

A review of individual property rights for Indigenous women.
A Major Research Paper by Jasmine H. Tranter

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ABSTRACT

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This major research paper presents an overview of the relationship between how the state and First Nation communities access land rights, given the gender discrimination and economic inefficiencies of the state formed system on First Nation reserves. The main issue is related to the claim that Indigenous women are discriminated against in Canadian law. A critical secondary document analysis has been used to explore the growing topic of individual property rights on reserve lands. While many authors have written that the solution to economic problems on reserve is to adopt westernized property rights, the literature suggests that this approach does not consider the cultural implications, nor does it take into consideration the process of reconciliation. Regardless of the approach taken, it is important for the planning community to be aware of the complexity of the economic, social, environmental and ideological roots underpinning current land management systems on and off reserve lands.

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All societies must concern themselves with how to protect their citizens from discrimination, especially when those citizens are made vulnerable by the very discrimination they endure. In the context of human rights, the term “equality” refers to all humans being equal before the law and having the same rights.

(Harder, 2015)

To focus on property immediately entangles one in a long history of deeply intertwined conceptual discussions, social philosophies and ideological justifications of past, present and future property regimes.

(Benda-Beckmann, Benda-Beckmann, & Wiber, 2006)

DEFINITIONS

There can be many definitions for the terms that are used in this major research paper. For this major research paper, the following terms are defined as follows:

Term	Definition
Autonomy	Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (United Nations, 2017).
Band Council	Elected government of a First Nation.
Bundle of sticks metaphor	A metaphor used to characterize the specific rights in a property object or to characterize the different kinds of property held by one social unit (Boudreaux, 2005; Barry, 2015).
Cousins discrimination	Situations of sex-based inequalities in registration as a result of the <i>Indian Act</i> affecting cousins and siblings, resulting in lesser status to descendants of Indigenous women (Palmater, 2011).
Sex inequality	Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (Canadian Charter, 1982, s.15.)
Land rights	Land rights are inalienable rights by the possessor.
Marrying out rule	This provision applied to Indigenous women who on marriage to a non-status person were stripped of their status, as were their descendants (Palmater, 2011).
Property rights	Property rights are divisible, they can be traded with others and how to use the property can be negotiated. Property rights play an important role in Canadian society, they can define and limit the privileges that individuals may receive. They allow individuals with scarce resources to exchange rights and generate economic development. (Boudreaux, 2005).
Second generation cut off rule	Individuals registered under s.6.2 of the <i>Indian Act</i> , which states that two successive generations of Indigenous parents with a non-status member will result in no status for descendants (Palmater, 2011).

SECTION 1: INTRODUCTION

PURPOSE

This major research paper presents an overview of the relationship between how the state and First Nation communities access land rights, given the gender discrimination and economic inefficiencies of the state formed system on First Nation reserves. The main issue is related to the claim that Indigenous women are discriminated against in Canadian law. How do women access land today on reserves and what are the barriers? This question is preceded by the fundamental question about the nature of property rights in the nineteenth century. Property rights are understood as a network between categorical and concretized property relationships, each with a specific position in equally complex property practices (Benda-Beckmann, Benda-Beckmann, & Wiber, 2006). How was the property rights system formed on reserve lands? Subsequently, the issue of whether there are alternatives to privatizing reserve land to achieve gender equality¹ and autonomy² on First Nation reserves will be addressed. This research paper will attempt to clarify the complex nature of this problem through a focus on the systematic nature of property as through the bundle of rights metaphor, which refers to the totality of property rights and duties as conceptualized by any one society and to refer to a specific form, such as ownership, which by itself can be thought of as a bundle (Benda-Beckmann, Benda-Beckmann, & Wiber, 2006).

This will be accomplished by reviewing Canadian human rights legislation to situate discrimination of Indigenous women by the state; exploring relevant literature on how land is

¹ The discrimination facing Indigenous women was chosen in this major research paper because land tenure is the tip of the iceberg to understand how to increase the control and use of land by women (Huairou Commission, 2016), which could result in increased community decision-making, women's economic empowerment, opportunities for asset ownership and profit from the land as an asset.

² Related to self-determination, autonomy was selected as a development goal of First Nations in Canada because of the emerging options to self-govern.

managed on reserves through economic utilitarian theories³; exploring relevant grey literature, government reports; and, analyzing alternative theories on land rights. The objectives of this research are:

- I. To identify gender-related systematic barriers in the *Indian Act*;
- II. To understand the state formed land system on reserves;
- III. To critically examine literature on economic utilitarian theory on property rights; and,
- IV. To present alternative theories on property rights as a framework for on-reserve land management systems.

The topic is being studied because ownership and access to on-reserve lands by Indigenous women is important for their economic and social empowerment. There are many empirical studies that make the argument that poverty reduction has been ascribed as an outcome of implementing formal land ownerships systems (De Soto, 2000; Ballantyne & Ballantyne, 2017). Legal reform, through formalization and title to land would increase an individual's access to credit, thereby lifting the individual title holder out of poverty (De Soto, 2000). This problem is significant to planning because of First Nation communities' special relationship to land, and in general First Nations have not had their relationship to land recognized by state land management systems (Alcantara, 2007; Ballantyne & Ballantyne, 2017). Gender discrimination could occur through Band Councils (Flanagan & Alcantara, 2003), resulting from patriarchal settler societies (Green, 2001; Grey, 2014), and is happening through the *Indian Act* (INAC, 2009; Palmater, 2011).

³ Utilitarian theories state that property rights are a means to a higher end, where rules and institutions are measured in terms of its economic utility. It holds that in any ethical situation, the solution should produce the maximum benefit for the greatest number of people.

ORGANIZATION AND METHODOLOGY

This major research paper explores historical and modern state and First Nations relationships and discusses gender equality and autonomy in relation to land and property rights. This will be accomplished by analyzing available literature of land management systems on reserves, government reports, examining policies, legislation and regulations, at a national scale. A critical secondary document analysis has been used to explore the growing topic of individual property rights on reserve lands. Academic and non-academic Canadian authors such as Alcantara, (2005, 2006, 2007, 2008); Baxter & Trebilcock (2008), Ballantyne & Ballantyne (2017), have explored the land management system imposed by the Canadian state on reserves, through the *Indian Act*. Many of these authors and others have concluded that formal systems will lead to positive economic outcomes for reserves by eliminating the Federal government as an intermediary, by creating fungible⁴ property assets (De Soto, 2000; Alcantara, 2007; Flanagan & Alcantara & LeDressay, 2011; Ballantyne & Ballantyne, 2017).

Given the volume of Indigenous knowledge in Canada today (Battiste, 2002), researching policy options that are not based on a western scientific perspective of maximizing land for economic gain should coexist with researching alternative theories to develop policy options to advance equality⁵ and autonomy⁶ on First Nation reserves. The arguments for privatizing reserve lands, inspired by De Soto (2000), are less about the welfare of its inhabitants, than about the appropriation of lands by clearing away customary ownership (Tough, 2013). While not the

⁴ Easily transferrable commodity in the market economy (Boudreaux, 2005).

⁵ While there are many forms of discrimination against Indigenous Peoples in Canada, sex discrimination was chosen for this research paper.

⁶ Related to self-determination, autonomy was selected as a development goal of First Nations in Canada because of the emerging options to self-govern.

focus on this research study, privatizing reserve lands needs to be thoroughly investigated from a land rights and First Nations perspective because of the cultural implications.

This major research paper has been organized into six (6) sections with an appendix and bibliography. Following this introduction in this first section, the second section will provide background information and context, including acknowledgement of different ideological perspectives of Indigenous Peoples and the Canadian state. The third section will be a literature review of peer reviewed journal articles and grey literature to describe how this issue has been studied, and provide key findings with respect to the gaps in academic knowledge. In section four, individual property rights, known through its legal metaphor, the bundle of sticks property rights concept (Demsetz, 1974; Boudreaux 2005; Barry, 2015), will be used to describe access to a property object, the variety of uses, benefits and obligations, the management of the object, how it may be transferred and inherited, and the political authority to regulate and distribute rights and duties. The bundle of sticks can also be used to characterize the specific rights in a property object or to characterize the different kinds of property held by one social unit (Boudreaux, 2005; Barry, 2015). Section five will discuss alternative theories of property rights, which would build on the discussion of land management systems on reserve and the individual property rights system of the Canadian state, from section three and four. Finally, section six will present a conclusion with recommendations for future research.

Aside from reserve lands, First Nations communities and Indigenous Peoples in Canada have territorial lands and comprehensive land claims, which present a wider range of issues to consider for Indigenous land rights but were excluded to bound this study. Natural resource rights agreements have wide ranging implications for land management systems and were similarly excluded. In addition, reserve land was chosen because of the vulnerable

socioeconomic position of women living on reserve and the belief that properly recognized rights in Canadian society can improve social outcomes for women (e.g. higher education, which could lead to secure employment and increased salary). As a result, discrimination living off-reserve is also outside the parameters of this study.

Limitations of this study include researcher bias and researcher subjectivity because analysis rests with the thinking choices of the researcher. A critique of the methods in this major research paper is not conducting interviews; future methods would include case study analysis, interviews and field work.

SECTION 2: BACKGROUND AND CONTEXT

LAND MANAGEMENT AND DISCRIMINATION IN THE *INDIAN ACT*

The *Indian Act (1876)*⁷ is a federal legislation that sets out land tenure system⁸ for reserve lands⁹ including the responsibilities for the Minister of Indigenous Services Canada (ISC) and the Minister of Indigenous and Northern Affairs (INAC), here within referred to as INAC. It is worth investigating and understanding how land rights on reserves are available to and used by Indigenous¹⁰ women in Canada, because Indigenous women have been subject to sex based status¹¹ discrimination leading to inequality (Alcantara, 2006; Alcantara, 2008; Green,

⁷ The sections that are central to this topic are s. 28, s. 89 of the *Indian Act*, which prohibit institutions from seizing assets and property in the even of a default; s.6 which defines how individuals qualify for status registration; and, new the *First Nations Land Management Act*, which allows First Nations to opt out of approximately 30 sections of the *Indian Act*.

⁸ Land tenure system differs greatly to that of lands off reserve because of the *Indian Act*, which sets out lands to be used by First Nations and defines the legal boundaries of how land is managed.

⁹ Reserve lands are set aside for inalienable use by First Nations, primarily through Treaties and the *Indian Act*.

¹⁰ This study excludes *Inuit* and *Métis* to bound the study. The term *Indigenous Peoples* will be used interchangeably with *First Nations* because this study is written from a national perspective. The term *Indigenous Peoples* and *First Nations* will not be used interchangeably with *Aboriginal Peoples*, *Native* or *Indian*. Instead, the use of *Aboriginal Peoples*, *Native* or *Indian*. will only be used in a direct quotation, citing titles of documents, and names of organizations.

¹¹ Status refer to those registered under the *Indian Act*, whereas non-status refers to people who don't have status under the *Indian Act* and have ancestors who were never recognized or lost their status under former or current provisions of the *Indian Act* (Joseph, 2016).

2001). For over 100 years, s.12.1(b) of the 1876 *Indian Act*, denied Indigenous women their status based on their choice of spouses, which unfavorably removed their right to bequeath Band property to their descendants (Palmater, 2011). Although s.12.1(b) was replaced by subsections (s.6) in the 1985 *Indian Act* amendments, the discrimination and perpetuation of assimilation and extinction of Indigenous Peoples culture in Canada continues (Canadian Women's Foundation & Feminist Alliance for International Action, 2017). Indigenous women in Canada have been denied land tenure security on reserves through colonialism and assimilation, manifesting in status discrimination and gaps in legislation leading to a lack of protection for divorced or widowed Indigenous women.

The United Nations General Assembly through the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have published materials that detail the challenges women face with respect to the right to marry and choose a spouse, the right to own property and inherit such property (Maheu & Rossiter, 2003). Most notably, CEDAW identify that dependency on male relatives for land tenure security, a lack of legal protection, and being subject to the denial of these rights to divorced or widowed women is a shared experience by women globally (UN Habitat, 2012).

Gender discrimination for women living on reserves

With the creation of the Canadian state, Indigenous Peoples were defined through the *Indian Act*. Registration in the *Indian Act* is one of the fundamental parts of the legislation that affects individuals. Those who are registered are referred to as “status” and those who are not registered are referred to as “non-status” (INAC, 2014). Through this defining legislation, the government created a paternalistic legal definition that illustrates the historical state notion that a group of people require control and direction by the federal government (Palmater, 2011). The

Indian Act only applies to those with status and the federal government assumed fiduciary duties over Band Council administration, education and health care and historically, it also determined that individuals with status had rights to live on reserves, which included determining decision-making powers in local political and social institutions (Palmer, 2011). Prior to 1985, registration status determined the Band membership of an individual, while changes after 1985 are described below through amendments to the *Indian Act*.

Access to land has been considered by many as a universal human right, which is incompatible with discrimination based on gender (UN Habitat, 2012). For instance, the Huairou Commission, a global development advisory board whose mission is to develop female leaders to confront problems affecting their communities, works to increase participation by women in decision-making and control over managing a productive asset by making a global call to advance access, ownership and control over land and resources at a national level (Huairou Commission, 2016). This is particularly relevant in Canada, where First Nations have the highest population growth amongst women in Canada¹², and yet are subject to an on-reserve property rights system which limits on the basis of gender their ability to have, hold, and exchange land as a commodity.

For decades, Indigenous women living on reserve did not have the same legal protections regarding property rights available to Indigenous women living off reserves, who had access to provincial laws and policies (which do not provide differential treatment based on gender?). For instance, women living on reserve were denied equal division of matrimonial reserve property through separation or divorce (Flanagan & Alcantara, 2005), which meant that divorce or separation from a spouse often come with separation from property rights. While the cause of

¹² First Nations female population grew by 23% between 2006 and 2011 (Statistics Canada, 2015)

divorce and breakdown of relationships on reserves is not the focus of this paper, a basic recognition of the seriousness of family violence is helpful for this research paper because it is a cause of separation or divorce. The National Inquiry into Missing and Murdered Indigenous Women and Girls states “[t]he full picture of missing and murdered women is a more complex, multilayered one consisting of individual histories, broader patterns of social disadvantage and social exclusion, and wholly inadequate policy responses (Oppal, 2012)

Women on reserve lands are impacted by the Canadian human rights system, despite being part of the global conversation that women are entitled to equality. Understanding how an Indigenous woman receives her status, as defined in the *Indian Act*, is central to the discussion on property rights¹³ because of the entrenched legislative patriarchy. While this complex history dates back to settler contact with Indigenous Peoples societies, the legal history for this research paper pertains to the former s.12.1(b). of the *Indian Act* (1951). Referred to the “marrying out rule”, this provision applied to Indigenous women who on marriage to a non-status person were stripped of their status, as were their descendants (Palmater, 2011). Men, on the other hand, did not lose their status if they married non-status women, whose descendants also benefited from their sex (Palmater, 2011).

Legal challenges and piece-meal remedies

The discriminatory nature and violation of human rights under the *Indian Act* has not been without challenge. A sex discrimination claim was petitioned by Sandra Lovelace to the UN Human Rights Council in 1977 with allegations against the *Indian Act* (Palmater, 2011). The

¹³ Property rights are divisible, they can be traded with others and how to use the property can be negotiated. Property rights play an important role in Canadian society, they can define and limit the privileges that individuals may receive. They allow individuals with scarce resources to exchange rights and generate economic development. (Boudreaux, 2005)

claim named provisions, such as s.12.1(b) of the *Indian Act*, which continued to disadvantage women based on sex. This section not only violated national laws, but violated international articles of the International Covenant on Civil and Political Rights (ICCPR) (INAC, 2009), to which Canada is a signatory. The ICCPR is a multinational Treaty adopted in the mid-twentieth century recognizing “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” (UN, 1966). In 1981, the UN Human Rights Council found s.12.1(b) of the *Indian Act* violated the right of Sandra Lovelace to access equal enjoyment of culture within community (Palmer, 2011; Canadian Women’s Foundation & Feminist Alliance for International Action, 2017). The Sandra Lovelace case advanced the rights of Indigenous women by confronting issues in her community, such as involuntary exclusion. While access to land and security of tenure was not the focus, the case is relevant for this paper because the amendments did not go far enough. In fact, the amendments resulted in difficulty in being reinstated as a Band member, while others were unable to regain property they would have inherited had they not lost status prior to 1985 (Maheu & Rossiter, 2003). The difficulty in being reinstated was related to some Bands drafting their membership codes to continue to exclude women who married non-Indigenous men, while other Bands refused to recognize reinstated women and children who were supposed to have regained their Indian status under Bill C-31 *An Act to Amend the Indian Act* (Green, 2001).

The 1985 amendments also granted Band Councils the power to develop their own membership codes, resulting in determining who can and who can not participate in their society and politics, including access to property. Residency is established on reserves through Band Council membership, which outlines that a non-Band member is denied the occupancy, use or residency on reserves (Flanagan & Alcantara, 2007). For anyone separating or divorcing on

reserve, this means non-members and children will no longer be entitled to continue living in their matrimonial property on reserve (AFN, 2007).

At the time of marriage, women are expected to renounce their membership in the First Nation of their birth, to become a member of the First Nation of their spouse (Palmater, 2011). If the relationship were to breakdown, at the time of a separation or divorce, women lose membership in the Band of their spouse resulting in lost rights to land from their spouse and do not automatically regain their original First Nations membership as of birth (Maheu & Rossiter, 2003). Coupled with this loss of status related to loss of reserve residency is an involuntary exclusion from communities (Green, 2001). In other words, separating or divorcing from a male partner implies not only separation from Band membership but also the property rights that such membership granted.

Another claim that has impacted the legal landscape is that of Sharon McIvor in 2009. This claim pertained to the loss of status of her descendants because of her sex through marriage of a non-status man, while a status man did not lose his status upon marriage of a non-status woman (Palmater, 2011; INAC, 2009). Despite amendments to the *Indian Act* in 1985, s.6 of the *Indian Act* is still discriminatory. The Supreme Court of British Columbia determined that s.6 of the *Indian Act* does not comply with s.15 of the *Charter of Rights and Freedoms* (Palmater, 2011; INAC, 2009). On appeal, the Court found that s.6 of the *Indian Act* discriminates against individuals like Sharon McIvor (INAC, 2014). While an extension of one generation for the rights to status was made as a result of this claim, the appeal Court named the Parliament of Canada in remedying sex discrimination (Palmater, 2011). As the author of the *Indian Act*, the Federal government is responsible for discrimination against women, which has led to further piece-meal legal remedies.

By December 2010, Bill C-3 *Gender Equity in Indian Registration Act* was enacted in the House of Commons, as a result of the McIvor case, to address the harms claimed. Bill C-3 intended to address the decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. The intention of this bill was to achieve fairness and gender equality for many individuals in the registration process by eliminating the specific cause of gender discrimination as identified by the court of appeal for British Columbia (*Gender Equity in Indian Registration Act*, S.C. 2011, c.18). Criticisms of Bill C-3 include that, first, it is a piece-meal approach to sex discrimination because it perpetuates exclusion of certain groups, which are Indigenous grandchildren of women who married non-status men. Second, Indigenous grandchildren born prior to the 1985 legislative amendment who parented in common-law relationships with non-status men; and, finally, Indigenous female children of status men born prior to the 1985 legislative amendment (Canadian Women's Foundation & Feminist Alliance for International Action, 2017). Through another court order¹⁴, the Government of Canada was told to comply on when it should remedy inequality in Canadian legislation.

The legislative gap about property rights for Indigenous women is related to the absence of matrimonial protection resulting in women moving off reserves because of unfair housing policies on reserves, Band membership affecting members within the same family differently, lack of information on rights by women living on reserve, barriers to access legal recourse and lack of written information within custom allotment tenure systems (AFN, 2007). The *Indian Act* was upheld against provincial matrimonial property protection for Indigenous women¹⁵.

¹⁴ Descheneaux c. Canada (Procureur Général), 2015 QCCS 3555.

¹⁵ The Supreme Court of Canada upheld that provincial laws could not be a substitute for the lack of matrimonial real property provisions in the *Indian Act* in *Derrickson v. Derrickson* (1986) SCR 285; and, *Paul v. Paul* (1986) SCR 306.

Though some Canadian courts have been able to order compensation to be paid¹⁶, if provincial laws permit, the paramountcy of s.88 of the *Indian Act* over lands has been upheld (Alcantara, 2006). In other words, women were not able to benefit from the transformation of women's right off reserve lands, which protects women from losses at the time of a marital breakdown.

It was not until 2014 that formal legislation existed on entitlements after the breakdown of a relationship, through the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (MIRA) (MacTaggart, 2015). In conjunction with the *First Nations Land Management Act* (FNLMA), these two pieces of legislation are meant to fill a legislative gap by ensuring that communities have matrimonial property laws through two measures. The first is through the enactment of First Nation laws as a result of MIRA, and through a sunset clause in the FNLMA to enact their own matrimonial property laws (MacTaggart, 2015).

In 2016, the Senate of Canada tabled Bill S-3 *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada*, which is intended to provide entitlements to registration in the registration process as a response to the *Descheneaux c. Canada* (Procureur Général), 2015 QCCS 3555. The claim in this case is against the registration rules adopted in 1985, where members within one family who traced their ancestry to a female rather than a male are cannot be registered or have the right to transmit status to their children (Palmater, 2011). In 2016, the federal government committed to a two-stage approach to address the harms in current legislation, first through a bill to address the claims made in the Quebec court and second, a comprehensive review of the rules related to status (Palmater, 2011). While the federal government has proposed a comprehensive review of status under the *Indian*

¹⁶ The court cases that ruled on this subject are *Sandy v. Sandy* (2016) BCSC 1684; *Derrickson v. Derrickson* (1986) SCR 285; and, *Paul v. Paul* (1986) SCR 306.

Act, it is critical that it not be discriminatory against sex while Canadian law continues to define Indigenous Peoples in Canada (Palmater, 2011).

INDIGENOUS AND WESTERN SCIENTIFIC KNOWLEDGE

Although Canadian colonial policies are founded on extinction and assimilation of Indigenous Peoples, there remains recognition of distinct cultures, and that these cultures are irreconcilable with s attachment to the land (Elliott, 2005). There within is the challenge; to balance colonial and Indigenous legitimacy, colonial and Indigenous authority, and the capacity of Indigenous knowledge since it has been exposed as valuable and extensive (Battiste, 2002). Finding a respectful way to compare Indigenous and western knowledge is challenging, especially given that the state has made a determined push to eliminate Indigenous knowledge (Battiste, 2002), and the institutions with responsibility for modifying the legislative framework are rooted in western scientific traditions. While not the first study of its kind, the Royal Commission on Aboriginal People (RCAP) stated the importance of Indigenous knowledge, noting the differences between predominantly oral culture and noting that in language, children are taught their perspective based on the importance of not only the words that are said but how the words are said (RCAP, 1996).

The differences between Indigenous traditional knowledge and western science is not the subject of this paper, however a basic recognition of the differences is helpful to understand the complex relationship between the state and First Nations around land ownership (see Table 1). Existing Aboriginal rights and Treaty rights, while not substantively defined, are protected within s.35 of the *Constitution Act* (IOG, 2012), as is Indigenous knowledge under s.35.1 of the *Constitution Act* (Battiste, 2002). Greater definition to s.35, which is fundamental in this research paper, was provided by *Delgamuukw v British Columbia* [1997] 3 SCR 1010. In this case, the

Gitskan and Wet’suwet’en National Chiefs claimed ownership and legal jurisdiction over what they declared were traditional territories and instead of taking on a definitive stance on land rights, the Supreme Court of Canada established a continuum in which to classify First Nations rights in respect of their connection to the land, with one end classification being title that allotted a direct right to land and the other being a site-specific or practice and custom-based rights (IOG, 2012).

Table 1: Differences between western science and traditional knowledge

Factor	Western Science	Traditional Knowledge
Approach	Compartmental	Holistic
How communicated	Written	Oral
How taught	Lectures, theories	Observations, experience
How explained	Theory, “value free”	Spiritual, social values

Source: Simeone, 2004

Indigenous Peoples envision themselves in relation to each other and to everything else, the Indigenous approach to knowledge is not compartmental, but a web of relationships within an ecological context (Battiste, 2002). In this way of thinking, knowledge is a process and it is inherent in and connected to nature and spiritual existence. Experiences of tradition, ceremonies, and observations are part of the spiritual process that enables knowledge to emerge within. Knowledge is tied to land, landscapes, landforms where ceremonies are held, oral histories shared, and medicines gathered, these are also places where knowledge is transferred (Morphy, 1995).

In contrast, the western scientific perspective has its origins in rational objectivity, which is the dominant approach that guides managing land and capital assets off reserve lands in Canada and many other jurisdictions. This approach relies on clear delineations of property

rights that can be transferred between economic agent through market-based mechanisms. With respect to land, western views have been blamed for the tendency to be individualistic, exploit nature at the expense of obligations to other people and the environment, and for treating land as a commodity, neglecting other types of relationships that do not generate wealth (Barry, 2015). Recognizing these two knowledge systems and the values that underpin them is central to alternative theories on property rights because ideology and value systems influence how lands are managed.

HISTORICAL RELATIONSHIPS

Historical relationships are still relevant today, as many of the institutions and practices continue to constrain present day relationships between First Nation communities and the state (RCAP, 1996). British and Canadian displacement and assimilation policies molded and shaped First Nations reserve lands in the emerging Canadian state during confederation. The *Royal Proclamation (1763)* marked the beginning of centuries of British and Canadian displacement and assimilation policy (Flanagan & Alcantara, 2003; Tough, 2013;), by suppressing Indigenous Peoples traditional knowledge systems (Coates & Poelzer, 2010). While oppressive, the *Royal Proclamation* was used as a tool to protect possession or use of the lands reserved to Indigenous Peoples in North America, through state management (Elliott, 2005). As a result, the state retained ownership of reserves set aside for the use and benefit of First Nations communities.

There are over 70 historic Treaties in Canada (1871-1921) (see Appendix, Figure 1); these established the special relationships between the state and First Nations (AANDC, 2006). There is a total of 619,020 Indigenous Peoples who are under historic Treaties with the federal government, with 364 of 617 First Nations who are Treaty First Nations, representing 59 per cent of the total (AANDC, 2006). Treaties are constitutional documents reflecting the special status

of the tribal nations that signed them with the Crown (RCAP, 1996). Recognized Treaties and modern Treaties cover all of Canada (see Appendix, Figure 2), also known as comprehensive land claims, are negotiated under self-government agreements. Modern Treaties are organized to achieve jurisdiction to determine their own rules for citizenship (Palmater, 2011).

The reserve lands that were created through historical Treaties form millions of hectares of reserve lands under Crown ownership and management (AANDC, 2008). However, there are a number of other sections of the *Constitution Act* which are relevant. For instance, while s.91(24) of the *Constitution Act* establishes jurisdiction of the federal government over defining the Indigenous Peoples population in Canada, including managing their lands, s.35 entrenched the protection of Aboriginal culture in s.35 and s.91 and s.92 sets out property and civil rights. This means that the legal framework and protections for an Indigenous person varies depending on whether the individual lives on or off reserve, and as a result, whether they are male or female.

INDIGENOUS WOMEN AND DISCRIMINATION IN CANADIAN LEGISLATION

The Senate of Canada published report, *A hard bed to lie in: Matrimonial real property on reserve* (Maheu & Rossiter, 2003), and the RCAP (1996) settle the fact that Indigenous women living on-reserve face multiple disadvantages in Canadian society because of race and sex (Royal Commission, 1996; Maheu & Rossiter, 2003). For instance, through inadequate housing, health inequalities, and extreme poverty (Oppal, 2012). In addition, the distribution of rights and benefits for Indigenous women have not been distributed and regulated equitably among land users (Natcher, Hickey, Nelson, & Davis, 2009). Colonial institutions, like the *Indian Act*, taught generations of Indigenous youth to incorporate colonial norms, one of the

most fundamental is patriarchy (Green, 2001; Grey, 2014; Palmater, 2011), most directly since the categorical definition of and Indigenous person in the original *Indian Act* was male.

The power of Indigenous women decreased while colonial powers grew, depriving them of status, participation, and autonomy in every realm of their lives, such as spiritual, economic, political, or diplomatic realms (Grey, 2014). Many Indigenous women lost ownership of and access to land as well as customary maternity and inheritance rights (Grey, 2014).

Claims of sexism within Indigenous societies are rooted in forced assimilation and through conscious intent to omit women from colonial policy documents (Grey, 2014). While not the focus on this research study, Grey (2014) and Green (2001) have argued that Indigenous women have been largely unsupported by the state in remedying discrimination but also by Band Councils and national Indigenous organizations in their political support of collective rights over that of individual rights.

Situations of sex-based inequalities in registration as a result of the *Indian Act* affecting cousins and siblings, resulting in lesser status to descendants of Indigenous women (Palmater, 2011). Changes to the *Indian Act* in 1985 allowed Band Councils to create their own membership codes, while presenting other barriers to membership, Indigenous women could apply to regain status (INAC, 2014). Although the changes in 1985 created new categories of status, the court took a narrow interpretation on the McIvor case and gave responsibility to Parliament of Canada to modify the *Indian Act* (Palmater, 2011).

The sum of the background presented in this section has been an attempt to describe land management and discrimination in the *Indian Act*, differences in knowledge between two cultures, reviewing state and First Nations historical relationships and presenting information on the issue of sex discrimination in Canadian legislation.

SECTION 3: LITERATURE REVIEW

Property rights define and limit the responsibilities and obligations that individuals hold to specific resources, such as a parcel of land. These rights develop when there is agreement and support for the allocation, use and transferability of these rights (Boudreaux, 2005). These rights can be formal by being captured in rules and regulations or informal through behavioural norms (Boudreaux, 2005). Property rights will fail if they are not employed within a carefully considered property regime (Boudreaux, 2005). Each Canadian province has its own similar, yet distinct system for registering interests in property, as property legislation is a constitutionally assigned provincial responsibility. The systems share common aspects, which is that they either guarantee indefeasible title to land or provide recorded information related to land. Documents go through a certification process through provincial registry authorities. Tough (2013) supports the argument that private titling needs a comprehensive understanding of everything that contributes to successful property rights. Formal, individual property rights without economic development may be detrimental in the context of poverty (Tough, 2013; Boudreaux, 2005).

Conceptual discussions on property regimes in between the status and First Nations are important for the legitimation of rights and obligations with respect to goods that are regarded as valuable (Benda-Beckmann, Benda-Beckmann, & Wiber, 2006). Property is important to economies, and defines the identity of groups and individuals (Benda-Beckmann, Benda-Beckmann, & Wiber, 2006). While the individual property rights regime that exists in Canada purports to be universal, it is based on western law, important to uphold individual ownership rights, which, though colonization has led to a muddled land management system for on reserve lands in Canada. The literature review is now presented as it relates to property rights theory, application in practice, and more specifically, application on-reserve.

FOUNDATIONS OF PROPERTY RIGHTS

Modernization theory can be described as development is determined by external forces and not by forces within a society, referred to as externalities (Demsetz, 1974). This theory implies that social change and a sense of progress as a society transitions from traditional forms to form new forms of technological and social characteristics of a modern society, is a linear irreversible process (Barry, 2015). Modernization in the west can be described as political search of democracy, to social erosion of the power of ethnic groups, and economic drive for capitalism and market systems (Coatsee, Graaff, & Wood, 2001). A critique of modernization is that the distinction between modern and traditional is not clear because traditional societies are evolving continuously, therefore it is overly simplistic (Coatsee, et al., 2001).

Modernization theory can be observed in policy proposals calling for the Crown to privatize reserve lands (Flanagan, Alcantara & LeDressay, 2010), understood as modernizing what is seen as traditional land management systems. These authors propose that the Crown to consider legal reform and adopting a regulatory system to unlock the capital stored on reserve lands by guaranteeing private ownership and access to title (Flanagan, et al., 2010). In their criticism of this proposal Newhouse and Shpuniarsky (2013) outline much broader challenges for First Nations before there is a national commitment by all First Nations to adopt formalizing all on reserve lands. While some communities have chosen to formalize their lands and have adopted the Torrens land registration system¹⁷, the decision for the Nisga'a First Nation and Westbank was tied to their traditional cultural values and felt that this decision was a reflection of their development goals (Barry, 2009).

¹⁷ Benefits of this system includes generating certainty in title, thereby allowing anyone to track their interest in the property, such as any granted easements, entitlements to bequeath or transfer (Graben, 2014).

In their study of drawing connections between land tenure reform and development goals of greater community economic growth, Baxter and Trebilcock (2009) suggest that it would not be possible to apply the outcome chosen by Nisga'a to every First Nation community in Canada. The Flanagan et al. (date) proposal needs to clarify how the diversity of First Nations communities would be respected, based on the different configuration of lands, experiences and capacities of each community (Newhouse & Shpuniarsky, 2013). Further, economic outcomes may not be central to decision-making for every First Nation community, and the federal government role is ambiguous in their policy proposal (Baxter & Trebilcock, 2009). While the Flanagan proposal represents an evolution of the control and management permitted in the FNLMA, removing the special status of reserve lands with the goal to remove protectionist policy and replace it with participation in the market economy could be seen as short sighted (Newhouse and Shpuniarksy, 2013) and further evidence of the shortcomings of modernization theory. A more holistic approach to formalizing land rights through legal reform would first consider ideology and anthropology of the land holder before assessing whether to start exchanging reserve lands as a commodity on the market is an appropriate option to consider.

Evolutionary theory builds on modernization and goes further to suggest that social change is caused by many factors (Barry, 2015). The five main assumptions of evolutionist thinking include (Le Roux and Graaff, 2001):

- I. A predetermined number of phases of social change in a society;
- II. Evolution occurring along a single, linear path and it is repeatable;
- III. Change occurring gradually and not in revolutionary leaps;
- IV. The change being irreversible; and,

- V. The view that evolution is good where advanced societies are better than the less-advanced or primitive.

A criticism of this theory is that it can be oversimplify change because change is complex (Barry, 2015). Both Demsetz (1974) and Hardin (1968) present evolutionary theories which are rooted in the idea that economic forces shape and define all political, social, cultural aspects of civilization. The main idea in their theories is that communal land management systems will function well until there is economic competition for the land, then economic actors will start to compete for their fair share of land and ultimately, private property will emerge because of its efficiencies (Hardin, 1968; Demsetz, 1974). In fact, Demsetz (1974) argued that First Nations property systems are likely to evolve to private property regimes as population pressure and market integration increases competition for land. Without tools and ways to control land management, Demsetz (1974) and Hardin (1968) argue that communal systems become inefficient and costly, whereas private ownership reduces the costs of negotiation. These two theories have influenced western policy makers and continue to be popular given the work of De Soto (2001), who studied country level property reform where enabling systems were effective in transforming lands to have land titling systems (Barry, 2015).

The argument for property rights formalization was made popular by De Soto (2000) who documented the phenomenon through a large empirical study. Impoverished, vulnerable populations suffer from a deficient property rights system, which do not effectively document land and houses, sold in market systems and unlocked to be used as capital (De Soto, 2000). Inspired by De Soto, Flanagan and Alcantara (2004) present a stark comparison of the conclusions drawn by De Soto to First Nations reserve lands, drawn through legislative analysis and fieldwork including a range of interviewing techniques. The elephant in the room in their

paper is that the on reserve land management system has been improved, not selected. That is, while many First Nations communities desire greater participation in the broader economy, benefitting from established ways of exchanging goods and services and decreasing poverty conditions through greater access to capital, they operate within a legal framework which is not of their own design. The authors are pre-occupied by the narrow question of how to increase participation in the market economy and that while there are unique property rights regimes that exist as a result of Canadian policy, the system creates a drag and is a barrier to greater economic freedom (Flanagan & Alcantara, 2004).

The problem in Canada is whether the enabling conditions exist for Indigenous Peoples living on reserves and whether the system is the right cultural fit or even desired. Rights and benefits are formed within norms of cultures; therefore, the debate is not as stark as presented by Flanagan and Alcantara.

The perspective of many authors who have written about privatizing reserve lands is through utilitarianism, which is an ethical theory that places the power and control of right and wrong solely on the outcomes of choosing one policy over others (Demsetz, 1974). The benefits of which are placing individual interest and happiness above that of common interests, recognizing the state's role in managing the conflict between public and private interests (Campbell & Marshall, 2002). The challenges of utilitarianism include the value judgements in determining good versus bad, at the expense of equity or welfare, creating vulnerable people who lose their land interests (Barry, 2015). From a land use planning perspective, private ownership and commodifying lands is viewed as achieving the highest and best use, which could lead to serious environmental and cultural offences.

PROPERTY RIGHTS IN-PRACTICE

The Torrens land registration system, which is a land registration system that is used to record transactions, is a key tool used in the process of creating capital from an asset (De Soto, 2000). Torrens, adopted from utilitarian economic theory, demonstrates the objective to generate value through the commodification of land (Demsetz, 1974; Flanagan & Alcantara, 2004; Tough, 2013). Capital is a process that converts the economic potential of the usage of owned land into capital (De Soto, 2000). Individual ownership is a key factor of transferring land into capital, which is how the Torrens system was adopted by formal property rights systems.

From a western scientific perspective, registered freehold is considered the most secure form of property rights, often accompanied by stable employment in market economies with formal land management policies (Boudreaux, 2005). Though, not all groups in a western economy would benefit from ownership and titling because of the many steps which must be followed to access the right to freehold title, not to mention the financial, fiscal or other obligations which often accompany it. For example, the most appropriate tenure option for low-income individual would be a lease holder because of the inability to manage monthly mortgage payments or meet the terms and conditions for lending requirements from private banking institutions. If you dig deeper within the lease holder category, a further definition can be made between a lease holder who is subsidized by the government and a lease holder who is not subsidized. This example is illustrative of the concept that while there is a bundle of property rights within a system, that these bundles can be forked off and further splintered (Boudreaux, 2005).

In western formal property rights systems, categories of land tenure include open-access, communal, state and private ownership. Benda-Beckmann, Benda-Beckmann, & Wiber, 2006

suggest these categories are too simplistic to describe complex relationships, which could constitute a plurality of land tenure relationships in Canada. While the bureaucratic system of managing and handling access to land makes up one of the barriers to private ownership, through the *Indian Act*, women have been doubly challenged in accessing land rights. For First Nations wanting to take over the governance and management control of their lands and resources, the Land Code replaces approximately 30 sections of the *Indian Act* (First Nations Land Management Act, S.C. 1999, c.24.). By developing its own land governance system through the Land Code, communities can enter into negotiations with Canada regarding the land laws to govern their communities, and in doing so removes the role of the Minister of INAC in the management and decision-making on making their reserve lands (First Nations Land Management Act, S.C. 1999, c.24). While this framework doesn't remove the Crown as title holder of reserve lands, nor allow for sale to third party interests, it nevertheless grants First Nations with the powers and legal status necessary to manage lands. For example, First Nations are permitted to develop their own laws, manage lands and resources including revenues, manage third party interests, option to exercise powers of expropriation, report to its members and increase accountability, insert information into a software system (First Nations Land Registry System) and make rules on the rights of spouses (First Nations Land Management Act, S.C. 1999, c.24).

KEY THEORIES AND CONCEPTS APPLIED ON RESERVE

This section will describe the ways Indigenous Peoples living on reserve individually interact with formal property rights, in the Canadian context. While legal title is held with the Crown, the use and benefit of these lands are held as an inalienable right by Indigenous Peoples (Elliott, 2005; Natcher, Hickey, Nelson, & Davis, 2009). This differs from the rest of Canada, given that

lands are managed provincially and unlike provincial register officials, the Minister of Indigenous and Northern Affairs (INAC) is in an administrative position of approving and granting land transactions under the *Indian Act* (INAC, 2008).

While excluded from the classic property systems in the Canadian context, there is a top-down system in place for reserve lands with several different management approaches, which yield different outcomes for First Nations communities living on reserves. Reserve lands managed under the *Indian Act* are viewed through the lens of economic determinism with the objectives to internalize externalities, respond to the development of commercial trade and increasing economic efficiency (Hardin, 1968; Demsetz, 1974).

Band Councils are given authority in the *Indian Act*, who have a wide range of powers, though limited in control, including membership rules, zoning, housing and administration of reserve lands. This means that a member can access their right to land through one of four approaches to land management that their Band Council and community have adopted.

Almost half of reserve lands managed as custom allotments (Alcantara, 2007; Ballantyne & Ballantyne, 2017), they are outside of any legal recognition in the Canadian court system and are not recognized in federal statutes. Customary allotment is mis-categorized in academic conversations, especially where economic determinism dominates in lieu of an anthropological understanding of the governance structures that exist within custom allotment systems. Through their analysis the authors attempt to combine two spatial land registration data systems known as the Lands Registry and the Canada Lands Survey System (Ballantyne & Ballantyne, 2017). These authors conclude that informal land holdings hinder economic prosperity for communities that are managed by INAC and state that informal systems impedes and delays simple land transactions to develop or mortgage a property, on Reserve (Ballantyne & Ballantyne, 2017). In

the final summative statement of their report, however, admit to a scarcity of information about custom land holdings on reserve (Ballantyne & Ballantyne, 2017), which weakens their determination of informal system hindering economic performance.

A Certificate of Possession (CP) is recorded in the Land Registry, a transaction system managed by INAC, which creates the ability to build, farm, extract resources, sell, subdivide, devise it in a will or lease the land (Alcantara, 2006). A CP is enforceable in court, though transactions related to CPs require Band Council consent, approval of the Minister or both with provisions that limit the sale of a CP to Band members (Alcantara, 2006). Under the CP system, leases offer individuals with a CP permit a non-Band member to occupy or use reserve land for a period of one year, with renewals and longer leases managed through INAC and Band Councils (Alcantara, 2006).

While customary rights are not recognized in court, the final regime, the FNLMA, offers new protections in relation to CP, leases and custom allotments to communities and allows communities to opt out over 30 sections related to the management of land in the *Indian Act*, through a defined process (INAC, 1996) The regulations under the FNLMA could offer a community to express their development goals, as they wish.

In their examination of security of tenure in informal reserve land property systems, Ballantyne and Ballantyne (2017) argue that contrasting formal and informal land tenure may not be so stark. Through their own examination of literature of what makes property rights secure, they find that formal institutions have no bearing on secure property, instead informality was underscored because of the various relationships that are based on trust, respect, and control (Ballantyne et al., 2017). Land tenure systems can instill a sense of security in one's access to

land. Tenure security as a feeling or personal belief that one's access to land will either be maintained or diminished in the future (Natcher, Hickey, Nelson, & Davis, 2009).

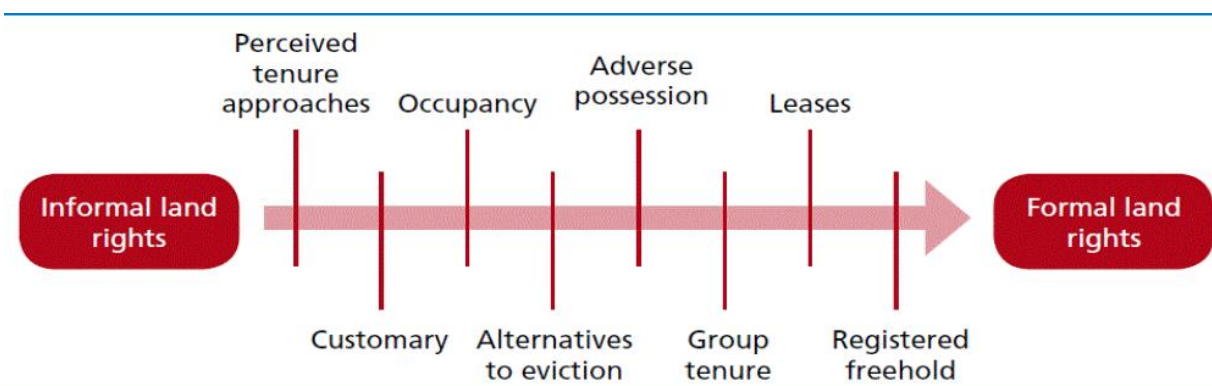
The ability to access and benefit from land use is determined through policy and socioeconomic status of the users of the lands. How land is used and the users of land influence the patterns of community development, and through social planning could benefit vulnerable populations. In their study on territorial and traditional lands, Natcher, Hickey, Nelson, & Davis, 2009 developed a random sample questionnaire and asked about equal access and equal distribution of land use rights among different users in two First Nations communities¹⁸. In one community, 75% of respondents felt insecure about their future access to the land on reserves and believed in their ultimate displacement by the government and the majority in the second community believed equitable access to land would not be achieved because of private sector interests in their land (Natcher, Hickey, Nelson, & Davis, 2009). While the author does not state which tenure model exists in either of these communities on their reserve, land tenure security does not necessarily follow from legal ownership and more informal systems may function better for diverse groups (Barry, 2015). Canadian laws are an incomplete and imperfect tool to deal with complex social challenges and laws have not been able to deal with the relationship between the state and First Nations communities appropriately (Elliott, 2005).

One way to contextualize the differences between each of the different tenure options on reserve is through the continuum of land rights. The continuum of land rights is a metaphor developed to describe land tenure systems, from different ideological perspectives to develop strategies to improve tenure systems (Barry, 2015). The challenge in Canada has been to describe custom allotment systems and transforming from state management to those managed by First

¹⁸ Little Salmon/Carmacks First Nation and Little River Cree Nation

Nations communities. The continuum fits into the literature by contextualizing each of the benefits and weaknesses associated with informal and formal land rights and points along the line. It was developed by the *Global Land Tool Network*, with support through UN-Habitat, to help developing communities understand their current tenure systems and where there is a desire for formally recognized land rights, creating categorical descriptions to achieve development goals (Barry, 2015).

Figure 1: Continuum of land rights



Source: Global Land Tool Network, 2017

At one end of the continuum are formal land rights, with a set of registered rights to a parcel of land that are enshrined in law; the parcel is delineated on a map held in a records office; the owner has the right to occupy the land, build on it (subject to approvals), sell it, rent it out, transfer it to his or her heirs, and prevent other people from coming on to it (Boudreaux, 2005). At the informal end of the continuum are informal rights; a group of individuals (such as a clan) who may have traditional rights to use a piece of land (Barry, 2015). While informality may imply disorganization, many informal systems are well-organized (Barry, 2015). By suggesting that customary allotment systems are informal, may be offensive to some First Nations groups, especially given assimilation policies (Barry, 2015).

GAPS IN KNOWLEDGE AND LITERATURE REVIEW SUMMARY

The magnitude of the problems that Indigenous women have faced in Canada is not well understood through academic literature, although appears to have been well-documented in legal cases in Canada's highest courts and being pursued by high-profile bodies such as the Commission on Missing and Murdered Indigenous Women and Girls. Both studies by Green (2001) and Alcantara (2006, 2007) state that one of the main objectives in their academic research was to develop baseline information rather than to develop solutions through policy development. The gaps are centered on knowing what enables or constrains access to property rights for Indigenous women on reserves. The *Journal of Aboriginal Economic Development* and was searched to find Indigenous Peoples perspective on this issue, as was the *Native Women's Association of Canada* and *The Assembly of First Nations*. While the latter two are not peer-reviewed journals; the materials are relevant for the methodology used in this research study.

Most authors writing from the perspective of increasing formalization on reserves, may reflect the ideology behind how rights and benefits debates are contextualized in Canada. Most of the disciplines of authors writing on this subject were in law, political and social sciences, or policy studies. The sections were organized into the theory and concepts of property rights and then what authors have written about these theory and concepts, applied to First Nations communities and Indigenous women. Land ownership and access to property rights on reserve lands by Indigenous women is not a well understood social concept. Furthermore, whether improved social outcomes for Indigenous women (such as poverty reduction or higher education) have a positive relationship as a direct result of converting reserve lands to individual land rights managed in a formalized land registration system, is another social concept that requires further study and careful attention to categories for the variable.

SECTION 4: INDIGENOUS WOMEN AND PROPERTY RIGHTS

BUNDLE OF STICKS PROPERTY RIGHTS METAPHOR

The bundle of sticks property rights concept will be used to describe the systematic barriers that constraints access to property rights, at a national level, faced by Indigenous women on reserve lands in Canada. The bundle of sticks metaphor was selected because it is an analogy used by lawyers when describing the rights and obligations of the relationship between a person and property. The outcome of this step will be to develop a description of the range of rights available to Indigenous women in the Canadian context, using government documents and statistics. Access to a property object relies on the type of system a Band Council has implemented, outlined in Table 2, each system has its own series of benefits and obligations, management, rules around transfer and inheritance as well as the political authority to regulate its use.

Each of these regimes used by a First Nation community affect men and women differently and have often been developed with male interests and priorities. A gender analysis tool was developed to try to consider the deeper issues, such as power, society and culture and has been tested and the results were studied, though refinement of the matrix is required in different countries (GLTN, 2017). Through a matrix that aims to ensure that the land tools deal with gender rather than general questions and through identifying the kind of information to answer the questions (GLTN, 2017). While the tool aims to achieve gender-responsiveness of land reform measures, the program was preparing to pilot test the tool in 2009-2010 at the country level and had not yet been operationalized by the Global Land Tool Network.

This metaphor helps describe the number of rights available to different people or groups of people, each stick can be defined through law. Each stick has a magnitude, representing

powers and obligations associated with property right. This metaphor can be applied to various regimes, differentiate between roles and responsibilities. For this major research paper, the constraints of Indigenous women (through status discrimination and through inadequate matrimonial property rights) affect property rights directly and indirectly.

Table 2: Bundle of Sticks Metaphor

Typical categories (Boudreaux, 2005, UN Habitat 2012, Barry, 2015)	Direct or indirect constraint to rights?	Description
1. Possess, own land, jointly or individually	Direct	<ul style="list-style-type: none"> • Underlying title is not held by First Nations communities or individuals. • The extent to which joint possession of land by spouses is applied equally between sexes for all First Nations, within each of the four tenure systems, needs research.
2. Right to enjoy and use lands	Indirect	<ul style="list-style-type: none"> • The extent to which women and men enjoy and use lands needs research.
3. Right to sell and transfer property during one's life and upon death, inherit and bequeath	Direct	<ul style="list-style-type: none"> • The right to inherit and bequeath are impacted by status registration discrimination in the <i>Indian Act</i>.
4. Right to manage, exclude, restrict or use lands productively	Direct	<ul style="list-style-type: none"> • Membership rules impact women because they are removed from decision-making (management) when marrying a man of another First Nation and on breakdown or divorce.
5. The right to pledge lands for mortgage loan, transfer, sell, purchase, grant	Direct	<ul style="list-style-type: none"> • Restricted by s. 28 and s. 89 of the <i>Indian Act</i>, which prohibit institutions from seizing assets and property in the even of a default.
6. The right to improve and develop lands	Indirect	<ul style="list-style-type: none"> • Indirectly impacted from social economic status, assumes access to capital, loans or grant programs to improve or develop.
7. Right to income, keep profits and benefit from increased property values	Indirect	<ul style="list-style-type: none"> • Indirectly impacted from social economic status, assumes development goals and opportunities of communities.

8. Right to lease, sublease and other temporary use rights	Direct	<ul style="list-style-type: none"> • Leases can be generated on Band’s collective or privately controlled land, can only be leased through the <i>Indian Act</i> and Band Councils. • Short term, long term, leases granted on behalf of the CP holder.
9. Right to seek redress from harms	Direct	<ul style="list-style-type: none"> • Custom allotment systems are not recognized by the <i>Indian Act</i>, which affect the ability to use Canadian court systems to redress grievances, such as gender inequality in the handling of matrimonial property. • Matrimonial property is a requirement for First Nations managed under the FNLMA.

This metaphor is overly simplistic and ignores the relationships that people have to land or that land has to land; from an ecological perspective this metaphor does not see the relationship within the natural environment. Depending on the culture, property rights can be fluid and changing in contrast to the legal and economic definitions of property rights. This metaphor highlights how Western systems have operated, at the expense of the natural environment as well as glorifying individual property and constructing land as a commodity. The objection to this metaphor to help vulnerable populations relate more to the ideology that is being used to justify the right.

ALTERNATIVE PROPERTY RIGHTS APPROACH

While the bundle of sticks property rights metaphor can be used to describe relationships in different societies, an alternative property rights concept will be used to help describe opportunities to adopt alternative property rights theory to enable access to property rights for Indigenous women on reserves in Canada.

The constellation is a framework to analyze property systems, comprised of three layers, which are (1) ideology; (2) legally institutionalized categorical property relations – the categories of rights and duties constituted in the legal institutional framework; and, (3) the system of concretized relationships – the actual social relations as they exist in practice (Benda-Beckmann, Benda-Beckmann, & Wiber, 2006). In fact, they argue that state administrative organizations are ill-prepared to manage cross-cultural situations due to different ideologies and inadequate attention being given to organizational and institutional development to manage different ideologies behind property rights. Along the continuum of land rights are the different rights along the informal and formal spectrum of property rights.

The constellation of property interests' metaphor, by Benda-Beckmann, Benda-Beckmann, and Wiber (2006) is used to explain complex, multi-layered land tenure systems where a particular parcel of land draws on state and customary laws. In this analytical framework, the analysis of property is in relation to a society's members with respect to valuables that are given significance (Benda-Beckmann, Benda-Beckmann, & Wiber, 2006).

They are:

- I. Social units (individuals, groups, lineages, corporations, states) that can hold property rights and have obligations;
- II. Construction of valuables as property objects; and,
- III. Different sets of rights and obligations the social units have with respect to the objects.

Therefore, property is not one set type, for example individual ownership. The analytical framework allows one to identify the major elements of any property constellation, as well as how they are conceptualized as bundles of rights, at the three different levels (ideological, legal institution and social relational).

While almost 50 per cent of reserve lands are managed under custom allotment tenure systems (Ballantyne & Ballantyne, 2017), the gaps highlighted in literature reveal that not much is known about these types of systems. This theory could be used to describe custom allotment systems, especially if a community is looking to reform, to help explain what is happening and predict any problems with the systems. For example, custom allotment may not be able to be defined within the

The challenges with this alternative model is that it is not yet proven in practice in environments dominated by economics and law. By encouraging systems thinking, this alternative theory focuses on what is happening and not just what is documented in state systems (Barry, 2015). Another weakness of applying an alternative theoretical lens to stakeholders involved in creating outcomes for communities involved in complex change, is communication and being able to simplify the messages about the outcomes and objectives (Barry, 2015).

SECTION 6: CONCLUSION AND RECOMMENDATIONS

This research paper anticipates presenting recommendations to future researchers by understanding sex based inequity in the *Indian Act* and how Indigenous women access or are hindered to access property rights. The analysis reviewed alternative approaches to land tenure regimes for reserve lands to achieve greater formalization while mitigating assimilation.

Land tenure systems governing on-reserve is derived primarily from the *Indian Act*, which the Supreme Court of Canada has shown to discriminate on the basis of gender, and to be rooted in a western scientific approach to land management. However, options are emerging for land management and self-governance as a result of Aboriginal Title through the acknowledgement of Indigenous interests in land. New options create opportunities of reforming relationships between Indigenous and non-Indigenous people that goes beyond land management to embrace fundamental issues of rights. The *Delgamuukw v British Columbia* [1997] 3 SCR 1010 case included a comment about Indigenous Peoples rights and title existing along a spectrum regarding their degree of connection to land; that title to land is an inalienable, communally held interest that began before occupation of Indigenous Peoples lands in Canada (Elliott, 2005).

Land management systems with clear property rights can provide access to economic opportunity through commodifying and assisting in economic transition, unlocking the economic value in land. While this has cause some authors, Flanagan to propose modernist arguments suggesting that the solution to economic problems on reserve is to adopt westernized property rights, the literature suggests that this approach does not consider the cultural implications, nor does it take into consideration the process of reconciliation.

The alternative property rights system provides a potentially more valuable framework for balancing economic development objectives with the more holistic approach common amongst Indigenous knowledge. Land is far more than a commodity, it embodies other types of relationships, such as social, political, or spiritual. While there are many challenges to reconcile history and better understand informal land tenure systems, reform and developing understanding using ethnography present opportunities to improve the wellbeing of Indigenous communities that have faced significant adversity because of colonization.

The challenge is that the alternative approach has not been operationalized, which creates the risk that Indigenous women would not be better off under that system as compared to the system in which they operate now. Regardless of the approach taken, it is important for the planning community to be aware of the complexity of the economic, social, environmental and ideological roots underpinning current land management systems on and off reserve lands. In the absence of this understanding, further harm could be done to the reconciliation effort, where policies aimed at supporting the aims of Indigenous Peoples could have the deleterious effects, as has been shown to the case in the past.

REFERENCES

- Aboriginal Affairs and Northern Development Canada. (2006). Historic Treaties and Treaty First Nations in Canada. Retrieved November 27, 2017, from https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AL/STAGING/texte-text/treatyMaking-infopic-pdf_1380133996417_eng.pdf
- Alcantara, C. (2005). Certificates of possession and First Nations housing: A case study of the Six Nations housing program. *Canadian Journal of Law and Society*, 20(02), 183–205. <https://doi.org/10.1353/jls.2006.0019>
- Alcantara, C. (2006). Indian women and the division of matrimonial real property on Canadian Indian reserves. *Canadian Journal of Women and the Law*, 18(2), 513–533.
- Alcantara, C. (2007). Reduce transaction costs? Yes. Strengthen property rights? Maybe: The First Nations Land Management Act and economic development on Canadian Indian reserves. *Public Choice*, 132(3–4), 421–432. <https://doi.org/10.1007/s11127-007-9168-7>
- Alcantara, C. (2008). Aboriginal policy reform and the subsidiarity principle: A case study of the division of matrimonial real property on Canadian Indian reserves. *Canadian Public Administration*, 51(2), 317–333.
- An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in *McIvor v. Canada* (Registrar of Indian and Northern Affairs) (2010). Retrieved from <http://www.parl.ca/DocumentViewer/en/40-3/bill/C-3/royal-assent>
- Ballantyne, C., & Ballantyne, B. (2017). Measuring informal housing and its socio-economic Outcomes on First Nation reserves in Canada. Presented at the 2017 World Bank Conference on Land and Poverty, Washington, DC: The World Bank. Retrieved from https://www.conftool.com/landandpoverty2017/index.php/11-11-Ballantyne-443_paper.pdf?page=downloadPaper&filename=11-11-Ballantyne-443_paper.pdf&form_id=443&form_version=final
- Barry, M. (2015). Property theory, metaphors and the continuum of land rights. (V. Quinlan, Ed.). United Nations Human Settlements Programme (UN-Habitat). Retrieved from <http://www.ucalgary.ca/mikebarry/files/mikebarry/barry-2015-property-theory-metaphors-and-the-continuum-of-land-rights-published.pdf>
- Battiste, M. (2002, October 31). Indigenous knowledge and pedagogy in First Nations education: A literature review with recommendations. Apamuwek Institute. Retrieved from http://www.afn.ca/uploads/files/education/24_2002_oct_marie_battiste_indigenousknowledgandpedagogy_lit_review_for_min_working_group.pdf
- Baxter, J., & Trebilcock, M. (2008). Formalizing land tenure in first nations: Evaluating the case for reserve tenure reform. *Indigenous Law Journal*, 7(45).

- Benda-Beckmann, F. von, Benda-Beckmann, K. von, & Wiber, M. G. (Eds.). (2006). *Changing properties of property*. New York, NY: Berghahn Books.
- Boudreaux, K. (2005). The role of property rights as an institution: Implications for development policy. *Mercatus Centre, Mercatus Policy Series Policy Primer (2)*. George Washington University. <http://ssrn.com/abstract=1336664>
- Campbell, H., & Marshall, R. (2002). Utilitarianism's Bad Breath? A Re-Evaluation of the Public Interest Justification for Planning. *Planning Theory, 1(2)*, 163–187. <https://doi.org/10.1177/147309520200100205>
- Canadian Charter of Rights and Freedoms - Equality Rights (1982). Retrieved from http://www.charterofrights.ca/en/17_00_01
- Canadian Women's Foundation, & Feminist Alliance for International Action. (2017). *Sex discrimination in the Indian Act*. Retrieved from <https://register.gotowebinar.com/recording/recordingView?webinarKey=4057947056462022401&recordingKey=6870474710881840391®istrantEmail=jasmine.tranter%40ccochohousing.org>
- Coates, K., & Poelzer, G. (2010). Defining Indigenous space: The constitutional development of Aboriginal property and resource rights in Canada. *Georgetown Journal of International Affairs, 11(7)*.
- Coetzee, J., Graaff, F. H., & Wood, G. (Eds.). (2005). *Development theory, policy and practise*. Oxford University Press.
- De Soto, H. (2000). *The mystery of capital: Why capitalism triumphs in the west and fails everywhere else*. New York, NY: Basic Books.
- Delgamuukw v British Columbia [1997] 3 SCR 1010. Retrieved from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>
- Demsetz, H. (1974). Toward a theory of property rights. In *Classic Papers in Natural Resource Economics* (pp. 163–177).
- Descheneaux c. Canada (Procureur Général), No. 500-17-048861–093 (QCCS August 3, 2015). Retrieved from <http://canlii.ca/t/glzhm>
- Elliott, D. (2005). *Law and Aboriginal Peoples in Canada* (5th ed.). Concord, ON: Captus Press.
- Enright, J., Winn, C., & Sapeha, H. (2015, November). Self-government for First Nations: Beyond the Nisga'a experience, self-governance and its perceived benefits for the Cree of Northern Quebec and the First Nations of Westbank (Kelowna), Sechelt (Sunshine Coast), and Yukon. Frontier Centre for Public Policy. Retrieved from <http://books.scholarsportal.info/viewdoc.html?id=706652>

- First Nations Land Management Act, S.C. 1999, c.24. Retrieved from <http://laws-lois.justice.gc.ca/eng/acts/F-11.8/page-1.html>
- Flanagan, T., & Alcantara, C. (2003). Individual property rights on Canadian Indian reserves. *Queen's University*, 29.
- Flanagan, T., Alcantara, C., & LeDressay, A. (2010). Beyond the Indian Act. Montreal, QC: McGill-Queen's University Press.
- Gender Equity in Indian Registration Act, S.C. 2010, c.18. Retrieved from <http://www.parl.ca/DocumentViewer/en/40-3/bill/C-3/royal-assent>
- Global Land Tool Network. (2009, 2010). 22 Evaluation questions to tell us whether a tool is responsive to both women and men. Retrieved December 4, 2017, from <http://www.monppab.org/content/libraryfiles/78.pdf>
- Global Land Tool Network (GLTN). (2017). About GLTN. Retrieved December 4, 2017, from <https://gltn.net/home/about-gltn/>
- Graben, S. (2014). Lessons for Indigenous property reform: From membership to ownership on Nisga'a lands. *UBC Law Review*, 47(2), 399–443.
- Green, J. (2001). Canaries in the mines of citizenship: Indian women in Canada. *Canadian Journal of Political Science/Revue Canadienne de Science Politique*, 34(4).
- Green, J. (2001). Canaries in the Mines of Citizenship: Indian Women in Canada. *Canadian Journal of Political Science*, 34(4), 715–738.
- Grey, S. (2014). Self-determination, subordination, and semantics: Rhetorical real-world conflicts over the human rights of Indigenous women. *UBC Law Review*, 47(2), 495–534.
- Hardin, G. (1968). The tragedy of the commons. *Science*, 162(3859), 1243–1248.
- Huairou Commission. (2016). About us. Retrieved December 2, 2017, from <https://huairou.org/about-huairou/>
- Indian Act, as amended, R.S.C. 1985, c.1-5. Retrieved from <http://laws-lois.justice.gc.ca/PDF/I-5.pdf>
- Indigenous and Northern Affairs Canada. (2008, November 3). Land management [promotional material]. Retrieved November 29, 2017, from <https://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738#ch2>
- Indigenous and Northern Affairs Canada. (2009). *Discussion paper: Changes to the Indian Act affecting registration and band membership (McIvor v. Canada)*. Retrieved from https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/mci_1100100032488_eng.pdf

- Institute on Governance. (2012). Beyond section 35: Symposium discussion paper. Presented at the Beyond Section 35 Symposium, Ottawa, ON. Retrieved from https://iog.ca/docs/Beyond-Section-35_Ottawa_Discussion-Paper1.pdf
- Joseph, B. (2016, July 20). Indigenous Peoples terminology guidelines for usage. Retrieved December 13, 2017, from <https://www.ictinc.ca/blog/indigenous-peoples-terminology-guidelines-for-usage>
- MacTaggart, S. L. (2015). Lessons from history: The recent applicability of matrimonial property and human rights legislation on reserve lands in Canada. *Western Journal of Legal Studies*, 6(23).
- Maheu, T. H. S., & Rossiter, T. H. E. (2003, November). A hard bed to lie in: Matrimonial real property on reserve. The Senate of Canada. Retrieved from <https://sencanada.ca/content/sen/Committee/372/huma/rep/rep08nov03-e.pdf>
- Mitchell, T. (2004). Property problems for Aboriginal women. *Law Now*, 29, 79.
- Morphy, H. (1995). Landscape and the reproduction of the ancestral past. In E. Hirsch & M. O'Hanlon (Eds.), *The Anthropology of Landscape: Perspectives on place and space* (pp. 184–209). Oxford: Clarendon press.
- Natcher, D. C., Hickey, C. G., Nelson, M., & Davis, S. (2009). Implications of tenure insecurity for Aboriginal land use in Canada. *Human Organization*, 68(3), 245–257.
- National inquiry on missing and murdered Indigenous women and girls. (2017). *Our women and girls are sacred* (Interim Report). Retrieved from <http://www.mmiwg-ffada.ca/files/ni-mmiwg-interim-report-en.pdf>
- Native Women's Association of Canada. (2000). Aboriginal women's rights are human rights. Retrieved from <https://www.nwac.ca/wp-content/uploads/2015/05/2000-NWAC-Aboriginal-Womens-Rights-Are-Human-Rights-Research-Paper.pdf>
- Natural Resources Canada. (2004, May). Treaties and comprehensive land claims in Canada. Retrieved December 14, 2017, from <http://www.cbc.ca/8thfire/images/treatymap.jpg>
- Newhouse, D., & Shpuniarsky, H. (2013). Aboriginal land tenure reforms in Canada: A discussion of “beyond the Indian Act.” *The Journal of Aboriginal Economic Development*, 8(2), 12–22.
- Oppal, W. T. (2012). *Forsaken: The report of the Missing Women Commission of Inquiry*. Vancouver: Missing Women Commission of Inquiry.
- Palmater, P. D. (2011). *Beyond blood: Rethinking Indigenous identity*. Saskatoon, SK: Purich Publishing Limited.
- Royal Commission on Aboriginal Peoples. (1996). *Report of the Royal Commission on Aboriginal Peoples*. Ottawa, ON.: Royal Commission on Aboriginal Peoples.

- Simeone, T. (2004, March 17). Indigenous traditional knowledge and intellectual property rights. Library of Parliament. Retrieved from <https://lop.parl.ca/content/lop/researchpublications/prb0338-e.htm>
- Statistics Canada. (2015, September 17). Projections of the Aboriginal population and households in Canada, 2011 to 2036. Retrieved November 27, 2017, from <http://www.statcan.gc.ca/pub/91-552-x/2015001/hl-fs-eng.htm>
- The Assembly of First Nations. (2007, February). Matrimonial real property on reserves: Our land, our families, our solutions. The Assembly of First Nations. Retrieved from <http://www.afn.ca/uploads/files/mrp/mrp-handbook.pdf>
- The Assembly of First Nations. (2010, October 15). Case studies of four First Nations who have levered funding from financial institutions for infrastructure and other economically-related projects. Department of Indian Affairs and Northern Development. Retrieved from https://www.afn.ca/uploads/files/policy_forum/case_studies_on_first_nations_who_have_levered_private_sector_funding_for_infrastr.pdf
- Tough, F. J. (2013). “Full Circle”: Theories of property rights as indicated by two case summaries concerning the individualization of collective Indigenous land interests. *The Journal of Aboriginal Economic Development*, 8(2), 24–39.
- Truth and Reconciliation Committee of Canada. (2015). *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada*. Retrieved from http://epe.lac-bac.gc.ca/100/201/301/weekly_acquisition_lists/2015/w15-24-F-E.html/collections/collection_2015/trc/IR4-7-2015-eng.pdf
- United Nations. (1966, December 19). International Covenant on Civil and Political Rights Adopted by the General Assembly of the United Nations on 19 December 1966. Retrieved from <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>
- United Nations. (2017, September 13). United Nations Declaration on the Rights of Indigenous Peoples. Retrieved December 14, 2017, from http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- United Nations Declaration on the Rights of Indigenous Peoples. (2011, June). Fact sheet on the United Nations Declaration on the Rights of Indigenous Peoples. United Nations. Retrieved from <https://www.nwac.ca/wp-content/uploads/2015/05/2011-UNDRIP-Fact-Sheet.pdf>
- United Nations Habitat. (2012). Handling land: Innovative tools for land governance and secure tenure. United Nations Human Settlements Programme (UN-Habitat). Retrieved from <https://unhabitat.org/books/handling-land-innovative-tools-for-land-governance-and-secure-tenure/>

Figure 2: Marrying out rule

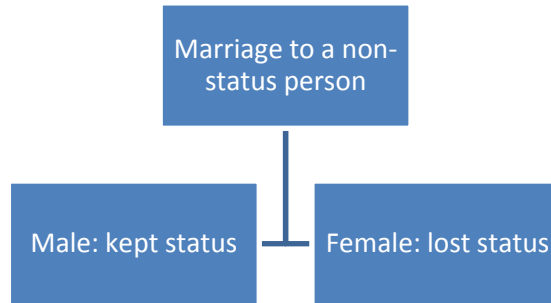


Figure 3: Second generation cut off

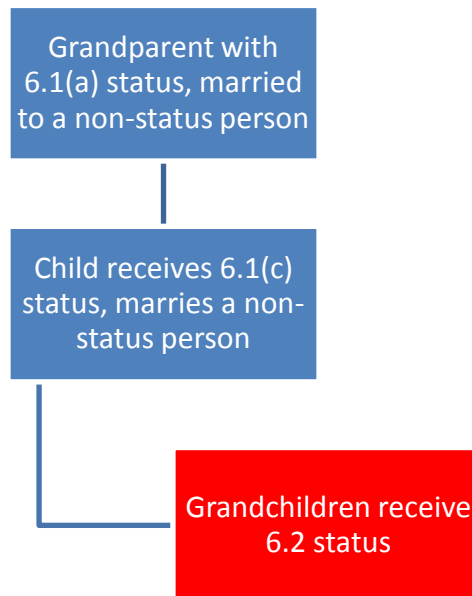


Figure 4: Cousins Discrimination

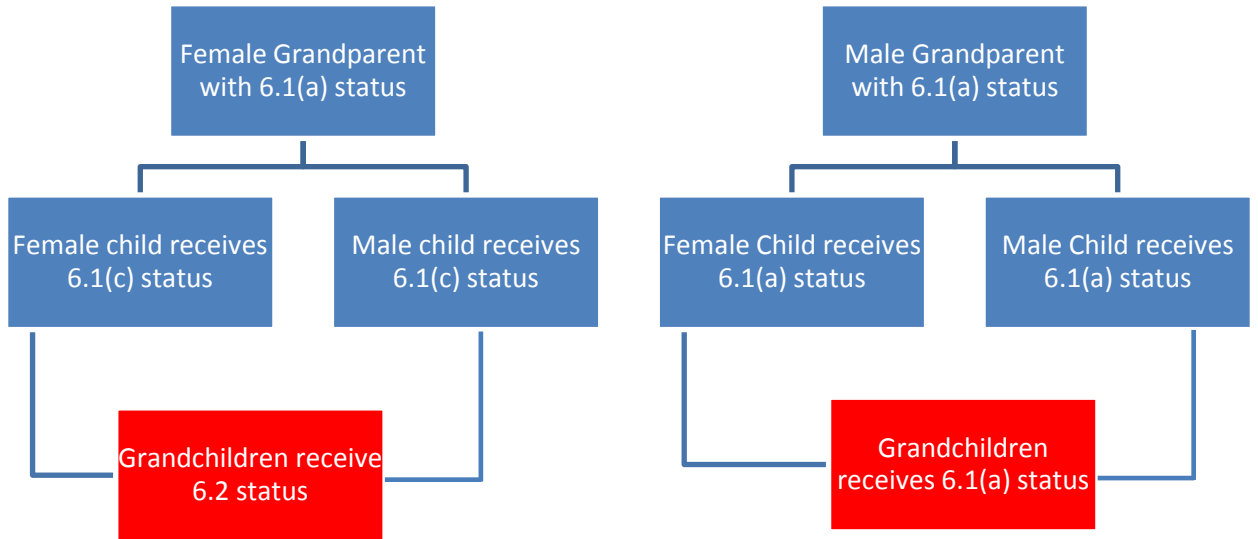
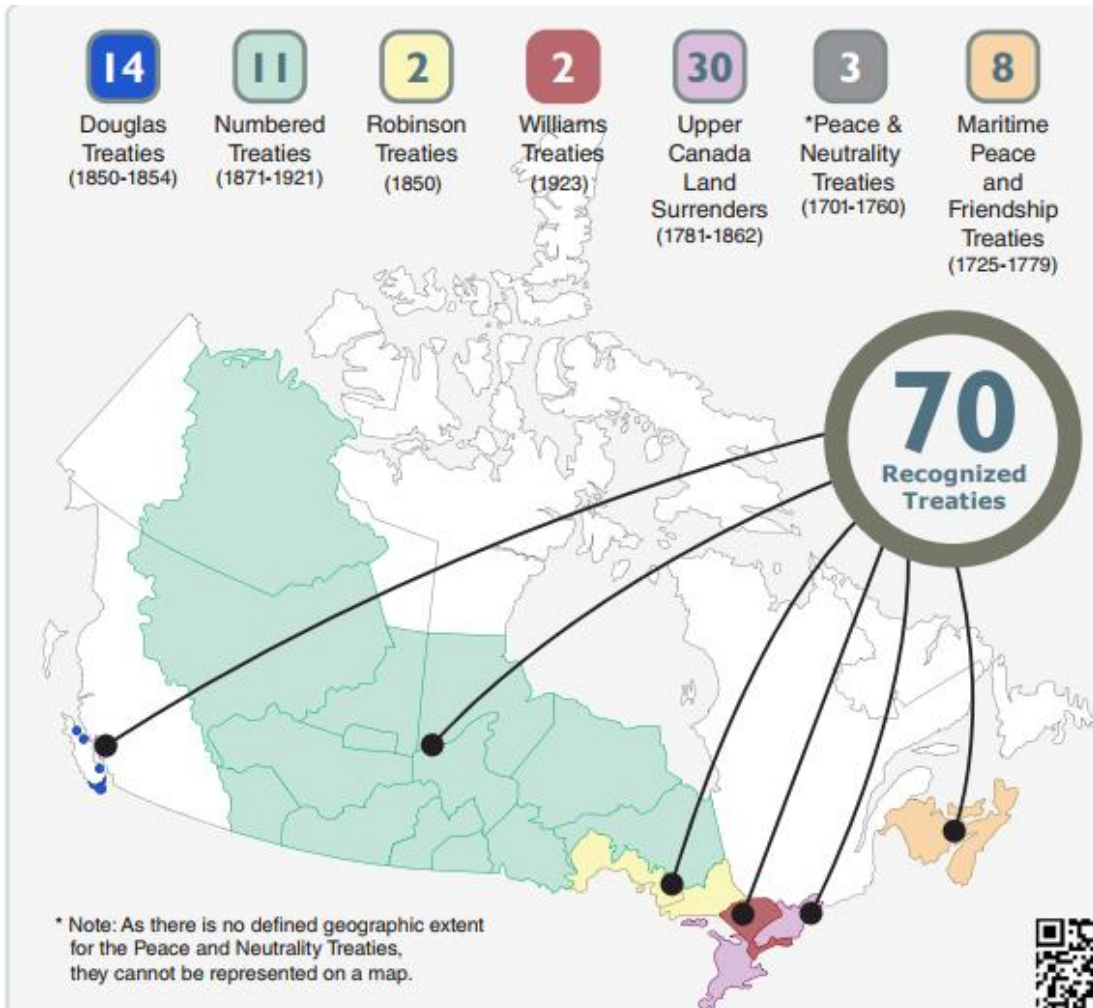
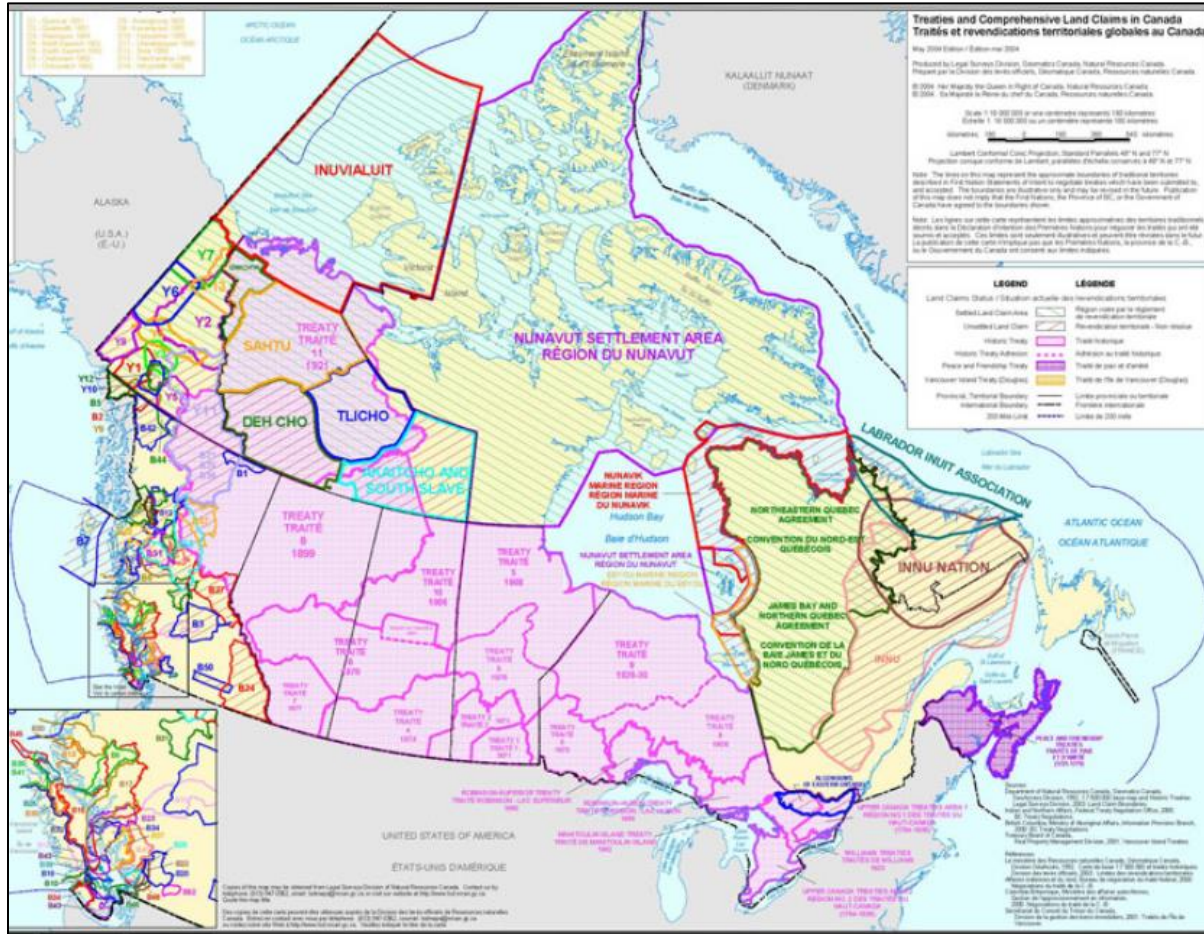


Figure 5: Historical Treaty making in Canada



Source: AANDC, 2014

Figure 6: Map of Modern Treaties in Canada



Source: Natural Resources Canada, 2004