerial scrutiny, which for the Indigenous peoples in the region meant their ownership and control over traditional territories would be disregarded. The act gives the Ministerial the authority the right to reclaim spatial elements for preservation. The underlying tone is the threat of Indigenous management (*Wild Rivers Act*, s. 33). In combination with the NTA, Indigenous peoples in CYP are left with few options to negotiate

preferred deals and stop development projects which could harm sacred spaces (Altman 2011, 2–4).

The Wik peoples of the Aurukun Shire held protests against the Wild Rivers Act in 2009, to object to the act's appropriation of Indigenous resources and dispossession of traditional territories (Slater 2013). This eventually led to a federal court case against the Queensland government for failing to consult with Indigenous peoples' prior to adopting the act. The Wik won the appeal in June 2014 (McIntyre, 2014). The Wik believe that the Wild Rivers legislation further alienates them from their heritage and laws (Slater 2013). They argue that the act disregarded their title over the Archer Bend area and their right "to control access to their lands and waters" (McIntyre, 2014). Furthermore, the term "wilderness" is hotly denounced by Wik, as it reinforces the concept of *terra nullius* and subordination (Slater 2013; Langton 2012). Wilderness perpetuate the concept of vacant lands free from human activity and ultimately assumes a de-politicized space that can be occupied and reimagined for political ends. According to Altman (2011, 4), the combination of the Wild Rivers Act and NTA, denies access to commercially valued resources. This makes it increasingly difficult for Indigenous peoples to become prosperous. As a result of the conditions placed upon the Indigenous peoples through the Wild Rivers Act, communities have resorted to collaborating with mining companies and carbon farming practices as a means to secure some control over their lands and marketable resources (Aurukun Shire Council Annual Report 2013–2014).

Under the support of the Wild Rivers Act and the CYPHA, Indigenous self–government are devoid for economic and political purposes —to stabilize the regions political tensions and to stimulate economic investment. To reterritorialize CYP, the settler state engaged in development and management techniques that undermined Indigenous title and invited apathy towards

Indigenous recognition. As noted above, the settler state retained dominance by homogenizing social factions under unsubstantiated claims that economic chaos would ensue if the state accommodated Indigenous self–government. Next, the state sought to secure "certainty" for a few, namely for market purposes. To protect and advance policies which do not jeopardize settler legitimacy and authority, Australia disavowed (by fragmenting) Indigenous rights to self–government. This is also the reason that the state allots usufruct rights and holds simplistic views of Indigenous self–government as that which is "frozen in time" —a point that will be elaborated on below.

3.3.3. (Mis)Recognition as Policy

Indigenous sacred spaces are rooted in the creation of the life story in which Indigenous ancestors dreamed all living things into being (Hill 1995, 308). Indigenous ancestor's dreams are physically manifested in the world and divided by the spirits. Markings or sacred sites are scattered across their territory, and it is imperative that such sites be protected in order to avoid the wrath of the ancestors' spirits (Hill 1995, 308). Yet, Indigenous owners have had few tools to oversee adherence to Indigenous religions despite the allotted heritage zones and protected areas developed after the *Wik* decision (Smith 2010; Skilton, Adams and Gibbs 2014, 149).

At the conclusion of the 1998 *Wik* decision, the Wik people of Queensland territory won access to their traditional territories that were within pastoral leases. Complementing the *Mabo* case, the *Wik* decision transformed Indigenous negotiations for title and the policies implemented thereafter. Starting with the NTA, which underwent numerous amendments, the government's reaction was to implement provisions which would extinguish title and limit Indigenous authority to the benefit of pastoralists and settlers (Tehan 1998). According to Tehan (1998, 794), the 1998 amendments represent "a reversion to pre–*Mabo II* practices." Incentives to take

part in negotiations were reduced and ultimately shrank the value associated with Indigenous title and management. The potential for agreement–making became increasingly difficult as the qualifications for Indigenous title tightened and required greater proof of continued physical links to traditional land and customary law (Tehan 1998; Langton and Palmer 2003, 6). All such rights under the NTA would be protected by western common law, a vastly different legal structure in comparison to Indigenous law.

As argued by Dorsett and McVeigh (2012), Anglo–Australian common law fails to incorporate Indigenous laws because of the jurisdictional history of liberalism. Common law is considered to be the lowest level of the liberal democratic legal structure (Borrows 2010, 13). This constructed hierarchy in Anglo–Australian law leaves Indigenous laws to be read as customs or traditions rather than part of a formidable legal structure that stands as a sovereign entity (Dorsett and McVeigh 2012). Before Indigenous territorial claims can be acknowledged, communities must undergo an anguishing process of providing proof of Indigenous spaces, rights, and customs. One consequence of the burden of proof is that Indigenous rights are reduced to usufruct rights, primarily associated with hunting, gathering, and fishing (Dorsett and McVeigh 2012, 482). The aforementioned rights are secured namely because of the ability to prove continuity and practice. However, the key development is that usufruct rights do not challenge settler legitimacy or claims to territory. Another element of granting usufruct rights is that these rights promote subsistence living as opposed to granting rights which would further self–governance and access to resources. As Slater explains, granting Indigenous title is merely a symbolic gesture (2013, 776):

> In a contested country dominated by, however disguised, settler colonial epistemology and ontology, Aboriginal 'beliefs' are at best tolerated and sensitively negotiated and incorporated and contained within the Australian political–legal system. But they cannot be law.

Ultimately land and rights are negotiated to ensure Australia and its supporting market actors can gain access to resources and political certainty (Mercer 1997; Howitt and Jackson 1998).

Following the *Mabo* decision, the judiciary recognized continuous Indigenous title on pastoral leased lands. The momentum of the Indigenous rights came to a stop after the *Yorta Yorta Aboriginal Community v Victoria* decision and the1998 amendments to the NTA. The *Yorta Yorta* decision validated the hierarchy of Australia, determining that Indigenous laws are only recognized in–so–far as the Indigenous community can prove their ancestors were a part of organized societies and that the ongoing practices of the community are worthy of protection (McIntry 2002; Dorsett and McVeigh 2012). Hindering Indigenous self–government, the *Yorta Yorta* case unequivocally marked the date of sovereignty as the arrival of the British Crown, (McIntry 2002). Arguably, the *Yorta Yorta* decision reverts back to pre–*Mabo* era, relying on *terra nullius,* to paint the first peoples of Australia as socially unorganized and unproductive. Rights are frozen in time, wherein Indigenous rights and customs that date to the pre–occupation and have not evolved since European occupation. Permanently locking Indigenous peoples in historical realities, reinforcing the narrow depiction of the primitive, traditional, backward 'other.'

The act of fracturing Indigenous law, according to Maddison (2013, 291), creates and identity–based violence that is reinforced by structural impediments to the self and to the collective histories of Indigenous peoples. That is for Indigenous peoples "to assert an identity that both engages with and resists cosmopolitanism" means that "tradition and modernity exist uneasily alongside one another" (Maddison 2013, 292). Maddison (2013, 300) goes on to argue that settler colonialism resists fluid "understanding[s] of identity and denies political significance of identity–based struggle." In other words, settler states premise their expansion on fragmented

Indigenous identities that reproduces colonial geographies. This is not to say Australia is unaware of its colonial past, rather, a false or imagined history is useful in limiting Indigenous self–government and redeveloping colonial geographies than the actual belief in such events. In other words, the uneven colonial history assists in the overall program of reterritorialization, this is no more evident than in the NTA guidelines of reclamation.

Under the NTA, to launch a claim, Indigenous communities must apply through the federal courts to reclaim rights for self–government and traditional title (Lochead 2004, 8). Approval and rejection are based on the claimant's ability to present evidence that Indigenous title is ongoing and in accordance with traditional laws and customs (Lochead 2004, 9). Funding is not provided for Indigenous claimants, meaning if they are to apply they must cover their own legal fees (Lochead 2004, 12–13). To add to the complexities, under the provisions of the NTA non–Indigenous actors can seek claims and interests through the negotiation process. To paraphrase Hill (1995, 307), Indigenous peoples are pitted against each other and against like–minded actors (depending upon which community, this may include farmers, conservationists, pastoralists, cattle herders, and mining companies). As noted in the previous section, the NTA contributes to the belief that Indigenous recognition threatens prosperity. For this reason, the NTA has provisions that allow the settler state significant authority to intervene and access traditional territories as a means to create stable geographies for investors and political legitimacy.

The assumptions within the NTA do not consider the fluid concept of Indigenous identity and community. Title is approved based on Indigenous peoples' ability to demonstrate linkages to traditional land use, where a member or members of the community have maintained a physical connection to their traditional territory and customary practices. This is increasingly

difficult as a majority of Indigenous peoples reside in urban centres and understand territory in a more fluid and moving sense (Maddison 2013). The idea that Indigenous peoples "belong outside of the city" (Maddison 2013, 294–296) also fixes the view of the primitive other and retains that colonial practice of containing Indigenous bodies to the state's periphery (Veracini 2012). Pushing Indigenous peoples to the periphery reinforces the dependent relationship.

The NTA's requirement to prove physical connection also disregards the colonial practices of displacement and assimilation that limited access, mobility, determination and the activity of Indigenous peoples, so much so that Indigenous territories is fragmented from "the knowledge that underpins or is represented in that production" (Tehan 1998, 773). This representation refers to the complexity of Indigenous law, spirituality, and territory which is essential to Indigenous identity and self–government. According to Gibson (1999, 48), "the Australian nation–state legitimates Aboriginal self–determination by confining it to structures and maps of the non–Aboriginal realm–attempting to contain the 'other'". The settler state homogenizes non–Indigenous interests to superimpose an uneven development agenda. Utilizing conservation dogma and the tension between pastoralists, mining, and forestry in Cape York undermines Indigenous title and authority. By the end of the negotiations, Indigenous self–government undergo meticulous fragmenting for the benefit of Australia. Such reterritorializing tactics are developed through localized visions (or demands) and reforms touting economic stability and limited understanding of Indigenous links to territory and law, which is transfixed in the reform process (Gibson 1999).

3.3.4. Fragmenting Indigenous Self–government

To paraphrase Veracini (2011b, 186), the nature of economic development rests on undermining Indigenous authority and relinquishing the capacity for Indigenous peoples to gain

self–governing status. To unwrap this argument, it is important to uncover the economic motivations which have transformed into the multi–tenure land model in Australia. While Indigenous rights were provided through the *Mabo* case, Australia carefully carved out management strategies which would not compromise settler legitimacy (Dorsett and McVeigh 2012). The *Mabo* case was particularly advantageous for Australia as the decision tactically avoided the question of sovereignty (Russell 2005). Ownership, in a post–*Mabo* era, is maintained by the Crown through freehold land possession rights and the implementation of regional councils (Godden 1999, 25). In other words, Australia continues to possess its hierarchy over governance by establishing regulations and conditions that Indigenous owners must abide by, and by constraining tools that would make the settler state accountable to Indigenous peoples (Memmott, and Blackwood 2008). Indigenous land title is characterized as *sui generis*, meaning that Indigenous owners hold no right to the land itself. Instead, the Crown provides the owners with a 'bundle of rights' (Lochead, 2004, 19). Due to the provisions of the NTA, according to Lochead (2004, 25), Indigenous Australians are recognized only as users of the territory and not owners. The structure also does not recognize the ongoing authority of Indigenous peoples to exercise self–government.

Limitations of title rights for communally owned Indigenous territory appear stark when contrasted with private property rights. Communally owned territory cannot be mortgaged. Resource development projects cannot be initiated without federal government approval (Venn 2007a; 2007b). Moreover, under the NTA, the Crown maintains ownership of all resources within traditional territories (Smith 2010), thus placing significant restraints on Indigenous authority.

To gain some control over market influences, Indigenous communities are overwhelmingly choosing to opt into Indigenous ILUA with third parties, which has the unfortunate consequence of devaluing the territory and control over it (Tehan 1998). Indigenous societies turn to land use agreements as a means to gain some rather than no authority over the development of their traditional territories (Tehan 1998). More importantly, land use agreements are more feasible for Indigenous communities both monetarily and logistically. This is due to the fact that Indigenous communities are provided higher rates of compensation by third parties. Third parties include mining and forestry companies interested in gaining use of the land. Queensland, in particular, has engaged in regional agreement strategies through the enactment of Indigenous Protected Areas (IPA) and the establishment of Native Title Representative Bodies (NTRB) to oversee joint management of national parks (Langton and Palmer 2003, 8; Memmott and Blackwood 2008). ILUA's and Protected Areas become most useful in the CYP region of Queensland where agreement–making has come to a standstill due to overlapping claims to mining leases, pastoral use, and ecological management.

At the conclusion of the *Mabo* and *Wik* cases, Australia enacted multi–tenure land–use systems for Indigenous title holders, pastoralists, commercial actors and conservation groups. The aforementioned multi–use land management strategy was deployed as a model that would assist in the economic and ecological management of a region with a history of economic difficulties. The Queensland and federal governments made many attempts to transform the peninsula into productive or capital spaces which had little success (Holmes 2012).

In the 1970s, the federal and local governments enacted management strategies in the peninsula as a means to improve the failing pastoral industry. This was also an opportunity for the Australian government to enforce strict assimilation policies on Indigenous residents,

regulating everything from the movement of Indigenous peoples and employment to finances and property (Holmes 2012, 254-257). The government sought to recreate the peninsula into active property regimes that would encourage investment. The market industries of the region include cattle grazing and agriculture and mineral extraction. All except for the mining investments returned little profit and contributed very little to the national rate of production (Holmes 2012, 263). Short–lived development projects in the peninsula eventually withered away and were replaced by the goal of stabilizing the region by converting it into national parks in hopes of attaining World Heritage status (Holmes 2012).

The transformation and attention to conservation was in part due to the heavy presence of environmental groups in the region, similar to the struggles in British Columbia (BC) (outlined in the next Chapter). Environmental interests often clashed with Indigenous peoples and have resulted in the disavowal of territory and rights. Through ecological management strategies, the government opened the door to investors, via tourism, carbon farming, and national parks. Unfortunately for Indigenous peoples, the advancement of ecological management resulted in the adoption of the Wild Rivers Act (as mentioned above), which undermined Indigenous peoples present and future access to markets, resources, and their heritage.

Ecological management utilizes renewed market logic for conservation and preservation. Yet, the most contradictory notion of ecological management is the attempt to commodify natural environments to assume that nature can be rationalized and organized (De Bont 2015, 217). While supporters of ecological management strategies stress the advantages of combining scientific logic with Indigenous knowledge and sustainable development (Ockwell and Rydin 2006), others warn of the appropriation of Indigenous rights disguised within conservation rhetoric (Langton 2012; Altman 2011; Slater 2013; De Bont 2015). In the CYP, tension between

ecological management and profitable mining leases on Indigenous lands presents a double–edged sword for Indigenous peoples. As Langton (2012, np) poignantly expresses:

> Aboriginal land is targeted both by mining companies and conservation campaigners precisely because it is Aboriginal land. These vast areas owned by Aboriginal people are the repository of Australia's megadiversity of fauna, flora and ecosystems because of the ancient Aboriginal system of management, and because, Aboriginal people fought to protect their territories from white incursion. They are not wilderness areas. They are Aboriginal homelands, shaped over millennia by Aboriginal people. The presumption by conservationists that these areas need to be rescued from Aboriginal people…is a strange twist on the racist fiction of *terra nullius* overturned by the *Mabo* case.

Moreover, Indigenous peoples are left no veto power or access to commercially valuable resources as Australia's policies in the peninsula are contradictory sites of extraction and conservation that are used to limit Indigenous authority (Altman 2011, 4). Instead, fishing, hunting, minerals, and water–ways are solidified as Crown–owned, as a result of the 1998 amendments to the NTA (Altman 2011, 4). That is to say policies of misrecognition are critical means through which Indigenous peoples are denied resource rights, decision making authority, and access to their lands. To add to these troubles, Indigenous peoples must tout their environmentalism, otherwise title and the aforementioned cultural practices of hunting and fishing would also be denied by the state (Povinelli 2002, 57).

In the CYP region, the regulations set out in the NTA created a harsh and often unwinnable environment for Indigenous peoples. After the stalled Cape York Heads of Agreement (1996) and the Cape York Peninsula Land Use Strategy (CYPLUS), the Queensland government encouraged binding land use agreements with the state, mining companies, pastoralists and Indigenous title holders in the place of a regional agreement (Tehan 1998; Holmes 2011a; 2011b). Although the state and federal governments are still processing Indigenous titles, ILUA, and IPA are processed with greater speed, because these agreements do

not require acknowledgment of Indigenous title (Langton and Palmer 2003). Without having to consolidate Indigenous titles, negotiators can quickly carry out top–down policies which isolate Indigenous owners (Smith 2010). While some scholars have suggested that ILUA's and conservation zones can be advantageous for Indigenous self–government (Altman 2001; Memmott and Blackwood 2008), I find that through reterritorializing policies Indigenous peoples are provided title with the understanding that Australia continues to hold underlying title and ownership of the resources. Moreover, the peninsula acts as a vessel of contradictory forces of extraction and ecological management. Caught between removing and preserving, Indigenous owners are reduced to by–stander status as their traditional lands are disassembled under the NTA, as seen in CYP.

The largest township in CYP is also the most remote. The Aurukun Shire council governs over 7, 570 km², an area which possesses "high biodiversity and geological variation" (Edwards and Heinrich 2006, 573). The region has been plagued with declining market endeavors, where "aside from pastoralism [and mining] …to date there has been very little non–traditional use of the land" (Edwards and Heinrich 2006, 573). As market pressures loomed the government saw the opportunity to reclaim parts of the Wik, Wik Way and Kugu peoples' territory in October 2000. The territory was transformed into Wik freehold title, mining leases, and the Oyala Thumotang National Park. The Wik later gained a 'bundle of rights' to access forestry, but continued to be excluded from the regional decision making process for the development of industry and resources on their traditional territory.

Wik peoples were granted 6, 000 km² of their traditional territory and the right to exercise self–government for subsistence. In a region that attracted much public attention due to mineral extraction and uncertainty about the future of mining activities within the region. So much so

that the mining companies halted projects "worth up to AU$1.75 billion unless the *Wik* claim issues were resolved" (Short 2007, 863). As a result, in 2004, the Wik community gained 12, 500 km² of the overlapping 21, 000 km². The overlapping claims included seven pastoral leases, four mining titles and Wik title. Of the 21, 000 km² the Wik community reaffirmed ownership of 12, 500 km² and relinquished title over the remaining, which was allotted to the mining lease *7024*.

Wik peoples make up a majority of the Aurukun Township, and fall under the jurisdiction of the Aurukun Shire Council and the Ngan Aak–Kunch Aboriginal Corporation is the Registered Native Title Bodies Corporation (RNTBC) (Venn 2004; *Aurukun Shire Annual Report* 2013–14). Upon recognizing Indigenous land trusts through ILUAs and IPAs, the NTA requires Indigenous communities to implement Prescribed Body Corporations (PBC) to oversee and engage Indigenous interests and rights (Howard–Wagner 2010). There are two types of PBC's: trustee and agency corporations. Both can vary in regards to a participatory or a representative membership and can function as either active or passive models (Memmott and Blackwood 2008). Both agency and trustee corporations act as an umbrella organization overseeing Indigenous title; this includes the consent 'making' with Indigenous peoples. Yet the difference lies in the liability or personal responsibility of the decisions made. Agency corporations bear the burden of responsibility while trustee groups do not (Memmott and Blackwood 2008). Trustees, in other words, are not bound to their Indigenous constituents and are free to make decisions. Indigenous societies have preferred the agency model as it gives greater decision–making power (Memmott and Blackwood 2008). The division of power, however, is far from ideal as Indigenous owners are given a choice of two Anglo–Australia models of participation: participatory and representative. This impacts the level of participation, decision–making, funding, resources, and frequency of consultation meetings. A passive and

representative agency reduces the role of Indigenous decision–making and places much of the authority in the hands of the PBC. If there are fewer than 25 members, an active and participatory agency or trustee can be established according to the NTA. This system grants greater authority and decision–making power (Memmott and Blackwood 2008). PBC's are established on all recognized and registered title holdings by the NTA. PBC's can be established as an arm of a company or government to relay information on land use and management.

The bodies of Indigenous governance mentioned above have been criticized for infrequent funding and for lacking Indigenous involvement. They have been found to perpetuate settler dominance. As articulated by Short (2007) and O'Faircheallaigh (2006), the symbolic label of Indigenous title did not translate to significant veto power over industrial extraction or ecological management. In other words, Indigenous title did not grant self–governing authority that would provide Indigenous leaders the voice to object against or for the development of their traditional lands. The ultimate goal in the reterritorialization project was to make the region appealing for investors, economic development, and to secure access (through intervention) for Australia. Because Indigenous communities are fighting ongoing poverty and must fund land negotiations independently (Lochead 2004, 12–13), extractive industries are attractive, as they provide monetary relief in exchange for uninterrupted extraction (O'Faircheallaigh 2006). Yet in an extensive study — on Indigenous participation and ILUA agreements with mining companies, O'Faircheallaigh and Corbett (2005) — found that environmental assessment programs provided little to no opportunity for Indigenous participation, arguably a result of Indigenous peoples' weak negotiating powers. And after the amendments to the NTA, the Crown reterritorialized ownership over resources and wholly diminished Indigenous authority and the right to govern. The Crown accomplished this not only by removing basic ownership rights but by failing to

provide oversight of and provisions regarding authority and land use (CYPNRM Plan Final Draft 2013; Venn 2007a; 2007b).

Title holders under the NTA have far fewer rights and authority over their lands than ordinary private property holders, who are granted the privilege of mortgaging their lands and authorizing or denying development projects (Smith 2010; Venn 2007a). Indigenous hopes of communal ownership returning prosperity have fizzled into a situation where necessity is the only option. This comes after lengthy efforts to gain Indigenous title. The Wik peoples in particular, having gained ownership of the 12, 500 km², were still uncertain about their rights to manufacture or profit from their traditional territories (Venn 2007a; 2007b). However, as stated by Venn (2007b, 138), in the current form the NTA promotes exchanging Indigenous land by extinguishing "another form of rights to natural resources, including individualized and alienable rights to land under private freehold title." Indigenous title holders are thus drawn to ILUAs for profit instead of opting for communal property rights, even though the former place large list of restrictions upon the community, whereas the latter would make it possible to transpose traditional holdings into economically viable regions (Altman 2001; Venn 2007a; Venn 2005). Although Indigenous communities require start–up finances for development, evidence suggests that mortgaging land and selling off parcels to developers will only further their debt. Communal holdings are a more viable option because Indigenous development projects are intended to enhance employment on traditional territories. Yet, as stated above, the most popular land tenure (in the governments' multi–tenure land program under the NTA) is co–managed lands in the form of natural reserves (Langton 2012).

In the case of the Wik and the Queensland government, forestry became the battle ground upon which multi–tenure land model took shape, namely the development of Indigenous

freehold land tenure and co–managed regimes. Wik peoples waged legal battles against the Queensland government to gain the right to cut and commercially sell timber, challenging the Regional Forest Agreement 2000 (Lloyd *et al*. 2005). Under the agreement, state advisory committees were formed to provide feedback, where it was observed by Lloyd *et al.* (2005, 409) that:

> Indigenous participants on these committees often believed their motivations are not fully understood by non–Indigenous members, and are often driven by a fear of loss of land through a misinterpretation of native title provisions.

In the end, the Queensland government was able to secure access to lumber on traditional lands by maintaining its authority and ownership of resources that sit within or on traditional lands, by–passing the *Forestry Act of 1959* (Venn 2007a; Lloyd *et al.*2005; section 45 of Forestry Act). Wik successfully challenged the government and acquired 18, 500 km² of their traditional territory.

Wik successfully negotiated the right to oversee forestry activities, as timber production and distribution were consistent with traditional and customary practices (Venn and Quiggin 2007; Venn 2007b). By gaining access to their traditional timber, Wik hoped to increase employment for their kin groups, improve their standard of living, and contribute to the local economy (Venn 2005). This belief holds true for many of the Wik elders in the Aurukun region (Smith 2010; Venn 2004; Venn 2005). Raising funds for timber production required the Wik to use their "timber resources as collateral, as distinct from the land" (Venn 2007b, 155). Because the government would have to act as a guarantor for a private loan, the state of Queensland benefitted more by offering discounted revenues for Wik, who would remove "unmerchantable trees to promote regeneration" (Venn 2007b, 156).

CYP is a harsh environment for production and agriculture, and the Wik land was no exception. A number of factors were determents to the Wik's success: low productivity of the land, language barriers, access to resources, and undervalued non–Western education (Altman 2001, 2–3; Venn 2007a; 2007b; Venn and Quiggin 2007; Lloyd *et al.* 2005). In any case, the Wik peoples of the Aurukun Township were able to secure management over the Darwin stringy bark forest because the government saw value in the bauxite deposits in current and future mining projects (Venn 2007a; Venn 2004). The Wik would clear the bark forest which would speed up the rate at which mining projects could begin extracting bauxite minerals. Nonetheless, timber harvesting, for the Wik community, was a continuous challenge. Arguably the state did not intend on assisting the Wik forestry industry as the closest sawmill was over 2, 000 km away and located in government operated southern and northern forestry regions (Venn 2005; Lloyd *et al.* 2005). In one of the few studies conducted in the region, Venn (2004, 438) recorded low volumes for millable and harvestable timber in the region:

> [L]og volume per hectare is low for an old–growth eucalypt forest, being typical between 5 m^3/ha and 12m^3/ha. The total resource in the Aurukun area is approximately 3.7 M m^3 distributed over 0.4 M ha of harvestable forest.

One would think access to aging timber goes against the conservationist rhetoric which has largely determined the development of the peninsula as noted above. However, the *Forestry Act of 1959*, makes clear rights and access to timber for Wik peoples were accessible only through the Shire and were reserved by the Crown, implying that "the Shire was a Crown holding within the meaning of the *Act*" (Venn and Whittaker 2003, 13), rather than representative of Indigenous interests. Nonetheless, Australia stood to benefit from Wik–owned and managed timber production, in an area where benefits were minimal at best and Australia could more quickly gain access to bauxite deposits (Venn 2004).

It has been suggested that Australia can collect royalties on more than 165,200 hectares of new mining leases in Aurukun by shifting lumber management to the Wik peoples. Given that the shire council reports directly to Australia, Indigenous rights holders are justified in their fear of losing land and rights due to NTA provisions as suggested by Lloyd *et al.,* above (2005). Inclusive Indigenous management of forestry is rare in the state of Queensland. Most often inclusion is the result of necessity, not of duty to incorporate Indigenous government (Lloyd *et al.* 2005). Indigenous communities provide labor to clear off damaged lumber that is sold to local communities as firewood (Loxton, Schirmer and Kanowski 2013). Rather than gaining rights to self–government Indigenous peoples are exhaustively placed within a cycle of dependency. Meanwhile, Australia relinquishes responsibility for its own historical wrongdoings.

After Indigenous peoples dealt with the constraint of lumber production in the Wik territory, they were once again met with frustration when seeking out co–management agreements. In 2014, the Wik community signed a land use agreement with the Aurukun Bauxite Developments Company (ABD). Not long after, the Queensland government introduced a controversial "one–day bid," whereby the state's preferred company, Glencora International, was awarded the contract. In an effort to reduce state reliance, the land use agreement between the ABD and Wik owners would have returned 15 percent of the shares to the community. This was estimated at $950 million over 35 years for the Wik of Aurukun Shire (Walker 2014; Cluff 2014). The Wik could take the Queensland government to court for clearly bypassing the legal process (Walker 2014), however, the courts would most likely reaffirm that Indigenous owners "do not have the right to veto mining projects on their traditional land" (Venn 2004, 438). As such, the Wik peoples' attempts at determination were halted or prevented from success from the onset of negotiations with the state.

Arguably, there are few meaningful changes to Indigenous lands pre and post–*Mabo* (Tehan 1998). The lasting impact of the *Mabo* decision is unfortunately reduced to symbolic "ownership" whereby Indigenous peoples have few mechanisms to control sacred spaces. And as alarming as it may be, Indigenous communities in the CYP continue, at high rates, to convert their lands into ILUA's or IPA's. Many do so to escape poverty and dependency, which is almost never the outcome (O'Faircheallaigh and Corbett; Langton and Palmer 2003). From overbearing protected zones, community use areas and colonial co–management regimes, Indigenous spacialities have not fundamentally shifted in a post–*Mabo* era. Governance is kept in a rigid and tightly managed process, where Indigenous representation is minimal at best. Indigenous rights to self–government are narrowly accommodated, in part, because Indigenous law and rights are not recognized by common law as independent and organized institutions of governance. Moreover, by limiting Indigenous self–government Australia ensures capital and resource extraction is unimpeded.

In the name of World Heritage status, Indigenous knowledge and resource management are fragmented and devalued over western knowledge systems. Indigenous rights are frequently extinguished as there are few mechanisms under the Wild Rivers Act and CYPHA to protect Indigenous peoples from settler authority. Thus, as Lloyd *et al.* (2005, 409) notes, Indigenous communities are in a perpetual state of fear. This, too, enhances the violence which runs through the colonial geography. Where in, violence is inherent within abstract spaces of contradictory nature and often felt through lived experiences (Lefebvre 1964–1986/2009, 187). For the Wik community, though allotted title over their territories and rights to extract timber, the discursive representation of title and ownership is entrenched within the settler colonial schema. The troubling outcome of such practices is that without marketable resources, Indigenous

communities such as the Wik of the Aurukun Shire are forced into carbon farming practices which further fragment resources, title, and ownership.

3.4. Conclusion

Paraphrasing Wolfe (1999, 163), settler colonialism is a structure and not an event. The structure (the settler state), as argued above, is in a constant state of self–preservation (Veracini 2011b, 185). After the *Mabo* case and the *Wik* decision, Australia reacted by modifying the discourse of land as one where inevitable uncertainty was directly linked to Indigenous recognition (Gibson 1999, 47). Moving away from overt settler colonial laws, Australia utilizes homogenization and fragmentation to weave its authority in less obvious manners. As noted by Li (2007, 6) states are in pursuit "not of one dogmatic goal but a 'whole series of specific finalities'" and they use multiple strategies to create the environment necessary for reterritorialization.

As noted in this Chapter, Australia uses fear–mongering to encourage the formation of unified fronts against the Indigenous 'other,' while administering a specific localized strategy of fragmentation and development projects. The state uses different strategies to problematize Indigenous title and recognition that appeals to the various non–Indigenous factions within Cape York, by eroding Indigenous rights to self–government. Under the multi–tenure land management scheme of the settler state, Indigenous owners enter into co–managed areas that are said to incorporate Indigenous participation. However, co–management entrenches uneven relations and marginalizes Indigenous interests. More than this, the governments scare tactics produced tensions between pastoralists and conservationists who feared that Indigenous ownership would tarnish the value and preservation of the land (despite having contributed to both ventures for thousands of years) (Langton 2012). This suggests that under the multi–tenure

land schema of the state, the certainty produced is vital to implement localized strategies which also assist the government in maintaining colonial geographies of dispossession. In CYP, both ecological management and industrial expansion fit into colonial management structures that appropriate cultures to enhance Australia's territorial authority.

The governments' reliance on ecological management techniques has led it to the appropriation of Indigenous knowledge and has over emphasized scientific rationalization and commodification as tools to enhancing environmental protection. This threatens Indigenous heritage and undermines Indigenous knowledge. Co–management and the multi–tenure land structures devalue the authority of Indigenous peoples. Thus, the NTA and ILUA structures remove Indigenous rights to self–government by devaluing Indigenous authority, governing institutions, and economic planning. In a post–*Mabo* environment, Indigenous communities are merely provided title with few usufruct rights for subsistence. In addition, with the advent of the Wild Rivers Act, the state of Queensland has solidified resource extraction, by limiting Indigenous access to prosperity and wealth creation. In the end, Indigenous title–holders undergo an intensive professionalization process to gain few advantages in terms of labor and self–governance. The restructuring is greatly influenced by local tensions and historical relationships which shape the current reterritorialization and removal of Indigenous self–governance.

The CYP region, in particular, presents an important example where clashes in priorities (ecological management verses industrial expansion) provided Australia with mechanisms to oversee Indigenous mobility and maintain strict control. Moreover, Australia holds underlying title and grants title on the condition that Indigenous rights to self–government will be limited. In other words, Australia maintained uneven social relationships and territorial dominance by devaluing and removing Indigenous self–government. By extinguishing Indigenous rights and

maintaining pastoral leases, Australia has stabilized the region which has led to the accumulation of wealth through the extraction of resources. Such advances in the region have yet to 'trickle down', per se, for Indigenous peoples who have not benefited from the royalties or from access to employment (Hollinsworth 1996). Instead, Indigenous dependence on the state continues as the Indigenous peoples lose their access to labor in pastoral, forestry, and mining industries.

Canada's Comprehensive Land Claims Process

4.1. Introduction

Entrenched within the settler state is an ongoing history of dispossession and accumulation, based upon the racialized tenants of *terra nullius* (vacant lands). Homogenization and fragmentation assist the settler state in the deployment of authority and legitimacy by disavowing Indigenous lands and histories. Although Australia and Canada both rest their political legitimacy on the doctrine of vacant lands and violent imposition of authority, Canada differs significantly from Australia because Canada signed treaties with Indigenous nations before and after the time of Confederation. However, treaty–making upon consolidating Canada was completed under a false pretext of a nation–to–nation relationship between the First Nations and colonial powers. Today Indigenous peoples hold unique legal title under the Indian Act where a variety of treaties exist. The Act strengthens Canadian dominance by overseeing reservese, governing structures, resources, and social development. Due to the advent of the Indian Act and accompanying assimilationist policies, Indigenous activism (including the Idle No More Movement 2015, Oka Crisis 1990 and many First Nations blockades) began with the reclamation and recognition of traditional territories, rights, and histories.

According to Coulthard (2014, 2) recognition has become "the dominant expression of self–determination within the Aboriginal rights movement in Canada." One that is granted by the settler state. Coulthard (2014, 4–6) makes reference to three major events that have shaped the current state of Indigenous territorial claims in Canada: the 1969 White Paper, the *Calder v. Attorney General of British Columbia 1973* case and, finally, the declining oil prices and the economic bust of the 1970s. For settlers, the White Paper and the *Calder* case were significant

determinants to the state's territorial legitimacy and the economic future of the natural resource industries. The White Paper was rich with colonial logic to disavow Indigenous territories and rights in return for equal citizenship (Coulthard 2014). Canada sought to disempower Indigenous claims under the White Paper to advance its territorial dominance and remove the likelihood of the Indigenous question affecting future governance. After the *Calder* decision, which struck down *terra nullius,* Canada was faced with a new crisis of territory and legitimacy. This Chapter will further explore the significance of all three events with specific attention to the province of British Columbia (BC). BC is an anomaly to the rest of Canada, as the province did not undergo significant treaty negotiations upon confederation. With few exceptions, Indigenous peoples within the province were forcibly removed from their lands to establish settler colonial authority. It was not until the *Calder* decision that *terra nullius* and the settlement of Europeans were questioned. The court decision reshaped Indigenous recognition–based activism, by enacting a comprehensive land claims policy and the *Constitutional Act of 1982.* This Chapter will highlight the aforementioned transition from the European arrival to the *Calder* decision and end with an analysis of the comprehensive land claims agreement process.

Utilizing the Nisga'a Final Agreement (NFA) as a case study, this Chapter will focus on the mechanisms of reterritorialization used by Canada to reassert territorial legitimacy and dominance despite the much touted self–governing agreement. The combination of conservationist rhetoric and the fear of Indigenous title increases the settler state's capacity to manage the development, governance, and mobility of Indigenous communities (Blackburn 2005, 591; Rossiter and Wood 2005, 360–361). By reorganizing Indigenous territories, Canada ensures certainty for its investors and "introduce[s] its presence, control, and surveillance in the most isolated corners" (Wilson 2013, 370). Similar to the state of Queensland, the province of

BC used fear and crises to foment public outrage against Indigenous land rights activists who had slowed down the forestry industry and development (Rossiter and Wood 2005. 359–360). Companies were spending thousands of dollars fighting the 'war on woods', mounted by environmentalists and Indigenous peoples, whose activism included blockades (Molloy 2000, 122). The highly political forestry industry in BC jeopardized the settler state's territorial legitimacy. The objective of this Chapter is to assess the Canada's reaction to the *Calder* decision which maintained that Indigenous title was still largely unresolved. Not surprisingly, the state's reaction is to reconfigure rights to self–government. In the aftermath of the decision, the comprehensive land claims process recognizes a municipal plus status of Indigenous government on the condition that Canada hold underlying title and authority over Indigenous activities. Consequently, Indigenous peoples remain in a dependent relationship with the settler state.

In the midst of developing a comprehensive land claims process the province of BC asked the public to decide on elements of Indigenous recognition (including self–governing rights) in the province by voting on a multi–question referendum. The referendum largely did not affect the outcome of the Nisga'a agreement but did demonstrate the government of BC's reluctance to acknowledge Indigenous self–government. The referendum was criticized by some for two features. The first was the biased wording of the question which was criticized for leaning voters to reject self–government, and the second was for allowing a majority rule to determine the fate of a minority (Rossiter and Wood 2005, 360-361). The referendum was viewed by some as a means to reduce the challenges to economic and political legitimacy presented by Indigenous territorial claims (Rossiter and Woods 2005). The referendum demonstrated the governments hesitation to negotiate with Indigenous peoples over certain rights also demonstrated the government's attempts at homogenizing the region to form consent among

the public — despite the failure to manifest such opposition (Rossiter and Wood 2005). Nonetheless, as Rossiter and Wood (2005) suggest, the referendum alludes to the reterritorialization project that the government of BC instigated to satisfy investors and produce an environment of certainty for political and economic ends. Wherein, Indigenous blockades were extremely detrimental to the economy and governing capacity of the province. As will be noted below, Canada, specifically the province of BC under the comprehensive land claims process, tightens their hold over Indigenous territories through homogenization and fragmentation, to ensure access for industry goes unthreatened.

With a contradictory space of development and conservation, the state managed to interject itself in strategically relevant places. The state did so by implementing policies of fragmentation that undermined the degree to which Indigenous peoples can oversee the management of their lands and resources. The NFA is carefully assess to understand the mechanisms of fragmentation that are used by the state to disassociate claims to sovereignty, rights to territory and resources, and self–government. The NFA provide certainty for Canada's network of investors while also restricting Nisga'a development projects due to environmental constraints. The commodification of resources and lands has resulted in the fragmentation of traditional lands which are now in the control of various actors (due to carbon sequestering programs) including both international and domestic governments, companies, tourists, and developers. In the end, through the comprehensive land claims process, the spatial representation of the settler state remains unchallenged as a result of the limitations placed upon the Nisga'a Nation's self–government.

With the intent to uncover Canada's homogenization and fragmentation, this Chapter will begin with a brief historical background of settler colonial policies in the making of Indigenous

spaces. This will be followed by an assessment of the events leading up to and including the *Calder* decision. The final portion of the Chapter will delve into the Canada's responses to the *Calder* decision, with specific attention to the comprehensive land claims process. Unlike the multi–tenure system under the NTA in Australia, where territorial claims have produced numerous models of land agreements, Canada has initiated a constitutionally protected agreement–making process which has been touted as a path towards "post–sovereign" spaces where reconciliation is possible (Scott 2012). Yet, under the modern land claims process Indigenous rights to self–government reconfigured to open new avenues for the settler state to intervene upon territorial development while also relinquishing state responsibility to correct historical (colonial) wrongs. This Chapter will draw on the experiences of the Nisga'a Nation in northern BC and the agreement signed between Nisga'a, BC, and the federal government in 2000. Notably, the Nisga'a Nation's attempt to reclaim traditional territory created much panic that has led to policies of misrecognition that produce regional certainty and attract investment. For reterritorialization to take shape, the unfortunate consequence for Indigenous peoples is the ongoing dispossession of rights and lands within the neatly disguised colonial project running through the land claims process.

4.2. The Making of Settler Space

As noted above, Canada's settler colonialism differs from Australia's, due to the adoption of Royal Proclamation of 1763 and the advent of Peace and Friendship treaties in the 1700s and reserves in late 1800s (Alfred 2009, 45). In Canada, the colonizers used the Royal Proclamation to secure Indigenous–owned lands (Alfred 2009, 45–46). The Proclamation was implemented by King George III. After the implementation of the Proclamation, British Colonies in North America were required to uphold it through treaty–making between the colony and Indigenous

peoples. Such efforts were referred to as Peace and Friendship treaties (Asch 2007). Treaty–making in Canada, "appear[ed] to provide legitimacy for the assertion of Crown sovereignty" (Asch 2007, 109). However, the language of the Proclamation expresses the desire to respect existing land tenure and authority. Treaty–making, thus, was deceptive in nature, as the settler state's intentions were to rid Indigenous peoples of their land rights. Yet, as stated by Blackburn (2007, 623) "Aboriginal people did not think that they were ceding their title, but rather entered into treaties as sacred instruments to protect their rights and establish a nation–to–nation relationship with Canada." The land, especially after the advent of the reserve system, was far from a shared space as was intended by Indigenous peoples. Indigenous peoples were in for a great surprise, eventually finding themselves contained to federally entrusted reserve systems and regulated under the Indian Act. The Indian Act, to date, is a regulatory structure which promotes assimilationist and exclusionary policies under which Indigenous lives are monitored and restricted (Blackburn 2007, 628; Alfred 2009, 46).

While the rest of Canada, with a few exceptions, initiated treaty–making with Indigenous neighbors, BC refused to engage in the treaty–making process as laid out in the Royal Proclamation of 1763. Aside from the Douglas Treaties on Vancouver Island in the 1850s, and Treaty 8 in 1899, the government of BC, after James Douglas, maintained a view of Indigenous peoples as no more than primitive savages (Blackburn 2007, 623–624). At the time, settlers believed their assimilation and missionary work was "not only acceptable but virtuous" (Soja 2014, 1–2). *Terra nullius* and the accompanying racist dogma remains elemental to the assertion of settler legitimacy and spatial authority in the province of BC. Notably with few exceptions the principle of *terra nullius* was not applied in the same fashion as it was in BC. Ascending governments of the province upheld the racial doctrine of *terra nullius* to ensure territorial

dominance in the face of Indigenous resistance. The provincial government refused to engage with Indigenous peoples or to respond to questions concerning land.

While BC is the only province that upheld *terra nullius,* Indigenous peoples of Canada fell under the Indian Act. Among many things, the Indian Act rationalized the Doctrine of Discovery as having "deeply rooted Eurocentric beliefs in the supremacy and right of Christian–bearing cultures to subjugate and claim dominion over non–Christian cultures" a belief that is continuously held by "political leadership, legal theory, and…the minds of jurists" (Greymorning 2006, 76). Crucial to settler colonialism, the Indian Act dispossesses Indigenous lands through the representation of space, spaces of representation and through the everyday use of the lands (Lefebvre 1964–1986/2009). Within BC, the Doctrine provided the government with justification to repeatedly ignore Indigenous title until the late 21st century. Colonial relations between Indigenous peoples and European colonizers initially was trade–oriented (specifically fur-trade oriented) and then turned violent (Harris 2004, 172). BC, in particular, was "almost completely de–populated"– due to small–pox, measles and influenza– giving more incentive to the settler state to appropriate traditional territory and resources (Harris 2004, 171). Indigenous peoples were said to have no real property rights based on John Locke's notion of property, whereby the existence of title is only relevant in European law when the soil is made productive (Evans 2009). According to settler schema, Indigenous traditional territories did not adhere to European legal standards of ownership (Evans 2009; Edmonds 2010, 7). This understanding of Indigenous territory devalues Indigenous institutions of governance and reaffirms settler superiority (Alfred 2009, 47).

Aside from the rights to traditional territory, under the Indian Act Indigenous peoples were denied the right to vote, organize potlatch ceremonies, and form political organizations.

They were also forbidden to raise funds for land claim campaigns until 1927 (Godlewska and Webber 2007). Indigenous children were removed from their communities and placed into the Residential School System where they were physically and mentally abused (Blackburn 2007, 621). As in Australia, Indigenous peoples were torn from communal ties, traditions, and cultural heritage. The Indian Act also disadvantaged Indigenous women greatly. Women were denied the right to vote until 1951 (Egan and Place 2011, 134). Indigenous mothers found to be unfit to raise their children had their children taken away under the Residential School System. Christian missionary schools were set up to civilize young Indigenous peoples whose lives would be forever changed (Nichols 2013). Under the Act, Indigenous women faced significant inequalities, including the removal of their traditional roles, membership, and status. Indigenous women who married someone who was not Indigenous lost their reserve status (until Bill C-31 that amended the Act in 1985 (Egan and Place 2012, 134)). This same regulation was not applied to Indigenous men who engaged in intercultural marriage and who often held "property rights on reserve[s]" (Egan and Place 2012, 134).

When Canada implemented yet another assimilationist policy, the White Paper, Indigenous activists expressed their concerns over the rewriting of colonial histories and the erosion of Indigenous rights (Godlewska and Webber 2007). Among the Indigenous groups to protest the White Paper was the National Indian Brotherhood, known today as the Assembly of First Nations, which stated that if "we accept this policy, and in the process lose our rights and our lands, we become willing partners in cultural genocide" (Coulthard 2014, 5). At the time of the *Calder* case, the federal government had attempted to pass the White Paper. The White Paper envisioned a crucial stage of the assimilation process whereby Indigenous peoples would be granted equal rights of citizenship under the stipulation that they would retract their

"entitlements to land, rights and other claims for jurisdictional sovereignty" (Eisenberg 2013, 103). With that, Indigenous negotiations upon land and rights would be nullified (Godlewska and Webber 2007). The White Paper would erode Indigenous status regardless of history. The policy provided the grounds to homogenize Indigenous identity and remove the power that the First Nations held based on their historical claims to territory and sovereignty (Eisenberg 2013). This assertion territorial dominance, as indicated in the work of Lefebvre (1964–1986/2009), is a feature of both the colonial state and also the modern state.

In 1971, the White Paper was scrapped and the *Calder* case found new paths to Indigenous recognition (Coulthard 2014). Below I will trace the mechanisms of the Canadian settler state to redefine its territorial dominance at a time of tension. What becomes clear by analyzing the *Calder* case and the Distinctive Cultural Test (DCT) is the need for the settler state to contain Indigenous rights and limit self–government.

4.3.1. The *Calder* Case

Indigenous activists in 1913 put pressure upon the Privy Council through partitions and references to deal with questions concerning Indigenous title (Foster 2007, 69). In each failed effort, Indigenous peoples were determined to retain title over their lands, specifically Indigenous peoples of the west coast (given the absence of treaties). In 1927, the Allied Tribes of BC took their concerns to the joint parliamentary committee in Ottawa, where, to their dismay, their requests for a response on Indigenous lands were once again denied (Foster 2007, 64; Miller 2009). The difference which marked this period of activism came when the parliamentary committee pronounced that there was no valid Indigenous title which resided or had been extinguished in BC (Foster 2007). In the same year, the Indian Act forwarded numerous provisions to put an end to pursuing claims, concluding the first major phase of activism

according to Foster (2007). Between 1927 and the 1950s, Indigenous activism went underground in reaction to section 141 of the Indian Act, which made it "an offence for anyone to raise money from any Indian or Indians for the purpose of prosecuting any claim against government unless the minister's permission had first been obtained" (Foster 2007, 70). Section 141 was repealed by the settler state in 1951, marking a significant change for Indigenous activists who could now hire legal advisors and lawyers to sue the government over land rights (Foster 2007). At the forefront of this activism was the Nisga'a Nation, which viewed the *Calder* case as "another step in the continued assertion of their right to the lands they had never ceased to occupy and defend" (Godlewska and Webber 2007, 1).

The significance of *Calder* cannot be understated; the court case confronted the history of stolen lands and ongoing Indigenous dispossession (Eisenberg 2013; Blackburn 2007; Asch 2007). Brought to the Supreme Court by the Nisga'a Frank *Calder* and the Nisga'a Tribal Council in 1973, the case, which was lengthy, sought to determine Nisga'a title to approximately 1000 sq. mi (Blackburn 2007, 624). The Nisga'a Tribal Council is made up of four bands: Gitlakdami, Canyon City, Greenville, and Kincolith (*Calder v. British Columba, AG* 1973). Under the umbrella organization of the Nisga'a Tribal Council, the collective court case argued that the communities involved never accepted the reserve system, which was placed upon them, and that reclamation of Indigenous title is "well embedded in English law" (*Calder v. BC, AG* 1973, 318). At a time when Indigenous rights were in the process of being permanently extinguished with the advent of the White Paper, *Calder* called into question the continuity of Indigenous title (Greymorning 2006). Beginning in 1971 at the BC Court of Appeals, the provincial courts did not recognize Nisga'a title, based on the belief that the Nisga'a were too primitive to hold title (Greymorning 2006). Chief Justice Herbert William Davey dismissed the

Indigenous suit, claiming that "at the time of settlement [Indigenous peoples in BC were] a very primitive people with few of the institutions of civilizing society, and none at all of our notions of private property" (Asch 2007, 102). This precedent set by Chief Justice Davey remains the most cited in contemporary cases concerning Indigenous recognition (Asch 2007, 104).

The Nisga'a community did not give up and went to the Supreme Court of Canada. The Nisga'a tribal council sued based on three issues. The first was to affirm that Indigenous title existed and the second to determine if the Nisga'a title had been extinguished upon European arrival. The third was a procedural issue; at the time BC required appellants to gather permission to sue the Crown. In the event that the Nisga'a did not secure permission, courts were asked if the case was an exception to the rule (Godlewska and Webber 2007). Seven justices heard the Nisga'a and provincial cases for and against title. Six justices agreed that the Nisga'a had claims to title, but they were split as to whether Nisga'a title had been extinguished (Godlewska and Webber 2007). Among the three justices who agreed that the Nisga'a Nation title had not been extinguished was Justice Hall, who acknowledged that the evidence proved that:

> [T]he Nisghas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership [I]ndigenous to their culture and capable of articulation under the common law. (Asch 2007, 103)

Justice Hall and the two of his fellow justices who concurred with him believed that the Nisga'a held continued title over their lands and that the title had not been extinguished by the Crown (Blackburn 2007, 624). This was determined after intensive reading of an anthropological text provided by Wilson Duff. Duff argued in the 1964 *The Indian History of BC* that:

> It is not correct to say that the Indians did not "own" the land but only roamed over the face of it and "used" it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar

> purposes… Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognized territory of one or other of the Indian tribes. (*Calder v. British Columbia, AG* 1973*,* 318–319)

Duff acknowledged title outside of the Euro–centric model, breaking the barrier between Indigenous law and territory and that of the dominant settler societies. Duff's work greatly influenced Justice Hall's decision. Justice Hall went on to write that "[A]boriginal Indian title does not depend on treaty, executive order or legislative enactment" (Asch and Macklem 1991, 502). Justice Hall implied that Indigenous peoples inherently possess rights and title and, therefore, did not require Crown recognition (Asch and Macklem 1991, 502).

Despite Justice Hall's insightful arguments, it was Justice Davey's initial reading of the hierarchy of European settlement, as noted in the BC Court of Appeals, that the Supreme Court reinforced when it upheld primitive notions of Indigenous rights (Asch 2007, 104). Supreme Court Justice Judson believed that while the Nisga'a had initial claims to title, "the history of discovery and settlement of British Columbia demonstrated that the Nass Valley and, indeed, the whole of the Province could not possibly be within the terms of the Proclamation" (*Calder v. British Columbia, AG* 1973, 314). Justice Judson held that with the provisions of the *British North American Act 1867* (BNA Act) and post–confederation, the province could extinguish land through cession (*Calder v. British Columbia AG* 1973, 320). Moreover, both Justice Hall and Justice Judson argued that the Royal Proclamation of 1763 did not extend to the province of BC, citing that at the time of the Proclamation, the province was *terra incognita* (Godlewska and Webber 2007; *Calder v. British Columbia, AG* 1973, 314 and 323). The British did not explore BC until the 1780s and 1790s, when "commercial capital reached the coast" (Harris 2004, 168). Many have rightfully stated that the document must have been extended to the province after Governor James Douglas explored the territory. Douglas fulfilled the promises of the

Proclamation by engaging in treaty–making on Vancouver Island in the 1850s (Blackburn 2007, 623). Moreover, as referenced in the court proceedings, "[t]he wording of the Proclamation indicated that it was intended to include the lands west of the Rocky Mountains" (*Calder v. British Columbia, AG* 1973, 316). While the Proclamation remains a point of contention, both in terms of justifying settler legitimacy and extending to BC, the Supreme Courts dismissed the *Calder* case based on a procedural technicality (Godlewska and Webber 2007; *Calder v. British Columbia, AG* 1973).

According to Justice Louise–Phillippe Pigeon, the courts had to dismiss the appeal based on the inability of Nisga'a to secure the consent of the Attorney General of BC before suing the government, a requirement at the time. Justice Pigeon believed that the Nisga'a did not present sufficient evidence to prove their case was an exception to the rule. Thus, he did not comment on the issue of title and extinguishment. Although the Nisga'a lost the appeal, the case is largely regarded by scholars and activists as a milestone as the first legal battle in which title was recognized and the rights of Indigenous peoples received more attention (Blackburn 2005; Ash 2007). After the *Calder* decision, the settler state was forced to re–evaluate the rights of Indigenous peoples (Blackburn 2005, 624). With the exception of James Bay agreement, the *Calder* decision preempted the comprehensive land claims process in Canada, which has led to agreements in the Yukon, North–West Territories and BC (Blackburn 2007, 624).

4.3.2. Manifesting (Un)Certainty

The significant political change from non–negotiation to the comprehensive land claims process came out of a desire to settle uncertain lands and protect the settler state's access to resources (Blackburn 2005). In a time of multiple crises in BC that included falling forestry industry, rising unemployment, environmental activism, and clashes with Indigenous groups, the

settler state was inclined to maintain colonial geographies to promote economic and political stability (Hayter 2003; Jackson and Curry 2004). After the *Calder* decision that left many questions concerning Indigenous rights unanswered and the government of BC turned to the general public to decide on key aspects of the land use agreement (Jackson and Curry 2004). The government of BC held a multi–question referendum that would allow the majority of BC voters to voice their concerns over the instability in the region caused by Indigenous territorial claims. The implication of the referendum was limited, as the referendum did not greatly impact the future of the Nisga'a agreement. However, the province of BC demonstrated its unwillingness to uphold Indigenous claims to self-government and attempt to reduce Indigenous issues to a minority rights concern, which was then decided by the majority (Rossiter and Wood, 2005, 360–361).

The reactions to the economic crisis by the state shaped much of the agreement–making process as it laid out mechanisms that ensured economic stimulus and development. The reference included questions regarding Indigenous rights to hunting and fishing rights, taxation and protected areas, causing much strife between the state and Indigenous peoples (Rossiter and Wood, 2005, 359–360). Voters in BC were asked to respond yes or no if they believed that "Private property should not be expropriated for treaty settlements" or if "hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians" (Rossiter and Wood 2005, 359–360). The questions also went on to ask about environmental protection, parks, and Indigenous self–government. The outcome of the referendum, according to the BC government, was "an overwhelming indication of the electorate's wishes with regard to treaty negotiations" (Rossiter and Wood 2005, 360–361). The government of BC reached this conclusion despite a low voter turnout of 35.84 percent (Elections BC 2002, 6) and the one–

sidedness of the questions asked (Rossiter and Wood 2005, 360). According to Rossiter and Wood (2005, 361–362), the referendum was intended to round up support for economic restructuring.

Key to the analysis of BC's reaction to the claims process is contextualizing the political and economic environment at the time of the negotiations. In the 'war on woods' Indigenous and environmental activism on lands led to a highly uncertain environment for investors and industrialists (Hayter 2003). The government attempted to remedy its economic woes by introducing subsidies for industrialists and limiting timber imports (Hayter 2003). According to Hayter (2004), the provincial and federal governments were forced to acknowledge environmental and Indigenous protests, because the protests were putting a strain on the resource based economy. BC's resource and timber economy is largely based on exports, specifically soft–wood lumber exports which are connected to markets in Europe, the USA, and Japan (Hayter 2003, 712). Therefore, the markets took a deep hit with clashes in the woods between Indigenous and environmental activists, and the lumber industry. Indigenous peoples set up blockades to prevent resource based industries (namely the forestry industry) from entering their traditional lands. Indigenous peoples in the Skeena River region set up blockades to prevent companies from crossing the Skeena Cellulose Bridge (Notzke 1994, 102). The region's Indigenous peoples worried that the degradation and extraction of timber would leave little to nothing for future generations. As noted by Notzke (1994, 103), Indigenous peoples "have played havoc with the timber companies with a series of roadblocks and court injunctions." With such activities, Indigenous peoples were able to prevent the expansion of new cutting areas.

Indigenous peoples were rightly worried about the future of their territory's resources given the detrimental practices of the soft–wood lumber industries in the province from the

1960s and 1970s (Hayter 2003; Young 2008). The clear cutting of soft–wood lumber, as noted by Hayter (2003) did harm Indigenous territories and the future of the provinces resource laden industry. As a consequence of the declining timber industry in the 1980s, the province saw a drop in employment by 200,000 jobs and a reduction in profits by $500 million (Hayter 2003, 715). Having gained political and legal pull, Indigenous and environmental activism has attracted the attention of regional and industrial actors (Young 2008).

The province undertook reform plans which included revitalizing forests creating land zones for mining and resource development, and dedicating 20 percent of Crown land for redistribution for community and private use. From this pool, the Crown would determine land claims with Indigenous nations within the province (Young 2008, 13). These reforms were accompanied by a participatory land use and resource management process used to ensure economic and political certainty (Jackson and Curry 2004; Young 2008; Hayter 2003). The participatory land use and resource management reflected an ecological modernization process which was criticized for "perpetuating unequal and exploitative social relations" (Everett and Neu 2000, 6). The NFA was negotiated under the condition that the Nisga'a Nation must "meet or beat" the federal and provincial standards as they apply to education, child and family services, and resource management (*Understanding the Nisga'a Treaty,* 1998). Because of that condition, the final agreement contained an immense list of conditional management standards which, as will be noted below, impinge upon the Indigenous nation's self–government.

Similar to the case in Australia, the Canada relied upon homogenizing the interests of conservationists to ensure control and surveillance of Indigenous lands. As mentioned above, Indigenous lands were necessary for the region's industrial development. Yet the driving force for the comprehensive land claims process, as noted by Hayter (2003, 721),

> assumed that ab–original self–government would redress political grievances, initiate sustaining forms of local government, and reduce the uncertainty facing investments in BC's forest economy arising from land claims and associated protests.

Similar to the province of Queensland, BC sought to produce a national crisis over the land claims process that would incite contempt and fear over Indigenous ownership, after which, the province could enforce with public support the fragmentation of Indigenous rights and territory.

4.3.3. (Mis)Recognition as Policy

After the *Calder* case the land claims process in Canada began with the James Bay and Northern Quebec Agreement, followed by BC's Nisga'a Nation. With amendments to the Constitutional Act of 1982 which recognized and affirmed Indigenous rights and title, it had seemed that the country was finally ready to correct past wrongs. To say the least, the relationship between Indigenous peoples and the state was hostile. Many activists assumed that the advancements after *Calder* would lead to an optimistic future for Indigenous peoples. But with no specifications of what rights were provided, and with ongoing judicial challenges to gain rights to resources, markets and self–government, the familiar feeling of hostility reasserted itself (Borrows 1997/1998, 38; Asch and Macklem 1991, 505).

In the most general terms, Section 35 of the Constitutional Act of 1982 recognized "existing aboriginal and treaty rights of the aboriginal peoples of Canada" this includes "rights that now exist by way of land claims agreements or may be so acquired" (Constitutional Act 1982). According to Asch and Macklem (1991, 505), to some extent Section 35 implied the inherent rights of Indigenous peoples, but requirements to determine the existence of these rights relied solely on Crown recognition. To gain specific rights, the courts implemented the DCT, which came out of the *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development 1978* proceedings and later in the *R v Sparrow* and *R v Van der Peet* cases (Asch

2007, 104). *Baker Lake* and *Sparrow* rulings suggest that the DCT relies on a "presumption, which is counter to that espoused by Justice Hall and Judson, that until they provide proof to the contrary, [I]ndigenous peoples are assumed to have been living at the time of European settlement in a form of life that is less than our own" (Asch 2007, 109). The result of such litigation over land claim agreements has been described by Rynard (2000, 216) as a "cash for land" grab in which the nature of the agreement–making process extinguished Indigenous rights and enhanced settler intervention to erode Indigenous rights to self–government.

The DCT formalizes reducing Indigenous rights to self–government. As stated by Borrows (1997/1998, 43), the test "invites stories about the past," which in itself implies that the courts define Indigenous peoples as primitive and backward. The DCT was developed within numerous court cases, beginning with the *Delgamuukw* case and then the *Sparrow*, *Van der Peet*, *Gladstone,* and *Baker Lake* cases. The DCT measures the extent to which Indigenous claimants were an "organized society" prior to European arrival. The significance of Indigenous social organization has to be accompanied by proof of an established claim to land and proof that continued occupation of traditional lands "was largely to the exclusion of other organized societies" (Lochead 2004,7). The courts imply here that sovereignty dates only as far back as European arrival. Similar to Australia's *Yorta Yorta* decision, the courts reassert European dominance and legitimate settler authority.

From the application of the DCT in *Sparrow* and *Van der Peet,* Indigenous rights and legal structures have to be modified to fit the language of the courts, contained to pre–contact practices, be specific in nature as to not resemble rights to self–government; and cannot be transferred (Borrows 1997/1998, 45-52). The latter conditions mean that rights are not

universalized or generalized across Indigenous societies (Borrows 1997/1998, 45–52). Taken one by one, these requirements explicitly fragment Indigenous rights.

For instance, the Constitutional Act does provide universal and general protection; however, specifications on what rights are recognized are not referenced. Instead, Indigenous peoples are required to translate the language of their law to liberal traditions, which can result in the fragmentation and disavowal of Indigenous authority, rights, and title. To prove such rights exist, Indigenous peoples must rely on anthropological texts which may be rich with colonial bias and used to uphold European superiority (Borrows 1997/1998, 49). As Borrows (1997/98, 46) summarizes, Indigenous laws are reframed to gain judicial approval, but this can

> create the very real danger of mischaracterizing Aboriginal law in order to make it "fit" another system, and thus not accurately protect the underlying context and reason for the rule's existence within the Aboriginal community.

Overcoming colonial rule becomes an overwhelming challenge for Indigenous peoples when rights, culture, tradition, and laws are frozen in time. Based on the DCT, Indigenous peoples must prove that their societies were established and organized prior to European arrival. In addition, the Crown and courts must determine the degree to which Indigenous communities were 'organized' before the courts can grant Constitutional recognition (Asch 2007, 105). Because Indigenous peoples must reframe their traditional legal systems to adhere to the DCT test, Borrows (1997/1998, 46) argues that the potential for Indigenous "claimants to express laws on their own terms" is wholly damaged and diluted. To fit into the settler judicial system, Indigenous peoples must demarcate their legal structures to gain partial recognition of their jurisdiction and authority. Just as in the Australian case study, the Canadian settler state

reduces the likelihood of reclaiming territory and self–government as a result of the fragmentation that occurs under the DCT.

The DCT further "entrenched the power of the Canadian state to shape Indigenous ways of life by allowing courts to decide, the current context, which cultural practices merit constitutional protection" (Eisenberg 2013, 92). An example of the mechanisms used to erase Indigenous authority is showcased in the *R v Gladstone 1996* ruling. This ruling, is critical to understand Canada's response to after *Calder* because it highlights the manner that the state can retain its authority despite granting territorial claims and Constitutional recognition. Though seemingly beneficial to the Heiltsuk Nation, the Crown retains dominance to determine the future of Indigenous land and resources. Rights are fragmented to provide settler states the points of access to intervene on key issues that potentially undermine the settler state's authority.

As noted above, while Section 35 of the Constitutional Act protects the rights and title of Indigenous peoples, rights are left to the courts to define. The Heiltsuk Nation brought the aforementioned case to the courts claiming that the settler state infringed upon their right to fishing for and exchanging herring spawn for commercial purposes (McNeil 2004, 290). In the *Gladstone* ruling, the Crown had to defend its infringement upon Indigenous rights made valid through "legislative objective" and prove that the Crown "respected its fiduciary obligations to the Aboriginal people in question" (McNeil 2004, 289). The courts found that the Crown overstepped its authority, and granted the Heiltsuk Nation the right to commercially fish and sell herring spawns. However, the courts reaffirmed the Crowns underlying title by adding the provision that granted the Crown rights to fee simple interest on Indigenous lands "for agricultural purposes, or to provide corporations with leases or licences to exploit the forest and

mineral resources on those lands" (McNeil 2004, 295). Yet, for Indigenous peoples to use these lands, they must pay Crown licencing fees, which does not bode well for economic development (McNeil 2004).

The Gladstone case was also significant in fragmenting Indigenous rights, as the ruling was limited to the Heiltsuk Nation and not transferable to other Indigenous communities unless they pursued their own negotiations through the courts or with the Crown (Borrows 1997/1998, 50). Although Indigenous societies are heterogeneous communities, the cost and burden of proof, in this case, is overwhelmingly unequal for Indigenous peoples. And once again, limiting Indigenous peoples by preventing universal rights and privileges to commercially develop from their territory and resources.

The *Gladstone* case is telling of the use of law in restructuring Canada's hierarchy that maintains the Crown's underlying authority and can justify its *prima facie* infringements over Indigenous territory (McNeil 2004, 289). Indigenous peoples are no more protected in Canada than in Australia, despite constitutional commitments do to so. Similar to Australia's multi–tenure land structure, the Crown retains the right to resources and markets, which prevents Indigenous prosperity. At the same time, Canada allows and forgives extinguishment of Indigenous rights, interference, and domination over territorial claims. According to Eisenberg (2013, 102), Indigenous rights are not being misinterpreted; rather — as evident in the court decisions listed above — Indigenous rights are purposefully constrained to produce interdependence and fragmentation. A similar thread running through the aforementioned cases is the tendency of the state to reduce Indigenous peoples into primitive beings that are un–evolving after European arrival and that which favors settler authority. Reverting to pre–*Calder* realities where title and rights are undermined, the *Gladstone* case takes away Indigenous

capacity to mitigate development and market endeavours, the very same tactics which were also used by the Australian state following the amendments to the NTA.

Outside the legal system, Indigenous peoples –particularly in regions where treaty–making did not occur– can take on a comprehensive claims process. Case–by–case negotiations allow the settler state the freedom to assess the monetary and property benefits of each Indigenous territorial claim brought before them. BC assured its investors and citizens that claims under the comprehensive claims process would only transfer about five percent of land and compensation that was based not on historic wrong–doings but on the geographical importance (Jackson and Curry 2004).

Canada's comprehensive land claims process is open to Indigenous peoples whose title has not been extinguished by means of treaty making (Lochead 2004, 7). First, claimants must prove, via the DCT test, their rightful claim to title. Then, Indigenous peoples and the provincial and federal governments can carve out an agreement allotting lands and rights to the Indigenous nation (Lochead 2004, 17). According to Lochead (2004, 9), once agreements are at their final stage, the Indigenous nation partaking in negotiations must agree to cede or surrender "finally and forever, all claims to native title and other aboriginal rights whatever they may be." This implies that Indigenous laws and lands are not evolving, which can present challenges to future generations that will be constrained by pre–existing agreements or conditions (Rynard 2000, 219). Because the negotiations take place in a highly uneven power dynamic, Indigenous peoples are pressured to accept compromises that may harm their access to commercial agreements and their capacity to govern and manage their lands. This is the reality facing the Nisga'a Nation, as will be noted below.

Once Indigenous comprehensive claims are recognized and ratified by the settler government, Indigenous rights and title are constitutionally protected that is, if Indigenous peoples can mitigate the red tape, and if their fragmented rights and title are protected. As stated by Egan (2013), the comprehensive land claims process is intended to reproduce settler colonial relationships and structures. The institutions and relationships produced as a result of the NFA only further legitimize the settler state's claims and jurisdiction over Indigenous territories.

4.3.4. Fragmenting Indigenous Self–government

The participatory land use and resource management process implemented after the referendum integrated various levels of interaction and regulation, including the dedication of protected areas and the implementation of the *Environmental Assessment Act of 1994,* the timber supply review, and the BC Treaty Commission (Jackson and Curry 2004). The latter was formed to oversee land claims agreements with the BC's Indigenous communities (Jackson and Curry 2004). Although the NFA was completed outside the BC Treaty Commission process, the Nisga'a land claim is viewed as the model to set the standard for all other contemporary land claims. The Nisga'a Nation settled agreements after lengthy negotiations with federal and provincial governments. Nisga'a gained claims to a mere eight percent of its traditional territory, relinquishing control over the remaining 92 percent (NFA 2000; the lands transferred by the Nisga'a nation are contested overlapping lands with the Gitanyow Nation; the *Gitanyow First Nation v British Columbia (Minister of Forests),* found no grounds that proved Gitanyow ownership (Sterritt 1998/99)). Thus, the NFA becomes the go–to determinate of future agreements whereby Canada signals a precedent that only a "small portion of land claimed by an Aboriginal nation will actually form part of a treaty settlement" (Sterritt 1998/99, 75). The

following section will assess the Nisga'a Nation's governing powers and capacity to determine resource management on traditional lands. It will also review the various property and self–governing rights as a result of the NFA.

Arguably, the NFA, land claims agreement, provides few resources and tools for the Nisga'a Lisims government to determine development and economic outcomes. With a municipal plus status, the NFA divides lands into three regulatory mechanisms: one transfers the reserve land to fee simple ownership by the Nisga'a, the second are the Crown–owned lands which are said to be co–managed, and the third are extinguished lands transferred to the Crown (NFA 2000; Jackson and Curry 2004). The division of lands is based on a "land selection model" whereby Canada can determine which lands are and are not included in the final agreement (Egan 2013, 41). Indigenous rights and agreements are assessed according to the monetary value of their lands and resources. The value of lands varies according to the cost of the land, resources, and the population of the Indigenous community (Jackson and Curry 2004, 34-35). Thus, the rights to self–government granted to Indigenous peoples is carefully calculated and carved out, arguably only allocating the rights for subsistence (Egan 2013). In this asymmetrical process, the settler state can divide lands along the borders that it believes are beneficial for the state. This process was used in the NFA (Egan 2013). Similar to the Australian multi–tenure land structure, the Canadian state retains the authority to divide lands to benefit their territorial capacity to influence Indigenous ownership. Although negotiated through a comprehensive land claims process, the development of Indigenous rights to self–government differs little in its overall goal of securing settler authority and economic gain.

For instance, consider the co–managed Nass Wildlife Area which comprises up to 15,000 sq. km of land where Nisga'a citizens are provided wildlife harvesting rights. The Area –

continues to fall under settler jurisdiction (Rynard 2000, 224). The Nisga'a Nation retains only consultative status on co–managed lands, through committees that can only make recommendations (Rynard 2000, 228). Canada and its networks retain their authority by controlling the waterways on Nisga'a lands, regulating fishing and forestry, and ensuring that agricultural and timber tenures are unaffected by the NFA (Rynard 2000). Referencing a report filed by the provincial government, Jackson and Curry (2004) contend that the financial benefits for the province would be between $3.8 and $4.7 billion for consolidating Indigenous lands. Jackson and Curry (2004, 39) also argue that in order to keep forest resources intact while accommodating Indigenous title, an estimated "3% of Crown lands would have to be conveyed or entailed to extinguish remaining aboriginal rights, covering some of 5% of the provincial forest resources." In other words, the settler state utilized the tough economic climate to relinquish Indigenous rights and authority, whilst also reducing the state's responsibility for correcting past wrong doings (by evening the playing field) (Rynard 2000).

The NFA divides the territory, first, into fee simple holding where the Nisga'a own over 1, 992 sq. km, constituting eight percent of their traditional lands and resources (NFA 2000). Under a fee simple ownership, the Nisga'a Nation is still subject to the dominate Canadian state, despite having self–governing status. Fee simple holdings were used in the Anglo–Saxon feudal system to retain Crown authority because "the land–holder does not technically own the land but rather is considered a tenant of the Crown, which continues to hold underlying title" (Egan 2013, 43). This becomes increasingly evident as the Nisga'a Nation moves towards a privatized model, allowing its citizens to sell off parcels of their traditional lands. Through fee simple plus holdings, Canada holds authority over the transfers from Nisga'a lands to private owners and is responsible for transferring lands back to the Nisga'a Nation once the contract is complete

(Rynard 2000, 224; Egan and Place 2012, 134). Crown authority that overrides Indigenous title maintains colonial geographies wherein Canada has the final say over the land, similar to the multi–tenure land model found in Australia. In other words, disempowering Indigenous rights to self–government.

To make sense of the shift from traditional (communal) legal traditions towards privatization, it is important to mention Hernando de Soto, a Peruvian economist, recognized by the World Bank for his research on property regimes. De Soto makes the claim that private property can open new avenues for revenue streaming for the world's poor (Graben 2014, 410–411). In other words, investors and capital accumulation will be promoted by establishing more certain property laws, namely through privatization. This argument was not lost on the Canadian settler state. As reported by Graben (2014, 411), "In Canada, the First Nations Tax Commission and its Chief Comissioner, Manny Jules, have been vocal advocates for First Nations property ownership based on de Soto's economic theory." Moreover, the transfer to private property was touted by Canada as the defining variable towards economic success. Although de Soto's argument is highly contested, Canada continues to divide Indigenous lands under the assumption that private property will assist in economic projects. This is the reality of the Nisga'a who is disposing of its territory in exchange for highly contested terms of economic success (Graben 2014, 414). The benefits of private property are sole for the settler state, private property regularizes land regimes and creates geographic stability for investments that maintain settler authority while taking advantage of weak Indigenous communities. Indigenous community's welcome investors that promise to evade them of the continuous cycle of poverty. Yet, as will be noted below, fee simple holdings have immensely detrimental effects on rights to self–government and traditional lands with few economic benefits in return.

After fee simple title is transferred to a third party, the Nisga'a "do not have constitutionally protected law–making powers on their properties" (Rynard 2000, 224). This can have adverse effects on heritage, culture, and community, and constrains Nisga'a government's jurisdictional reach. Arguably, the loss of communal ownership over the lands can hinder socio–political development and ecological restoration that has already been damaged by privatized land holdings (Egan and Place 2012). Through the enactment of a feudal property structure, Canada reinforces its dominance by repurposing the lands under the NFA. Fee simple title is a rigid model of title that is, in some cases, polar opposite to Indigenous understandings of territory and resources. Indigenous knowledge is embedded within their traditional territories, and territory is the means through which political, social, and legal institutions are crafted (Egan and Place 2012; Borrows 2002; 2010). The Ayuukhl was the oral and legal history that governs over the Nisga'a Nation, which situates their traditional land as the keeper of the community and law (King 2004; Borrows 2010).

The Ayuukhl states that Nisga'a land tenures are held and passed through generations under a matrilineal property regime (Borrows 2010, 96-100). But under the NFA, women's role in land tenure and management is erased (Borrows 2010, 96-100), thus fragmenting Nisga'a women's political voice and social role. Women's traditional knowledge and identities are disavowed under the redefined fee simple property holdings (Altamirano-Jimenez 2013, 138). This has a grave impact on relations to land and the social roles of Nisga'a citizens. Yet, it is such colonial geographies that are necessary for Canada to reterritorialize authority and ensure that networks of production are intact. As stated by Egan and Place (2012), land becomes a tool through which settler colonial rule can be encoded into social and political relations. Similar to Lefebvre's production of space, Egan and Place (2012) express their concerns over the colonial–

geographic project that is entrenched within the land claims agreement process in Canada. The NFA creates a daunting structure of dependency due to the looming control of the settler state over commercial practices and resources.

Fishing and forestry on Nisga'a lands are highly regulated and present many challenges for the Nisga'a Nation, as both are important to the province's economy. The Indigenous nation is allowed up to 15 percent of the annual catchment of pink salmon and up to 13 percent of the same for sockeye (NFA 2000, 8(22); Altamirano–Jimenez 2013, 141). Oolichan, consumed only by Nisga'a, are not regulated under the NFA. In other words, because the former two species of fish have commercial value, the profits must be contained. The latter can be consumed without regulation, given its low monetary value (Scott 2012). The agreement alludes to a skewed model of ecological management whereby catching pink and sockeye salmon is overvalued in comparison to the oolichan. In addition, the lack of regulation placed on the oolichan, a dietary staple for Nisga'a, secures the sustenance of the Indigenous nation rather than its access to successful commercial endeavors for the nation's fishing industry (Altamirano–Jimenez 2013, 142; Scott 2012). Selling pink salmon and sockeye is regulated by federal and provincial laws. Ministerial approval is required if the Nisga'a government wants to harvest fish (NFA 2000, 8(12)). Thus, mechanisms to profit off of the pink salmon and sockeye on Nisga'a lands are provided by ministerial and state approval (Altamirano–Jimenez 2013, 145). Similar to Queensland and its Wild Life Act, the province of BC maintains an upper hand in the allotment of resources and Indigenous development projects. The Nisga'a Nation has free range only when implementing laws of distribution amongst Nisga'a citizens. In other words, the Nisga'a Nation has no capacity to oversee or control commercial activities, despite "owning" a parcel allotment of pink salmon and sockeye on its traditional lands (Altamirano–Jimenez 2013, 141-145).

Furthermore, Canada holds authority over the distribution of commercial licenses and the tools and traps used to fish (Altamirano–Jimenez 2013, 145). Nisga'a can only proceed with commercial fishing if and when non–Indigenous commercial fishing is "also viable" (Rynard 2000, 242). Thus, the nation must secure the viability of fish running through the Nass valley for commercial purposes and for sustenance. For this reason, the Nisga'a Nation has exercised precaution and conservation that has resulted in an award from the Sierra Club for its salmon fishery management (Altamirano–Jimenez 2013, 145; Bains 2006). Notably, the settler state utilizes conservationist rhetoric to monitor fishing methods and the catchment of specific salmon runs (Altamirano–Jimenez 2013, 145). Such challenges keep the Nisga'a fishing industry in a perpetual cycle of dependence on the province of BC and Canada. Due to conservationist pressures, Nisga'a is tasked to "meet or beat" the expectations by reducing their annual catchment. The ecological management strategy of Canada has resulted in granting only subsistence rights to the people of Nisga'a as opposed to unstipulated ownership and control over their resources.

The forestry industry in BC, as noted above, is crucial for the province's political and economic strength. Thus, it is vital for the province to reassert control and maintain a secure environment for investors and stakeholders. After the 'war on woods' and through relentless negotiations, the Nisga'a Nation walked away with commercial ownership of its forestry industry. However, due to the practices of BC's soft–wood lumber industry from the 1960s and 1970s much of the commercially viable timber has already been extracted (Rynard 2000, 225). As well, the agreement guaranteed businesses with certainty that existing tenure over timber and industrial development in the region would not be interrupted (Altamirano–Jimenez 2013, 145). As a means to ensure ongoing land tenure, the Nisga'a Nation had to agree to halt development

projects for the first 10 years after the agreement was signed. After that, the Indigenous community will have to gain settler approval before building infrastructure to support its forestry industry and go through provincial red tape to obtain licensing (NFA 2000 5(3)).

Trained specialists and commissioners of the Forestry Act that continuously monitor and regulate Indigenous activities in all corners of the province (Rossiter 2008, 218). This is due to the fact that Forestry in BC is particularly important to the structure of the settler state to not only appropriate the space but represent nature as a space removed from cultural and social connections (Rossiter 2004, 142). Paraphrasing Braun's work, Rossiter (2004, 141) makes the claim that the colonial geography of BC resides within the "abstract spaces of the geographical imagination: the market, the nation and the global community." Due to the value of the forestry industry, BC retains a close eye on economic growth and Indigenous activities within the region. For instance, in the NFA, the settler state continues to hold significant influence over the development of the forestry industry on Nisga'a lands. It can ensure that the Nisga'a Nation is abiding by the provincial rules and regulations related to licensing and forestry practices. The settler state also holds significant powers of enforcement. Under Section 63 of the forestry Chapter in the NFA (2000), the settler authorities are allowed to enter onto Nisga'a lands if their forestry practices intervene with the neighboring Crown lands and affect the vegetation of the forestry industry. Yet, the Nisga'a Nation cannot hold the Crown up to the same standards on co–managed areas, such as the Wild Life Area dedicated for wildlife harvesting, where the Nisga'a are consulted but have no binding influence over the management of adjacent lands (NFA 2000; Rynard 2000, 228).

Based on the above challenges to the timber industry on Nisga'a lands, the Indigenous government has turned to carbon sequestration projects to provide some revenue through the

advances of carbon credits (Altamirano–Jimenez 2013, 146). Similar to the advances made in managing salmon fishing in the region, the Nisga'a Nation has relied on ecological management streams to mitigate the past and present environmental degradation. Carbon capturing projects, however, present multiple consequences that could perpetuate the cycle of dependency. Carbon sequestration relies on management through the commodification of lands and resources. Similar to the harm caused by the fee simple holdings of Nisga'a lands, carbon credits place limits on Indigenous rights to self–government because credits are often bought by third party governments, international bodies, tourists, and corporations who have significant influence over the development of the territory (Everett and Neu 2000, 5; Baldwin 2009). Self–government is compromised when Nisga'a lands and resources are fragmented or extinguished by multiple owners operating within the theory of ecological management. Carbon capturing restructures management and ownership of Indigenous title, producing "abstract regimes" that displaces "local use value in favor of global exchange value" (Baldwin 2009, 238). In other words, carbon capturing projects disorient Indigenous voices in favor of global actors. Global actors or non-state actors can plead with the government over control and de jure authority over resources (Barnes and Quail 2009) that sit on or alongside Indigenous territory. This can disassociate self-government by extinguishing Indigenous control over land and resources and by undermining communal ownership (Barnes and Quail 2009). Although the effects of such carbon capturing projects are still unknown, it is my understanding that such methods of fragmentation and extinguishment further limits Indigenous rights to self–government by decontextualizing Indigenous title with capacities to own and manage resources. The transfer of ownership, like fee simple holdings can have detrimental impact on title that is embedded within the territory. In

short, with the advancements of the carbon capturing initiatives on Nisga'a lands, the state and non–Indigenous actors determine the future of Indigenous territories.

One of the great measures of the protections that the agreement provides is Chapter 10 containing the environmental and assessment provisions. The provisions bind the settler state and the Nisga'a Nation to uphold the agreement's promises (NFA 2000, 10). Yet, as has been noted by the ongoing negotiations for mining projects on Nisga'a lands, the settler state holds much power over the proceedings. Similar to the case of the Wik peoples of Queensland, the Nisga'a could not prevent or participate in the development of their lands. The Nisga'a Nation cannot do much else but agree with the settler state as the NFA makes clear that in the event of a conflict, federal and provincial laws prevail (NFA 2000); the NFA cannot protect the Nisga'a from Canada's power to interfere and transform space. This was demonstrated recently when the Avanti Kitsault Mining (AKM) Company negotiated the redevelopment of the Kitsault mine on co–managed territory without consulting with the Nisga'a Nation. According to the environmental and assessment provisions, the settler state is responsible for informing the Nisga'a government on the possible adverse impact of a development project (NFA 2000). Initially, the Nisga'a Nation protested Canada's heavy–handedness due to the prior failures of the Kitsault mine. The mine had been linked to marine and freshwater contamination (Azak 2013). The Nisga'a nation proceeded to take AKM to court for failing to consult on co–managed lands where its fishing and hunting rights were being violated. Ultimately the Nisga'a and AKM settled out of court, developing the *Co–operation and Benefits Agreement* (CBA). While a success on some fronts, the agreement is arguably the best that the Nisga'a can get given that the NFA limits Nisga'a influence on development projects on co–managed territories. In an effort to retain some benefit, the Nisga'a peoples agree to negotiations with the mining company, a

common thread for Indigenous peoples living in resource rich lands, as seen with the Wik peoples of Aurukun Shire.

In spite of the NFA's environmental provisions, the Nisga'a peoples were shut out of negotiation processes about issues that would negatively impact the health of their lands and their access to employment. Just as the Wik peoples of Australia took action to secure a piece of their future, the Nisga'a nation had met with AKM to gain some hiring benefits and safeguards. This case is an example of the state's heavy–handedness and the challenges that the Nisga'a Nation faces when it attempts to reassert dominance over its territory. But as the comprehensive land claims intend, these powers of authority are taken away from Indigenous peoples and re–established under the settler state. Weak negotiating powers meant that the Nisga'a peoples could not consult their own environmental assessment and instead an independent engineering review panel oversaw the inspection. Representatives from the Nisga'a Nation were not asked to participate in the review, despite the fact that individuals from the province's Ministry of Energy and Mines were invited into the review (Avanti Kitsault Mine Ltd. April 2015, 4). The impact of the mining agreement is strongly felt by Nisga'a citizens, who have expressed discontent with the lack of employment and oversight. Often Nisga'a citizens have to travel off their lands for employment, into neighboring Terrace (Altamirano–Jimenez 2013, 144). Although the Nisga'a claim that they entered into Canada through the agreement, it is more appropriate to characterize the relationship as one where they remain disempowered by the Canadian settler state.

The second largest category of land under the NFA is made up of the Nass Wildlife Area, accounting for 15,000 km of shared land.l The area falls under settler state jurisdiction and the Nisga'a Nation can contribute to the planning of the region through its involvement in the two co–management committees: the Joint Fisheries Management Committee and the Wildlife

Committee. While Nisga'a representation is equal to that of the provincial representatives, the committees are both consultative and not binding or definitive (Rynard 2000, 228). Nisga'a citizens are free to roam the lands as long as their activities neither disturb contracted work nor violate harvest regulations. The Nisga'a government can distribute hunting licenses and must ensure that its citizens do "not interfere with other authorized uses of Crown land" (NFA 2000, 9(88)). Each year the settler state determines threatened wildlife species and the allowable harvest for non–threatened wildlife species. The settler state also determines what actions are necessary for preservation and conservation. The aforementioned committees can contribute to the discussion but ultimately the decision is in the hands of the settler state (NFA 2000). Harvesting practices must adhere to the laws of the settler state. However, the Nisga'a government can implement laws regarding the sale of wildlife and wildlife parts (NFA 2000). Harvesting laws must not "deny Nisga'a citizens the *reasonable opportunity* to harvest migratory birds under the Nisga'a wildlife entitlements" (emphasis added, NFA 2000, 9(89)). Reasonable opportunity, in this manner, is not specified within the NFA. It is up to Canada to determine whether such obligations have been met. Because Nisga'a participants can only provide recommendations, the Indigenous community cannot regulate the harvest, which is crucial for domestic purposes. Both committees are reportedly underfunded and the recommendations provided are rarely supported by the settler state (Rynard 2000). Thus, the collaborative claims are highly exaggerated, and the challenges, provisions, and limitations provide very few tools for the Nisga'a Nation to secure and oversee its interests. Identical to Australia and its Heritage Act and later the Wildlife Act, the settler state utilizes ecological dogma to administer unequal regulatory measures to paralyze Indigenous development and activity.

The agreement also emphasizes "scientific procedures for wildlife management" (NFA 2000, 9(59)), which undervalue Indigenous knowledge and research methodologies. This has translated into a significant concern over the declining moose population within the Nass region; some suggest that this is due in part to human hunting practices (Pynn 2015). Suggesting that the Nisga'a hunting and harvesting in the region has resulted in the declining population of moose is racialized and exclusionary reasoning given that Canada holds much reign over the territory and the resources, including the harvesting regulations. In essence, the traditional practices of the Nisga'a are viewed as harming the "wildness" of the co–managed lands. Similar to the response to the Wild Rivers Act in Australia, conservationists fail to acknowledge the human element of ecological management. Thus, communities and knowledge systems are undermined to uphold scientific rationalization strategies. The result is a racialized notion of conservation in which the "production of wilderness," as suggested by Baldwin (2009, 233), requires the erosion of human lives, which are often Indigenous lives.

In the end, the comprehensive land claims process fulfills the strategies of reterritorialization as it allows the state to take careful calculation of lands and compensation. In addition, the land claims process creates new forms of surveillance and control over valuable natural resources. The state can deny development and access to wildlife areas, and can enter into agreements without consultation, all of which legitimate settler territoriality. Through the enactment of the NFA, the settler state has sought to devalue traditional laws, cultures, knowledge and rights. The state's fragmentation of Indigenous rights relies upon ecological management and the fear of Indigenous recognition to justify such tactics. The result is a heavily regulated region in which the Nisga'a Nation faces numerous challenges to market its lands, fish, and timber. Instead of gaining full ownership and self–governing rights, the Nisga'a Nation is

locked into an agreement that denies it the ability to negotiate in the future, and which gives few tools to appropriately self–govern. From dividing territories and encouraging privatized land holdings, the settler state re–develops a colonial geography that ensures access for its networks of investors and creditors who validate its legitimacy. In essence, the spatial representation elicits the settler colonial relationship that is vital for the survival of the state.

4.4. Conclusion

Given the importance of BC's natural resources to its economy, the settler state holds significant interest in maintaining an uneven spatial relationship which is reflected through the land claims process. Provided the local context, the settler state engages in restructuring strategies, first by implementing a unified resolve for certainty through homogenizing tactics like the one–sided referendum, noted above. Next, the state utilizes the fragmentation of space and recognition to uphold settler colonial geographies. Most notable in the restructuring is the reliance on ecological management strategies. Ecological management strategies that have adhered to commodifying the environment as a means to regulate it. This has limited Nisga'a's capacity to self–government and has devalued Indigenous knowledge (Baldwin 2009; Everett and Neu 2000, 6).

Indigenous territories are crucial constructions by the settler state to entrench settler rationalization and political legitimacy. Although Canada provides constitutionally protected rights and has implemented a comprehensive agreement process, Indigenous lands and rights are no more protected with such advances. Instead, Canada has employed processes of dispossession and reterritorialization similar to those in Australia. Although Australia's land model is constructed out of multiplicity, Canada's land claims process produces almost identical outcomes. For instance, Indigenous territorial claims are strategically halted despite gains from

the challenges to *terra nullius.* In Canada the settler state has found mechanisms to respond to advances made in the *Calder* case that solidify the political legitimacy and dominance of the Crown. As noted above with the *Gladstone* case, Indigenous peoples are found to hold few rights to marketable resources and can find themselves in a situation where their rights are infringed upon without due process. Moreover, with the advent of the DCT, settler legitimacy becomes solidified in the judicial process. In other words, the Crown does not have to justify its sovereignty, instead the burden of proof is on Indigenous communities.

In the aftermath of the referendum initiated by the BC government it is clear that Indigenous peoples are viewed as a threat to contemporary conservation and development strategies. While the Nisga'a Nation is recognized for implementing sound ecological management initiatives –the salmon catchment and carbon sequestration schemes– its success does not dissolve racialized notions of the primitive hunter gatherer. This becomes especially evident when blame is directed towards the Nisga'a Nation for 'traditional' hunting of moose, despite the fact that the region where the moose population is declining is on co–managed lands where Crown authority is supreme. Instead, the exclusion of Indigenous peoples continues in all areas of governance. Despite achieving great strides with the *Calder* case, the NFA becomes and exemplary model of Indigenous self–government to the point that Indigenous peoples have fewer avenues to hold the settler state accountable and greater influence in the decision–making process. As will be noted in the concluding Chapter, although, Nisga'a has stronger governing authority it is only relative to the limitations placed by Australia on the Wik community.

Conclusion

Throughout this study I have reviewed the settler state's responses to the *Mabo* and *Calder* rulings using Lefebvre's concepts of homogenization and fragmentation. Australia and Canada, expressly rearticulates settler dominance under policies of misrecognition and fragmented lands. The techniques of reterritorialization of the settler state (i.e., homogenization and fragmentation) disassociate concepts of ownership and self–government to reshape the power and authority over Indigenous lands. Evidence of fragmentation that was most important to this thesis were the mechanisms used by the state to appropriate title, rights to resources, and the degree to which Indigenous peoples can manage their lands and resources. To gain access to contested lands and rights, Canada and Australia, used homogenizing tactics to disavow Indigenous authority. The results of the homogenizing tactics in both cases was the same: Indigenous peoples are portrayed as enemies of the state its industrial networks. Rights and title that are provided to Indigenous peoples are "ultimately authorized by governments rather than deriving their status and authority from the law and custom of the land's traditional owners" (Howitt 2009, 144). In short, the process of reterritorializing lands to create stable economic and political geographies has removed the capacity of Indigenous peoples to exercise self–government — which are rooted in land and law.

Indigenous resistance in Australia and Canada formidably shaped the reactions and responses by both states when met with contested claims to territory. While this thesis assesses the reactions to *Mabo* and *Calder* — two defining court cases that set the path towards territorial claims — on numerous occasions Indigenous peoples of Australia and Canada have resisted settler colonialism. For instance, in Australia there had been a long list of activism that were focused on constitutional recognition including the failed Yirrkala Bark Petition in 1963 (Russell

2005, 156). The petition came out of long protests to remove mining on the Yolngu people's land. Similarly, in Canada following the Meech Lake accord which challenged the governments Constitutional amendments in 1987, the Oka crisis intended to hold the Canadian accountable to its Constitutional promises (Coulthard 2014, 115-116). In both cases, Indigenous peoples in Australia and Canada were exercising rights to territory and resistance to the colonial state which has shaped the responses by both states. Although Canada's Charlotte Town accord resulted in constitutional amendments that recognized Indigenous rights and title in 1992 (Coulthard 2014, 115-116) Australia and Canada continue to share a history of appropriating Indigenous rights and territories that has led to campaigns of resistance. Notably, in Australia the Bringing Them Home: the 'Stolen Children' report and the Truth and Reconciliation Commission in Canada mark grand recommendations which focus on Indigenous interests and reconciliation (Walter 2010, 123; Coulthard 2015, 126-127). Recommendations made in each report include the investment in Indigenous education, language and historical preservation, family reunification, and child placement among other social justice issues (Australian Human Rights and Equal Opportunity Commission 1997, Appendix 9; Final Report of the Truth and Reconciliation Commission of Canada 2015, 223-241). The recommendations in both Australia and Canada point towards a renewed interest in policies that would ensure self–determination, that without such an emphasis on self–determination, Indigenous reconciliation will fall short of its goals (Coulthard 2015, 126-127).

Moreover, Indigenous activism has opened the door to revisit contested claims concerning territorial rights and title. Despite Indigenous resolves to equalize the relationship, as this thesis shows, Australia and Canada continue to uphold colonial structures in its responses to Indigenous territorial claims by implementing policies of misrecognition and fragmentation.

Fragmentation is immensely powerful in limiting Indigenous self-government because fragmentation disassociates Indigenous law and claims to sovereignty. That is to say, subsequent policies following *Calder* and *Mabo* would effectively limit Indigenous self–government. However, in comparing Australia's multi–tenure land model and Canada's comprehensive land claims process, the findings suggest the fragmentation and limitations in Australia's model goes further than Canada. This is not to suggest Canada is an exceptional case, rather in perspective Australia's model yields fewer benefits to Indigenous capacity to self–government than Canada's recognition model. The following sections compare and contrast Australia and Canada's responses to court cases, focusing primarily upon the differences of each case study that has led to my conclusion that Australia's land model further limits Indigenous territorial claims and rights to self–government.

5.1. *Mabo* and *Calder,* One Win and One Loss

The first point of difference between the two case studies is the state's response to *Mabo* and *Calder*. In Australia the *Mabo* appeal successfully defended their territorial claims in comparison to Canada where the Nisga'a ultimately lost in *Calder.* Despite the polarity between the legal cases, the courts did acknowledge the misuse of *terra nullius* and continued to question Indigenous territorial claims. However, it is important to note that despite the loss benefits awarded to Nisga'a are *comparatively* more than the Wik community received.

Calder and *Mabo*, were careful rulings that determined that Indigenous peoples were entitled to ownership over their traditional lands, but the ruling made little mention of how ownership would be exercised and to what degree Indigenous communities had self–governing rights. The Australian government reduced Indigenous territorial claims to a 'bundle of rights', where Indigenous self–government was torn apart to accommodate non–Indigenous interests. Unlike Canada, Australia's multi–tenure land structure under the Native Title Act (NTA)

produces more convoluted land schemes. These schemes seek to accommodate third party claims to land and resources (namely, industrialists, pastoral owners, and conservationists), while reducing the Indigenous peoples' role.

In comparison, in Canada, Nisga'a lost the *Calder* case based upon a technicality, which stated, at the time, the Nisga'a Nation did not gain permission to sue the government of British Columbia (BC). Despite the loss, the *Calder* case put pressure on the government to resolve the Indigenous land question, which resulted in recognition under Section 35 of the *Constitutional Act 1982* and the comprehensive land claims policy. However, constitutional protection did not specify which rights are to be recognized by the state; self–governing rights under the comprehensive land claims process were negotiated in a case–by–case model that calculated Indigenous rights based on the geopolitical importance that the communities occupied.

In reaction to the court rulings, Australia and Canada utilized public discontent to implement policies of reterritorialization. Canada used a biased referendum to perpetuate fear against the claims process and Australia utilized false economic projections to base their policy of misrecognition (Short 2007; Rossiter and Wood 2005). The message of both states was clear, to propose that Indigenous land claims will disrupt the economic output in both regions. Suggesting, communal property, collective ownership, and self–government are structures that are not conducive to market based development and to overall public good.

5.2. Australia's Multi–Tenure Land Model v Canada's Comprehensive Land Claims Process

Australia's implementation of the multi–tenure land model under the revised NTA in 1998 was careful not to affect the lands of non–Indigenous peoples (Short 2007, 866–867). As a result of the NTA, Indigenous peoples are granted rights to territory if they can provide evidence confirming physical links to the land and the continued operation of organized societies. One of

the mechanism of the state uses to justify fragmentation and misrecognition of Indigenous rights and title is to avoid ever having to justify settler sovereignty. In this regard, the sovereign remains the settler state, which was affirmed through the *Yorta Yorta* decision. Granting territory based upon the assumption that sovereignty was the result of European occupation, not only reaffirms the logic of *terra nullius*, but separates Indigenous rights to self–government. Moreover, to paint Indigenous peoples' rights and values as if they are frozen in the pre–sovereign era, Indigenous peoples' cultural practices and (economic) activities are limited. As was noted in Chapters Three and Four, there are many roadblocks that stand in the way of Indigenous access to resources and development projects that would improve Indigenous livelihood and reduce dependency on the settler state.

Similarly, Canada implemented the Distinctive Cultural Test (DCT), through which the courts set the stage of misrecognition after the *Calder* decision. Under the DCT, Indigenous communities must reframe their laws and rights to prove Indigenous rights are worthy of protection and can be accommodated by Canada's common law. With the example of the *Gladstone* ruling, it becomes clear that Indigenous rights (outside of usufruct rights) are not universal. Moreover, the *Gladstone* case reaffirms the superiority of the Crown's underlying title. That is, even with significant defeats to Canada's authority, the courts maintain that the settler state can, if necessary, impede upon Indigenous rights and territoriality when state and market concerns are in question. The finality of the settler state's authority not only allows the state to determine which rights are accommodated, but as noted in Chapter Four, the state has also used referendums to shape public perception in order to implement policies which undermine Indigenous rights and authority.

Canada's comprehensive land claims policy was a strategic ownership model which ensured the extinguishment of all but five percent of Indigenous territories. Canada's land model considered compensation based on geopolitical importance, population size, and resource conflicts. As argued above, the capacity of self–governing rights provided to Indigenous communities in Canada is immensely limited. Instead, self–government was rearticulated by Australia and Canada as mere usufruct rights, with some control over resources and lands.

Indigenous land and resources hold particular geopolitical importance for settler colonial legitimacy. To reiterate Langton's (2012, np) sentiments, Indigenous lands are vital because Indigenous peoples hold claim to ecosystems that were maintained through "ancient Aboriginal system[s] of management". Despite the importance of Indigenous management, the Queensland government took significant steps to impede upon Wik's territorial claims. In this manner the case studies differed, wherein, Nisga'a did not have overlapping claims by non–Indigenous stakeholders. Unlike the CYP region where both Indigenous and non–Indigenous titles 'co–existed'. Unfortunately, this limits Indigenous peoples' self–governing rights, as Australia aligned with pastoral groups which, according to the state, were the first pastoralists of the lands. This disregarded the pastoral activities of Indigenous peoples before and after European settlement, in essence, reaffirming unproductive and primitive images associated with Indigenous communities.

Similar to Australia's multi–tenure land policy, Canada implemented a process that recognized usufruct rights in exchange for the extinguishment of Indigenous title and self–government. Yet, Canada does provide Nisga'a with clear access to a portion of their traditional lands (8 percent), consulting status, and control over social services within the jurisdictional boundaries laid out in the NFA. Unlike the Wik community who are bound to 'community–use

areas' and have little to no veto power over the actions on their estate. Such limitations were proposed after long and to some degree, calculated fear–mongering campaigns in Australia and Canada, that disavowed Indigenous rights and territorial claims.

Australia and Canada's aggressive scheme of coalition building is in an effort to contain and define the Indigenous 'other' as *the* threat to modernity. As a result, the state can initiate development schema that reorganize Indigenous power and authority in relation to contested claims, while also, expanding their spatial reach through the appropriation of resources. The shared claims to land, between pastoral groups and Indigenous communities in Australia's CYP region, shape the fundamentally different models of land claims adopted by Australia and Canada.

5.3. Conservation v Preservation

As stated throughout this thesis, Australia and Canada, responses were incredibly calculated. One manner that is used in Australia and Canadais to denounce the acknowledgement and transfer of territories to Indigenous peoples because it will produce uncertain environments that will bread ciaos and unrest, among investors and social factions. As noted above, Australia and Canada, use such worries, to implement or justify the fragmentation of Indigenous territorial claims. Moreover, Indigenous peoples must tread a careful line between protectors of the environment and willful industrialists. As a consequence, in each case study there is a tension between preservation and extraction sites that often reduce Indigenous capacities to artfully manage and voice their opinion on matters of their territory.

In CYP, ecological management zones were used to transform Indigenous lands to appeal to investors as valuable industrial and ecological ventures. Despite the contradictory notions of extraction and preservation, the settler state constructed a narrative where such projects could coincide with the help of ecological management policies. Ecological management relies on the

commodification of nature for preservation. Wherein the market would regulate and maintain the ecological diversity. Ecological management rhetoric led to governmental regulation and it provided the state with the reasoning to contain Indigenous peoples to 'community–use areas'. These 'community–use areas' mimic reserve style structures by reaffirming the logic of *terra nullius.*

In Australia, the dedication of World Heritage sites and community–use zones are starkly reminiscent of colonial land regimes, whereby Indigenous development, access, and ownership can be undermined for settler expansion. At any given moment, as noted in the Wik case study, the authorities of the state can refrain from granting rights to Indigenous peoples. In addition, with few marketable resources, the Wik were required to find new pathways to reduce their dependency from the settler state. For instance, in order for the Wik peoples to defend their rights over the timber on their lands, they had to prove to the Crown that commercial manufacturing of timber can be accommodated without harming the traditional practices. Moreover, the assumption that Indigenous traditional practices are unbeneficial for economic development and conservation reinforces the subordinate position of Indigenous law, knowledge, and values.

Under the Wild Rivers Act and the Heritage Act, the Wik peoples of Queensland are facing resource deficits and challenges to self–governing rights to control their sacred lands. Indigenous peoples are moved further away from protecting their sacred sites. Implications run deep, where Indigenous Australians' spiritual and religious connections are tarnished through their active removal from lands that are now profitable due to the region's biodiversity. The knowledge and traditional understandings that are lost during the process of recognition is a complex topic that was not discussed in length in this thesis. The appropriation of Indigenous

intellectual property rights and traditional teachings require further research, as it is another layer of Indigenous rights that are in threat.

In Canada, the structures of settler colonialism are strengthened with the input of multiple regulatory mechanisms in the NFA. Nisga'a are continuously facing off with the settler state, due to the conditions placed upon the community who are limited from developing of their lands and resources. In Canada, the Nisga'a was fitted as keepers of ecosystems, in that the community was required to meet or beat provincial and federal standards. This title did not last long, as the public was quick to blame the Nisga'a for the reported decline of moose on co–managed lands, suggesting the racialization notions of Indigenous peoples is ramped and has caused public discontent towards Indigenous peoples who are perceived to be incapable of preserving biodiversity (Baldwin 2009, 247). This is particularly noteworthy given the positive attention that the Nisga'a had received for their carbon capturing programs, and from the high rankings by the Sierra club.

Under the Wild Rivers Act, the settler state affirms the 'primitiveness' of Indigenous peoples as that stands in the way of preserving the wildness of the peninsula. In both Australia and Canada, the state oversaw ecological management structures that relied heavily on marketization and scientific rationalization of biodiversity and lands. The wildlife areas or protected zones according to De Bont (2015, 235), predispose a racial essentialism, which has led to re–creating colonial structures in the form of "enclosed–and–exclude–conservationism." The Indigenous body must present itself as worthy of protection based on its historical links and the imagined identities of the primitive, the hunter and gatherer (De Bont 2015). Moreover, the financial profits of situating protected or ecological zones have reported benefits in revenue streaming for municipalities. Such results are unlikely to translate into benefits for Indigenous

peoples (Baldwin 2009, 248). While further research needs to be conducted on the impact of ecological management sites and the use of Indigenous knowledge, this study could not ignore the complacency of the settler state to yet again shrink the arena that Indigenous peoples are able to use to build sustainable lives.

The economic instability that led BC and, more generally, the federal government, to enact state beneficial policies occurred in the era of 'war on woods.' The NFA sought to not only deal with Indigenous land questions but to also ensure environmental regulations. Indigenous peoples' concern with resource extraction, differed from the dominant conservation rhetoric; Indigenous communities believed that the erosion of resources would deplete the wealth and value of resources that they could build an economy and community around (Notzke 1994, 102). This was essentially the plague of the Nisga'a Nation, which, after waiting for the final agreement and the 10–year transition period, adopted a ruined timber industry on highly volatile lands. As detailed by Rynard (2000, 225), the forests that were transferred to the Nisga'a, under the NFA, were basically unmarketable.

As a result, Nisga'a is having to find new revenue streaming strategies. The most controversial of the methods that the Nisga'a use to entice investment and profit is the privatization of lands under fee simple holdings. The land reform agreement instituted Anglo–centric notions of property with the advent of fee simple holdings. While this study could not delve the impact of privatization and fragmentation on women, Indigenous knowledge, the impacts are many. Including the notable destruction of Indigenous laws and religious connections, with few economic benefits. Despite this, privatization in both Australia and Canadais used as a tool to commercialize and profit off the land itself (Venn 2007; Graben 2014). While the arguments for privatization are overwhelmingly disputed, Indigenous peoples

like the Nisga'a would not have to rely on this source of income if they were given full access to resources and infrastructure. This in turn re–establishes the settler colonial relationship, in which the state removes all responsibility and ownership over past wrongdoings while continuously extracting Indigenous lands and resources. Besides, the NFA explicitly states that the Nisga'a cannot bring land–related issues to the courts upon the completion of the agreement, implying that the lands are finalized and remain static, which is starkly different from Indigenous understandings of territory (Altamirano–Jimenez 2013; Egan and Place 2012). This tarnishes the ability of future generations to renegotiate their ancestral lands, thus providing Canada with immense powers to regulate and contain Nisga'a rights to self–government.

Nisga'a are able to initiate projects and programs of development because comparatively Canada's regid land claims process allows Indigenous peoples with more tools of self–government than in Australia. An example of this is outlined in Chapter Three and Four, where the mineral rights of the Wik and Nisga'a were under threat by the settler state. Although Australia and Canada both succeeded in maintaining state beneficial mining agreements, Nisga'a were able to drag the state and the Avanti Kitsault Mining (AKM) company back to the negotiating tables to secure employment opportunities and some degree of environmental oversight. Wik peoples, on the other hand, were unable to defend itself against the heavy handed and swift act of the government in its preemptive one–day bidding war to secure a mining agreement with Glencora International. This nullified the agreement signed by the Wik community days before with the Aurukun Bauxite Developments Company, an agreement that would have provided much needed economic relief in the form of $950 million over 35 years.

Despite the many limitations, the Nisga'a Nation's and Wik communities' resolve is unquestionable; both communities have attempted to maneuver through the provisions and the

destruction of its lands, but as expected faces high unemployment levels and receives very few tools to remedy the low economic prospect of its lands (Altamirano–Jimenez 2013, 144; Altman 2011). Without sufficient veto power to stop adverse policies initiated by governments or businesses, Indigenous territorial claims will always be under the threat of fragmentation. Nisga'a and Wik communities have sought to develop sustainable or ecological ventures to diversify their economy and increase investment without further fragmenting their traditional laws. However, the outcome of such attempts is the ongoing disaggregation of their lands and autonomy. Investors including governments, industrialists, and international agencies can retain parts of Indigenous lands, thus tarnishing Indigenous authority and sacred connections which are derived from links to land. This can have detrimental effects upon generations to follow, leading to increasingly vulnerable economic regulations and diminished access to resources. The pressure on the Nisga'a community is already quite significant given the decision to divide already fragmented territory through carbon sequestration programs and the fee simple property structure. Similarly, the Wik community is continuously fighting to secure their interest in a highly politicized environment where international policies for World Heritage status undermine Indigenous roles within the region. The impact of both conservation ventures could not be unpacked in this thesis, but is vital to understand the many mechanisms that are used to disavow Indigenous rights.

The fragmentation of Indigenous resources, lands, identity, and laws is intended to erode distinctiveness. In other words, the settler schema of fragmentation and homogenization actively removes the autonomy and authority from Indigenous peoples as a means to contain political and economic stability. Instead contradictory notions of development and conservation programs have produced ironic sites (Li 2007, 272) that dispossess Indigenous peoples while allocating a

few usufruct rights for cultural continuity. To remedy such tensions, the state sought homogenizing tactics by borrowing ecological management strategies, touting market solutions, and naturalizing the primitive and romanticized notions of Indigenous identity. However, if such imagined or fantastic images of Indigenous identity are rejected, according to Povinelli (2002, 57), Indigenous peoples may not win the limited rights to title and ownership provided to Indigenous peoples by the settler state. The uneven playing field on which Indigenous peoples have to renegotiate is in part due to the entrenched settler dominance in the land claims process.

As a means to reterritorialize Indigenous lands, following the *Mabo* and *Calder* cases, the settler states tried to drum up fear of Indigenous threats to modernity and conservation. Conservation policies for the settler state was administered in a manner that would not disrupt but rather contribute to the capital production. By this logic, the settler state is able to solve two problems with one solution, to confine Indigenous peoples and their activities in addition to opening up new revenue streams. Though the impact of ecological management policies on Indigenous territories is still largely unknown, both case studies show that ecological sites are used to reproduce a colonial and racialized notions of Indigenous peoples. The depiction of biodiverse regions as empty lands erodes the human (specifically Indigenous) presence and limits the agency of Indigenous self–government. In the end, the Nisga'a and Wik are entrenched within colonial geographies that reproduce settler authority.

As such, any space (whether it is termed post–sovereign, post–settler, abstract or hybrid) that continues to appropriate Indigenous rights to self–government and autonomy will not interrupt settler dominance. While this thesis was focused upon the state's responses to Indigenous territorial claims, other avenues of research can explore processes of decolonization, the implication of ecological management sites, the appropriation of intellectual property rights

as a result of ecological management, the impact of land rights on Indigenous women, and the tension between Indigenous peoples and migrant populations. As noted by Soja (2010, 13; 1980, 207), state processes and social issues are not always spatial, yet, temporal analysis is often utilized instead of considering spatial shifts that are often considered natural or neutral concept. This thesis sought to critique state responses to Indigenous land claims using a spatial analysis, namely by utilizing Lefebvre's concepts of reterritorialization — homogenization and fragmentation. This thesis and similar studies (i.e., Howitt 2009; Lestrelin 2011; Soja 2014) is to demonstrate the importance of Lefebvre in rethinking the state, to incorporate a moving and transformative understanding of the state and its structures.

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