

Equally Recognized? The Indigenous Peoples of Newfoundland and Labrador

Sébastien Grammond

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Indian and Aboriginal Law Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Grammond, Sébastien. "Equally Recognized? The Indigenous Peoples of Newfoundland and Labrador." *Osgoode Hall Law Journal* 51.2 (2014) : 469-499.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss2/3>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Equally Recognized? The Indigenous Peoples of Newfoundland and Labrador

Abstract

In Canada, certain Indigenous groups are struggling to obtain official recognition of their status and rights. This is particularly so in Newfoundland and Labrador, where the authorities took the stance, when the province joined Canada in 1949, that no one would be legally considered Indigenous. This paper analyzes the claims of the Indigenous groups of that province, which have resulted, over the last thirty years, in various forms of official recognition. In particular, this article highlights how the concept of equality was used by these Indigenous groups to buttress their claims. Equality, in this context, was mainly conceived of as “sameness in difference”—that is, the idea that an unrecognized group claims to be treated consistently with other groups that share the same culture or identity and that are already officially recognized. Such assertions may be made in the context of human rights litigation, but also through joining or leaving associations of Indigenous groups. Through the latter process, unrecognized Indigenous groups of the province indicated to whom they wished to be compared and, in doing so, they ironically reinforced the hierarchy of statuses recognized under Canadian law.

Keywords

Indigenous peoples--Legal status, laws, etc.; Indigenous peoples--Claims; Newfoundland and Labrador

Equally Recognized? The Indigenous Peoples of Newfoundland and Labrador

SÉBASTIEN GRAMMOND*

In Canada, certain Indigenous groups are struggling to obtain official recognition of their status and rights. This is particularly so in Newfoundland and Labrador, where the authorities took the stance, when the province joined Canada in 1949, that no one would be legally considered Indigenous. This paper analyzes the claims of the Indigenous groups of that province, which have resulted, over the last thirty years, in various forms of official recognition.

In particular, this article highlights how the concept of equality was used by these Indigenous groups to buttress their claims. Equality, in this context, was mainly conceived of as “sameness in difference”—that is, the idea that an unrecognized group claims to be treated consistently with other groups that share the same culture or identity and that are already officially recognized. Such assertions may be made in the context of human rights litigation, but also through joining or leaving associations of Indigenous groups. Through the latter process, unrecognized Indigenous groups of the province indicated to whom they wished to be compared and, in doing so, they ironically reinforced the hierarchy of statuses recognized under Canadian law.

Au Canada, certains groupes autochtones luttent pour obtenir la reconnaissance officielle de leur statut et de leurs droits. C’est tout particulièrement le cas à Terre-Neuve-et-Labrador, où les autorités ont décrété, lorsque la province s’est jointe au Canada en 1949, que personne ne devait légalement être considéré comme Autochtone. Cet article analyse les revendications des groupes autochtones de cette province qui ont donné lieu, au cours des trente dernières années, à diverses formes de reconnaissance officielle.

* LL.B., LL.M. (Montreal), D.Phil. (Oxford), Ad.E.; Dean and Full Professor, Faculty of Law (Civil Law Section), University of Ottawa; Counsel, Dentons Canada LLP. The author would like to thank Joseph Eliot Magnet, Lucie Lamarche, Charles-Maxime Panaccio, and Thibault Martin, who commented on an earlier version of this paper, as well as the anonymous reviewers.

Cet article souligne plus particulièrement la façon dont ces groupes autochtones ont employé le concept d'égalité pour étayer leurs revendications. Dans ce contexte, l'égalité était principalement perçue comme « l'équivalence dans la différence », c'est-à-dire l'idée qu'un groupe non reconnu revendique d'être traité comme d'autres groupes déjà reconnus officiellement qui partagent la même culture ou identité. Un groupe peut faire de telles affirmations dans le cadre de litiges en matière de droits de la personne, mais également au moment d'adhérer à des associations de groupes autochtones ou de les quitter. Par cette dernière méthode, les groupes autochtones non reconnus de la province ont indiqué à qui ils désiraient être comparés et ils ont ainsi paradoxalement renforcé la hiérarchie des statuts reconnus en vertu du droit canadien.

I.	INDIGENOUS PEOPLES AND EQUALITY CLAIMS.....	472
II.	ASSIMILATION AND EQUALITY	476
	A. Indigenous Newfoundland and Labrador and Colonization	477
	B. Confederation (1949) and its Aftermath.....	479
III.	RECOGNITION AND EQUALITY	482
	A. The Labrador Inuit Association.....	484
	B. The Island: Miawpukek.....	486
	C. The Innu Nation	488
	D. The Island: Qalipu.....	490
	E. The Labrador Métis Nation/Nunatukavut.....	495
IV.	CONCLUSION	497

SECTION 35(2) OF THE *Constitution Act, 1982*¹ states that the “aboriginal peoples of Canada,” whose Aboriginal and treaty rights are recognized, include “the Indian, Inuit and Métis peoples of Canada.” In this regard, the province of Newfoundland and Labrador is remarkable because in 1982, none of its Indigenous peoples had any form of legal recognition, while today groups in the province have gained official recognition under each of the three categories. Recognition, in this context, means the ascription of a separate legal status based on ethnic identity by a branch of the state (*i.e.*, Parliament, the executive, or the judiciary), usually triggering specific rights applicable only to the members of the group so recognized. Since 1982, the federal government has signed a treaty with the Labrador Inuit Association, created bands and reserves for two Innu communities in Labrador (as well as for the Miawpukek band), and created the “landless” Qalipu band encompassing all Mi’kmaw people (other than the Miawpukek members) on the Island. Meanwhile, the claims of the Labrador Métis Nation have been partially validated by the courts.

The aim of this paper is to trace the use of the concept of equality in the discourse concerning the recognition of Newfoundland and Labrador’s Indigenous peoples. It may seem counterintuitive to speak of equality as the basis for the separate legal and political treatment of the Indigenous peoples, as

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

the idea of equality—at least in its formal sense—suggests that the same rules must be applied to everyone. Thus, the specific rights of Indigenous peoples have often been contrasted to the universal ideals that undergird the right to equality.² And indeed, it was in the name of equality that no special status was afforded to the Indigenous peoples of Newfoundland upon union with Canada in 1949. Yet, richer conceptions of equality require that a different treatment be offered to individuals or groups who find themselves in a disadvantaged position.³ Substantive equality then becomes a claim for the recognition of difference rather than a claim for consistent treatment.⁴ Such a conception of equality has often been mentioned as one possible justification for the specific rights granted to the Indigenous peoples.⁵

Given the federal and provincial governments' initial refusal to recognize the existence of Indigenous groups in the province, Newfoundland and Labrador provides a unique and novel case study of a framework for the recognition of Indigenous groups in an era when equality has become a cardinal legal and political value. To be sure, we do not assume that the motivation of the federal government (or any other actor) was to achieve greater equality. Nevertheless, as this article will demonstrate, equality played a central role in the justification of claims for recognition. Arguably, government responses to such claims were also informed by equality-related considerations, at least to the extent that the government must publicly justify its policies such that it does not appear as if similar groups are treated differently, and to the extent that it faces the prospect of court rulings invalidating laws or policies that are contrary to the right to equality. Thus, equality is at once a powerful tool and a powerful constraint. Yet, when we look today at the (almost) final result of these struggles for recognition, we do not find a single set of rules equally applicable to all Indigenous persons in the province, but rather a patchwork of statuses and bundles of rights that differ from group to group. I will argue that this inconsistent treatment is the result of a combination of assertions of sameness and difference by the groups concerned and of the practical way these assertions played out in the political arena.

-
2. See *e.g.* *R v Van der Peet*, [1996] 2 SCR 507 at para 18, 137 DLR (4th) 289 [*Van der Peet*].
 3. For a general survey, see William B Griffiths, "Equality and Egalitarianism: Framing the Contemporary Debate" (1994) 7 Can JL & Jur 5.
 4. See Michel Rosenfeld, "Equality and the Dialectic between Identity and Difference" in Omid Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007) 156. See also Danièle Lochak, *Le droit et les paradoxes de l'universalité* (Paris: PUF, 2010).
 5. See *e.g.* Will Kymlicka, *Multicultural Citizenship: a Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

In Part I of this article, I explain how unrecognized Indigenous peoples can use the right to equality, in its substantive conception, to articulate their claims for recognition as claims for “sameness in difference.” In Part II, I describe the Indigenous groups of Newfoundland and Labrador and indicate how, in the years after Confederation, formal equality was used to justify their non-recognition. In Part III, I analyze how these groups used the concept of equality to support their respective struggles for recognition. Those claims were often based on “sameness in difference” and led each group to compare itself to other, already recognized groups.

I. INDIGENOUS PEOPLES AND EQUALITY CLAIMS

Explaining this complex outcome requires a deeper understanding of certain aspects of the right to equality and of the manner in which it can be applied to the claims of ethnic groups such as Indigenous peoples. In particular, we must pay attention to how the concepts of comparison, sameness, and difference play out in each case.

The liberal argument for cultural rights based on substantive equality is grounded in the idea that the state must respond positively to cultural differences where the failure to do so would actually put members of a cultural minority at a disadvantage.⁶ Thus, an assertion of difference grounds specific rights aimed at enabling members of the group to live according to their culture and to perpetuate that culture. However, assertions of sameness may also ground claims to cultural rights in a situation where such rights are already recognized for some individuals, but denied to others who share the same culture. For example, Indigenous women who, in a number of famous cases, claimed that they were unjustly deprived of Indian status were, in a sense, asserting their sameness to Indigenous men who kept their status in similar circumstances.⁷ In other words, these women were in the same situation as those whose difference already translated into specific

6. For an application of this idea to the context of language rights, see *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1 at para 31, [2000] 1 SCR 3; *Gosselin v Quebec (AG)*, 2002 SCC 84 at paras 15, 21, [2002] 4 SCR 429. See also *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 (providing an analogy in a different context, where the failure to provide sign-language translation to deaf persons was considered to be a breach of equality).

7. See e.g. *Canada (AG) v Lavell*, [1974] SCR 1349, 38 DLR (3d) 481; *Lovelace v Canada*, UNHRC, 1981, Supp. No. 40, UN Doc A/36/40, 116; *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153, 306 DLR (4th) 193. For an analysis of these cases, see Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009) at 91-99 [Grammond, *Identity Captured by Law*]; Sébastien Grammond, “Discrimination in the Rules of Indian Status and the McIvor case” (2009) 35:1 Queen's LJ 421.

rights. For that reason, we will refer to this sort of claim as one of “sameness in difference.” This category of claim assumes that a particular kind of cultural difference has already been validated by the state as a source of specific rights. As such, the claimants assert that the definition given by the state to the category of persons who may benefit from those rights is under-inclusive, as it excludes persons (such as the claimants) who share the same cultural difference (hence, “sameness in difference”) as the persons who are included.

The same distinction also applies when claims are made collectively (by which I mean that what is sought is a collective right or a right that can only be enjoyed collectively). For example, a minority group may say that specific rights are necessary for its cultural survival. Professor Magnet, for one, has elaborated a theory of equality between groups that ensures cultural minorities have the same opportunities to enjoy and perpetuate their cultures as the majority group. As he puts it: “A group is equal to other relevant groups when it possesses adequate means of perpetuation.”⁸ This theory is aimed at maintaining the minority’s difference or specificity and is not inherently based on a comparison with other groups.

But again, a minority group might base a claim on “sameness in difference” — that is, it could challenge its exclusion from rights or benefits granted to another minority group that shares the same (or a similar) culture. For example, in *Ardoch Algonquin First Nation v Canada*,⁹ a number of non-status Indigenous groups successfully asserted that they should have the same opportunity as First Nations groups to conclude agreements for the management of workforce training programs aimed at their constituencies. The plaintiffs did not so much argue that the management of a workforce training program was essential to the maintenance of their culture; rather, they asserted that since the program was aimed at the Indigenous population generally, and the government had seen fit to delegate its management to First Nations, it should extend the same treatment to non-status groups.

Of course, the application of these concepts to practical situations depends on factual judgments about which cultural differences require specific rights for their maintenance, or which similarities call for similar treatment. Culture, ethnicity, and identity are not easily measurable nor compared. The difficulty

8. Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality, and Democracy* (Markham, Ont: LexisNexis, 2004) at 237. See also *Canadian Charter of Rights and Freedoms*, s 16.1, Part I of the *Constitution Act, 1982*, *supra* note 1. This section refers to the equality of the French and English linguistic communities in New Brunswick.

9. 2003 FCA 473, [2004] 2 FCR 108 [*Ardoch*]. See also Sébastien Grammond, “Equality Between Indigenous Groups” (2009) 45 Sup Ct L Rev (2d) 91 [Grammond, “Equality”].

in identifying the differences that call for specific treatment is illustrated by the process by which the courts select the “analogous grounds” that attract the protection of the right to equality. Section 15 of the *Canadian Charter of Rights and Freedoms*¹⁰ prohibits discrimination not only on the basis of the grounds enumerated therein, but also on “analogous” grounds identified by the courts.¹¹ This process relies heavily on existing social categories, identity groups, and patterns of discrimination and prejudice. For example, with respect to sexual orientation, the Supreme Court of Canada (SCC) has noted that this characteristic is profoundly related to individual identity and cannot easily be changed.¹² One can appreciate, however, that such a conclusion depends on the knowledge and social representations of the judges about homosexuality and its link to personal identity. Hence, the practical application of the right to equality may very well depend on dominant social perceptions or representations of the situation or identity of disadvantaged groups. Thus, sameness and difference with respect to cultural groups may be difficult for the judiciary or others to assess.

An additional difficulty arises when a group seeks specific rights on the basis of the right to equality as the recognition of its difference. Deciding what bundle of specific rights is necessary for the preservation of a group’s culture involves not only a measurement of the group’s cultural specificity, but also practical judgments as to the contribution of certain rights or policies to the preservation of that specificity, as well as a cost-benefit analysis of those rights or policies. This task is all the more difficult in the case of unrecognized Indigenous groups, as their cultural difference has generally been denied for a long period by the government, by non-Indigenous society, and often by recognized Indigenous groups. Those difficulties, however, are not present when their claims are framed in terms of “sameness in difference.” In these cases, the courts are not called upon to craft new measures intended to protect a group’s culture, but rather to decide whether existing measures in favour of one group should be extended to another group that is culturally similar. Such a judgment may more easily be made intuitively or on the basis of a superficial analysis of each group’s cultural traits.

As a result, we may hypothesize that Indigenous groups seeking recognition will be more successful if they frame their claims in terms of “sameness in difference.” In other words, claimants will liken their situation to that of other Indigenous groups whose status and rights are already recognized. A side effect of

10. *Part I of the Constitution Act, 1982*, *supra* note 1.

11. See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1.

12. See *ibid*; *Vriend v Alberta*, [1998] 1 SCR 493 at para 90, 156 DLR (4th) 385.

this tendency is to bring back the search for comparator groups at the forefront of equality analysis, even though the SCC has tried to downplay the importance of comparison in such cases, given the obstructive effects it has on many kinds of claims (in particular where no useful comparison may be drawn or where a comparison fails to capture the essence of the disadvantage that flows from a distinction¹³).

Studying the struggle of the Indigenous peoples of Newfoundland and Labrador bears out this hypothesis. The starting point of that struggle is the official classification of the Indigenous peoples that derives from legislation and government policy. This classification usually reflects the views and the goals of government officials and non-Indigenous society in general; yet, it is constantly challenged by the claims of groups that are excluded from it. In making such challenges, these groups liken their circumstances to that of groups that are already recognized—they want to be treated equally with them. Sadly, these groups also stress their differences with other unrecognized groups, in an attempt to portray themselves as more deserving of recognition than others. Over the last forty years, the response of the federal government to the claims of unrecognized groups has had the effect of making the official classification more complex. In blunt terms, new categories were created for groups who were seen as “less Indigenous” according to the stereotypes of the non-Indigenous society, attracting a narrower bundle of rights than groups with Indian status.¹⁴ The result is effectively a hierarchy of Indigenous peoples or a ladder of statuses. When a group seeks recognition by invoking the right to equality, it is trying to climb this ladder as much as it can. This has been done by delicately deploying sameness and difference in establishing positive and negative comparisons to other groups and by showing to outsiders features usually associated with recognized Indigenous groups. Thus, while equality was a driving force in the developments of the last thirty years, the end result might very well be a patchwork of Indigenous groups. Whether that outcome reflects the actual needs and circumstances of the groups concerned or the views and prejudices of dominant society is a difficult question that cannot be fully addressed in the context of this paper.

In the following pages, I will analyze the successive use of formal and substantive conceptions of equality to justify the non-recognition and, later, the recognition of Newfoundland and Labrador’s Indigenous peoples. For each group that sought recognition, I will show how its discourse and actions invited

13. *Withler v Canada (AG)*, 2011 SCC 12 at paras 55-63, [2011] 1 SCR 396 [*Withler*].

14. See Part III of this paper for additional detail on this reality.

comparisons with certain groups and avoided comparisons with others. The focus will not be so much on court decisions—for most lawsuits were settled—but on the arguments made in various legal fora as well as the reconfiguration of political organizations that reflected the struggles for recognition. Indeed, joining a political organization or breaking away from one are powerful ways of asserting one's views on the proper terms of comparison under an equality analysis. In that sense, the need to build a legal case has an impact on the manner in which the Indigenous peoples build their political organization. At the same time, the legal categories are transformed and complicated by the struggle for recognition and the negotiated solutions reached with various groups.

II. ASSIMILATION AND EQUALITY

Before Newfoundland joined Confederation in 1949, the official classification of the Indigenous peoples was based on the “Indian/white” dichotomy.¹⁵ The *Indian Act* categorized, through the use of criteria based on ancestry, a number of persons as being “Indian,” and those who were not “Indians” were defined as being “persons.”¹⁶ The assumption behind the classification was that “Indians” were uncivilized, and the goal—as exemplified through the statutory mechanism of enfranchisement—was to cause an increasing number of Indians to lose that characterization or, to use racial terms, to become “white.” The label of “Indian” was clearly seen as a badge of inferiority.

With a few exceptions, the scheme of the *Indian Act* did not allow for intermediate categories; the Act did not grant rights to non-status Indian groups. Thus, the Métis who accepted scrip¹⁷ would not be considered status Indians, but white persons who did not need the protection of the *Indian Act*. The notable anomaly in this binary distinction was the Inuit, who were recognized as “Indians” under section 91(24) of the *Constitution Act, 1867*,¹⁸ even though the federal government refused to bring them within the purview of the *Indian Act*.¹⁹

Hence, Newfoundland joined Canada in a context that did not favour the creation of specific categories of Indigenous peoples and where the existence of a specific legal regime for the Indigenous peoples was viewed as temporary.

15. See also Grammond, *Identity Captured by Law*, *supra* note 7.

16. For the definition of “person,” see *Indian Act*, SC 1876, c 18, s 3(12) [*Indian Act*].

17. “Scrip” is the expression commonly used to refer to the individual land grants made to the Métis. See *Manitoba Act, 1870*, SC 1870, c 3, reprinted in RSC 1985, App II, No 8, s 31.

18. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

19. *Re Eskimos*, [1939] SCR 104, 2 DLR 417 [*Re Eskimos*]. See also Constance Backhouse, *Colour-Coded: a Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 39-52.

A. INDIGENOUS NEWFOUNDLAND AND LABRADOR AND COLONIZATION

It is generally accepted that prior to European colonization, Newfoundland was inhabited by an Indigenous people called the Beothuk. Labrador, on its part, was inhabited by the Inuit, mainly on the coast, and by the Innu, who occupied mostly the interior.

What remains a matter of debate are the circumstances of the arrival of the Mi'kmaq in Newfoundland. The Mi'kmaq assert that they were able to cross Cabot Strait from today's Nova Scotia and to establish themselves in southern Newfoundland before the establishment of a firm European presence.²⁰ Others contend that the Mi'kmaq were brought to the Island by the French, who maintained fishing posts on the Island until the eighteenth century and who needed allies to fight the Beothuk.²¹

Colonization of Newfoundland and Labrador was relatively slow. Fishing remained the most important economic activity for a long time; it did not require the extensive use of land, so the population of European origin remained concentrated on the coasts. Yet, as the British presence developed, violent conflict with the Beothuk increased. Most historians recognize that as a result of these conflicts and other factors, including the spread of disease, the Beothuk became extinct in the early nineteenth century.²² The characterization of those events remains highly controversial: some historians go as far as to speak of extermination²³ or "an open hunting season against the Beothuk,"²⁴ whereas others simply note in passing the conflict between colonists and the Beothuk and its tragic end.²⁵ It may well

20. See Maura Hanrahan, *The Lasting Breach: The Omission of Aboriginal People from the Terms of Union Between Newfoundland and Canada and its Ongoing Impacts*, online: Government of Newfoundland and Labrador <<http://www.gov.nl.ca/publicat/royalcomm/research/Hanrahan.pdf>>. See also Bonita Lawrence, "Reclaiming Ktaqamkuk: Land and Mi'kmaq Identity in Newfoundland" in Julian Agyeman, ed, *Speaking For Ourselves: Environmental Justice in Canada* (Vancouver: University of British Columbia Press, 2009) 42 at 47.

21. See e.g. Sean T Cadigan, *Newfoundland and Labrador: A History* (Toronto: University of Toronto Press, 2009) at 53 (stating that the Mi'kmaq may have visited Newfoundland as early as the 16th century, but emphasizing that the French incited more Mi'kmaq to settle on the southern coast of the Island).

22. See generally LFS Upton, "The Extermination of the Beothuks of Newfoundland" (1977) 58:2 Can Hist Rev 133; Olive P Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 4th ed (Toronto: Oxford University Press, 2009); Cadigan, *supra* note 21.

23. See Upton, *supra* note 22.

24. Dickason, *supra* note 22 at 71.

25. Cadigan, *supra* note 21 at 53-54, 86-87, 93-95.

be that some Beothuk actually joined other Indigenous groups, although this is difficult to trace precisely.

Prior to Confederation, Newfoundland did not have a well-defined policy towards its Indigenous peoples.²⁶ It did not have a comprehensive statutory scheme similar to the Canadian *Indian Act*. It did not operate a system of reserves, although the establishment of a reserve for the Mi'kmaq of Conne River was contemplated towards the end of the nineteenth century.²⁷ Most importantly, it did not have rules concerning Indian status, which would legally ascribe an Indigenous identity to a part of its population.

The ethnic identity of the Indigenous peoples of Newfoundland and Labrador was not static and the ways in which some of those groups conceived of their identity, or represented it to outsiders, shifted over time. These changes were the result of phenomena such as mixed unions, assimilative pressures, and stigmatization of the Indigenous peoples on the part of Euro-Canadians.²⁸

As a result of these factors, Mi'kmaq identity became less visible on the Island. It appears that the Mi'kmaq intermarried in large numbers with non-Indigenous Newfoundlanders. Mi'kmaq identity was not always transmitted to the children of such unions, as Indigenous ancestry was often a source of shame (the term "jackatar" was used pejoratively to describe persons with Indigenous ancestry²⁹). Dennis Bartels and Alice Bartels give examples of persons who have Mi'kmaq ancestry but were not told about it in their childhood and who only recently decided to emphasize that aspect of their identity.³⁰ As descendants of these unions integrated into mainstream society, distinctive cultural practices were not always retained and homogeneous and isolated Indigenous communities were no longer the norm. Yet, some communities remained ostensibly Mi'kmaq. Conne River was one of those, but some observers note that other communities

26. See Adrian Tanner, "The Aboriginal Peoples of Newfoundland and Labrador and Confederation" (1998) 14:2 Nfld Stud 238 at 241-44; David Mackenzie, "The Indian Act and the Aboriginal Peoples of Newfoundland at the Time of Confederation" (2010) 25:2 Nfld and Lab Stud 161 at 163.

27. See Hanrahan, *supra* note 20 at 235.

28. See John C Kennedy, "Labrador Metis Ethnogenesis" (1997) 62:3&4 Ethnos 5 [Kennedy, "Labrador Metis"].

29. Tanner, *supra* note 26 at 242.

30. "Mi'kmaq Lives: Aboriginal Identity in Newfoundland" in Ute Lischke & David T McNab, eds, *Walking a Tightrope: Aboriginal People and Their Representations* (Waterloo: Wilfrid Laurier University Press, 2005) 249. Regarding the current revival of Mi'kmaq culture, see Angela Robinson, "'Being and Becoming Indian': Mi'kmaq Cultural Revival in the Western Newfoundland Region" (2012) 32:1 Can J Native Stud 1.

such as Flat Bay, Badger, St. Georges or Glenwood had an important Mi'kmaq population and were always considered Mi'kmaq communities.³¹

In northern Labrador, beginning in the late eighteenth or early nineteenth century, marital unions between Indigenous (mainly Inuit) women and men who settled on the coast to take part in fishing and trading gave rise to a population of mixed ancestry that became distinct from the Inuit, yet developed a culture that drew upon both Indigenous and European traits.³² These people were called the “Settlers” or, in Inuktitut, *Kablunangajuit*.³³ The Settlers were initially mocked by the Inuit. The Moravian missionaries who established stations on the Labrador coast tried to keep the Settlers and the Inuit separate, which contributed to the rise of a specific ethnic consciousness on the part of the Settlers.

A similar phenomenon took place in southern Labrador as well.³⁴ However, the less structured administration of that part of the territory resulted in greater assimilation to European culture, including a much less frequent use of the Inuktitut language. Moreover, stigmatization of Indigenous identity led many people to hide their ancestry, although Indigenous persons knew that they were different from their non-Indigenous neighbours.³⁵ According to John C. Kennedy, “Group consciousness was tacit, loosely bounded, not reinforced by social or administrative institutions, and not mobilized around the obvious criteria usually epitomizing a group or nation, such as for example, language, or even group name.”³⁶

B. CONFEDERATION (1949) AND ITS AFTERMATH

As is well known, Newfoundland joined Canada in 1949, becoming its tenth province. During the negotiations concerning the terms of union, the federal and Newfoundland governments discussed matters concerning the Indigenous

31. Tanner, *supra* note 26 at 243-44; Lawrence, *supra* note 20 at 57; Jerry Wetzel, “Liberal Theory as a Tool of Colonialism and the Forced Assimilation of the First Nations of Newfoundland and Labrador” (1995) 4 Dal J Of Legal Stud 105 at 142-43.

32. See Kennedy, “Labrador Metis,” *supra* note 28 at 8 (who mentions that many Settlers spoke Inuktitut and learned “complicated techniques of survival on the land and sea,” while adhering to “European notions of individual accumulation, hard work, and race”).

33. With respect to the various names employed to describe this population, see Yves Labrèche and John C Kennedy, “Héritage culturel des Métis du Labrador central” (2007) 37:2&3 Recherches amérindiennes au Québec 43.

34. See *ibid*; Kennedy, “Labrador Metis,” *supra* note 28 at 11-13; Paul Charest, “La spécificité culturelle des communautés métisses du Labrador méridional” in Denis Gagnon & Hélène Giguère, eds, *L'identité métisse en question: stratégies identitaires et dynamismes culturels* (Quebec City: Presses de l'Université Laval, 2012) 99.

35. See *ibid*.

36. Kennedy, “Labrador Metis,” *supra* note 28 at 13.

peoples. While both governments initially thought the *Indian Act* would apply in the new province,³⁷ entailing the creation of reserves and bands and the registration of Indians, they later changed their minds and decided, provisionally at least, to treat Indigenous Newfoundlanders no differently than other citizens.

This decision must be set against the background of the Canadian policies of the time. In 1949, the *Indian Act* was in a process of revision. The distinctive legal treatment of the Indigenous peoples was seen as a temporary measure that would prepare them for their assimilation into mainstream Canadian society (*i.e.*, their becoming “full citizens”). The new *Indian Act*,³⁸ adopted in 1951, promoted enfranchisement—that is, the loss of Indian status of those who had attained a certain “degree of civilization.”³⁹ Through section 88, the new *Indian Act* would also pave the way for the application of provincial legislation and services to the Indigenous peoples. The reluctance to extend the reach of the *Indian Act* was also evident in the Canadian government’s refusal to apply it to the Inuit, despite an SCC decision holding that they fell under federal jurisdiction.⁴⁰ Moreover, in the years following World War II there was a greater awareness of human rights, and the separate legal treatment of Indigenous peoples, which resulted (among other things) in their inability to vote, was seen by many as a form of racial discrimination.

In that context, Canadian officials gradually realized that extending the *Indian Act* to the Indigenous peoples of Newfoundland would deprive the latter of certain rights, most importantly the right to vote.⁴¹ This argument eventually convinced most participants in the negotiations that it would be better to leave the administration of Indigenous affairs to the new province. Other arguments were also mentioned, such as the difficulty of creating reserves in the new province.⁴² In truth, however, the issue was not at the forefront of the union discussions and the decision not to apply the *Indian Act* in Newfoundland appears to have been more the result of inertia and lack of interest than that of any principled analysis.

Moreover, Canadian officials doubted the authenticity of the Indigenous identity of the Mi’kmaq of Newfoundland. For example, an official sent on a fact-finding mission in 1948 reported that Newfoundland’s Indigenous

37. See Mackenzie, *supra* note 26 at 166; Tanner, *supra* note 26 at 244-45.

38. RSC 1985, c I-5.

39. *Indian Act*, *supra* note 16, s 86.

40. *Re Eskimos*, *supra* note 19. See also Grammond, *Identity Captured by Law*, *supra* note 7 at 82-84.

41. Mackenzie, *supra* note 26; Tanner, *supra* note 26 at 245-46. See also Wetzel, *supra* note 31 at 132-33.

42. See Tanner, *supra* note 26 at 248-49; Mackenzie, *supra* note 26 at 171.

population was wholly located in Labrador.⁴³ Later documents of the Department of Indian Affairs show that it was believed that the Mi'kmaq had become "merged with other citizens."⁴⁴

After Confederation, the federal government took some years to even acknowledge that it bore some responsibility for the Indigenous peoples of Newfoundland. After initial public denials of responsibility and internal debates as to its jurisdiction, the federal government concluded funding agreements with the province to cover the costs of providing services to the Indigenous population: first in 1954, and then in 1965 (with respect to a broader range of services).⁴⁵ One original feature of these agreements was that they did not focus on services provided to individuals holding Indian status, but provided benefits to all residents of certain "designated communities," which were generally regarded as being mostly Indigenous.⁴⁶ Initially, the designated communities were all in northern Labrador, but Conne River was added in 1973, at the behest of the Native Association of Newfoundland and Labrador.⁴⁷ Even though these agreements were based on the Indigenous character of the designated communities and the federal government's jurisdiction over the Indigenous peoples, they used geographical criteria that avoided the identification of specific individuals as being Indigenous or not.

Yet, other forms of inequality continued to haunt federal officials. In memos written in the 1960s, Department of Justice officials underscored that the Indigenous peoples of the province were deprived of the benefits offered to their counterparts elsewhere in Canada. The argument that the Indigenous peoples of Newfoundland had the "benefit" of enfranchisement was countered with the argument that they were never given the choice to enfranchise or to retain

43. See Mackenzie, *supra* note 26 at 170.

44. Wetzel, *supra* note 31 at 133 (citing a memorandum dated 25 October 1949 by HL Keenlyside). See also Tanner, *supra* note 26 at 243.

45. See Tanner, *supra* note 26 at 247; Donald M. McRae, *Report on the Complaints of the Innu of Labrador* (Ottawa: Canadian Human Rights Commission, 1993) at 7-8. See also *Anderson v Canada (AG)* (2013), 335 Nfld & PEIR 46, 1040 APR 46 (CA) (where the history of those agreements is reviewed).

46. Bill Rompkey, *The Story of Labrador* (Montreal: McGill-Queen's University Press, 2003) at 101ff; Evie Plaice, "The Lie of the Land: Identity Politics and the Canadian Land Claims Process in Labrador" in Derick Fay & Deborah James, eds, *The Rights and Wrongs of Land Restitution* (New York: Routledge, 2009) 67 at 71.

47. Tanner, *supra* note 26 at 247; John C. Kennedy, "Aboriginal Organizations and Their Claims: The Case of Newfoundland and Labrador" (1987) 19:2 *Can Ethnic Stud* 13 at 15 [Kennedy, "Aboriginal Organizations"].

Indian status, contrary to the practice in other parts of the country.⁴⁸ Thus, the attempt to invoke formal equality to justify the non-recognition of Indigenous identity in Newfoundland became less convincing to those who realized that various comparisons could be drawn with other Indigenous peoples and that some of these comparisons would support the granting of status to the province's Indigenous population. Formal equality led to the suppression of difference, whereas the people concerned wanted to retain and assert their difference and had never been consulted on the subject.

III. RECOGNITION AND EQUALITY

With the resurgence of Indigenous activism in the late 1960s and early 1970s, the formal equality paradigm that underpinned the refusal to grant a specific legal status to the Indigenous peoples of Newfoundland and Labrador became increasingly untenable. It became obvious that the Indigenous peoples of that province had not become assimilated. Equality came to be invoked in support of claims for recognition.

The strategies that they deployed to gain recognition made explicit use of the legal concept of equality. Beyond that, they also sought to position themselves as being the equals of other Indigenous groups and did so by inviting comparisons between these groups and themselves—thus asserting their “sameness in difference.” But some groups of the province also sought to distance themselves from other groups that were perceived as less Indigenous in order to increase their chances of obtaining recognition. In so doing, they were trying to fit within the classification or hierarchy of Indigenous groups that stemmed from federal policies,⁴⁹ and they were indicating to whom they wanted to be compared.

During the relevant period, that classification became more complex than the Indian/non-Indian binary distinction that underpins the *Indian Act*. Of course, First Nations composed of status Indians residing on reserves remain at the top of the classification. Yet, as more and more status Indians move outside the reserves to live in an urban or rural setting, federal policies and legislation operate in a way that affords much-diminished funding and rights to off-reserve Indians, thus creating a divide within the category of “Indian” itself.⁵⁰ Nationally, on-reserve

48. Wetzel, *supra* note 31 at 141 (quoting a Cabinet Memorandum dated 22 April 1965).

49. For a detailed discussion of the emergence of that classification, see Grammond, “Equality,” *supra* note 9.

50. For example, off-reserve Indians usually do not benefit from a tax exemption and several federal funding programs (*e.g.*, housing) are limited to reserves.

status Indians are represented by the Assembly of First Nations (AFN). The next category is that of “Inuit.” While the Inuit have never been brought under the *Indian Act* for historical reasons, most federal policies treat them equally to status Indians and grant them similar benefits, with some notable exceptions such as the tax exemption.⁵¹ This similarity of treatment, combined with the geographical isolation of most Inuit, produces a popular representation of that category that carries the same level of indigeneity and authenticity as for status Indians. Nationally, the Inuit are represented by the Inuit Tapirisat of Canada (ITC), now called Inuit Tapiriit Kanatami (ITK).

In an attempt to manage the increasing attractiveness of indigeneity and the growing number of groups who sought recognition, the federal government constructed a “non-status” Indigenous population and dealt with it through channels separate from the Indian Affairs bureaucracy.⁵² While it is by no means homogeneous, this third category comprises persons who are neither status Indians nor Inuit and who chose to identify with such labels as Métis, non-status Indians or Aboriginals. The federal government’s refusal to consider that this category of persons falls under its jurisdiction places those in this category at a serious disadvantage compared to status Indians and Inuit, as most programs offered to the latter are unavailable to these groups.⁵³ Yet, the federal government has provided funding to associations that represent this category of persons, and certain programs are made available to all Indigenous persons irrespective of Indian status.⁵⁴ The selection of the groups to whom such funding is offered has had a significant influence on the structuring of Indigenous identity.⁵⁵ Thus, the government recognizes one national association—the Métis National Council (MNC)—and one association in each of the Western provinces and Ontario representing the Métis Nation.⁵⁶ In addition, the government funds one national

51. *Indian Act*, *supra* note 16, s 87. For a detailed discussion, see Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 496-511.

52. See generally *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6 at paras 84-110, 357 DLR (4th) 47 (for information about federal policy in respect of Indian affairs).

53. This refusal was challenged with success. See *ibid* (holding that Métis and non-status Indians fall under federal jurisdiction). The case was heard by the Federal Court of Appeal in October 2013. *Daniels* was partially upheld on appeal: 2014 FCA 101.

54. See *e.g. Ardoch*, *supra* note 9 (with respect to a government-funded human resource training program).

55. See Larry Chartrand, “Metis Identity and Citizenship” (2001) 12 Windsor Rev Legal Soc Issues 5; Joe Sawchuk, “Negotiating an Identity: Métis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality” (2001) 25 Am Indian Qrtly 73.

56. *Ibid* at 77-80.

association—the Congress of Aboriginal Peoples (CAP)—and its provincial affiliates to represent Aboriginal peoples who are neither status Indians, Inuit, nor members of the Métis Nation.⁵⁷ Yet, CAP’s affiliates have membership policies that exclude a number of persons who assert an Indigenous identity,⁵⁸ thus creating a fourth category of Indigenous peoples who are deprived of any official recognition or rights and whose political organization is limited to self-funded voluntary associations.

Over the last forty years, the Indigenous groups of Newfoundland and Labrador have tried to gain recognition not only from governments, but also from the associations representing the various categories of Indigenous peoples elsewhere in the country. Recent research has highlighted the significance of inter-Indigenous recognition in the definition of various forms of Indigenous status.⁵⁹ In the case at hand, such recognition allowed certain groups to buttress their equality claims by inviting a comparison with groups on the upper rungs of the hierarchy of Indigenous peoples described above. In other words, trying to join a national association is a form of assertion of identity; it signals who a particular group considers its equal. However, this form of jockeying has the unfortunate effect of reinforcing the official categories instead of challenging them.

In the next pages, I describe the legal and political strategies of the Indigenous groups of the province. For each case, I analyze the implicit or explicit role of the concept of equality in support of their claims, as well as the ways in which they indicated the groups to which they wanted to be compared, and the actual results they obtained. I also highlight how the search for comparators has driven the splits and mergers among Indigenous political groups and how the groups emphasized certain forms of difference in support of their quests for recognition. In the end, we will be in a position to appreciate how the groups’ actions subverted the federal government’s will to keep as many people as possible in the lower rung of the classification.

A. THE LABRADOR INUIT ASSOCIATION

As mentioned earlier, northern Labrador was populated by Inuit and Settler groups. While the two groups remained quite distinct, the “designated communities”⁶⁰

57. *Ibid* at 80-82.

58. See *e.g.* Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich, 2011) at 198-99; Sébastien Grammond, Isabelle Lantagne & Natacha Gagné, “Aux marges de la classification officielle: les groupes autochtones sans statut devant les tribunaux canadiens” (2012) 81 *Dr et Soc* 321.

59. See Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford: Oxford University Press, 2010).

60. See Rompkey, *supra* note 46 at 101ff; Plaice, *supra* note 46 at 71.

system resulted in both groups being eligible for the benefits resulting from federal-provincial agreements. In the early 1970s, when Indigenous groups across the country intensified their political organization, the Inuit of northern Labrador were approached by the ITC, the national Inuit organization, to form a regional chapter.⁶¹ This is how the Labrador Inuit Association (LIA) was created in 1972-73. Yet, the issue of membership in the LIA sparked a controversy: Could the Settlers join this organization? Initially, it appears that the ITC was reluctant to extend LIA membership to the Settlers. However, the LIA eventually decided to admit the Settlers, likely because of the possibility of increasing its membership.⁶² (It may also be that because Settlers were admissible to federally-subsidized programs and services offered to northern Labrador communities, their claim to join in whatever benefits that the LIA could secure appeared as the continuation of the former policy of inclusion.⁶³) Thus the northern Labrador Settlers were successful in associating with the Inuit and in sharing in the capital of recognition that came with this label, although they might have been labelled as “Métis” in other circumstances.

The LIA eventually filed a land claim, which was quickly accepted for negotiation, perhaps because the Indigenous identity of the Inuit and the validity of their claims are rarely doubted. Despite delays in the negotiation process, the Labrador Inuit Agreement was concluded in 2005 and provided for the creation of a regional government, the Nunatsiavut Government, which is controlled by the Inuit and Settlers.⁶⁴ The definition of the beneficiaries of the Agreement was tailored to take into account the two groups comprising the LIA, although there is a single registry, which means that the two groups are now legally merged.

Geographical isolation may have also played a role in the acceptance of the Inuit-Settler alliance by the governments. By restricting the area of its land claim to northern Labrador, the LIA excluded persons of Inuit ancestry living in central and southern Labrador, whose Indigenous identity had received less outside recognition and whose claims may have been viewed as more threatening to military and resource development interests.

Thus, signature of the Agreement consecrated the equal treatment of the Inuit and Settlers of Labrador, affirming in a sense that there is no natural boundary

61. Kennedy, “Aboriginal Organizations,” *supra* note 47 at 15-16; Kennedy, “Labrador Metis,” *supra* note 28 at 10-11.

62. Plaice, *supra* note 46 at 72-73.

63. Kennedy, “Labrador Metis,” *supra* note 28 at 9-10.

64. Intergovernmental and Aboriginal Affairs Secretariat, *Labrador Inuit Land Claims Agreement*, online: Newfoundland and Labrador <http://www.exec.gov.nl.ca/exec/igas/land_claims/agreement.html>.

between the two groups, at least with respect to the northern part of Labrador. The Settlers were successful in their assertion of sameness to the Inuit, although in the process their difference from the Inuit is legally erased. One should be aware, however, that had the Settlers chosen to insist on their difference and to identify as Métis, their aspirations would have met with the federal government's refusal to enter into land claims agreements with Métis groups in the provinces.

B. THE ISLAND: MIAWPUKEK

The early 1970s also saw the development of Indigenous political organizations on the Island of Newfoundland, first through the Native Association of Newfoundland and Labrador (NANL), which, as its name indicated, initially attempted to cover the whole province. The NANL was founded in 1973, apparently with the support of the Native Council of Canada (NCC—the predecessor of CAP), the association that represented non-status and Métis people across Canada.⁶⁵ Yet, as we saw above, the federal government currently does not recognize the NCC/CAP membership as falling under its jurisdiction over “Indians,” even though it has agreed to fund certain programs for their benefit. Moreover, as we saw above, the cultural authenticity of Mi'kmaq people on the Island was often doubted by outsiders. Thus, the NANL initially suffered from a negative perception, probably reinforced by the decision of the Innu of Labrador to dissociate from it and to pursue their claims separately.

In order to combat this perception, the NANL changed its name to the Federation of Newfoundland Indians (FNI) and moved its headquarters to Conne River, a community whose Indigenous character appeared more obvious to outsiders, partly because it was inhabited mainly by Mi'kmaq (thus giving it greater homogeneity than other Mi'kmaq communities on the Island) and because Newfoundland had considered setting a reserve apart for them in the nineteenth century. It also sought to join the National Indian Brotherhood (the predecessor to AFN).⁶⁶ By these gestures, the FNI clearly showed to whom it wanted to be compared and what bundle of rights it sought.

Nevertheless, the federal government remained skeptical of the Indigenous identity of FNI members and demanded genealogical evidence as proof. Conne River was selected as a pilot project.⁶⁷ In 1982, realizing that it alone could satisfy the requirements of the federal government, Conne River announced that it would withdraw from the FNI, and in doing so expressly cast doubt over the legitimacy

65. Kennedy, “Aboriginal Organizations,” *supra* note 47 at 15.

66. *Ibid* at 17.

67. *The Mikmaqs of Newfoundland: A Report Prepared for the Canadian Human Rights Commission* (Ottawa: Canadian Human Rights Commission, 1997) at 5 [“The Lyon Report”].

of the identity of other members of the FNI.⁶⁸ Conne River was constituted as an Indian band in 1984, changed its name to Miawpukek in 1989,⁶⁹ and received a reserve thereafter. As a result, Miawpukek members are individually exempt from tax on their income earned on the reserve and also benefit collectively from federal funding associated with the existence of a reserve.

Thus, only after considerably narrowing the category of persons who were seeking recognition was the federal government willing to treat Conne River equally to other First Nations in Canada, in effect allowing Miawpukek to join the uppermost category of Indigenous peoples in the official classification. In the process, other members of the original class (*i.e.*, those seeking recognition) were pushed down the ladder and their status likened to those whose identity is doubtful or contested and who receive fewer rights as a result. And perhaps the Miawpukek benefited from the presumption, which underpins the federal funding policy, that there must be some Indian group in each province (in the sense that no group in the region had a better claim to indigeneity at the time⁷⁰). It may also be that the glaring omission to recognize the Indigenous peoples of the province in 1949 created the impression that a gap needed to be filled.

Yet, Miawpukek members are not treated equally to other First Nations in Canada in one significant respect: Most First Nations elsewhere in the country have either Aboriginal or treaty rights or, in some cases, both. However, the provincial government has challenged Miawpukek's claim of Aboriginal rights on the basis that the Mi'kmaq were brought to the Island by the French—in other words, they were “immigrants.”⁷¹ Therefore, they could not establish that they exercised rights in the province before first contact with the Europeans, as required by the SCC in *R v Van der Peet*.⁷² Thus, the province's court of appeal denied their claim in a 2006 case.⁷³ This means not only that Miawpukek members do not have Aboriginal rights to hunt, trap, and fish in their traditional territory, but that they will be unable to assert a right to be consulted when large-scale development projects are under consideration.⁷⁴

68. Kennedy, “Aboriginal Organizations,” *supra* note 47 at 17.

69. *Miawpukek Band Order*, SOR/89-533.

70. Plaice, *supra* note 46 at 73.

71. The Premier of Newfoundland once referred to the Mi'kmaq as immigrants. See Bartels & Bartels, *supra* note 30 at 252, 256.

72. *Supra* note 2.

73. *Drew v Newfoundland and Labrador (Minister of Government Services and Lands)*, 2006 NLCA 53, 260 Nfld & PEIR 1 [*Drew*].

74. Of course, one might say that this result arises because the *Van der Peet* test applies to all Indigenous peoples in Canada and the Miawpukek have been unable to meet the test. However, a substantive equality perspective overlooks the fact that the *Van der Peet* test is designed to produce different outcomes without an adequate justification.

C. THE INNU NATION

While the Innu were initially members of the NANL, they separated from it in 1975 in order to form the Naskapi-Montagnais Innu Association (later called the Innu Nation), apparently because they were skeptical of the authenticity of Mi'kmaq Indigenous identity and felt that the NANL was dominated by Mi'kmaq.⁷⁵ The Innu were perceived by outsiders as “real Indians” with “obvious [I]ndigenous identity,” and they took political positions that were typically associated with the Indigenous peoples, such as opposing resource extraction activities and low-level military flights over their territory.⁷⁶ They also joined the Quebec provincial chapter of the AFN. Despite their lack of status as an Indian band, they filed a land claim, which was accepted for purposes of negotiation by the federal government in 1978.⁷⁷ Like the Inuit, they also signed an impacts and benefits agreement concerning the Voisey's Bay mining project, which affected their traditional lands. Thus, their lack of status did not prevent them from being recognized by outsiders as Indigenous. Their close association and family ties with recognized Innu bands in Quebec undoubtedly contributed to this recognition.

In parallel, the Innu Nation sought a form of political recognition that would provide them with benefits similar to those afforded to First Nations elsewhere in Canada, albeit outside the *Indian Act*. The failure of those discussions spurred the filing of a complaint with the Canadian Human Rights Commission (the Commission).⁷⁸ The choice of that forum is telling, as the Commission is rarely asked to inquire into the political claims of the Indigenous peoples, largely because matters arising under the *Indian Act* were, until recently, excluded from its jurisdiction.⁷⁹ As the Commission's mandate is to implement the right to equality, the Innu complaint was framed specifically in those terms:

75. Kennedy, “Aboriginal Organizations,” *supra* note 47 at 17.

76. Plaice, *supra* note 46 at 78-79; P Whitney Lackenbauer, *Battle Grounds: The Canadian Military and Aboriginal Lands* (Vancouver: UBC Press, 2007) at 221-27, 246-47. The Innu opposition gave rise to cases such as *R v Ashini* (1989), 79 Nfld & PEIR 318, 2 CNLR 119 (Prov Ct); *Naskapi-Montagnais Innu Assoc v Canada (Minister of National Defence)* (1990), [1990] 3 FC 381, 35 FTR 161 [CA].

77. At the time of writing, an agreement-in-principle has been reached, but the final agreement remains to be negotiated. See Aboriginal Affairs and Northern Development Canada, *Labrador Innu Land Claims Agreement-in-Principle*, online: Government of Canada <<http://www.aadnc-aandc.gc.ca/eng/1331657507074/1331657630719>>.

78. See *McRae*, *supra* note 45.

79. *Canadian Human Rights Act*, RSC 1985, c H-6, s 67, as repealed by *An Act to amend the Canada Human Rights Act*, SC 2008, c 30.

[T]he policies of the Canadian and Newfoundland governments regarding the delivery of most services to the Innu does not recognize them as an aboriginal people. We are of the view that this constitutes discrimination, and an infringement of the human rights and aboriginal rights of the Innu.⁸⁰

The Innu complaint also outlined how this lack of recognition resulted in differential benefits for the Innu, in the sense that it denied them such benefits as the opportunity to assume local control of educational and social services and to enter into negotiations towards self-government. To handle the complaint, the Commission appointed a special investigator, Dean Don McRae of the University of Ottawa, who produced a report that largely substantiated the Innu complaint.⁸¹ Thus, the federal government's failure "to acknowledge and assume its constitutional responsibility for the Innu as aboriginal people" resulted in a loss of "opportunity ... to become registered under the *Indian Act* and to have reserves created." Moreover, the consequence of this denial was that "the Innu [had] not received the same level and quality of services as [were] made available to other aboriginal peoples in Canada."⁸² It is noteworthy that in this process, the investigator did not belabour the point that the Innu were Indigenous nor justify his choice of First Nations under federal jurisdiction elsewhere in the country as the proper comparator—as if these points were obvious.

The complaint and the report eventually induced the federal government to offer recognition to the Innu as *Indian Act* bands. This recognition materialized in 2002 when reserves were created at Sheshatshiu and Natuashish.⁸³ As a result, the Innu are now eligible for a tax exemption for income earned on reserve and for the other benefits granted by the federal government to Indians individually (*e.g.*, post-secondary tuition fees and non-insured health benefits⁸⁴) and collectively (*e.g.*, financing for band council operations or on-reserve schools). In addition, the Innu bands can now benefit from the whole array of financial agreements extended to other First Nations.

80. See McRae, *supra* note 45 (containing a reprint of a letter from Peter Penashue, President of the Innu Nation, to Max Yalden of the Canadian Human Rights Commission, dated 16 July 1992).

81. *See ibid.*

82. *Ibid* at 73.

83. See *Mushuau Innu First Nation Band Order*, SOR/2002-415; *Sheshatshiu Innu First Nation Band Order*, SOR/2002-414.

84. See Health Canada, *Non-Insured Health Benefits for First Nations and Inuit*, online: <<http://www.hc-sc.gc.ca/fniah-spnia/nihb-ssna/index-eng.php>> (for additional information about the non-insured health benefits program).

D. THE ISLAND: QALIPU

In the early 1980s, the singling out of the Conne River community as the only Newfoundland Mi'kmaq community to be transformed into an Indian band (the Miawpukek) amounted to a clear differentiation between "authentic" Indians and other Indigenous peoples, who were not deserving of federal recognition. The implied message was that the communities represented by the FNI were less authentic than the Miawpukek. Of course, this was rarely stated officially in so many words. Perhaps one candid statement was made by a federal official in 1949, to the effect that the Mi'kmaq had become "merged with other citizens."⁸⁵ The idea that further genealogical research was needed, given as an explanation of why only Conne River was recognized in the early 1980s,⁸⁶ may be a more polite way of describing the widespread disbelief in the authenticity of the FNI members as an Indigenous group.

The federal government's view until the early 2000s seems to have been that the FNI membership should be considered "non-status Indians," thus remaining on this lower rung of the classification. And this became more evident when the FNI joined CAP, the national association that represents non-status and off-reserve Indigenous peoples. Yet the FNI was eventually successful in asserting its right to Indian status through a combination of legal action, representation of an "Indian" identity, and negotiation with the federal government.

When, in the late 1980s, the federal government announced that it would not pursue the option of registering FNI members as Indians, the FNI responded with a lawsuit in the Federal Court, in which it requested an order:

1) Declaring that the FNI Members are "Indians" within the meaning of [section] 91(24) of [t]he *Constitution Act, 1867*;

2) Declaring that the failure of Canada to provide the Plaintiffs with the benefits, entitlements and rights provided to other recognized Indians and Indian bands, including members of the Conne River (Miawpukek) Band, is discriminatory, and contrary to [s]ection 15(1) of the *Charter*;

3) Declaring that the FNI Members are entitled to receive benefits from Canada comparable to those provided by Canada to the Conne River (Miawpukek) Band members under the Canada/Newfoundland/Native Peoples Conne River Agreement of 4 July 1981, and any successor agreement;

85. Tanner, *supra* note 26 at 243.

86. The Lyon Report, *supra* note 67 at 5-6.

4) Directing the Governor-in-Council to recognize the member Bands of the Federation as bands under [t]he *Indian Act*; and

5) Awarding damages to the Federation for the breach by Canada of its fiduciary obligation to the member Bands of the Federation, which breach was Canada's failure to extend the benefits of [t]he *Indian Act* and the [Canada/Newfoundland/Native Peoples Conne River Agreement] to them.⁸⁷

As can be seen from this summary, the FNI lawsuit was based on the concepts of fiduciary obligation and, more importantly, the right to equality. Thus, the statement of claim⁸⁸ indicated clearly to whom the FNI members want to be compared. It asserted that the FNI membership was part of a single "Mi'[k]maq Indian Nation" present throughout Atlantic Canada and in Eastern Quebec.⁸⁹ FNI members were said to be recognized by the Grand Council of the Mi'kmaq Nation, an assertion that shows the importance of recognition by other Indigenous groups in the assertion of Indigenous identity.⁹⁰ The claim also stated that there were "no significant racial, cultural or ethnographic differences" between the FNI membership and Mi'kmaq in other provinces (who are recognized as status Indians).⁹¹ More specifically, the statement of claim asserted that there was no defensible distinction between the Miawpukek (Conne River) Band and the FNI member bands:

[T]he Mi'[k]maq who live in or contiguous to the community of Conne River and the Mi'[k]maq who live elsewhere on the Island of Newfoundland are descended from common ancestors, and ... there are no significant racial, cultural or ethnographic differences between and among them, except insofar as any two individuals may have a different number of Indians among their ancestors. A Mi'[k]maq who lives in Conne River ultimately shares the same Indian ancestry, either as to nature or degree, as a Mi'[k]maq Indian who lives elsewhere on the Island.⁹²

The statement of claim went on to highlight that the FNI member bands had not been provided with any of the benefits afforded to Miawpukek following its recognition as an Indian band.⁹³ It then attempted to bolster its argument by

87. *Federation of Newfoundland Indians v Canada*, 2011 FC 683 at para 3, 390 FTR 294. This is actually a judgment on a related procedural motion.

88. *Ibid*, T-129-89 (Statement of Claim of the Plaintiff) [on file with author].

89. *Ibid* at para 4.

90. *Ibid* at para 5.

91. *Ibid* at para 18.

92. *Ibid* at para 17.

93. *Ibid* at paras 27, 31-33.

comparing the FNI membership to the Innu and Inuit of Labrador, who have been provided benefits through the Canada-Newfoundland agreements.⁹⁴

The FNI also filed a complaint with the Commission.⁹⁵ As in the Innu case, the Commission retained an external investigator, Professor Noel Lyon. Professor Lyon's report drew upon Dean McRae's report concerning the Innu and stated that its findings "applie[d] equally to the Mi[']kmaq peoples of Newfoundland."⁹⁶ Yet, contrary to the McRae report, the Lyon report acknowledged that the Indigenous identity of the FNI members was being questioned and that this issue needed to be addressed. Thus, in the introduction to his report, Professor Lyon noted that it was unclear whether the FNI members would have been entitled to registration had the *Indian Act* criteria been applied to them in 1949. He went on to lament the effects of colonization on the assertion of Mi'kmaq identity:

With the passage of time the processes of intermarriage and assimilation with the incoming European peoples makes it increasingly difficult to establish Mi[']kmaq identity. If the process of registration had been undertaken in 1949 the greater isolation of Mi[']kmaq communities would have made the task easier. Only the tenacious commitment of these ten communities to the cultural heritage of their children has kept the lines that separate European and Mi[']kmaq cultures from being blurred beyond recognition.⁹⁷

Professor Lyon then devoted an entire section of his report to a detailed discussion of each Mi'kmaq community. While he acknowledged that many Mi'kmaq had assimilated into mainstream society as a result of economic pressures or government policy, he noted that "[w]hat both governments apparently did not know is that there were pockets of Mi[']kmaq people in Newfoundland who had chosen to continue living according to their own cultural values and practices and these groups formed living communities and remain so to this day."⁹⁸ Professor Lyon then went on to describe each Mi'kmaq band, paying particular attention to cultural and educational projects, integration with non-Indigenous communities, and broader socio-economic conditions. He also stressed the finite number of members in each band and the strict membership criteria (similar to those found in the *Indian Act*) in order to demonstrate that the FNI claim was not "an open-ended claim made on behalf of a potentially unlimited number

94. *Ibid* at para 34.

95. *See generally* The Lyon Report, *supra* note 67. This report was commissioned as a result of the FNI's complaint to the Canadian Human Rights Commission.

96. *Ibid* at 2.

97. *Ibid* at 4.

98. *Ibid* at 9.

of persons.”⁹⁹ He even noted that the FNI, with federal funding, conducted a detailed “institutional framework project” that outlined the steps already taken by the FNI bands to organize voluntarily and suggested how this organization could be further developed after federal recognition. Thus, his report emphasized characteristics of the FNI members that are usually considered typical of Indigenous communities and, more specifically, of First Nations governed by the *Indian Act*.

Nevertheless, Professor Lyon’s report contained the seed of one striking feature of the regime that would be put in place a decade later. He noted that most of the communities other than Conne River (and perhaps Glenwood) would not be suited for the creation of *Indian Act* reserves:

What struck me most forcefully at the end of my visits to FNI member communities was the inappropriateness of the *Indian Act* to their situations, with the possible exception of Glenwood. That situation is a product of considerable intermarriage with non-natives, going back over a very long time, and extensive integration with non-native communities. It was the relative absence of these factors at Conne River that made recognition under the *Indian Act* acceptable to the federal government.¹⁰⁰

He thus suggested that the federal government recognize the FNI bands as “legitimate Mi[']kmaq communities,” but that the *Indian Act* model should not be imposed on them. Rather, he invited the parties to enter into negotiations that would lead to an original form of self-government, better suited to the circumstances of the Newfoundland Mi’kmaq. In other words, Canada’s Indigenous peoples do not find themselves in identical circumstances and the same legal regime may not be appropriate throughout the country. In particular, the reserve system would not be appropriate to govern mixed communities, especially in the urban context.

The negotiations that began shortly thereafter and intensified in 2003 picked up this idea. In an agreement reached in late 2007, the federal government agreed to create one “landless band” encompassing all Mi’kmaq individuals (except Miawpukek members) on the island of Newfoundland.¹⁰¹ That band, called the Qalipu Mi’kmaq First Nation band, would be governed by the *Indian Act*, but no

99. *Ibid* at 10.

100. *Ibid* at 21.

101. Indian and Northern Affairs Canada, *Agreement for the Recognition of the Qalipu Mi’kmaq Band*, online: Qalipu <<http://qalipu.ca/site/wp-content/uploads/2011/07/2011sept-Agreement-In-Principle.pdf>> [“Qalipu Agreement”]. A supplemental agreement regarding the registration process was entered into in June 2013. See Indian and Northern Affairs Canada, *Supplemental Agreement*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1372160117898/1372160248148>>.

reserve would be created for it. That means that the Qalipu band will not exercise any territorial jurisdiction, such as the powers provided for in section 81 of the *Indian Act*.¹⁰² Rather, it will focus on the provision of services to its members. In particular, Qalipu members will be eligible for the benefits afforded directly by the federal government to status Indians irrespective of their residence on or off a reserve, such as non-insured health benefits¹⁰³ and post-secondary education support. However, they will not be entitled to the rights that depend on residence on a reserve, such as the tax exemption in section 87 of the *Indian Act* or certain federal funding programs that are only available to First Nations possessing a reserve (*e.g.*, funding for band council operations or housing).

The agreement provides for a registration process whereby persons of Canadian Indian ancestry who were members of a Newfoundland Mi'kmaq community in 1949, or their descendants, may apply for enrolment.¹⁰⁴ It also provides a non-exclusive list of thirty-six such communities.¹⁰⁵ While it was expected that about 10,000 persons would enroll, a much greater number of persons applied and the Qalipu band was officially created by order-in-council on 22 September 2011 with 21,429 members.¹⁰⁶ The initial registration process is still in progress.

The process that led to the recognition of the Qalipu band shows how similarity and difference are invoked in order to support claims based on the right to equality. The initial actions of the federal government painted the FNI as lacking the cultural and organizational features of genuine Indian bands or First Nations and thereby doomed to remain on the lower rung of the official classification of the Indigenous peoples. The FNI was able, however, to impose the idea that the appropriate comparison was with status Indians, not with non-status individuals elsewhere in the country. Thus, it was able to secure a place in the category that is associated with the largest bundle of rights and benefits. However, this admission among the status Indians came at a price: the reconfiguration of that category through the new concept of the "landless band,"¹⁰⁷ which carries lesser benefits

102. Such powers include the adoption of by-laws with respect to matters such as the residence of band members, the construction of buildings, or fishing and hunting on the reserve. *Supra* note 16.

103. *Supra* note 84.

104. Qalipu Agreement, *supra* note 101, s 4.1.

105. *Ibid.*, s 1.16.

106. See *Qalipu Mi'kmaq First Nation Band Order*, SOR/2011-180; *Order Amending the Qalipu Mi'kmaq First Nation Band Order*, SOR/2011-181.

107. We should note that the concept of the landless band was not truly new. However, up to that date, a landless band was seen more as an anomaly than as a principled policy option. See *e.g.*

than a band with a reserve.¹⁰⁸ Moreover, the courts of the province have so far denied that the Mi'kmaq enjoy Aboriginal rights, which makes for a further differentiation with First Nations in other provinces or territories.¹⁰⁹

Thus, what was viewed as an anomaly is now a new sub-category in the official classification. Whether this development will serve as precedent for groups elsewhere in the country (for instance, urban Indigenous groups) remains to be seen.

E. THE LABRADOR MÉTIS NATION/NUNATUKAVUT

The last Indigenous group to seek political and legal recognition in Newfoundland and Labrador is the Labrador Métis Nation (LMN), which was created in 1985. As mentioned earlier, groups of mixed ancestry formed in Labrador as a result of the arrival of European men. However, those “Settler” or “Inuit-Métis” communities were more visible in northern Labrador. Persons of mixed ancestry in southern Labrador were subjected to greater assimilative pressures and their identity was often hidden from outsiders.¹¹⁰ Moreover, when the “designated communities” system was put in place after Confederation, only northern communities were designated, reflecting and reinforcing the view that there were no Indigenous peoples in southern Labrador. Yet, as one observer noted, the latter “had just as much Inuit blood [as] and shared a similar way of life”¹¹¹ with their northern counterparts, which raises the question: Who is the appropriate comparator group?

The LMN was formed in 1985 by persons of mixed ancestry in southern Labrador who chose to reassert their Indigenous identity. As Kennedy notes, for those people, “pride and interest in [their] roots [have] replaced stigma and shame.”¹¹² Initially, the group met with challenges to its indigeneity, and accusations of opportunism.¹¹³ While one could assume that the group would at most be classified in the “lowest” category of Indigenous peoples (non-status Indians and Métis), it was actually successful in asserting its identity to the point

Micmac Nation of Gespeg v Canada (Minister of Indian and Northern Affairs), 2007 FC 1036, 316 FTR 130, aff'd 2009 FCA 377, 402 NR 313.

108. This choice caused a split within the FNI, leading to the creation of a parallel organization called K'takamkuk Mi'kmaq Alliance, whose legal action was dismissed mainly on procedural grounds. See *Davis v Canada (AG)*, 2008 NLCA 49, 279 Nfld & PEIR 1.

109. See *Drew*, *supra* note 73.

110. Kennedy, “Labrador Metis,” *supra* note 28 at 11-12.

111. Rompkey, *supra* note 46 at 155.

112. Kennedy, “Labrador Metis,” *supra* note 28 at 17.

113. Kennedy, “Aboriginal Organizations,” *supra* note 47 at 22.

that it may possibly claim status as Inuit. Indeed, the LMN affiliated with the Native Council of Canada, which became the Congress of Aboriginal Peoples, the association that represents non-status and off-reserve Indigenous peoples. Under that umbrella, it participated in certain federal programs—especially in the field of labour market training—that were designed to apply to all Indigenous peoples across the country, irrespective of status.¹¹⁴ Moreover, it recently changed its name to Nunatukavut Community Council to underscore the Inuit roots of its distinctive identity.¹¹⁵

The LMN was also successful in persuading the Royal Commission on Aboriginal Peoples of its Indigenous identity. In its 1996 report, the Commission stated:

Certainly, the Labrador Métis community exhibits the historical rootedness, social cohesiveness and cultural self-consciousness that are essential to nationhood, and they are developing a political organization that will allow them to engage in effective nation-to-nation negotiation and to exercise self-government. While the way of life of the Labrador Métis is very similar to that of Labrador Inuit and Innu, the Métis culture is sufficiently distinct to mark them as a unique people, and in our view they are likely to be accorded nation status under the recognition policy we propose.¹¹⁶

This represented a powerful endorsement, as the Commission refused to give an opinion on the situation of Métis groups other than the Métis Nation of the West and the Métis of Labrador. The Commission's explicit reference to the Labrador Métis was also noted by the SCC in *R v Powley*, in which the LMN was an intervener.¹¹⁷

However, the most interesting aspect of LMN's identity claims is the group's application to the courts of the province for the recognition of the provincial government's duty to consult them before undertaking the construction of the Trans-Labrador highway.¹¹⁸ Under the framework laid out by the SCC in *Haida Nation v British Columbia (Minister of Forests)*,¹¹⁹ an Indigenous group need

114. Kennedy, "Labrador Metis," *supra* note 28 at 16.

115. "Labrador Métis Nation adopts new name," *CBC News* (13 April 2010), online: <<http://www.cbc.ca/news/canada/newfoundland-labrador/labrador-s-m%C3%A9tis-nation-adopts-new-name-1.927252>>.

116. Royal Commission on Aboriginal Peoples, *Report, Perspectives and Realities*, vol 4 (Ottawa: Canada Communications Group, 1996) at 193.

117. 2003 SCC 43 at para 10, [2003] 2 SCR 207.

118. See *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation & Works)*, 2007 NLCA 75, 272 Nfld & PEIR 178 [*Labrador Métis Nation*].

119. 2004 SCC 74, [2004] 3 SCR 511.

only bring prima facie evidence of an Aboriginal right in order to trigger the government's duty to consult. The province's Court of Appeal decided to apply this principle not only to the proof of the Aboriginal right, but also to the issue of the Indigenous identity of groups who do not have Indian status. Thus, the LMN asserted that it had Inuit Aboriginal rights or, in the alternative, Métis Aboriginal rights. As the judge remarked:

While presenting their claim as beneficiaries of Inuit aboriginal rights, the [LMN] say it is possible that, as a matter of law, their claim may eventually be founded upon Métis rights. They submit, however, that they need not definitively take a position, at this stage, as to whether they are Inuit or Métis, saying that this will ultimately be determined by the courts, as a matter of law, once the essential facts have been established. For now, say the respondents, in order to trigger a duty on the Crown to consult with them, they need only establish a credible claim as aboriginal people.¹²⁰

The LMN, likely as a result of this case, was included in the consultation process dealing with the Lower Churchill hydroelectric dam project. While that process gave rise to litigation, this time no one contested the Indigenous identity of the LMN members.¹²¹

It remains to be seen whether the LMN will be successful in negotiating a land claims agreement or other forms of official recognition. From my perspective, the unsettled question is: Which comparison will be successful—are the LMN members similar to the Inuit or to Métis? The answer will likely determine the bundle of rights that they will secure.

IV. CONCLUSION

In 1949, applying equality in its formal conception was simple: No one in Newfoundland was to be granted Indian status, and everyone would be treated equally. More than sixty years later, substantive equality has proven to be a driving force in the emergence of a mosaic of Indigenous groups. Paradoxically, however, each group has secured different types of status, rights, and benefits.

In the process, groups seeking recognition claimed equal treatment by drawing comparisons with already recognized groups elsewhere in the country or within the province. They asserted “sameness in difference” rather than attempting to show that their own difference from non-Indigenous society is itself a ground for specific rights. This search for the appropriate comparator

120. *Labrador Métis Nation*, *supra* note 118 at para 8.

121. *Nunatukavut Community Council v Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)* (2011), 307 Nfld & PEIR 306, 954 APR 306 (SCTD).

also had profound implications for the political organization of the Indigenous peoples of the province, as certain groups split from organizations that included other groups that were considered of dubious Indigenous identity by mainstream society. Although the SCC has downplayed the importance of comparator groups in the application of the right to equality, the real-life experience studied above suggests that comparison remains the most intuitive manner of seeking equal treatment.

Whether this outcome should be celebrated or decried is a difficult issue. Advocates of equality will be uncomfortable with a situation where various Indigenous groups end up with very different bundles of rights and benefits, unless this disparity can be justified by the different needs and circumstances of each.¹²² As mentioned in Part I, it is difficult to measure whether such justification exists. Identity does not lend itself to easy comparisons; however, a critical observer would note that whatever comparisons succeeded in Newfoundland and Labrador were likely based on non-Indigenous perceptions about the authenticity of each group's Indigenous identity, as well as purely contingent factors such as a group's political bargaining position, timing, and sheer luck. And indeed, there does not seem to be any obvious reason why northern and southern Settlers are treated differently, or why Miawpukek has a reserve and Qalipu does not.

On the positive side, we may note that the official recognition of status and the acquisition of at least certain rights is a valuable achievement for groups who were previously dismissed as inauthentic. Qalipu is better off as a landless band than unrecognized; and the prospect of granting only a limited bundle of rights to groups who are currently without status might facilitate their recognition by governments who are wary of the consequences for the public purse. As recent SCC cases suggest that courts are mostly unwilling to scrutinize the disparities between the status and rights of different Indigenous groups,¹²³ political resolution based on somewhat intuitive comparisons and differential rights may be the best that unrecognized Indigenous groups can hope for in the foreseeable future.

Nevertheless, the current situation is unsatisfactory, especially when we consider the number of Indigenous groups in other parts of Canada that are claiming some form of recognition.¹²⁴ The lack of a principled framework for the resolution of these claims does not guarantee any form of consistent treatment

122. Indeed, the SCC indicates that distinctions may be compatible with the right to equality if they "correspond" to the characteristics or circumstances of the claimant. See *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 at paras 69-71, 170 DLR (4th) 1; *Witbler*, *supra* note 13 at para 76.

123. *Ardoch Algonquin First Nation & Allies v Ontario*, 2000 SCC 37, [2000] 1 SCR 950; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670.

124. See *e.g.* Robert K Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007) 70 Sask L Rev 153.

and leaves the rights of many groups to be decided by contingent factors. One hopes that serious consideration will one day be given to the recommendation issued by the Royal Commission on Aboriginal Peoples more than fifteen years ago: to set up a specialized body tasked with assessing claims for recognition against a common standard.¹²⁵

125. Royal Commission on Aboriginal Peoples, *Report, Restructuring the Relationship*, vol 2 (Ottawa: Canada Communications Group, 1996) at 1001 (referring to recommendation 2.3.27). See also Paul LAH. Chartrand, "The 'Race' for Recognition: Toward a Policy of Recognition of Aboriginal Peoples in Canada" in Louis A Knafla and Haijo Westra, eds, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: UBC Press, 2010) 125. It must be noted, however, that a similar system in the United States has been the subject of criticism. See Mark E Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgement Process* (Lincoln: University of Nebraska Press, 2004); Renée A Cramer, *Cash, Color and Colonialism: The Politics of Tribal Acknowledgement* (Norman: University of Oklahoma Press, 2005).

