A Critical Engagement with Nancy Fraser’s Theory of Bivalent Justice: Implications for the BC Treaty Commission process

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Abstract

This thesis explores Nancy Fraser's reconceptualization of the relationship between claims for recognition and redistribution through an analysis of her theory of bivalent justice. Her framework is applied to the BC Treaty Commission process to assess its usefulness. This thesis also critically engages with two of the provincial Liberal government's principles for negotiating treaties with First Nations: first, the provincial government refuses to negotiate compensation for the wrongful infringements of First Nations' rights and second, self-government is recognised as a form of local government with delegated powers. In applying Fraser's theory of bivalent justice, which includes the core normative principle of participation parity and a model of status subordination, it is evident that the provincial government's mandate is inconsistent with the type of justice Fraser envisages. Rather, not only should compensation be part of the treaty process, but also, self-government should be negotiated as an inherent right, not as a right delegated from the federal and provincial government. There are, however, two other important challenges to the provincial government's mandate: first, from those First Nations who assert that the inherent right to self-government exists beyond the framework of the Canadian Constitution. The second challenge arises from an analysis of the trends of privatization. Such a critique exposes how the provincial government appropriates the objective of self-government for First Nations and represents it as being "municipal-like" in nature. Finally, I conclude that these discursive trends of privatization may expose an important limitation to Fraser's theory. That is, these discursive practices inhibit the implementation of transformative remedies that are crucial for working towards the type of justice Fraser proposes.
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Chapter One

Fraser's Theory of Bivalent Justice and the BC Treaty Process

Introduction

During the last decade a dialogue has emerged among various political and legal theorists that interrogates the relationship between the politics of recognition and the redistribution of wealth. Nancy Fraser, one of the most prominent theorists consistently contributing to this debate, has argued that with the international expansion of capitalist economies, current concerns with identity politics have failed to address the growing divide in inequalities of wealth. Fraser argues that the "post-socialist condition" following the demise of Soviet communism, represents a historical moment where there no longer exists any universal normative frameworks to govern an emancipatory politics that can feasibly challenge liberal capitalism. Fraser critiques the antiessentialist tendencies of postmodern theory, arguing that the absence of a universal normative framework undermines the capacity for postmodern politics to be transformative as such an approach continues to exist within, and be reliant upon, a liberal capitalist paradigm. Fraser has called on theorists to develop a comprehensive normative framework that moves outside liberal capitalism by addressing both the politics of recognition and redistribution and conceptualizing these as interdependent yet distinct. That is, for Fraser, recognition and redistribution are interrelated yet irreducible, requiring an overarching theory of justice.

Fraser develops a theory of bivalent justice that is founded upon her reconceptualization of recognition and redistribution as mutually imbricated. She suggests that injustice cannot be characterized as exclusively a matter of either misrecognition or maldistribution, but because

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these are so intricately interwoven, remedies committed to realizing justice must redress both simultaneously.

Fraser could be seen as a materialist feminist as she is concerned with redressing the material inequalities that individuals' experience and that arise from both injustices of recognition and distribution. Other materialist feminists have entered this debate drawing on Marxism to recentre economic concerns. They argue Marxist insights have been overlooked by "ludic" postmodern projects that have focused primarily on the effects of power on the embodied self, for example, through a politics of aesthetics. Materialist feminists aim to take as their point d'appui individuals' lived experiences as part of a wider system of social relations. Therefore, while drawing on the tools provided by postmodernism, materialist feminists move away from considering the embodied subject as the primary site of power, to consider macro structures of economic relations in liberal capitalist societies.

It has been argued, however, that the trends of privatization pose an important problem for politics. The complex and often contradictory logic of privatization serves to "appropriate oppositional discourses," among other things, and this has regressive implications for realizing justice. Reregulation represents one dominant trend associated with privatization whereby government reinscribes different regulative practices. These trends of privatization employ discursive tactics that legitimate particular remedies being advanced that attempt to redress inequality, but that actually recreate inequality. These trends, while promoted through discursive language, have important material effects. They limit the scope of Aboriginal rights that will be recognized and this has implications for whether economic and cultural justice will be realized:

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An essential part of materialist feminism is therefore an engagement with these discursive trends as part of a broader engagement with the implications of neo-liberalism.

Some feminist scholars have critiqued Fraser’s failure to address the implications of these trends for her theory of justice.\(^7\) I aim to expand upon these critiques by considering the relationship between Fraser’s theory of justice and the discourses of privatization through an analysis of British Columbia (BC) Treaty Commission process. The objective of this thesis is twofold: first, to critically engage with the provincial Liberal government’s mandate in the BC Treaty Commission process in order to develop strategies that could be advanced to ensure the treaty process works towards bivalent justice; and, second, to examine this mandate in order to expose both the strengths and weaknesses of Fraser’s theory of bivalent justice.

**Part One: Defining the Research Problem**

1.1 **Central Research Questions**

Three central research questions guide this thesis.

1) First, in applying Fraser’s theory of bivalent justice to the BC Treaty Commission process, what strategies could be negotiated to work towards her theory of justice?

2) Second, how does an analysis of the provincial Liberal government’s mandate in the treaty process reveal the benefits of Fraser’s theory of bivalent justice?

3) Third, how do the discursive trends of privatization advanced by the provincial Liberal government through the treaty process problematize Fraser’s theory of bivalent justice?


1.2 Terms/Parameters of Research

There are important limitations associated with the methodological approach of this thesis. In drawing on the literature surrounding Fraser's theory of bivalent justice and applying it to the provincial government's mandate for negotiating treaties, I use government documents, such as agreements-in-principle, press releases and other position statements to trace the government's various discursive practices. I do not attempt to represent First Nations' views on these policies, and my critiques are made as a non-First Nations person committed to a process of decolonization. I draw on the vast resources published by First Nations and also the position statements of First Nation organisations, such as the Union of BC Indian Chiefs and the First Nations Summit of BC, to represent some of First Nations' "oppositional discourses" that contest and challenge the provincial government's mandate.

Another important limitation to my research is the terminology and language I use, which exemplify the explanatory power I am invested with as a researcher. Chandra Mohanty urges academics to be aware of the "need to examine the political implications of our analytic strategies and principles." The ways in which I categorize the diverse identities of "indigenous peoples" have vast political implications. In trying to be more accountable as a researcher, it is important that I explain the terminology I use and consider some of the implications of its use. "Indigenous peoples" is used to refer to the diverse "first peoples" internationally. It is associated with the growing movement of indigenous internationalism. "Aboriginal people" is a legal term used in Canada that encompasses First Nations, Metis and Inuit. This category is used to mean "original inhabitants" or "first peoples." When I employ it as an area of research I potentially undermine the multiplicity of experiences of First Nations, Metis and Inuit. "Indian" was the category first used by colonizers and continues to have legal definitional power through the

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Indian Act [1985]. In this thesis I use “First Nations” to refer to those nations either involved in, or boycotting the BC Treaty Process and “Aboriginal” when referring to concepts applicable to all of Canada’s first peoples. “Non-First Nation” refers to those who do not identify as Canada’s “first peoples.”

Part Two: Literature Review

2.1 Recognition and Redistribution: Towards a Theory of Bivalent Justice

Nancy Fraser’s article “From Redistribution to Recognition? Dilemmas of Justice in a ‘Postsocialist’ Age,” later republished as the first chapter of her book *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* in 1997, initiated what became a larger dialogue around the relationship between a politics of recognition and redistribution. Since Fraser’s first formulation of the dilemma which, she argued, was caused by claims for recognition undermining those for redistribution, there have been numerous theoretical engagements with her work and attempts to clarify the relationship between the two. This literature review traces the shifts within Fraser’s own work over the last five years examining her reformulations of her theory of “bivalent justice.” It also traces these theoretical debates through the work of theorists such as Iris Marion Young, Anne Phillips and Judith Butler. Finally, I identify two challenges to Fraser’s theory of bivalent justice that arise from: first, trends of privatization; and, second, the tensions caused by incommensurable claims for recognition between those First Nations who reject the legitimacy of the state to determine their status in Canadian society and those who use the institutions of the state to decolonize their relations with the Crown. These tensions will be introduced in this chapter and explored through this thesis.

9 ‘Aboriginal people’ is a term used in the Constitution Act, 1982 that includes all of Canada’s indigenous peoples.

10 Linda Tuhiwai Smith observes that this concept of “first peoples” has, at times, been co-opted by white settlers to distinguish themselves from more recent immigrants. As she succinctly states, however, for these people “their power, privilege, their history are all vested in their legacy as colonizers.” Linda Tuhiwai Smith (1999) *Decolonizing Methodologies: Research and Indigenous Peoples*, Auckland: University of Otago Press at 7.
2.2 The Recognition/Redistribution Dilemma

Nancy Fraser argues in *Justice Interruptus* that theories focused on the recognition of difference have privileged cultural issues of identity, failing to adequately account for the interconnectedness of recognition and redistribution. While maintaining that the politics of recognition and redistribution are inseparable, she develops a theory of justice that attempts to encompass all forms of oppression within two theoretically distinct categories, injustices arising from lack of cultural or symbolic recognition and those arising from the distribution of wealth. Fraser argues that this approach overcomes the problems inherent in existing frameworks that promote divided and incomplete theories of justice.

Within Fraser’s theory, all forms of injustice exist along a continuum she constructs between these two distinct types of injustice, depending on the “root” or “core” of the injustice. At one end, an injustice of recognition is concerned with cultural injustice, including cultural domination, nonrecognition, misrecognition, and disrespect. At the other end of the continuum, an injustice arising from redistribution is concerned with socioeconomic injustice, which includes exploitation, economic marginalization, and deprivation. Theories that approach these types of injustices as mutually exclusive, Fraser argues, has led to “the recognition/redistribution dilemma” whereby:

The politics of recognition and the politics of redistribution often appear to have mutually contradictory aims. Whereas the first tends to promote group differentiation, the second tends to undermine it. Thus, the two kinds of claim stand in tension with each other; they can interfere with, or even work against, each other.12

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11 Fraser, *Supra* note 1.
12 *Ibid* at 16.
Fraser attempts to reconceptualize the relationship between recognition and redistribution so that a theory of justice can resolve this tension, redressing injustices arising from both simultaneously.

Fraser argues that most groups are not situated at either end of the spectrum experiencing only one type of justice, but represent what she terms “bivalent” collectivities. Fraser states that “bivalent collectivities, in sum, may suffer both socioeconomic maldistribution and cultural misrecognition in forms where neither of these injustices is an indirect effect of the other, but where both are primary and co-original.” Examples she gives of complexly situated bivalent collectivities are those based on gender and “race,” both requiring enhanced forms of recognition that would resituate them as respected and valued identities and in so doing, would reinforce these categories through positive recognition. At the same time, redistributive projects are needed to redress the exploitation and economic marginalization these groups experience. The aim of redistributive projects, Fraser asserts, is to restructure the economic sphere so that gender and “race” are no longer categories that define sources of oppression and privilege. It would, as Fraser states, put these identities “out of business” as such.

While Fraser considers most collectivities to be bivalent, that is, experiencing injustices arising from both misrecognition and maldistribution, she argues that some collectivities are located primarily at either end of the continuum. For example, Fraser argues that exploited working classes within capitalist economies suffer injustices arising exclusively from the political economy and not from cultural non-recognition or misrecognition. In capitalist societies, the mode of production structures class relations so that the working class is the most exploited, doing most of the work for the least amount of money. At the other end of this

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14 Fraser, Supra note 1 at 22.
15 Ibid at 17.
recognition-redistribution continuum is sexuality, which Fraser argues, is “rooted wholly in culture, as opposed to political economy.”\textsuperscript{16} She justifies her characterization of sexuality as a matter of recognition and not redistribution because homosexuals:

are distributed throughout the entire class structure of capitalist society, occupy no distinctive position in the division of labor, and do not constitute an exploited class. Rather, their mode of collectivity is that of a despised sexuality, rooted in the cultural-valuational structure of society.\textsuperscript{17}

Injustices experienced by gay/lesbian people are therefore best remedied through recognition, not redistribution. While Fraser assumes that collectivities of class and sexuality emerge from their respective injustices of redistribution and recognition, she recognizes that it may be problematic to assume that any “pure collectivities of this sort” actually exist.\textsuperscript{18} Fraser observes that exploited working classes may simultaneously experience injustices of misrecognition and disrespect. Fraser maintains, however, that even these injustices arise primarily as a result of their economic exploitation, concluding again that the appropriate remedy is therefore redistribution, not recognition.\textsuperscript{19}

2.3 A Socialist/Deconstructivist Theory of Justice

Fraser proposes a theory of justice that aims to resolve the emergent tension between claims for recognition that she argues reaffirm group identities and redistributive projects that dissolve group differentials, distinguishing between affirmative and transformative remedies.\textsuperscript{20} Affirmative remedies redress misrecognition by retaining the existing power relations that structure identities, but aim to be more inclusive. In remedying maldistribution, affirmative remedies create greater opportunity for individuals to participate in the market as economic actors. She attributes these affirmative approaches to “mainstream multiculturalism” and “the

\textsuperscript{16} Ibid at 18, emphasis added.
\textsuperscript{17} Ibid at 18.
\textsuperscript{18} Ibid at 18.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
liberal welfare state,” respectively. Fraser argues both are inadequate, as they tend to create further misrecognition and do not address the “root” cause of these injustices, namely the normalization and privileged positions that marginalize and exploit those “othered.” She advances instead a transformative model of recognition and redistribution, a socialist/deconstructivist paradigm that restructures relations of production and recognition while destabilizing group differentiation. Fraser argues that a transformative approach “would change everyone’s sense of self.”21 Not only would those collectivities that had been dominated and exploited be revalued and included, but also the hierarchical structures of power that normalize certain identities would be destabilized. For example, Fraser argues a transformative recognition politics would not only aim to be more inclusive of gay/lesbians, but also deconstruct and destabilize the hetero-homosexual dichotomy.22 A socialist redistributive paradigm would, she argues, be transformative as it radically restructures the existing capitalist relations of production.

Fraser concludes that a socialist/deconstructivist approach is particularly useful when individuals are situated within wider and more complex social relations where they do not belong to one collectivity, but are constructed through “larger field[s] of multiple intersecting struggles against multiple, intersecting injustices.”23 As individuals do not experience components of their identity independently from other aspects, but instead experience these as complex matrices of oppression and privilege, a theory of justice must account for these multiple, intersecting relations of power. For example, contemporary theorists have been concerned with addressing the different injustices First Nation women experience as a result of the intersection of both racialization and gendered norms. Fraser submits that her transformative socialist/deconstructivist framework better accounts for these plural experiences as “affirmative

20 Ibid at 23.
21 Ibid at 24.
22 Ibid.
remedies work additively and are often at cross-purposes with one another." Affirmative approaches associated with liberal multiculturalism tend to structure legal remedies as a matter of choice between individuals' different experiences of injustice, such as between being a woman or First Nation. A transformative socialist/deconstructivist model would therefore be preferable to an affirmative, liberal multiculturalist approach by challenging the underlying structures of power that give rise to these multiple and intersecting experiences of injustice.

2.4 Complicating Recognition/Redistribution: Reformulating “The Dilemma”

Revisiting her theory of justice in The Tanner Lectures on Human Values in 1998, and in her more recent article “Rethinking Recognition” in 2000, Fraser develops a “status subordination” framework that treats misrecognition and maldistribution as a matter of social status. The group-specific identity in this framework is not the site of political recognition, but rather the individual as part of multiple group identities in the larger social matrix. Any injustice arising from misrecognition limits individuals’ ability to participate as full members of society. Fraser evokes an underlying norm of participation parity whereby all adults are able to interact as full and equal members of social and political life. Fraser states that focusing on social status allows for a range of strategies to be employed to redress subordination within and between group identities as it places the subject within the broader context of social relations.

Theorists such as Axel Honneth and Charles Taylor characterize recognition as a matter of self-realization, which Fraser argues, assumes everyone has equal right to social esteem. Her theory of bivalent justice ensures instead, that “everyone has an equal right to pursue social

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23 Ibid at 32.
24 Ibid.
26 Ibid.
27 Ibid.
esteem under fair conditions of equal opportunity." She identifies this condition of mutual respect as an "intersubjective precondition" of her participatory norm. Fraser argues that not only must an intersubjective precondition be present to realize participation parity, but also an "objective precondition." This requires a fair distribution of resources to ensure that individuals are sufficiently independent to exercise "voice" through their social and political participation. This objective precondition in turn includes three material prerequisites. First, that there is "freedom from deprivation and from the sort of dependency that renders one susceptible to exploitation." Second, that vast inequalities in wealth and income must not be institutionalized to create a distinct group of "second-class citizens." Finally, vast differences in leisure time must not be institutionalized.

She considers same-sex marriage laws as an example of how her model of status subordination could be employed to promote equality and parity of participation. She argues the root of the injustice excluding legally recognized same-sex marriage is the cultural valorization and normalization of heterosexuality. As other theorists have argued, Fraser notes that various strategies are available to redress this injustice, including legalizing same-sex marriage and de-institutionalizing heterosexual marriage. She maintains that redistributive projects would also be required to ensure full parity of access to these participatory processes where these various strategies are discussed and deployed. Strategies that could be advanced include, for example, recognizing gay/lesbian partners as "spouses" and allowing the same

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28 Fraser, Supra note 13 at 27.
29 Ibid at 31.
30 Ibid.
31 Ibid at 54.
32 Ibid.
33 Ibid.
34 Fraser, Supra note 25 at 115.
access to marriage as heterosexuals and second, that gay/lesbians reject inclusion within marriage laws but gain the same entitlements as married heterosexuals.\footnote{Fraser, \textit{Supra} note 25 at 115. The first strategy has recently been successful in Canada with court decisions affirming that gay/lesbians should be included within the legal meaning of 'spouse' and 'marriage.' See \textit{Barbeau v. British Columbia (Attorney General)} 2003 BCCA 406.}

Utilizing Fraser’s affirmative/transformative framework, the first strategy is an affirmative remedy as it entrenches a status quo normalizing the institution of marriage as the site conferring entitlement, but it can also be seen as transformative as it destabilizes heteronormativity as the basis for these entitlements. The second is both affirmative and transformative. It is affirmative as it preserves heteronormativity as the basis for inclusion within the institution of marriage, while also affirmative of gays/lesbians’ exclusion from marriage. It is also transformative as it challenges underlying structures of power rejecting the institution of marriage as the exclusive site investing privilege. Fraser’s approach “allows in principle for what we might call universalist recognition, and deconstructive recognition, as well as for the affirmative recognition of difference.”\footnote{Ibid at 116.} She argues that this approach does not favour any particular strategy, but responds to the needs of the subordinated subjects so that they can participate fully in social life.

A significant shift from Fraser’s initial characterization of the recognition/redistribution dilemma, is her claim that not all redistribution claims “dedifferentiate” between collectivities and not all recognition claims differentiate.\footnote{Fraser, \textit{Supra} note 25 at 115. This strategy has recently been successful in Canada with court decisions affirming that gay/lesbians should be included within the legal meaning of ‘spouse’ and ‘marriage.’ See \textit{Barbeau v. British Columbia (Attorney General)} 2003 BCCA 406.} Fraser argues instead that redistributive remedies aim not only to abolish collective identities and thereby be transformative, but also may be affirmative. For example, she cites affirmative action policies that reinforce group differentials while working towards redistributive justice. There may, however, still be other alternatives that Fraser does not consider. Taiaiake Alfred argues that First Nations should reject capitalism and
advance instead their own indigenous economies.\textsuperscript{40} This would be transformative, but not in the socialist model envisaged by Fraser.

In contrast to her initial claim that recognition claims tend to reify group differentials, Fraser suggests there are instead four possible outcomes.\textsuperscript{41} These include redressing the practice of “othering,” which can be essentializing and dedifferentialist of collective identities. This approach works to find points of commonality between different groups identities. Recognition claims can also work to redress claims of “sameness” and this tends to be differentiating of collective identities as attempts to reinforce differences between group identities. Fraser argues that a deconstructivist approach, which dedifferentiates between identities, promotes heterogeneity. Finally, Fraser argues the fourth possible outcome of recognition claims is that of locating and contesting the privilege of the dominant group, which tends to be differentialist by working to eradicate the basis of privilege and marginalization of collective identities.

Fraser argues that the “recognition/redistribution dilemma” is no longer an appropriate characterization of the political problem she is working to overcome because it overlooks the multiplicity of tensions that she now acknowledges exist.\textsuperscript{42} She concludes that the various remedies that can be pursued through recognition and redistributive politics:

\begin{quote}
belie the postulate of a single head-on-conflict between a politics of recognition, which promotes group differentiation, and a politics of redistribution, which undermines it. They suggest, on the contrary, a multiplicity of tensions among a variety of different claims. Equally important, moreover, logical contradictions between claims are not the source of the political difficulties. Practical problems are rooted, instead, in the imbrication of economy and culture.\textsuperscript{43}
\end{quote}

Fraser demonstrates that her concern is to examine the interconnections between recognition and redistribution by locating how injustices are filtered through both recognition and redistributive

\textsuperscript{39} Fraser, \textit{Supra} note 13 at 44.
\textsuperscript{41} Fraser, \textit{Supra} note 13 at 46.
\textsuperscript{42} \textit{Ibid} at 45, ft 46.
\textsuperscript{43} \textit{Ibid} at 47, emphasis added.
remedies. In order to examine this problem, her prior emphasis on locating the “root” or “core” of an injustice is replaced with the desire to examine their points of convergence and intersection.

Subsequently, Fraser notes for example, that the effects of the recognition remedies proposed “do not follow a base-superstructure logic, wherein enhancements in status automatically translate into improvements in economic position.”\[44\] They instead “pass through a second, economic logic that is connected to, but not reducible to, that of status.”\[45\] Fraser concludes that, “it is necessary…to trace the interpenetration of the two logics.”\[46\] As part of this process, both transformative and affirmative remedies will be necessary. Fraser is also aware, however, that these affirmative/transformative remedies may also have negative consequences that result in different relations of oppression and dominance being formed.\[47\] In order to adjudicate between these complex and often contradictory remedies, Fraser suggests that two different trade-off scenarios need to be avoided. First, it is important to avoid recognition remedies that impose unreasonable material costs on the claimants. Rather, a remedy should maintain or enhance the claimants’ economic well-being. Second, it is important to avoid those remedies that “combat one form of misrecognition in ways that exacerbate another.”\[48\] Rather, she suggests an appropriate remedy should aim to redress different forms of misrecognition simultaneously.

2.5 Critical Engagements with Fraser’s Theory

A significant shortcoming of Fraser’s work is that she fails to consider the implications of her theoretical framework for indigenous peoples. I argue that using her approach, First Nations

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\[44\] *Ibid* at 50.
\[45\] *Ibid*.
\[46\] *Ibid*.
\[47\] *Ibid*.
\[48\] *Ibid* at 52.
can be characterized as collectivities that experience cultural and economic injustice. First Nations in Canada experience injustices arising from both misrecognition and maldistribution and so, using Fraser’s model, could be considered “bivalent” collectivities. First Nations people experience injustices that result from cultural domination, misrecognition, disrespect and nonrecognition. Forms of racism continue to privilege “whiteness” and devalue First Nations as “backward,” “primitive” and “deviant” from the dominant norm of “whiteness.” In applying Fraser’s initial analysis of the recognition/redistribution dilemma to First Nations, the resulting remedy for misrecognition would typically be the valorization of First Nations.\footnote{Fraser,\textit{Supra} note 1 at 21.} The recognition and promotion of Aboriginal rights through section 35(1) of the\textit{Canadian Constitution Act [1982]} is an example of such an attempt to redress injustices of misrecognition and disrespect through the promotion and positive affirmation of Aboriginal peoples and their rights. First Nations, however, also experience injustices arising from maldistribution. As I argue later, the Canadian political economy depends on the exploitation of First Nations and their lands. Further, the division of labour in Canada is founded on the marginalization of First Nations from (as Fraser observes in relation to “race”) “higher-paid, higher-status, white-collar, professional, technical, and managerial occupations held disproportionately by ‘whites’.\footnote{Fraser,\textit{Supra} note 1 at 21.} A politics of redistribution aims, Fraser would argue, to abolish “First Nations” as a category of differentiation between those who are economically privileged and those who are marginalized. A redistributive project would therefore also be essential to promote justice. Utilizing Fraser’s characterization of the relationship between recognition/redistribution, First Nations can be seen to be bivalent collectivities, experiencing two distinct forms of injustice requiring two distinct forms of remedy: first, positive recognition of their identities as First Nations peoples; and

\footnote{Ibid at 22.}
second, equitable redistribution of wealth. The former reinforces First Nations as a differentiated social group and the latter tends to abolish group differentiation.

Theorists have critiqued Fraser’s initial characterization of the relationship between recognition and redistribution, arguing that she perpetuates a false dichotomy causing her to find a tension where in fact none exists. Iris Marion Young notes that this dichotomy is premised upon the assumption that recognition is an end in itself, and does not consider how some groups assert cultural recognition as a means to economic redistribution. That is, collectivities have worked for greater recognition not only as an important and necessary objective in itself, but to achieve redistributive goals.

Fraser agrees that the recognition/redistribution continuum is an artificial theoretical device. It serves only as a useful analytical tool to probe a particular political problem: namely, how a theory of justice can overcome the apparent contradiction between a politics of recognition and redistribution. Young argues, however, that the solution Fraser proposes is flawed as she constructs an overly simplistic dualism that ignores the many different relations of dominance and oppression. Young insists that as a result of complex relations of power there are diverse experiences of oppression both between and within what Fraser has labelled “recognition” and “redistribution.” Young argues further that these are often mutually reinforcing and so, cannot be overlooked by a theory of justice.

Fraser’s recognition/redistribution continuum is a useful tool, but as a linear continuum dichotomizing recognition and redistribution it is problematic as it assumes all forms of oppression originate from injustices arising from either recognition or redistribution. This

52 Ibid at 148.
53 Fraser, Supra note 1 at 12.
54 Young, Supra note 51 at 151. Young argues this dualism masks the multiple forms of oppression individuals experience, for example, the five “faces” of oppression she identifies, which are: exploitation, marginalization, powerlessness, cultural imperialism, and violence.
critique does not, however, invalidate Fraser’s use of recognition/redistribution: both Fraser and Young’s frameworks should co-exist, but neither should attempt to conclusively define the origins of all oppression and experiences of injustice as they risk essentializing and universalizing their own understandings of power differentials. For example, as Sherene Razack observes, locating the origin of all women’s oppression as patriarchy undermines a complex understanding of how women in some cultures value their social location and the agency they have within these power structures. She states that, “imperialism demands that we understand women either as victims or agents, as saviours or as saved, but not as complicated subjects acting within several hegemonic systems.”55 A critical theory of recognition should work to understand how differently situated cultures invest meaning in different systems of power without equating all relations of subordination to oppressive power.56

Furthermore, as Anne Phillips observes, Fraser’s approach is still useful as “in the political division of labour, no one can hope to do everything at once, but if the choices we make block out other issues, it does not help just to say that everything is interconnected.”57 Young’s insistence that all injustices be accounted for because they are interdependent and mutually reinforcing does not in itself assist in developing an approach that can begin to address the sometimes contradictory interplay between remedies of recognition and redistribution. As Phillips observes, the importance of Fraser’s approach is that it “enables us to think more precisely about political dilemmas.”58 Fraser’s concern is that without a clear normative framework, all differences will be affirmed as valuable. In adjudicating between claims for recognition, the broader matrix of power needs to be considered, so that it is then possible to contest those exploitative and dominating relations that are deemed unjust. Phillips suggests that

56 Bruce Baum ‘Feminist Politics of Recognition’ Signs (Forthcoming in 2003).
Fraser’s model could be more dynamically interpreted as a matrix of interlocking experiences of power so that the concern motivating Fraser’s framework, that of strategic choice, is not overlooked while also not ignoring the multiple tensions that exist.\textsuperscript{59}

There is, however, a significant theoretical shortcoming in Fraser’s approach that constrains the recognition of the multiplicity of struggles that occur. That is, Fraser does not sufficiently address how her transformative framework addresses intersectionality, asserting only that affirmative approaches are inadequate.\textsuperscript{60} Fraser is concerned that identity politics has displaced economic injustices by assuming that processes of recognition will also fix the maldistribution of wealth.\textsuperscript{61} She assumes, however, that because class is primarily a matter of redistributive justice, that economic redistribution will remedy the misrecognition of the working class. Fraser not only fails to recognize the gendered and racialized dimension of class, but also she seems to displace the politics of recognition by privileging projects for economic justice. Judith Butler argues further that Fraser’s characterization of sexuality as “merely cultural,” and injustices gay/lesbians experience as a “fairly straightforward” matter of misrecognition and disrespect, recentres economic concerns to the exclusion of “cultural” matters despite Fraser’s claim that both are important as they are interrelated and injustices arising from both need to be remedied.\textsuperscript{62} Fraser does not address the complex and multifarious struggles both between and within recognition and redistributive claims, but perpetuates her initial construction of the recognition/redistribution dilemma with a new emphasis on the economic. In Fraser’s rejoinder to Butler, she re-states her position that the economic and cultural are equally important; however, she insists that some injustices are located at different points of the continuum and some are more embedded in matters of recognition or redistribution.

\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid at 148.
\textsuperscript{60} Young, \textit{Supra} note 51 at 158.
\textsuperscript{61} Fraser, \textit{Supra} note 2 at 288.
Fraser shifts, however, in her characterization of class and sexuality, perhaps in response to Butler’s critique, or to her own discomfort in assuming there to be “pure collectivities.” She states:

virtually all real-world oppressed collectivities are bivalent...To be sure, not all oppressed collectivities are bivalent in the same way, nor to the same degree. Some axes of oppression, such as class, tilt more heavily toward the distribution end of the spectrum; others, such as sexuality, incline more to the recognition end; while still others, such as gender and “race”, cluster closer to the center...As a practical matter, therefore, overcoming injustice in virtually every case requires both redistribution and recognition.63

This approach represents a more complex appreciation of the interdependence of recognition and redistribution for all collectivities, but does still not appear to fully account for the experience of intersectionality. There is an assumption that the injustices experienced by collectivities are severable and that it is possible to locate the root cause of injustices along a sliding scale between misrecognition and maldistribution.

Butler challenges Fraser’s tactical use of conceptualizing injustice as arising from either recognition or redistribution as it “presumes that the distinction between material and cultural life is a stable one.”64 Butler attempts to destabilize this assumption by demonstrating that sexuality is tied to the mode of production and the “economic.”65 She argues that the political economy of Western liberal capitalist societies reinforces masculinist privilege and heteronormative assumptions. Butler asserts that “to the extent that naturalized sexes function to secure the heterosexual dyad as the holy structure of sexuality, they continue to underwrite kinship, legal and economic entitlement, and those practices that delimit what will be a socially recognizable person.”66 Heteronormative assumptions structure the political economy by defining “citizen” in accordance with specific legal and economic entitlements based upon their sexuality, for example, in tax and property law and this is a historically locatable experience

63 Fraser, Supra note 13 at 22.
64 Butler, Supra note 62 at 267-268.
65 Ibid at 272.
66 Ibid at 276.
emerging with the industrialization of liberal economies and society. Butler argues that Fraser’s failure to address this relationship ultimately undermines her objective, to find a theory of justice that addresses both types of injustice, as her false binary perpetuates assumptions that the cultural and economic are distinct. Injustices cannot be characterized as primarily arising from either cultural misrecognition or economic maldistribution and Butler’s discussion of sexual politics challenges this very distinction. In her response, Fraser maintains, however, that the recognition/redistribution distinction is an important analytical device to overcome the current impasse that has emerged between materialist feminist concerns with economic injustice, and “multiculturalist” concerns with recognition as both must be addressed in working towards bivalent justice.67

Susan Boyd, in an article that critically discusses this debate between Butler and Fraser, finds that “neither Butler nor Fraser develops an adequate dialectical analysis of the ways in which discursive challenges (for example, to the heteronormativity of the family) relate to resource distribution in late capitalist societies.”68 Boyd argues that a critical analysis of the interplay between recognition and redistribution must include an examination of the various tactics employed as part of the neo-liberalism that increasingly defines Western capitalist economies. While Fraser does not specifically consider these trends in her own work, such an analysis is consistent with her reformulation of the relationship between recognition and redistribution through her revised model of bivalent justice. Recent materialist feminist literature that examines the competing and sometimes contradictory logic of privatization is therefore useful in exploring the discursive practices that structure the highly contested terrain where claims for recognition and redistributive justice take place.

67 Fraser, Supra note 13 at 24.
68 Boyd, Supra note 7 at 378.
2.6 Problematizing Fraser's Bivalent Justice: Materialist Feminist Insights

As part of a materialist feminist project that critically engages with neo-liberalism, Brenda Cossman and Judy Fudge argue that trends of privatization are filtered through discursive practices.69 These discursive practices have important material effects as they serve to justify and legitimate particular policy positions being taken that inform current social and political relations. While privatization initially referred primarily to the sale of government assets, it has increasingly come to also represent the contracting out of government services and the fundamental restructuring of government to replicate market logic.70 Cossman and Fudge define privatization further as including:

deregulation of some sectors of economic activity, the marketization (and reregulation) of others, and the selling off of government operations with the goal of increasing opportunities for private profit making, as well as the commercialization of government services. It also involves a fundamental retrenchment of the state in social reproduction, leaving families and charities to shoulder a greater part of the burden in caring for people.71

They argue that trends of privatization have led to a reconstruction of the public/private divide. Like the recognition/redistribution binary, the public/private divide is not stable. As Susan Boyd notes, it is an “ideological marker that shifts in relation to the role of the state at different historical moments.”72 The indeterminacy of this divide means that it is constantly being renegotiated. For example, throughout many Western liberal societies after the Second World War and as a result of Keynesian economics, the state assumed responsibility to promote a higher standard of living for citizens while facilitating the accumulation of wealth.73 With the

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70 Ibid at 4.
71 Ibid at 18.
73 Fudge and Cossman, Supra note 69 at 6.
current dominance of neo-liberal market logic both domestically and internationally, such responsibility is increasingly argued to belong in the private sphere.\textsuperscript{74}

Materialist feminists have analysed the gendered dimensions of privatization to expose the emerging problems posed by such trends. For example, as part of this assumption that the welfare of the citizenry is best delegated to the private sphere, “the family” is being further entrenched as the primary societal unit. It is increasingly burdened with the responsibility for the costs of social reproduction and it is typically women who assume this responsibility within the family unit.\textsuperscript{75} Similar analysis is needed, however, to consider the racialized implications of these trends of privatization for First Nations.

I explore five neo-liberal trends of privatization in this thesis. The first trend is the valorization of self-sufficiency. The provincial government utilizes this concept of self-sufficiency to negotiate a limited model of self-government that creates economic independence for First Nations through enhanced market activity, not as a model that creates independence from state structures. The second and third trends I consider are reregulation and reprivatization. These trends are intimately connected and mutually reinforcing. I therefore consider their effects together. Reregulation is the trend through which the state legitimates its ongoing role as a coercive site that both directly and indirectly governs citizens. Reprivatization represents the relocation of public assets into the private realm and the naturalization of this relocation as inevitable and desirable.\textsuperscript{76} The fourth trend I identify is indigenization, which I argue is the process of racializing First Nations’ identities through the logic of privatization. Finally, the fifth trend is the discourse of risk management.

The BC Treaty Commission process is an important and complex site where many of these theoretical debates and tensions are currently taking place. Within the treaty process the

\textsuperscript{74} Ibid at 4.
federal, provincial and First Nations’ governments are attempting to negotiate more just relations by realizing treaties that both recognize First Nations’ rights and redistribute wealth. The discursive practices through which remedies are appropriated have, however, proven problematic as not one treaty has been negotiated to date. Exploring Fraser’s reconceptualization of recognition and redistribution, as well as her theory of bivalent justice through an analysis of the BC Treaty Commission process, reveals both the strengths and weaknesses of her framework while simultaneously contesting the legitimacy of the provincial government’s negotiating mandate.

2.7 The Problem of Incommensurable Claims for Recognition

A second limitation to Fraser’s theory of bivalent justice is the problem of incommensurable claims for recognition. This dilemma is particularly relevant to First Nations’ politics in BC as there is a basic tension between those First Nations who reject a recognition politics based on social equality and full participatory rights as Canadian citizens and those First Nations who employ the Constitution and state institutions as a means to gain greater recognition, including to contest the legitimacy of the state. Contesting the legitimacy of the basic structures of society from within those structures may be problematic for those First Nations that reject the state’s assertions of sovereignty over them. There is an incommensurability that precludes some First Nations’ willingness to use these structures of recognition and redistribution to address the injustices they experience. Challenging the legitimacy of the state through, for example, legal mechanisms, requires an acceptance that the state has jurisdictional power at all, which some First Nations refute. Theorists have offered

76 Fudge and Cossman, Supra note 69 at 4.
useful insights into this irreconcilability, proposing that perhaps it should not be "resolved," but that these differences are an inevitable and necessary practice of freedom.\textsuperscript{77}

James Tully suggests that it is more valuable “to ensure that eliminable, agonic democratic games over recognition and distribution, with their rival theories of distribution and recognition, can be played \textit{freely}, with a \textit{minimum of domination.}”\textsuperscript{78} Like Fraser’s underlying norm of participatory parity, Tully concludes that practices of agonistic freedom can be enhanced through the democratization of a participatory politics.

Similar to Fraser’s status subordination model, Davina Cooper proposes that different strategies be pursued, but that these should all work to contest overarching hegemonic structures of power, such as patriarchy and heteronomativity.\textsuperscript{79} A major limitation to both Cooper and Fraser’s approach is they assume individuals \textit{want} to be full participants in society and transform their social location or that this is a matter of \textit{choice.}\textsuperscript{80} Defining the origin of individual’s oppression as that which inhibits individuals’ ability to be full members of society is problematic as it first, masks their agency and their own systems of meaning and second, assumes it is possible to exercise choice to withdraw citizenship which may be crucial for some collectivities, such as First Nations, in order to exercise their freedom. Joan Williams suggests that “a true understanding of incommensurability requires us to accept with serenity that people of good faith often will see things differently. The key question is how we avoid letting that undermine our ability to work together.”\textsuperscript{81} Therefore, it is necessary to examine how recognition claims and transformative strategies may “empower” while being problematic and constraining.

\textsuperscript{78} \textit{Ibid} at 469, emphasis added.
\textsuperscript{79} Cooper, \textit{Supra} note 35 at 79.
\textsuperscript{80} Baum, \textit{Supra} note 56.
\textsuperscript{81} Joan Williams (2001) ‘From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition’ 76 \textit{Chicago-Kent Law Review} 1441-93 at 1447.
Donna Haraway emphasizes the importance of "vision," of questioning the power inherent in seeing and in making knowledge claims. For Haraway, this embodied vision rejects the "god-trick," that is, making claims to see everything from everywhere, which she argues, is an illusion. Haraway encourages the production of an objective knowledge, but this objectivity is based upon occupying a limited location and being committed to constantly reassessing that location through self-reflexivity and openness to different and sometimes competing ways of seeing. Joan Williams reminds us that situated knowledge requires us to locate ourselves, not just other peoples' knowledge claims. Patchen Markell suggests therefore, that perhaps the more pressing question is, "how do different political strategies and forms open or close down possibilities for citizens to acknowledge and contest the injustices that otherwise emancipatory forms of recognition also bring with them?" It is therefore important to consider how "emancipatory" projects and strategies that cause "transformations" both enable and constrain individuals and collectivities, restructuring different relations of domination and marginalization through both recognition and redistribution politics.

This thesis attempts to embody this practice of self-reflexivity by considering how Fraser's model of bivalent justice is both enabling and constraining as well as considering both the limits and the possibilities for realizing justice through the BC Treaty Commission process. Fraser's reconceptualization of recognition and redistribution as interdependent provides insights into the tensions between and within claims for justice. Her approach is also, however, problematic as she potentially overlooks some of the more subtle and nuanced tensions that emerge from trends of privatization and that ultimately inhibit the implementation of remedies that work towards the realization of bivalent justice.

83 Ibid at 191.
84 Williams, Supra note 81 at 1489.
Chapter Outline

Nancy Fraser constructs a useful theoretical framework that emphasizes the politics of recognition and redistribution’s interdependence and points of convergence, while not collapsing one into the other. While her initial formulation of the recognition/redistribution dilemma is problematic as it assumes a single tension exists between these two spheres of justice, the reformulation of her theory that takes as its primary concern individuals’ status subordination overcomes some of these limitations. Fraser’s approach accounts for the diverse remedies available both for a politics of recognition and redistribution, illustrating how, at times, these remedies can be in conflict. Further, the normative framework she advances addresses important issues of strategic choice. While Fraser’s model should not assume to conclusively define all experiences of injustice, her approach is valuable because she is concerned that, the pursuit of particular recognition claims may have important redistributive consequences. In working towards social justice, both must be taken into account.

There remains, however, an important limitation to her approach as Fraser has not considered the tensions caused by the trends of privatization advanced as part of neo-liberalism. These trends of privatization represent a significant challenge to her framework as they potentially undermine the implementation of remedies that would work towards bivalent justice. Another limitation to Fraser’s model of recognition/redistribution is the applicability of her framework for some First Nations who reject the state’s legitimacy to determine their status as citizens. The state’s exclusive jurisdictional authority to determine its own legitimacy undermines this choice to withdraw or contest citizenship.

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The insights that can be gained from applying Fraser's theory of bivalent justice to the BC Treaty Commission process will be explored in the following chapters. I consider Fraser's theory of justice specifically in relation to the provincial Liberal government's treaty mandate that precludes the negotiation of compensation for First Nations and negotiates self-government as a form of local government. Chapter two considers the usefulness of Fraser's approach and the limitations of the provincial Liberal government's mandate that does not negotiate compensation by examining how reconceptualizing recognition and redistribution as interdependent exposes the dominant discourse of dependency. I critically assess the implications of applying Fraser's theory of bivalent justice for negotiating compensation as part of the treaty process. The third chapter critiques the provincial Liberal government's negotiating mandate that recognizes self-government for First Nations as a form of local government. I explore whether negotiating self-government as a type of municipality is consistent with Fraser's theory of bivalent justice. I consider two additional challenges to the provincial Liberal government's mandate that arise from an understanding of self-government as an inherent right. Further, I analyze how the government has appropriated the progressive remedy of self-government for regressive ends through the logic of privatization. I consider the implications of this appropriation of progressive remedies for Fraser's theory of bivalent justice. Chapter four is a conclusion that discusses the main findings of this thesis.
Chapter Two

Compensating First Nations: Remedying Injustices of Exploitation and Misrecognition

Introduction

This chapter both considers the usefulness of Fraser’s theory of bivalent justice and critically assesses the provincial government’s mandate for negotiating treaties in the BC Treaty Commission process that refuses to negotiate compensation with First Nations. The provincial government, together with the federal government, are currently involved in a process to negotiate with First Nations and later implement treaties in British Columbia. Despite the federal government’s official policy that compensation should be paid to redress the wrongful acquisition of Aboriginal lands, compensation has been off the negotiating table in BC. The provincial government offers instead money transfers that simply allocate resources, but that do not recognize this as a remedy to redress historical and ongoing injustices of misrecognition and maldistribution that First Nations experience. That is, proposing compensation as a remedy would entail not only a transfer of money or resources, but also an understanding that the basis for this is an admission of a wrong and an attempt to remedy it through redistribution of, for example, money, resources and/or jurisdictional authority.

In exploring the implications of Fraser’s approach for negotiating compensation in the treaty process, this chapter is divided into two parts. In the first part I examine the existing treaty process. I consider the background within which it has emerged and locate some of the problems and tensions that exist. The second part of this chapter considers the current provincial Liberal government’s mandate in the BC Treaty Commission process that excludes compensation from being negotiated with First Nations. Drawing on Fraser’s arguments, I trace the characterization of the politics of recognition and redistribution as distinct and unrelated within the treaty process. I also use her conceptualization of recognition/redistribution as interdependent and her theory of
bivalent justice to explore whether the provincial government’s refusal to negotiate compensation works towards bivalent justice.

Part One: Compensation in the Treaty Process

1.1 The BC Treaty Commission Process

Unlike other provinces in Canada, and with the exception of a few treaties signed on Vancouver Island and the north-east of BC, no treaties were signed historically with First Nations in British Columbia. Consequently, many of the Aboriginal rights cases handed down by the Supreme Court of Canada have involved First Nations in BC. For example, the *Calder* decision, the first legal precedent set by the Supreme Court recognizing Aboriginal title in 1973, involved the Nisga’a Nation of the Nass River Valley in north-western BC. Other precedent-setting cases, such as *Delgamuukw*, *Sparrow*, *Guerin* and *Van der Peet* all involved claims for the recognition of Aboriginal rights in British Columbia.

Following the *Calder* decision, despite the Nisga’a having lost the case on a technical point of law, the federal government entered into bilateral negotiations with the Nisga’a Nation. A process of negotiation was increasingly seen as essential to avoid costly legal disputes. Both government and First Nations also saw it as necessary in order to achieve certainty with respect to land and resource development throughout the province. The BC government was, at that time, not party to these negotiations as only the federal government has constitutional authority to enter into treaties with First Nations.  

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6 Pursuant to section 91(24) of the *Constitution Act, 1867*. 

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The BC Claims Task Force was formed in 1990 to deliberate on how a wider process of negotiation might be structured between the federal and provincial government and First Nations in British Columbia. The resulting BC Treaty Commission Agreement was signed in 1992 by the federal and provincial governments, as well as the First Nations Summit of BC, representing those First Nations willing to negotiate treaties with the Crown. It was agreed that the BC Treaty Commission process would be a tripartite arrangement between the federal, provincial and First Nations’ governments. The British Columbia Treaty Commission was created as a result in 1993. As an independent body to the treaty process, its role is to facilitate negotiations, provide funding to First Nations and raise public awareness of the treaty process.

The BC Treaty Commission process has, to date, been unable to finalize any treaties. Negotiated outside the process, the Nisga’a Treaty or the “Nisga’a Final Agreement,” has been the only treaty successfully signed in British Columbia’s recent history. It was negotiated outside of the treaty process, having been initiated prior to the Treaty Commission’s inception. The Nisga’a Treaty was negotiated and finalized during the New Democratic Party’s term in office and came into effect on May 11, 2000. It represents the final settlement of Nisga’a rights and title in perpetuity under s. 35(1) of the Constitution Act, 1982.

Approximately 40% of British Columbia’s First Nations are not represented in the BC Treaty Commission process. Some First Nations have criticized the government’s refusal to negotiate compensation, but some First Nations also reject the provincial government’s involvement in negotiating treaties and insist that the federal government is the only appropriate

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7 The funding arrangement established to ensure that First Nations can participate more equitably with the Crown in negotiations is that for every $100, 80% is a loan from the federal government, 12% is a contribution from the federal government and 8% is a contribution from British Columbia.

8 Section 35(1) of the Constitution Act, 1982 states that ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.’


level of government that can enter into treaties with Aboriginal peoples as sovereign nations.\textsuperscript{11} There has been important work written on the BC Treaty Commission process by First Nation academics identifying its role in perpetuating a colonial relationship between First Nations and the Crown. They suggest the BC Treaty Commission process is simply another example of the Crown defining the conditions under which their relationship with First Nations will be “accommodated.”\textsuperscript{12}

These critiques are important, but many First Nations who reject the BC Treaty Commission process do not reject the potential for treaties to decolonize First Nations-Crown relations. It is the foundational principles that are flawed, they argue. Rather than develop a treaty process that is premised upon the \textit{interdependence} of First Nations-Crown relations that formalizes principles of mutual respect, consent and recognition,\textsuperscript{13} some First Nations argue that any political dialogue should be based on First Nations’ \textit{independence}. For example, Taiaiake Alfred argues that political space should be based upon First Nations being recognized as sovereign nations. He states that “state-sponsored processes such as the one presently underway in BC can never offer an honourable resolution so long as they refuse to demonstrate respect for the nationhood of our peoples.”\textsuperscript{14} This tension reflects the broader issue of how to deal with incommensurable claims for justice. Alfred’s insistence that the state must approach First Nations on the basis of recognizing their status as sovereign nations problematizes the approach of those First Nations who assert remedies are needed from within the state structures in order to destabilize colonial relations.

\textsuperscript{11} This is the position of the Union of BC Indian Chiefs who represent many of the First Nations boycotting the BC Treaty Commission process.
In addition to First Nations' critiques of the BC Treaty Commission process, the Liberal government argue that the NDP had caused the current stalemate in the treaty process by negotiating from a broad mandate. As part of their election platform in 2000, the provincial Liberals, led by Gordon Campbell, campaigned to get the BC Treaty Commission process “back on track.” This included a commitment to hold a referendum to create a more transparent and democratically accountable process. After being elected, the Campbell government held the referendum that asked the public to define the scope of the provincial government’s negotiating mandate. The negotiating principles underlying each of the eight referendum questions were not newly established by the Liberal party, but instead were a continuation of the NDP’s negotiation policy that had been in place since the formation of the BC Treaty Commission process.

Thus, the provincial NDP, when they were in power, had committed at the start of the process to “negotiate treaties which maintain or enhance basic social program standards, as well as comparable justice systems and taxation levels for all British Columbians.” They had also sought to ensure that these agreements would be affordable to BC taxpayers and avoid disruption to interests held in Crown land. They maintained that compensation should be paid when infringements occurred to commercial interests. Interestingly, the NDP government was, at the same time, unwilling to negotiation compensation for those Aboriginal rights that had been infringed. Private property was not to be negotiated and province-wide standards of resource management and environmental protection were to continue to apply. Access to land and resources for hunting, fishing and recreational use were to be guaranteed. Jurisdictional certainty between First Nations and municipalities was to be clear. Finally, the tax-exempt status of First

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15 Cindy Harnett ‘B.C to move on stalled treaty issues’, Victoria Times-Colonist (July 6, 2002).
17 I am grateful to Professor Paul Tennant (personal communication, 2002) for insisting on this point.
Nations was to be phased out. All these principles are reflected in the eight questions posed to British Columbians through the Liberal government’s referendum and each question was answered in the affirmative by the majority of respondents. The continuity of these principles through both the Liberal and NDP mandates demonstrate that criticism exclusively targeting the Liberal government for its unjust negotiating mandate risks overlooking the persistent imbalances of power that characterize the colonial condition in BC, regardless of the political party in power.

At the same time, however, the Liberal government has introduced a range of new policies that have had a profound effect on the social and economic structures of BC. This represents a significant philosophical shift to the Right and has distinct implications for First Nations’ politics. As I explore in the next part of this chapter, Fraser’s work on recognition and redistribution demonstrates that this shift has implications not only for the “economic” goals of First Nations, but also the politics of recognition.

The Liberal government has been committed to revitalizing the treaty process as the process has been struggling to implement treaties that articulate a commitment to a mutually acceptable relationship. Three First Nations are now in the fourth of the six-stage process, reaching an Agreement in Principle (AIP) with the provincial and federal governments. They must still advance, however, through the final two stages. That is, they must negotiate a final agreement or treaty and then implement it. The Lhedli T’enneh’s AIP has only very recently been signed and they have now entered the fifth stage of negotiating a final treaty settlement.

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19 It is important to note, however, that only 35.83% of total registered voters’ ballots in BC were counted representing 763,480 voters. After an active and well-publicised boycott by both First Nation and non-First Nations people that included burning ballots and returning them with marks of protest, over 26,700 ballots were officially excluded from the count and deemed “spoiled.” Elections BC, ‘Report of the Chief Electoral Officer on the Treaty Negotiations Referendum’, (September 9, 2002) <available at: http://www.elections.bc.ca/referendum/finalresults.pdf> [accessed September 13, 2002].

20 The five First Nations that have reached AIPs have not all formalized these agreements. The Sliammon, Maa-nulth, and Tsawwasen First Nations have reached a draft AIP. The Snuneymuxw First Nation have also concluded a draft AIP, but this is not yet publicly available and the Lhedli T’enneh First Nation AIP was formally signed on July 26, 2003.
Each step in the process must be fully completed before moving on to the next. Excluded from these agreements, as I explore later, is the issue of compensation for First Nations.

Neither the federal nor provincial government currently negotiates compensation as part of the BC Treaty Commission process, despite the BC Treaty Commission Task Force finding that this “constitutes a serious failure of the commitment on the part of Canada and BC” and several court decisions affirming that compensation is required when Aboriginal rights have been infringed. The federal and provincial government are willing, however, to include monetary settlements or “capital transfers” because they argue that these focus on future benefits and do not represent admissions of past wrongs. Both levels of government are reluctant to assume responsibility for the historical and ongoing injustices First Nations have experienced. It is feared that to do so would set a financially unsustainable precedent in negotiating treaties with the 53 First Nations currently participating in the BC Treaty Commission process. This represents both a failure of recognition and redistributive politics in British Columbia.

The context within which the BC Treaty Commission process emerged and the dynamics that have resulted between and within First Nations, federal and provincial governments have given rise to a particular process of treaty-making in BC. This process represents one model of negotiating treaties with First Nations. An array of different strategies could be advanced to transform the existing approach. Needing further analysis, therefore, are the strategies that would help to alter the existing process so that it could realize more just relations between First Nations and the Crown. Fraser’s work on recognition and redistribution and her theory of bivalent justice are useful to consider in this context.

In the next section of this chapter I apply Fraser’s theory of bivalent justice to the current provincial government’s mandate that excludes compensation from treaty negotiations. Such an analysis represents a very specific application of Fraser’s work. (In the next chapter I apply her framework to consider the provincial government’s mandate to negotiate self-government.) Her theory could be applied more broadly to consider other aspects of the BC Treaty Commission process. This could include an examination of the Liberal government’s treaty mandate to phase out the tax-exempt status of some First Nations. Her model of bivalent justice could further be employed to critique the form and structure of the process, such as the rigid linearity of the process. While these projects would offer useful insights into how to further realize justice through the treaty process, they are beyond the scope of this thesis. Rather, I explore how Fraser’s work on recognition and redistribution can be used to examine whether the provincial government’s failure to negotiate compensation promotes the type of justice Fraser proposes, thereby assessing the usefulness of her framework. I also aim to explore how Fraser’s work on recognition and redistribution can be used to examine the appropriateness of the provincial Liberal government’s refusal to negotiate compensation with First Nations.

**Part Two: Compensation and The Provincial Liberal Government’s Treaty Mandate**

**2.1 Introduction**

Fraser’s framework can be applied to the mandate of the provincial Liberal government that excludes compensation from being negotiated with First Nations to reveal the Liberal government’s problematic characterization of the relationship between the politics of recognition and redistribution. While the provincial government appears to be committed to recognising First Nations’ rights and redistributing wealth through a treaty process, the politics of recognition and
redistribution continue to be characterized as distinct and unrelated. This understanding of recognition and redistribution has undermined the capacity for the treaty process to redress these injustices. I identify two reasons for this: first, that the Liberal government has attempted to address what they perceive as the effects of these injustices and not their root causes; and second, that the Liberal government fails to recognize the forms of misrecognition and maldistribution that First Nations experience that are continued through the treaty process. These ongoing forms of misrecognition and exploitation are masked by the dominant discourse of dependency that characterizes First Nations as reliant upon the Crown and these discourses also justify the exclusion of compensation from the treaty process. I employ Fraser’s model of status subordination to contest the validity of this dominant discourse of dependency. Finally, I consider whether compensation as a remedy that redresses both the injustices of misrecognition and maldistribution, promotes Fraser’s model of bivalent justice.

2.2 Separating Recognition and Redistribution through the Treaty Process

By entering into the treaty process, the Liberal government is committed to redressing those cultural injustices that resulted in the misrecognition of First Nations. The provincial government has also been willing to redistribute resources so that First Nations can participate more fully in the liberal capitalist economy. That is, the government acknowledges that remedies that address injustices arising from both recognition and redistribution are necessary. As I explore later in this section, they will not, however, critically examine the ways in which these are interrelated and mutually imbricated. Using Fraser’s work on recognition and redistribution, it is clear that the provincial government must not only recognize that both recognition and redistributive remedies are necessary, but that because these remedies are interrelated, that an understanding of the ways in which these intersect will also be necessary to promote justice. An
approach that only deals with each injustice independently results in the perpetuation of experiences of misrecognition and maldistribution.

The current treaty process attempts to redress injustices of misrecognition and maldistribution by reallocating resources to First Nations and recognizing Aboriginal rights. For example, the provincial government recognises First Nations’ rights to hunt on Aboriginal lands for domestic purposes. They also are committed through the treaty process to recognising Aboriginal title. It is possible to locate Fraser’s initial formulation of the recognition/redistribution dilemma within the BC Treaty Commission process. The Liberal government pursues policies that affirm First Nations as a category by positively revaluing their identities through the recognition of their rights while also attempting to abolish the differentiation between First Nations and non-First Nations as “unsuccessful” and “successful” market actors by redressing First Nations economic marginalization. Characterizing the recognition of Aboriginal rights as reifying First Nations’ identity and redistributive policies as dedifferentiating between First Nations and non-First Nations, the remedies associated with each would therefore appear to be in conflict.

Fraser’s characterization of the politics of recognition and redistribution as interdependent demonstrates, however, that it is not enough to simply address cultural injustices of misrecognition independently, nor is it enough to redistribute wealth by reallocating resources to marginalized groups. As noted earlier, however, it will also be necessary to examine how these remedies intersect. The construction of the recognition/redistribution dilemma and Fraser’s own critique of the dilemma, exemplify how characterizing these as separate and unrelated fails to examine their points of convergence. For example, the provincial government has, through the treaty process, been concerned to “materially improve [First Nations’] quality of life.”24 The government does not examine why these remedies are necessary or how economic injustice
relates to a politics of recognition. Rather than examine the underlying patterns of recognition that have given rise to economic inequities, the remedies advanced by the Liberal government are instead committed to redressing maldistribution by enhancing First Nations' market activity. The government has concentrated on policies that allocate funds to viable business ventures, building employment partnerships between First Nations and the business sector and enhancing First Nations' involvement in resource management in the province. All these would strengthen First Nations' participation in the economy and these remedies are all necessary and desirable.

Applying Fraser’s construction of the affirmative/transformative binary, these policies represent both an affirmative liberal multiculturalist and liberal welfare state as they merely reify First Nations' identities by attempting to accommodate them within existing structures of recognition. This approach is also affirmative as it reinforces the liberal capitalist system of distribution and does not interrogate how injustices may in fact be perpetuated. As Fraser notes, both are problematic as they only address the effects of misrecognition and maldistribution and do not examine the underlying relations of recognition and production that structure the injustices First Nations experience. Furthermore, because the government is concerned to redress the effects of injustice, and not the underlying imbalances of power, the government does not account for how these injustices continue to inform relations of recognition and production. These relations of power that structure inequalities are seen to be unrelated to the injustices presently experienced by First Nations. The provincial government thereby rejects assertions that it is responsible for historical injustices by assuming that these injustices no longer inform current relations. The Liberal government's policies also do not account for the ongoing

24 BC Liberal Party, Supra note 16.
privileges and benefits non-First Nations in British Columbia enjoy as result of the historical and continuing exploitation of First Nations. This exploitation occurs through the ongoing accumulation of wealth derived from the wrongful acquisition of First Nations’ lands.

In demonstrating how the Crown continues to derive benefit from the exploitation of First Nations, some indigenous commentators have noted that the province of BC represents “the largest remaining mass of unceded sovereign Indigenous territory in North America.” In British Columbia, 95% of land is designated provincial Crown land. Crown land generates vast revenue for the province through the natural resource sector, which includes the primary forest industry, mining, hydro, oil and gas, and fishing and trapping, as well as raw resources processing. George Pedersson notes that not only are provincial employment rates dependent on the natural resource sector, but also “dependence on natural resources extends to the provincial revenue base.” Pedersson observes that “2001/2002 estimates show that direct revenues from [natural] resources [in BC] represent the largest single item after personal income taxes; 3.3 times that of corporate profit taxes, and 1.5 times that of federal transfers. When one includes personal income tax revenue provided by resource employment, it is safe to say that it is the largest single contributor to provincial government revenues.”

These economic benefits are seen to derive from the natural rights of the province to Crown lands rather than being dependent upon the illegitimate acquisition of First Nations’ lands. The treaty process was established precisely to recognize this injustice. Both federal and provincial governments recognize that these lands were wrongfully acquired by virtue of entering into the treaty process. It is difficult to deny that they continue to rely on money

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31 Ibid.
generated from these lands. They are willing, however, only to negotiate treaties that return lands to First Nations to the extent that these agreements do not threaten the provincial economy. That is, the government is unwilling to transform the relations of production that rely upon the exploitation of First Nations because they continue to derive economic stability and wealth from these exploitative relations.

In the treaty process, the Liberal government has recently negotiated an AIP with the Lheidli T'enneh First Nation. This Nation will have jurisdictional authority for resources over their lands for domestic purposes.\(^{32}\) The provincial government will not, however, recognize how those lands designated “Crown” land, as well as those traditional lands not included as part of the Lheidli T'enneh’s territory within the agreement, continue to be relied upon by the provincial government for their own economic benefit. The provincial government continues to use those resources that continue to be a part of “Crown” lands in order to generate profit and wealth for the provincial economy. The provincial negotiating team cannot discuss the issue of compensation with the Lheidli T’enneh for these lands not included as part of the Agreement. Instead, they will receive money transfers totalling $12.8 million and 3,360 hectares of provincial and federal Crown land.\(^{33}\)

Claims that current generations are not accountable or responsible for “past” wrongs are relied on internationally to distance colonizers from the exploitation of colonized peoples. Franz Fanon, writing on the “postcolonial” condition of Africa after liberation from European control, speaks powerfully to the need to recognize the ongoing privilege derived by the colonizers. He states:

Europe is literally the creation of the Third World. The wealth which smothers her is that which was stolen from the underdeveloped peoples. The ports of Holland, the docks of Bordeaux and Liverpool were specialized in the Negro slave trade, and owe their renown to millions of deported slaves. So when we hear the head of a European state

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\(^{33}\) Ibid.
declare with his hand on his heart that he must come to the aid of the poor underdeveloped peoples, we do not tremble with gratitude. Quite the contrary; we say to ourselves: “It’s a just reparation which will be paid to us.” Nor will we acquiesce in the help for underdeveloped countries being a program of “sisters of charity.” This help should be the ratification of a double realization: the realization by the colonized peoples that it is their due, and the realization by the capitalist powers that in fact they must pay.\footnote{Franz Fanon (1963) \textit{The Wretched of the Earth}. New York: Grove Press at 102-103.}

The provincial government has not only benefited from the wrongful acquisition of First Nations’ land, but it perpetuates injustices of misrecognition and maldistribution as it does not recognize that these exploitative relations structure current relations between the Crown and First Nations.

It is necessary, according to Fraser, for all sides to consider their role in the continuing power relations which structure society.\footnote{Nancy Fraser (1998) ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation’ p. 3-67 in \textit{The Tanner Lectures on Human Values}. Salt Lake City: University of Utah Press at 27.} In advancing bivalent justice this must entail not just attempting to “empower” those who are marginalized, but also fundamentally contesting those who occupy positions of privilege. Consequently, in failing to negotiate compensation with First Nations, the capacity of the treaty process to fundamentally restructure these relations of recognition and production by contesting the very basis of group differentiation is constrained. That is, the Liberal government’s refusal to negotiate compensation reflects a liberal multiculturalist agenda of inclusiveness that ignores the vital process of challenging colonizers’ privilege.

\subsection{2.3 Locating the Dominant Discourse of Dependency}

The ongoing misrecognition and maldistribution of First Nations through the treaty process is masked by the dominant discourse of dependency. This discourse characterizes First Nations as dependent, to evoke the wording of the ruling of the Supreme Court of British Columbia in the \textit{Delgamuukw} case, upon “the pleasure of the Crown.”\footnote{\textit{Delgamuukw v. BC} [1991], 3 W.W.R. 97.} This does not account
for the extent to which the "Crown" (that is, the sovereign entity of the nation-state) is dependent upon First Nations and more importantly, upon the exploitation of First Nations. That is, these discourses of dependency are not one-directional, but multidirectional. They are not a form of dependency that then flows only from the Crown to First Nations, but reflect the different forms of dependency flowing from the Crown to First Nations and from First Nations to the Crown. Discourses of dependency also exist within these groups, which is why multidirectional as a concept is perhaps more appropriate than characterizing it as interdependence.

Nancy Fraser and Linda Gordon conduct a genealogy of dependency in Western liberal democracies excavating the concept of dependency within shifting historical and economic contexts. Fraser and Gordon argue that such an inquiry exposes the presuppositions, upon which the discourse is founded, "especially assumptions about human nature, gender roles, the causes of poverty, the nature of citizenship, the sources of entitlement, and what counts as work and as a contribution to society." Fraser and Gordon observe that during the early history of colonization "the colonial native personified political subjection." Dependency was seen as a character trait, First Nations were seen to be lacking the reason and rationality needed to be self-governing individuals. In order to facilitate "Indian" development in gaining these attributes common among "men," the colonizers attempted to assimilate First Nations to Western religion, culture, economic and political practices. This attempt at assimilation did not, however, confer acceptance into European society. Those First Nations who mastered European culture were still demarcated as "other." Although at this time, universal human rights were being instituted as fundamental rights of all individuals, overt forms of racism rendered First Nations incomplete subjects and therefore in need of guardianship as opposed to citizenship. Ironically, First Nations

38 Ibid at 123.
39 Ibid.
were initially seen to be dependent because they were colonized and thus required paternal
governance structures like the *Indian Act*, but were later justified as colonized subjects because
they were dependent. They their incapacity to be full citizens determined their position as
subordinated members of society.

First Nations were further characterized as dependents through their exclusion from wage
labour and their failure to develop their lands for agricultural purposes. They were the
antithesis of the struggling colonizer, toiling the land and working to produce a new nation. The
importation of Lockean liberal ideology in the colony invested individuals with rights by virtue
of their capacity to work, to earn a wage and potentially to better their condition in life. First
Nations’ perceived inability to adopt similar ethics resulted in their characterization as lazy and
as lacking skill and initiative. First Nations were held to be responsible for their own condition in
the colony, their inability to adopt and promote European values validated their relative position
of poverty and justified the Crown acquiring “unused” lands. In this relation of dependency,
First Nations were seen as reliant upon the “pleasure of the Crown” for their survival.

This characterization of First Nations as “dependents” is perpetuated in a different, but
perhaps a more insidious form through the BC Treaty Commission process. Neither the
provincial Liberal government nor the wider British Columbian public explicitly condemn First
Nations for their perceived dependency. There is more awareness of the historical injustices that
have resulted in imbalances of power and an understanding of why “financial assistance” is
necessary. There is not, however, sufficient recognition of how the provincial government is
reliant upon the exploitation of First Nations. Rather than account for this exploitation, First
Nations are instead represented as reliant upon the goodwill of the government and the charitable

\[40\] *Ibid* at 128.
\[41\] *Ibid*.
assistance of the taxpayers of British Columbia and Canada. The ongoing benefits accrued through the provincial control of “Crown” land are not accounted for.

Martha Fineman has provided an important reading of discourses of dependency, analyzing how discursive practices mask “the dependency of society and all its public institutions on the uncompensated and unrecognized dependency work assigned to caretakers within the private family.”\(^{44}\) Her analysis reveals the need for asserting collective responsibility for the benefits of care-taking labour that is typically assumed by women and that has been hidden within the family. While her approach is useful, her conceptualization of dependency is at times problematic.

Fineman notes that “the family is delegated primary responsibility for dependency.”\(^{45}\) By locating the family as the primary site of dependency, Fineman risks further masking other discourses of dependency. She ignores the structures of colonialism upon which North American states are founded. There are other, perhaps even more fundamental and primary sites of dependency, for example, between the state and indigenous peoples through the wrongful acquisition of their lands and the persistent refusal to assume responsibility for this exploitation.

Another limitation is the distinction Fineman constructs between “inevitable” dependency, which she argues is based on biological and universal need and “non-inevitable” dependency, which are experiences that are not universal but that could be biological such as emotional, psychological as well as forms of economic dependency. Through the construction of this binary, Fineman concludes that “caretaking debt is a collective one [as it] is based on the fact that biological dependency is inherent to the human condition, and therefore, of necessity of collective or societal concern.”\(^{46}\) This dualism between “inevitable” and “non-inevitable” risks, however, naturalizing colonial privilege. The state’s dependency upon the exploitation of First


\(^{45}\) Ibid at 15.
Nations’ lands is not addressed within her approach as it is not a universally experienced form of dependency nor is it part of the human condition. As with Fineman’s analysis of caretaking labour, it is instead the social context within which these discourses take place that need to be contested. Projects of decolonization are premised upon identifying and destabilizing the discourses of colonialism that are perpetuated through the construction of First Nations as dependents.

First Nations, at the same time, use these discourses of dependency in order to contest the imbalances of power that they experience. For example, the fiduciary duty owed to them by the Crown causes First Nations to be reliant upon them to uphold this duty.47 This discourse can be useful to First Nations asserting the duty of the Crown to consult them in matters that affect their interests. Another example of how First Nations strategically use these discourses of dependency is by pursuing their interests through the capitalist market economy. First Nations’ increased reliance upon market norms as market actors while potentially problematic, can also create opportunity for First Nations to develop their resources and economies. Market activity provides further tools that First Nations can draw upon to assert their independence and autonomy from the Canadian nation-state. These discourses of dependency can therefore be strategically useful for First Nations. Discourses of dependency are problematic, however, when they are exploitative and it is these exploitative relations that the government does not recognize when they reject the importance of negotiating compensation with First Nations. In challenging the dominant discourse of dependency it is important to demonstrate how the Crown can be seen to be, not only reliant upon First Nations, but also on their economic exploitation.

46 Ibid at 18, emphasis added.
2.4 Applying Fraser’s Theory of Bivalent Justice to Compensation

Fraser’s approach demonstrates that such practices of unrecognized economic exploitation fundamentally undermines First Nations’ ability to participate fully in social, political and economic life and thereby undermine any attempt to realize bivalent justice. Her model of status subordination is useful as it demonstrates that compensation must be paid in order to ensure that these exploitative relations are contested and destabilized and in order to realize this form of justice.

Fraser’s normative condition of participation parity that she argues underlies her model of status subordination has two preconditions. First, she sets out an intersubjective precondition of mutual respect and second, an objective precondition that requires fair distribution of resources so that individuals can interact freely. The objective precondition has, in turn, three material prerequisites. First, that individuals not be subjected to experiences of extreme deprivation and exploitation; second, that there should not be vast institutionalized inequalities in wealth and finally, that there not be vast institutionalized inequalities in leisure time. All these work simultaneously to ensure that individuals have the “equal right to pursue social esteem under fair conditions of equal opportunity.”

The first material prerequisite of her objective precondition clearly establishes that all relations of exploitation undermine a participatory norm. The ongoing exploitation of First Nations’ lands and the refusal of the Liberal government to admit to this relationship of exploitation would thereby prohibit the realization of Fraser’s model of bivalent justice. Further, the second material prerequisite outlined is that inequalities in wealth should not be institutionalized. The treaty process would fail this second prerequisite as it risks institutionalizing inequalities if compensation is not negotiated. The economic privileges that the Crown currently enjoys would be institutionally sanctioned through formalized treaties protected
by the highest laws of the state, the Constitution. These treaties would institutionally entrench a
system of exploitation and gross inequality and would fundamentally undermine the realization
of bivalent justice.

Applying Fraser’s approach further, her model of bivalent justice requires a consideration
of how compensation, as a potential remedy that could be adopted through the treaty process, is
both constraining and enabling for First Nations. It is enabling as it involves the recognition by
the state that it is implicated in relations of colonization and that it must assume responsibility for
the resulting future relations of exploitation. It is constraining, however, for those First Nations
who are not participating in the treaty process. If compensation is only negotiated within the
existing treaty process, no alternate processes are available to those First Nations who reject the
legitimacy of the state to determine their inherent rights through the current treaty process.
Introducing compensation exclusively within the treaty process as the remedy that
comprehensively addresses both injustices of recognition and redistribution risks entrenching the
legitimacy of the state as the site that “transforms” First Nation-Crown relations. It overlooks
sites outside these institutions, such as within and between First Nations themselves, that contest
hegemonic colonial structures. For example, it ignores those First Nations boycotting the treaty
process and overlooks the significance of this resistance.

In determining whether compensation through the BC Treaty Commission process would
be an appropriate remedy to realize justice, Fraser’s work suggests that two “trade-off scenarios”
should be avoided. 49 First, those remedies that impose unreasonable material costs on the
claimants must be avoided and second, remedies that address one form of injustice, but that
worsen other injustices. 50 Rather, she suggests an appropriate remedy should aim to redress
multiple forms of misrecognition and maldistribution simultaneously.

48 Fraser, Supra note 35 at 27.
49 Ibid at 52.
50 Ibid.
As a remedy that should be available through the treaty process, compensation would address both misrecognition and maldistribution and would not worsen the economic status of First Nations in BC. It would instead, contribute to enhancing First Nations’ economies while addressing the experiences of poverty and economic marginalization. While compensation would redress some injustices of recognition by holding the provincial government accountable for its part in perpetuating exploitative relations, compensation could also further reinforce the legitimacy of the state. For those First Nations that are actively contesting the state’s assumed sovereignty by boycotting the BC Treaty Commission process, compensation as a remedy available exclusively through the BC Treaty Commission process is problematic. Rather, other strategies or sites must also offer to compensate those First Nations not involved in the current BC Treaty Commission process.

First Nations are involved in different decolonizing processes that attempt to restructure different relationships with the state. Following from Fraser’s model of bivalent justice, it is important to be aware of how compensating First Nations through the BC Treaty Commission process may benefit some First Nations, but also be problematic for others. It would appear that the vital determinant to realize bivalent justice is to ensure that various strategies are pursued simultaneously so that the many First Nations in British Columbia can structure the form of relationship each decides is appropriate. Excluding compensation from the provincial government’s treaty mandate constrains this choice and limits the possibility for bivalent justice to therefore be realized through the existing treaty process.

**Conclusion**

Fraser’s reconceptualization of the politics of recognition and redistribution as interdependent and her theory of bivalent justice expose an important limitation to the provincial government’s negotiating mandate through the BC Treaty Commission process. That is, by
excluding compensation from being negotiated through this process the experiences of 

misrecognition and maldistribution are thereby perpetuated. Fraser's work exploring the 
interconnectedness of recognition and redistributive justice assists in locating the ways in which 
the current government, by characterizing these as distinct and unrelated, fails to account for how 
they are mutually reinforcing. Further, Fraser's approach can be used to demonstrate that by 
characterizing recognition and redistribution as distinct, the provincial government justifies its 
refusal to negotiate compensation insisting instead that these injustices do not structure existing 
relations between First Nations and the Crown. The dominant discourse of dependency is 
employed by the provincial government to further dissociate itself from these historical 
injustices. This characterizes First Nations as reliant upon the Crown and does not recognize that 
the Crown is dependent upon the misrecognition and exploitation of First Nations. Fraser's 
theory of bivalent justice demonstrates that if justice is to be achieved through the treaty process, 
these relations of misrecognition and exploitation must be addressed not only by advancing the 
politics of recognition and redistribution, but by examining how these interrelate. Compensating 
First Nations is an important remedy that should be negotiated through the BC Treaty 
Commission process as it responds to the interplay between injustices of both misrecognition and 
exploitation that First Nations experience. Therefore, the provincial Liberal government's failure 
to negotiate compensation severely undermines its commitment to negotiate more just relations 
with First Nations in BC.
Chapter Three

Negotiating Local Government

Introduction

In applying Fraser's model of bivalent justice to the treaty process in the previous chapter, it is evident that her approach can be used to demonstrate why the provincial Liberal government's refusal to negotiate compensation is inadequate. Instead, in order to work towards the type of justice Fraser envisages, it will be necessary to negotiate compensation in the treaty process to redress injustices of misrecognition and maldistribution. Her work can also be employed to contest the appropriateness of the provincial Liberal government's mandate to negotiate self-government as a form of local government, and it is this project that will be undertaken in this chapter.

In addition to using Fraser's framework to analyze the provincial Liberal government's mandate, this chapter also identifies two other approaches that challenge it: first, an understanding of self-government as an inherent right; and second, an analysis of how the provincial government has appropriated self-government to denote a form of local government through trends of privatization. That is, the provincial government has limited the meaning of self-government, a constitutionally guaranteed Aboriginal right, within the treaty process and further, represents this limited understanding of self-government as both progressive and desirable for First Nations.

In working towards certainty over land claims with First Nations through the treaty process, the current provincial government sets self-government as an objective for First Nations while simultaneously pursuing policies of privatization. Self-government is promoted, therefore, as a means to achieve economic self-sufficiency for First Nations and as a form of local government, not as a strategy for realizing First Nations' inherent rights to be self-governing.
Trends of privatization that are invoked by the provincial government justify and legitimate this limited form of self-government being negotiated.

To explore these issues this chapter is divided into three parts. First, I introduce the concept of self-government and briefly situate the provincial Liberal government’s treaty mandate within the broader legal/political landscape. The second part critically considers the problems associated with negotiating self-government as a form of local government. There are three sections to this part. First, I employ Fraser’s framework to consider whether the government’s mandate is regressive by examining whether negotiating self-government as a type of local government realizes bivalent justice. I question whether negotiating self-government as an inherent right that is not delegated by both federal and provincial government, but exists within the framework of the Constitution, would be consistent with her theory of justice. The second section identifies another challenge to the government’s mandate. This challenge stems from First Nations’ different claims for self-government by exploring the different understandings of it as an “inherent” right. Finally, I identify a third fundamental challenge to the government’s mandate. I examine how the progressive objective of realizing self-government for First Nations as an inherent right is appropriated by the provincial Liberal government and diluted so that it is negotiated as a form of local government. That is, I explore the strategies and tactics associated with trends of privatization employed by the provincial government that justify and legitimate self-government being negotiated as “municipal-like” in nature. Within this third part I identify five discursive practices employed by the provincial Liberal government that are part of the broader logic of privatization: the discourse of self-sufficiency, reregulation/reprivatization, indigenization, and the discourse of risk management. Finally, I consider the implications of these trends of privatization for Fraser’s theory of bivalent justice.

The overarching objective of this chapter is first, to critically consider the provincial Liberal government’s mandate that negotiates self-government as a form of local government. Second, I
aim to critically engage with Fraser’s model of bivalent justice and to determine whether these trends of privatization problematize the realization of bivalent justice.

**Part One: Self-Government in the Treaty Process**

1.1 Negotiating Self-Government

As a potentially rich and complex source of First Nations’ rights, the fundamental and inherent right to self-government has been severely limited as it is currently negotiated in the BC Treaty Commission process. The provincial government will only recognize a form of self-government that is “municipal-like” in character.\(^1\) It is still unclear exactly what components of local government would make self-government for First Nations “municipal-like,” but one principle implemented through the treaty process is that self-government for First Nations is to be delegated from both the federal and provincial governments. An implication of this is that First Nations will have limited legislative power because most of those law-making powers recognized will be already subject to both provincial and federal laws. There are, however, broader social, political and economic implications for this model of self-government and I consider these later in the second part of this chapter.

In contrast to the provincial Liberal government’s mandate, the federal government has recognized that the right to self-government extends beyond a form of local government. The federal government, in 1995, recognized that it was an *inherent* right of Aboriginal peoples that was constitutionally guaranteed under section 35.\(^2\) The federal government argues that while they do not recognize First Nations as sovereign nations, they have:

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The right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.\(^3\)

The federal government has not mandated that this right be delegated from both the federal and provincial government, but states that it already exists within the framework of the Canadian Constitution.\(^4\)

Court decisions have also recognized that the right to self-government is constitutionally guaranteed and that it can be negotiated in the BC Treaty Commission process.\(^5\) Despite these precedents, however, the recent referendum initiated by the provincial Liberal government on the treaty process supported a mandate that limits self-government for First Nations, stating that “aboriginal governments should have the characteristics of local government, with powers delegated from Canada and BC.”\(^6\)

Despite negotiating from a limited mandate, five Agreements in Principle (AIPs) have to date been negotiated through the BC Treaty Commission. Most contain provisions relating to self-government. These Agreements provide for the formalization of a Constitution that requires that these governments be democratic in their composition, membership and duties,\(^7\) accountable to their citizens through regular elections,\(^8\) and financially accountable “comparable to standards generally accepted for governments in Canada.”\(^9\) These AIPs also recognize the law-making authority of First Nations government, which includes jurisdiction over education,\(^10\) child and family services,\(^11\) and citizenship\(^12\) subject to both provincial and federal laws.\(^13\) The Maa-nuth

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\(^3\) Ibid.
\(^4\) Ibid.
\(^6\) Letter from Geoff Plant, Supra note 1.
\(^8\) SAIP c.12 s.9(b), MAIP c.12 s.14(b), TAIP c.13 s.5(b), LAIP s.15(b).
\(^9\) SAIP c.12 s.9(c), MAIP c.12 s.14(d), TAIP c.13 s.5(c), LAIP s.15(c).
\(^10\) SAIP c.12 s.23(a), MAIP c.12 s.20(a), TAIP c.13 s.12(cc), LAIP s.19(a).
\(^11\) SAIP c.12 s.23(b), MAIP c.12 s.20(b), TAIP c.13 s.12(i), LAIPs.19(b).
and the Sliammon AIPs both allow for the negotiation of a “Self-Governance Agreement” and “Governance Agreement,” respectively, that may recognize First Nations’ jurisdiction over issues such as social services, income support and health services. These law-making powers will also, however, be subject to both provincial and federal laws.

Part Two: Identifying Problems with the Government’s Negotiating Mandate

2.1 Realizing Bivalent Justice: Negotiating Self-Government

Fraser’s theory of bivalent justice can be applied to consider whether negotiating self-government as a form of local government, as opposed to recognizing it as an inherent right, is a regressive remedy. Fraser proposes that if justice is to be realized, both injustices of recognition and distribution must be simultaneously addressed “without reducing either one of them to the other.” Her “normative core” of participation parity and her model of status subordination provide useful conceptual tools to consider whether the remedy of negotiating self-government as a form of local government is sufficient to realize bivalent justice.

Fraser sets out an intersubjective condition for the norm of participation parity requiring that “institutionalized cultural practices of interpretation and evaluation must express equal respect for all participants and ensure equal opportunity for achieving social esteem.” Negotiating self-government as a form of local government does not satisfy this intersubjective condition. First Nations do not receive equal respect or equal opportunity to realize social esteem in Canadian society. The ongoing legacy of colonialism has rendered their structures of

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12 SAIP c.12 s.23(i), MAIP c.12 s.14(h), LAIPs.18(c).
13 SAIP c.12 s.22, MIP c.12 s.28, LAIP s.22.
14 SAIP c.12 s.2, MIP c.12 s.2
15 Ibid. c.12 s.31(e)
16 Ibid. c.12 s.31(f)
17 Ibid. c.12 s.31(g)
18 Ibid. c.12 .32.
20 Ibid at 54, emphasis added.
governance subordinate to the state. Recognizing self-government as a form of local government not only continues to subordinate these to the federal government, but also to the provincial government. Fraser’s model of status subordination is useful to demonstrate that negotiating local government for First Nations would not therefore realize bivalent justice as it does not redress these inequalities, but rather perpetuates them.

It has been argued that First Nations’ own structures of governance have been so fundamentally destroyed by colonialism that this justifies the state’s intervention to define appropriate structures of governance.\(^1\) This has implications for both recognition and redistributive justice as it affects the type of representation that will be recognized and the resources that are allocated. Anishinabe legal scholar John Borrows’ recent book, *Recovering Canada: The Resurgence of Indigenous Law*, challenges the assumption that First Nations’ political and legal systems have been completely undermined by processes of colonization. His insightful analysis demonstrates not only that indigenous legal systems continue to inform First Nations’ lives, but also that Canadian law, is itself dependent upon the existence of these indigenous systems of law. He examines the ways in which Canadian law is reliant upon, and partly originates from, Aboriginal law. For example, through the legal characterization of Aboriginal rights as “sui generis,” “pre-existing,” “un-existingushed,” and “customary,” the common law cannot be the exclusive source that defines these rights, but that Canadian law in its dealings with Aboriginal peoples, draws upon Aboriginal law to give meaning to Aboriginal rights.\(^2\) Recognizing self-government as a form of local government does not create space for these indigenous legal and political systems. Rather than ensuring First Nations’ “voice” as full

\(^1\) Dara Culhane notes that the Crown in the trial hearing of the Delgamuukw decision made these arguments. She notes further, that arguments that First Nations had voluntarily “acquiesced” to colonial rule further justified the state’s justification of the refusal to recognize First Nations’ structures of governance. Dara Culhane (1998) *The Pleasure of the Crown: Anthropology, Law and First Nations*. Vancouver: Talonbooks at 216.

and equal members of social and political life, these legal and political systems continue to be marginalized.

Therefore, to be consistent with Fraser’s theory of bivalent justice, it would be necessary to negotiate the right to self-government as an inherent right that is not delegated from the federal and provincial governments. Recognizing the right to self-government as broader than a form of local government would facilitate First Nations’ full and equal participation by redressing the ongoing misrecognition that First Nations do not have their own fully developed and operational governance structures and systems of law. Further, negotiating this right on the basis that it is not delegated, but that it can exist within the framework of the Constitution, ensures that there is participation parity. First Nations may be seen as social and political partners in Canadian Constitutionalism and not subordinated members.

Fraser’s approach can be further employed to contest the Liberal government’s claims that, in fact, recognizing self-government as a form of local government enables First Nations’ participation in social and political life as it creates opportunity for greater involvement than was previously available. Fraser’s work can be used to reject these assertions as she maintains that for bivalent justice to be realized, the injustices experienced and the remedies proposed must be historicized. She asserts that “the pragmatic approach proposed here...situates claims for the recognition of difference squarely in the context of social power.” First Nations’ current experiences of injustice are not exclusively a result of historical inequality, but these have arisen from the ongoing history of colonialism. Recognizing First Nations’ right to self-government as a form of local government would increase First Nations’ jurisdiction to legislate over some matters not currently available under the existing Indian Act and to institute new structures of

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24 Fraser, Supra note 19 at 32-33 and Nancy Fraser (1997b) 'Heterosexism, Misrecognition, and Capitalism', Social Text 52/53 15 (3 and 4): 279-89 (Fall/Winter) at 287.
25 Fraser, Supra note 19 at 34-35.
governance other than the band system created through the same piece of legislation. It would, however, appear also to institute new injustices that are potentially more problematic for First Nations. For example, as a comprehensive land claims process, First Nations are forced to surrender the broader meaning of their rights to self-government in exchange for those self-governing rights created through the treaty process.

2.2 Self-Government as an Inherent Right

Fraser's model of bivalent justice demonstrates that negotiating self-government as a form of local government is inadequate. In negotiating self-government through the treaty process, that right must be understood as a broader right than simply delegated from both the provincial and federal governments. There are, however, tensions within claims for recognizing self-government as an inherent right. That is, while the federal government recognizes self-government as an inherent right, they do not characterize it as a right that invests First Nations with the legitimacy to be sovereign nations. The federal government argues that First Nations' governments must still operate within the Canadian Constitution. Some First Nations reject this assertion, arguing instead that their inherent right originates from outside of the existing Canadian state and so, this right necessitates that the government negotiates with them on the basis of their independence. This complicates the advancement of any model of self-government through the treaty process as it is currently structured. The existing process was created through statute and does not recognize the independence and autonomy of First Nations.

Taiaiake Alfred notes that to claim "sovereignty" for First Nations may be inappropriate as well, however, as it "implies a set of values and objectives in direct opposition to those found in traditional indigenous philosophies." He notes that the concept

27 *Ibid* at 57.
of “statehood” is problematic for First Nations’ structures of law and governance as it relies on a notion of absolute authority, legitimate coercive powers, hierarchy and the separation of powers.  

Alfred suggests that the concept of “sovereignty” needs to be reconceptualized so that it is more consistent with indigenous values. He suggests that the principles of Two-Row Wampum (or the Kanien’kehaka principle Kaswentha) will be central to developing an indigenous understanding of sovereignty. He traces the meanings of Kaswentha noting that:

The metaphor of this relationship – two vessels, each possessing its own integrity, travelling the river of time together – was conveyed visually on a wampum belt of two parallel purple lines (representing power) on a background of white beads (representing peace). In this respectful (co-equal) friendship and alliance, any interference with the other partner’s autonomy, freedom, or powers was expressly forbidden. So long as these principles were respected, the relationship would be peaceful, harmonious, and just.

This understanding of sovereignty poses important problems for the model of self-government currently negotiated by the provincial Liberal government. Rather than recognizing it as delegated from federal and provincial governments, this reconceptualization of self-government that is founded on indigenous values would require a model that respects the integrity and autonomy of First Nations while seeming not to necessitate that First Nations secede from the Canadian state. These principles would not preclude agreements that articulate mutual commitments to matters that affect both First Nations and the Canadian government (which should be the aim of a treaty process), but such dialogue would be based on the Canadian government and First Nations being equal and autonomous partners.

If this reconceptualization were to become the basis of a treaty process, the existing structure of the treaty process would need to be changed because it is inappropriate to allow the provincial government to be involved in dialogue on matters that affect First Nations and the Canadian government as equal partners. This approach would appear to contest the very framework of the BC Treaty Commission process as a tripartite negotiation process. This

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28 Ibid at 56.
29 Ibid at 52.
exemplifies the problems that emerge from irreconcilable claims for recognition. Those First Nations who reject the legitimacy of dominant state structures, are unable to draw on these to contest their marginalized status; this position is incommensurable with those First Nations who employ these state structures as tools to decolonize Crown-First Nations relations. Following Joan Williams’ suggestion discussed earlier in this thesis, the critical aspect will be to ensure that these various strategies do not undermine the capacity for these different approaches to work together to challenge the hegemonic structures of colonialism.

2.3 Appropriating “Oppositional Discourses”

A third challenge to the provincial government’s mandate that negotiates self-government as a form of local government arises from an analysis of the discursive trends of privatization that legitimate the “appropriation of oppositional discourses.” As part of a neo-liberal agenda pursued by the provincial Liberal government, the government appropriates the objective of self-government for First Nations for regressive ends through these trends. That is, trends of privatization justify the limited understanding of self-government being advanced through the treaty process – not as an inherent right founded upon First Nations’ autonomy and the continuation of their structures of governance, but as “municipal-like” in nature.

The emergence of neo-liberalism in Canada is typically understood as attempting to “restore the economic and political liberty of the individual through the promotion of the free market and the radical reduction of the state.” Judy Fudge and Brenda Cossman argue, however, that neo-liberalism represents not the assumed supremacy of the private sphere and the

30 Joan Williams (2001) ‘From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition’ 76 Chicago-Kent Law Review 1441-93 at 1447.
withdrawal of the state, but rather new logics and strategies of intervention and governance.\textsuperscript{33} As part of restructuring these systems of governance and regulation, the logic of privatization promises to advance both progressive and desirable outcomes. Marlee Kline observes that:

Privatization has most often been associated with neo-liberal concerns to reduce the size of government, decrease government spending, and dismantle the welfare state. But such policies have also been promoted to serve more progressive goals to undermine the overly bureaucratic, centralized, universalised, and often fragmented nature of service delivery, in favour of grassroots control over and design of more wholistic and integrated services appropriate to the diversity of local needs.\textsuperscript{34}

It is by appropriating particular ideological tools such as self-government and filtering these through the language of privatization that self-government becomes a form of local government.

While trends of privatization are not new, there is, however, something distinctive about recent trends of privatization.\textsuperscript{35} In First Nations politics, the discursive practices surrounding privatization have only recently attempted to assimilate First Nations within the market economy, while simultaneously shifting responsibility onto First Nations as distinct peoples for their own financial well-being as “self-sufficient” and “self-governing” peoples. A critical engagement with these trends of privatization aims to dismantle the strategies through which this understanding of First Nations as self-governing, self-sufficient market actors undermines a broader understanding of the concept of self-government. It is this project of identifying the logic of privatization that I advance in the following part of this chapter.

There are various discursive trends occurring simultaneously within First Nations’ politics. Fudge and Cossman identify more broadly numerous trends of privatization, such as: individualization, decentralization, familialization, commodification, delegation, and depoliticization.\textsuperscript{36} While these all in some way inform First Nations’ politics, it is beyond the

\textsuperscript{34} Kline, Supra note 31 at 331-332.
\textsuperscript{35} Cossman, Supra note 32 at 171.
\textsuperscript{36} Fudge and Cossman, Supra note 33 at 20-22.
scope of this thesis to consider them here. Instead, I identify five dominant discursive tactics employed by the Liberal provincial government that legitimate the appropriation of self-government: the valorization of self-sufficiency, reregulation/reprivatization, indigenization, and risk management.

The following section attempts to trace the discursive logic of privatization as it affects First Nations' politics and to contest the construction of self-government as a form of local government by challenging the assumption that it is a progressive and desirable remedy. Tracing the logic of these trends opens up "the political imaginary..., revealing some of its gaps and fissures, and creating more discursive space for oppositional strategies within these ruptures."37 It renders the BC Liberal government's characterization of self-government contestable by exposing the flawed assumptions that underlie their understanding of self-government as local government and the regressive implications of this appropriation of self-government for First Nations.

2.3.1 The Valorization of Self-Sufficiency

One of the central discursive practices of privatization in First Nations' politics is the valorization of self-sufficiency. The discourse of self-sufficiency and dependency can be characterized as "complementary themes."38 As argued in the previous chapter, First Nations are characterized through the treaty process as reliant upon the Crown for the recognition of their rights, as well as economically dependent on the state for financial assistance. As Fraser notes, dependency is constructed "not always [to] refer to a social relation; it could also designate an

37 Cossman, Supra note 32 at 180
individual character trait."\textsuperscript{39} To be dependent is stigmatized and pathologized by the government. It is seen as a personal failing as "dependency is suspect, and independence is enjoined upon everyone."\textsuperscript{40} Independence is upheld as both a desirable and necessary goal for First Nations to be achieved through the negotiation of treaties. As noted earlier, many First Nations share these goals of enhanced self-sufficiency and independence. In contrast to a neo-liberal understanding of self-sufficiency, which is individualized, First Nations understanding of self-sufficiency appears to be more collective. The discursive trends associated with realizing self-sufficiency for First Nations have, however, important \textit{regressive} implications for First Nations and specifically, for the type of self-government that is negotiated to realize this objective.

In employing the language of self-sufficiency, the provincial government aims to enhance First Nations' independence through market activity. Philipps attributes this privileging of economic independence to neo-classical economics where the private is often treated as a "source of costs" which are to be absorbed by the market.\textsuperscript{41} First Nations are increasingly being held responsible for the costs associated with addressing the economic injustices they experience "at precisely the moment when the welfare state is being dismantled and public financial assistance is becoming scarce."\textsuperscript{42} That is, the discourse of economic self-sufficiency masks the multidirectional relations of dependency and forces First Nations to assume an even greater burden for the injustices they experience. These discursive trends that promote self-sufficiency do not account for the historical injustices First Nations experience, but focus only on the end goal, that is, "independence" through free market activity.

\textsuperscript{40} \textit{Ibid} at 135.
\textsuperscript{42} Cossman, \textit{Supra} note 32 at 169.
Self-sufficiency and independence represent, as Martha Fineman observes, “core components of America’s founding myths... [which] have been ossified, used as substitutes for analysis, and eclipsed rather than illuminated debate.”\textsuperscript{43} She states that while these concepts have often been employed to mask underlying imbalances of power, they should not be rejected, but instead they should be situated and historicized. She observes that this must be an ongoing exercise as “justice requires constant mediation between articulated historic values and current realities.”\textsuperscript{44} The provincial government valorizes self-sufficiency to promote a particular type of self-government and this reveals significant gaps between the continuing practice of colonialism in British Columbia and attempts to redress this through the “progressive” remedy of self-government.

In the BC Treaty Commission process through the Agreements in Principle recently negotiated, the First Nation governments recognized will have jurisdiction to decide whether goods and services are privatized or whether the government will maintain collective control over these. For example, in accordance with these agreements, First Nation governments can legislate with respect to child and family welfare services.\textsuperscript{45} First Nations can collectively manage these services or they can be privatized and contracted out to commercial service providers.

At the same time, the money transfers agreed to under the agreements each set out a finite period within which the money will be distributed. The schedules for these monetary transfers have yet to be finalized as this will form part of the Final Agreement. In the Nisga’a Treaty, this period was determined to be 15 years, and after this time there will not be monetary support available for First Nations within the provisions of the treaty if their economies do not capitalize

\textsuperscript{43} Fineman, Supra note 38 at 16.
\textsuperscript{44} Ibid at 17.
\textsuperscript{45} TAIP, Supra note 7.
on market conditions and their investments and businesses fail to generate sufficient revenue.\(^{46}\) This places a great deal of pressure onto First Nations to become successful market actors. The discourse of dependency has expanded, therefore, to exist not only between the state and First Nations, but also between First Nations and the market.

While First Nations' perceived dependency on the state is deemed unnecessary and a burden to be remedied, their dependency on the market is naturalized. The market is portrayed as the appropriate site that will redistribute resources as it rewards entrepreneurial individuals committed to realizing self-sufficiency. Those First Nations who are unsuccessful or who fail to capitalize on economic opportunities are rendered blameworthy. This intense devaluing of a particular form of dependency occurs simultaneously with the valorization of independence so that First Nations’ increased dependency on the market is not characterized as dependency, but rather represents the realization of self-sufficiency and independence.

These discursive practices of valorizing self-sufficiency have potentially regressive implications for First Nations as “it requires that indigenous people actively participate in their own exploitation.”\(^{47}\) Taiaiake Alfred cites the experience of indigenous peoples in Alaska under the 1971 Alaska Native Claims Settlement Act that extinguished indigenous peoples’ rights over 90% of their lands, guaranteeing access to corporations to resources on the land and superficial compensation amounting to three dollars per acre.\(^{48}\) Alfred notes that this agreement was supported by major indigenous organizations in Alaska.\(^{49}\) It established twelve regional and 200 village-level corporations to facilitate their new role as resource developers and market actors. Alfred observes that the model of self-government adopted emulates a corporate model where First Nations people are “shareholders,” and the governments foremost concern is to generate revenue through profit “in order to provide the shareholders with returns on the investments

\(^{46}\) Nisga’a Final Agreement Act, S.B.C. 1999 c.14 s.1.
\(^{47}\) Alfred, Supra note 26 at 116.
\(^{48}\) Ibid.
made on their behalf."\textsuperscript{50} Alfred concludes that this is an explicit example of the co-optation of indigenous leaders and the forced assimilation into a market economy that is fundamentally exploitative and that disrespects indigenous peoples. Alfred asserts that First Nations people are not rejecting "modernity,... but forced compliance with an exploitative system and the imposition of an inappropriate form of government."\textsuperscript{51}

This intense pressure to become economically self-sufficient is an affirmative liberal welfarist remedy. As Taiaiake Alfred argues:

An ideology of accumulation, even if it’s collective rather than individual, plays right into the consumptive commercial mentality shaped by the state corporatism that has so damaged both the earth and human relationships around the globe. From an indigenous perspective, appropriate economic development consists in taking advantage of opportunities to build self-sufficiency in order to preserve the essence of indigenous cultures and accomplish the goals that emerge from the culture. This is quite different from tying a community to an exploitative economy promoting objectives that contravene traditional values.\textsuperscript{52}

The current economic initiatives promoted by the Liberal government are potentially problematic for some First Nations as they entrench assumptions that business opportunities and economic partnerships with corporations will result in First Nations realizing self-sufficiency as self-government.

This discursive practice of defining self-sufficiency as realized through unconstrained market activity justifies the provincial government’s narrowing of the type of self-government to be negotiated in the treaty process. It focuses attention on the economic and political “freedom” generated through market activity representing a broader understanding of self-government as threatening the realization of any form of self-government. Following the referendum on the treaty process in 2002, Geoff Plant, the Attorney General of British Columbia and Minister responsible for treaty negotiations, stated that if progress was not made in the treaty process, it

\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid at 117.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid at 114.
might be necessary to temporarily leave the process so that other more promising strategies could be pursued. Negotiating a more moderate style of government ensures that energy is channelled to “developing” First Nations’ economies, and not expended on less pressing issues that might undermine achieving progress in the treaty process, such as negotiating this right as an inherent right.

2.3.2 Reregulating and Reprivatizing First Nations’ Politics

Two other dominant trends of privatization are reregulation and reprivatization. While neo-liberalism is often defined in relation to the withdrawal of the state from vast sectors of public life through deregulation, Fudge and Cossman argue that:

the concept of reregulation allows us to highlight better the ways in which privatization is a highly selective process of shifting some public responsibilities to the private sphere while diligently protecting and intensifying the role of the state to regulate in other areas.

That is, through reregulation the state shifts its control while simultaneously claiming to have “freed” the economy and economic actors. Applying these reregulative trends to the BC Treaty Commission process, the provincial government can be seen to be committed to enhancing First Nations’ self-sufficiency or market freedom while simultaneously restricting the scope of self-government and the nature of their economic and political activity. Both the language and discourse of self-government have been strategically used to decentralize power without ever losing the paternalistic ability to control.

Together with these reregulative trends, processes of reprivatization also affect First Nations’ politics. Lisa Philipps notes that reprivatization reflects “a renewed emphasis on the

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53 Cindy Harnett ‘B.C to move on stalled treaty issues’ Victoria Times-Colonist (6 July, 2002). While the Liberal government has not stepped away from the treaty process, they have committed significant resources and focused public attention on those projects that are part of the Economic Measures Fund. See Ministry of Attorney General Treaty Negotiations Office, News Release 2003TNO0020-000511, ‘Backgrounder: Economic Measures Fund’ (May 21, 2003).
54 Cossman and Fudge, Supra note 33 at 20.
responsibility of individuals, families, and communities to secure their own welfare."^55

Reprivatization reveals a fundamental shift where responsibility is reassigned to belong within the private sphere. That is, whereas as part of Keynesian economics the state was seen to assume responsibility for the collective welfare of its citizens, increasingly this responsibility is argued to be the exclusive concern of individuals.^56 Brenda Cossman observes that “assumptions about the role of government and the rights of its citizens is emerging, in which government responsibility for the social welfare of citizens is being replaced by a political and social order in which governments are only responsible for helping citizens to help themselves.”^57 Promoting “self-sufficiency” and “economic independence” for First Nations, the government attempts to shift responsibility from the state onto First Nations. The provincial government thereby maintains regulative control, defining the type of self-government that will be recognized as realizing self-sufficiency, while the associated costs are transferred onto First Nations as autonomous market actors.

A contradiction that emerges from these trends of privatization is that these often take place at the level of the discursive and do not necessarily inform the lived realities of many First Nations.^58 Cossman states that:

While the shift from public responsibility to private self-reliance and from social welfare law to family law is a discursive shift, embodied in legal and political institutions, with real material effects, it does not necessarily operate at the concrete level to actually transfer responsibility.^59

While First Nations are assumed to take responsibility to be successful market actors, they are not transferred the responsibility that would see them develop their own structures of governance free of the constraints imposed by the state. That is, there is not a transferral of control at a practical level. Further, the language of relocating of responsibility used by the provincial

^55 Philipps, *Supra* note 41 at 41.
^56 Cossman, *Supra* note 32 at 172.
^57 *Ibid*.
^58 *Ibid* at 170.
government is also premised on the assumption that the state actually assumed full responsibility for the injustices First Nations experience. As demonstrated in relation to compensation, the provincial Liberal government has not yet assumed this responsibility.

Marlee Kline notes that as part of the privatization trends in Alberta there has been pressure to privatize child welfare services to First Nations under the Progressive Conservative Party. This seemingly progressive approach promotes self-government on the basis that First Nations will regain control of these services. These trends of privatization will have, however, regressive implications for First Nations in Alberta. Under this policy, child welfare services were to be transferred to communities where it was argued service provision could be more efficiently and effectively managed and distributed. Kline argues, however, that First Nations' aspiration to self-govern with respect to these services according to traditional practices and values are undermined by the provincial government's reregulation of First Nations. While empowering First Nations to assume the responsibility of managing child welfare services, the government has limited the ability of First Nations to assume responsibility to administer these services as applications for funding are processed through "block" criterion that applies to all community agencies. Furthermore, the government requires First Nations to remain "integrated" with government departments to ensure that services are not duplicated. The government maintains control of the nature and scope of these services arguing that they should not occur "in isolation," as there may be opportunity to coordinate programs for cost saving purposes. Another tactic of reregulation Kline identifies is that the government appropriates First Nations' emphasis on collective responsibility, but not to argue that First Nations' communities are best equipped to address these child welfare problems. Rather, they justify a collective

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59 Ibid.
60 Kline, Supra note 31 at 340.
61 Ibid.
62 Ibid.
response because the government identifies the communities themselves as the source of these problems.\textsuperscript{63}

Kline’s analysis of the effects of reprivatization and reregulation within Alberta’s child welfare system is applicable in the BC government’s approach to promoting economic self-sufficiency through the negotiated Agreements in Principle. The government evokes a discourse of enhanced self-sufficiency and economic independence for First Nations while shifting responsibility from the provincial government onto First Nations through reprivatization. They have not, however, surrendered regulative control. They instead continue to regulate the ways in which First Nations exercise self-government by subsuming First Nation’s legislative powers within provincial governmental structures through reregulation and deregulation. First Nations are unable to draw upon their own practices and values to introduce new and innovative laws and economies. These discursive practices of reregulation and reprivatization constrain the type of self-government negotiated as part of the treaty process and justify the appropriation of self-government as a type of local government.

\subsection{2.3.3 Indigenization}

The responsibilities that are imposed upon First Nations as part of reprivatization/reregulation have been entrenched ideologically by being deemed “natural” and “normal.” This reveals a third discursive trend of privatization, that is, “indigenization.” This trend reflects the particular practice of racializing First Nations through the logic of privatization. For example, despite the Liberal government’s attempts to promote First Nations’ participation in the economy, the government limits the scope of Aboriginal rights recognized through the treaty process. This constrains the nature of First Nations’ participation in the economy based upon particular assumptions about their identity. The logic of privatization poses a unique

\textsuperscript{63} Ibid.
challenge to First Nations as it perpetuates particular colonial assumptions about First Nations’ identities, while simultaneously promoting “progressive” remedies that are argued to enhance the recognition of these identities by recognizing their right to self-government.

In accordance with the Lheidli T’enneh Agreement in Principle, the First Nation government will have authority to legislate with respect to business licenses and will have responsibility for matters of land-use planning and development. The agreement states that in relation to fisheries, the Lheidli T’enneh can only harvest fish for “food, social and ceremonial purposes.” The provision goes further to note that fish that has been harvested by Lheidli T’enneh Citizens may only be traded or bartered either among themselves or with other aboriginal peoples of Canada who are residents of British Columbia. Importantly, the agreement states that fish that is harvested and that is traded or bartered may not be sold. It is anticipated that after the finalization of this agreement, that treaty related measures will be entered into that will further clarify the management of commercial fisheries. This approach does not, however, recognize that the commercial development of fisheries may be part of the Lheidli T’enneh’s Aboriginal rights protected by section 35(1) of the Constitution. That is, the Lheidli T’enneh First Nations are unable to develop their own economies based upon a broader recognition of their Aboriginal rights.

Philipps notes that marginalized individuals are often treated as lacking economic agency. In this context, First Nations are characterized as having been dependent upon state support and must therefore become successful economic actors (through the valorization of self-sufficiency). This ignores, however, First Nations’ own economies and economic agency based on a broader understanding of Aboriginal rights that includes their right to commercially develop

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64 TAIP ‘Governance’ s.19(e)
65 TAIP ‘Lands’ s.7
66 TAIP ‘Fisheries’ s.13
67 Ibid s.15(a) and 15(b)
68 Ibid s.16(b)
their economies. Based upon particular assumptions of what is “integral” to their identities and through reregulative trends, the recognition of First Nations’ identities is constrained. These discursive practices operate through the treaty process to constrain the type of self-government that is negotiated.

The purpose of the treaty process is to define Aboriginal rights, but these are constrained through the discursive practices of privatization. Through the trend of indigenization, the logic of privatization, together with colonial mentalities, serve to undermine the objective of economic self-sufficiency for First Nations. Recognizing a broader understanding of self-government as including First Nations’ right to commercially develop their economies would enhance their capacity to be economically self-sufficient. The provincial government’s claims that assert this would contravene the “traditional” practices that define First Nations inhibit the realization of self-sufficiency. These trends serve to impose further constraints on First Nations’ right to self-government.

2.3.4 Managing Risk

The discourse of risk management is the final trend to be identified in the treaty process. First Nations themselves, as well as the provincial and federal governments, employ this discourse of risk management. For First Nations, this discourse of risk management accompanies the increased pressure to exercise self-government by realizing economic self-sufficiency. Citing Nikolas Rose, Condon observes that neo-liberalism entails restructuring “the provision of security to remove as many as possible of the incitements to passivity and dependence.”

First Nations employ this discourse to further their role as entrepreneurial market actors to ensure their

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69 Philipps, Supra note 41 at 48.
economic success and to ensure that an understanding of self-government includes the recognition that their economies are dynamic and responsive to market changes.

In addition to the economic risk managed by First Nations, the state is also engaged in a process of managing risk. The government is involved in a discursive mode of risk management to protect against potential "threats" that may undermine its legitimacy and authority. Certainty and stability for the state are paramount principles, and the primary objective of the BC Treaty Commission process is to ensure certainty in BC as a result of First Nations' land claims. The construction of a looming "crisis" is a powerful discursive practice employed by the government through this process that promotes a limited form of self-government as progressive while simultaneously inhibiting transformative understandings of self-government.\footnote{See Dianne Martin (2002) 'Both Pitied and Scored: Child Prostitution in an Era of Privatization' p. 355-402 in B. Cossman and J. Fudge (eds) Privatization, Law, and the Challenge to Feminism. Toronto: University of Toronto Press at 382.} Self-government in its more substantive meaning as an inherent right is portrayed as causing great uncertainty for the wider public. It is a security risk; land claims are seen as threatening to undermine non-Aboriginal economies and natural resource development. Further, it causes uncertainty for the cohesion of the nation-state. The recognition of the inherent right to self-government is portrayed as inevitably leading to the secession of First Nations from Canada. The BC Liberal government promises safety and certainty through a moderate form of self-government for First Nations that is contained, manageable and comprehensible to the wider non-First Nations public.

Discourses of risk management and pending "crisis" constrain the recognition of First Nations' governance structures by presenting broader understandings of self-government as an inherent right as threatening the stability and security of the Canadian state. At the same time, however, a more moderate form of self-government is supported by both levels of governments, as well as by other corporate economic actors in the province. Negotiating self-government as a form of local government is argued to provide certainty in the province without exacerbating risk
and instability as it recognizes First Nations’ authority as only existing within the control of the provincial government.

**Part Three: Implications for Fraser’s Theory of Bivalent Justice**

As shown in an earlier section of this chapter, the mandate of the provincial government in the treaty process embodies principles that are inconsistent with Fraser’s model of justice. Fraser’s framework cannot, however, account for the particular logic associated with privatization that promotes a limited understanding of self-government as a progressive objective. Her model cannot be used to critically analyze the various discursive tactics that appropriate “self-government” and that legitimate it as a form of local government. As part of Fraser’s concern to recentre economic injustice, the logic of neo-liberalism and the trends of privatization must be exposed and her failure to address these represents an important challenge to her approach.

Mary Condon observes that trends of privatization associated with neo-liberalism pose distinct problems for Fraser’s theory of bivalent justice. Condon focuses on the privatization of pension schemes, arguing that it has had important implications for achieving the type of justice that Fraser envisages. She argues that Fraser does not consider how “the opportunity for feminists to push the welfare state in the desired direction is receding under the onslaught of market-oriented policy making, bringing with it new inequalities in gender-based risk.” Despite Fraser’s explicit concern to recentre redistributive justice and her focus on the interplay between the politics of recognition and redistribution, an analysis of the logic of privatization would seem to expose a limitation in her approach. She does not account for how the transformative capacity of politics is constrained as a result of the discursive trends of privatization. This has

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72 Condon, *Supra* note 70 at 161.
implications for realizing bivalent justice as her model of justice favours a deconstructivist/socialist approach which is a transformative model of politics.

Arguing that Fraser's model account for the discursive tactics that undermine transformative remedies from being implemented in the treaty process may seem too specific a requirement for an overarching theory of justice that attempts to address all experiences of injustice that stem from misrecognition and maldistribution. Following Haraway's politics of partial perspective, Fraser's approach cannot comprehensively account for the discursive practices that affect the realization of recognition and redistributive justice. Requiring that the discursive trends of privatization be addressed, however, is consistent with both the objective Fraser defines for her theory of justice and the framework she constructs. Fraser acknowledges that in working towards bivalent justice that it is essential to trace how economic and cultural injustices converge and she is committed to exploring their intersection. Fraser does not, however, explicitly identify how this filtering between recognition and redistribution occurs. That is, she expressly provides for such an analysis within her framework, but does not state that this is a discursive analysis of the logic of neo-liberalism. This critique does not dismiss the usefulness of Fraser's approach. Rather, it suggests that there are additional lenses through which Fraser's model must be applied. Further, in using these lenses, they illuminate an important constraint within her approach.

Fraser's theory fails to consider how these discursive tactics undermine the implementation of progressive remedies that would work towards bivalent justice. For example, within the BC Treaty Commission process self-government becomes negotiated as a form of local government. Fraser's model recognizes that this is an unsatisfactory remedy as it undermines the norm of participation parity. Her framework cannot, however, address how self-government, as an inherent right, can be advanced when the discursive tactics advanced by the provincial Liberal government undermine a broader understanding of self-government.
The discursive tactics of privatization appear to undermine the implementation of more transformative remedies that would work towards bivalent justice, and Fraser’s failure to consider the implications of this for her model of justice represents a significant gap in her work. This is a particularly pressing problem as her primary concern has been to develop a normative framework that can challenge liberal capitalism. Any critical engagement with neo-liberalism must therefore entail an awareness of the constraints created as a result of the trends of privatization. The BC Treaty Commission process is an important site where such limitations are evident. It is not enough to apply Fraser’s framework, but the logic of privatization must be directly contested.

3.2 Conclusion

Negotiating self-government as a form of local government through the BC Treaty Commission process poses distinct problems for realizing justice. Fraser’s model of bivalent justice is useful as it demonstrates that this appropriation of self-government is in fact inconsistent with a model of bivalent justice. Applying her norm of participation parity as well as her model of status subordination, demonstrates that an understanding of self-government must move beyond the provincial government’s characterization of it as a form of local government. Instead, self-government must be negotiated as an inherent right that cannot be delegated from both federal and provincial governments, but that is within the framework of the Canadian Constitution. As Taiaiake Alfred notes, this approach would require negotiating with First Nations as co-equal partners, not as subordinated collectivities. This poses an important challenge not only to the mandate of the provincial government, but to the structure of the treaty process. In advancing bivalent justice through the treaty process, therefore, the provincial government’s participation could arguably be limited and their interests represented through the
federal government when negotiating matters that affect both the Canadian government and First Nations.

The final important challenge to the provincial government's mandate are the trends of privatization through which self-government is appropriated as a progressive remedy, but that have regressive implications for First Nations. Trends such as the valorization of self-sufficiency, reregulation/reprivatization, indigenization and the construction of risk management all serve to legitimate self-government being negotiated as a type of municipality. This has negative implications for First Nations as it undermines the recognition of their right as an inherent right while simultaneously justifying this appropriation under the guise of realizing "independence" for First Nations. In exposing these complex and often contradictory trends, there is an emergent problem, however, not only for the provincial government's mandate, but also for Fraser's theory of bivalent justice.

While her theory of justice can be usefully deployed to demonstrate the inappropriateness of negotiating self-government as a form of local government, her approach does not account for the appropriation of progressive remedies as part of the logic of privatization that have regressive implications for First Nations. Thus, her model fails to account for the discursive tactics associated with trends of privatization that limit the transformative capacity of politics as these discursive trends potentially undermine the implementation of remedies that work towards bivalent justice. The implications of the appropriation of "oppositional discourses" for Fraser's theory of bivalent justice poses, therefore, an important challenge to her theory of bivalent justice.
Chapter Four

Working Towards Bivalent Justice in British Columbia: Concluding Remarks

Fraser’s theory of bivalent justice provides useful insights into the appropriateness of the provincial Liberal government’s negotiating mandate. There are two principles within this mandate that were considered: first, the government’s failure to negotiate compensation; and, second, the government’s recognition of self-government as “municipal-like” in nature. Fraser’s reconceptualization of recognition and redistribution as interdependent yet distinct, her norm of participation parity and the model of status subordination all can be deployed as tools to critically examine these principles that are proposed on the basis of redressing the injustices that First Nations experience, but that simply reinscribe inequalities.

In applying her theory of bivalent justice to the provincial government’s mandate that maintains compensation is an inappropriate remedy for First Nations, it is evident that the provincial Liberal government has through its mandate, characterized the politics of recognition and redistribution as distinct and unrelated. The provincial government is committed to recognizing First Nations’ rights (such as to land and self-government) and to redistributing resources, but does not recognize how the injustices that arise from both are mutually reinforcing. That is, the government attempts only to address the effects of these injustices and not consider the relations of recognition and production that cause injustice. Further, because there is no attempt to understand how these injustices arise, the provincial government do not consider that they may continue to be entangled in exploitative and marginalizing relations with First Nations. Characterizing these injustices as distinct and unrelated justifies assertions that the Crown is not responsible for the injustices First Nations experience. It is evident, however, that failing to compensate First Nations for those Crown lands that were wrongfully taken from First
Nations and by continuing to derive benefit from these, constitutes an ongoing injustice that should be rectified through the treaty process.

The dominant discourse of dependency serves to mask the dependency of the Crown on the exploitation of First Nations. Conducting a genealogy of dependency reveals how dependency has historically legitimated state policies of paternalism and colonialism. Discourses of dependency justified the Crown’s initial acquisition of First Nations’ lands. More recently, this discourse of dependency has shifted so that the wider public increasingly rejects the overt forms of racism that legitimated the cultural domination of First Nations, but more subtle and insidious tactics and strategies associated with current practices of colonialism remain hidden.

Further complicating these discourses of dependency is the fact that First Nations also use these discourses to contest the injustices they experience. For example, the fiduciary duty the Crown owes First Nations continues to be employed by First Nations to assert the federal and provincial governments’ duty to consult them over matters that affect First Nations’ interest. While these discourses of dependency may therefore be strategically useful, these discourses of dependency are problematic, however, when they are exploitative. The provincial government has not accepted its role in perpetuating these exploitative relations even through the treaty process by failing to negotiate compensation with First Nations.

Fraser’s model of bivalent justice is useful as it demonstrates not only that injustices of misrecognition and maldistribution are intimately connected, but that to redress only one risks undermining the realization of justice for either. Her framework can also be employed to contest this dominant discourse of dependency that legitimates the provincial government’s claim that it is not responsible for the injustices First Nations experience. Fraser argues that in working towards participation parity it will not be enough to simply attempt to “empower” marginalized collectivities, but rather “everyone’s sense of self” will need to be challenged. Accordingly, the
provincial government’s assertions that it is disassociated from the injustices First Nations experience will need to be contested.

The material prerequisites Fraser advances as part of her norm of participation parity are also useful as they require that all forms of exploitation be remedied and that inequalities of wealth should not be institutionalized. The treaty process represents an institutional site where both these prerequisites would not be satisfied unless compensation was negotiated. Further, Fraser sets out that a remedy advanced to redress injustices of misrecognition and maldistribution should not create inequalities, but should attempt to overcome multiple injustices simultaneously. For those First Nations rejecting the legitimacy of the state to negotiate treaties with First Nations through the current BC Treaty Commission process, advancing compensation solely through this process would be problematic. Rather, because the category of “First Nations” represents a multiplicity of nations each structuring their own processes of decolonization with the state based on their different needs, various strategies should be advanced. Fraser’s theory of bivalent justice can be used to demonstrate that compensation is one such strategy crucial to these processes of decolonization. Compensation is a necessary strategy that should therefore be negotiated as it can begin to redress these ongoing injustices that are perpetuated as part of the BC Treaty Commission and to ensure that the treaty process works towards bivalent justice.

The second aspect of the provincial Liberal government’s negotiating mandate is the recognition of self-government as a form of local government. Fraser’s theory of bivalent justice can be applied to demonstrate how negotiating self-government as a form of local government is problematic. The normative principle of participation parity requires that individuals have equal opportunity to achieve social esteem. Requiring that First Nations’ structures of governance continue to be subordinated to state structures fails to reflect First Nations’ equal opportunity for respect. First Nations’ own structures of governance continue to inform their lives, and further,
are relied upon by non-First Nations' legal and political systems. Marginalizing First Nations' own structures of governance by insisting that these are in fact, forms of local government can be seen to be inconsistent with Fraser's theory of bivalent justice.

Fraser's framework reveals that self-government should be negotiated as an inherent right to promote participation parity and to challenge First Nations' status subordination. There are, however, different understandings of "inherent" that can mean that the right to self-government exists within the framework of the Canadian Constitution, but also that this right originates from outside of, and transcends, the state. While neither of these approaches necessitates that First Nations cede from Canada, both approaches fundamentally contest the existing structure of the BC Treaty Commission process.

The challenge posed by those First Nations who reject the legitimacy of the state to determine the nature of this inherent right may require that the current structure of the treaty process be changed. Following from the application of Fraser's theory of bivalent justice, First Nations should not be subordinated to the interests of the provincial government, but instead be recognized as partners in Canadian Constitutionalism. Alfred suggests that a true partnership does not mean continuing to subordinate First Nations to the federal government. Rather, as part of reconceptualizing First Nations' sovereignty to embody indigenous values, their relationship with the Canadian state should be as co-equal, autonomous partners. Accordingly, while compensation should be negotiated in the treaty process and the provincial government should be involved in this process, in dealing with matters that affect both the Canadian government and First Nations, the treaty participants to this process should be restricted to only include federal and the relevant First Nation government.

There is a third challenge to the provincial government's mandate in the treaty process and this arises from an analysis of the trends of privatization. The discursive practices associated with trends of privatization are used by the provincial Liberal government to appropriate the
progressive objective of self-government for First Nations while limiting the meaning and scope of this right. While these trends of privatization are not new, more recently, these trends have been advanced in First Nations’ politics through the language of self-government. Self-government, while a mutually shared objective, has been constrained in its meaning through these trends of privatization and this had regressive implications for First Nations as it is recognized not as an inherent right, but as a form of local government.

While there are numerous trends of privatization that affect First Nations’ politics, I identified five: the valorization of self-sufficiency, reregulation/reprivatization, indigenization and, the discourse of risk management. Through their use, these trends justify the scope of self-government being constrained while being presented as both a progressive and desirable remedy. These trends represent the tactical appropriation of progressive strategies for regressive ends. It is these discursive practices that undermine the implementation of self-government in its more substantive meaning, as an inherent right that is not simply delegated from the provincial and federal government.

There is, however, an important limitation to Fraser’s theoretical framework. It does not seem to account for these trends of privatization and how they inhibit the transformative potential of politics. That is, while her theory can be used to demonstrate why negotiating self-government as form of local government is inadequate, it does not provide for how this appropriation is to be contested and more transformative remedies advanced. An analysis of the trends of privatization provides for this method of contestation. Her failure to address the implications of these trends of privatization is a significant critique given that Fraser’s concern is to develop a theoretical framework that can stand outside of liberal capitalism and the trends of privatization represent a major barrier to implementing remedies that would work towards bivalent justice. This critique does not undermine Fraser’s theory, but suggests that additional discursive analysis needs to occur in order that her theory can challenge liberal capitalism.
critical analysis of the discursive trends associated with privatization that are part of the logic of neo-liberalism is therefore an essential part of Fraser’s overarching normative project.

Fraser’s theory of bivalent justice and the theoretical tools she develops to adjudicate between claims for recognition and redistribution can be employed to critically contest the mandate of the provincial Liberal government in the BC Treaty Commission process. Utilizing her norm of participation parity, status subordination and her reconceptualization of recognition and redistributive justice as interwoven demonstrate that the government’s refusal to negotiate compensation and the recognition of self-government as a form of local government through the treaty process is inadequate. An analysis of the BC Treaty Commission also allows for a critical engagement with Fraser’s theory of bivalent justice. While her normative framework can be employed to highlight the problems within the treaty process, there is an important limitation in her approach. That is, the trends of privatization pose a distinct problem for implementing transformative remedies that could work towards bivalent justice through the treaty process. A critical analysis of the implications of these trends is therefore an essential component of her theory. While such an analysis is not inconsistent with her framework, she does not explicitly identify these discursive trends or recognize the implications of these for her theory of justice. In order to further bivalent justice through the BC Treaty Commission process, not only should Fraser’s approach be applied, but also as part of this, the discursive tactics associated with trends of privatization must be contested.
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