

# Enduring Eliminary Logics, Market Rationalities, and Territorial Desires: Assessing the Harper Government's Legacy Concerning Aboriginal Rights

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*This paper examines governmental policies surrounding issues of land and territory in the context of reconciliation between Indigenous peoples and the Canadian state. It traces not only a committed effort during Stephen Harper's tenure as Prime Minister to establish private property regimes on Aboriginal reserves, but also the creation of a policy framework surrounding land, energy infrastructure, and treaty rights which radiate with eliminatory rationalities. The paper argues that these logics not only undercut Indigenous jurisdictions and territorial claims in favour of existing constitutional structures and non-Aboriginal economic interests, but also serve to represent Aboriginal peoples as "Canadians" seeking forms of integration into the broader social and economic structures of settler society. Ultimately, this paper demonstrates that conservative discourses surrounding "marketization" and "reconciliation" have worked in tandem to dispossess Indigenous peoples and sustain the legal, social, and territorial boundaries of the Canadian state. It concludes by questioning the extent to which the newly elected Liberal government under Justin Trudeau will truly embrace Indigenous understandings of non-exploitative territorial relationships and responsibilities, or whether it will continue the policy trajectory strengthened by the Harper Conservatives of treating Indigenous territories as settler-colonial sites of unrealized economic potential for the benefit, and protection, of the larger "Canadian" nation.*

*L'auteur de cet article examine les politiques gouvernementales entourant des questions liées aux terres et au territoire dans le contexte de la réconciliation entre les peuples autochtones et l'État canadien. Il fait l'historique non seulement d'un effort engagé durant le mandat de Stephen Harper comme premier ministre pour établir des régimes de propriété privée sur des réserves autochtones mais aussi de la création d'un cadre stratégique entourant les terres, l'infrastructure énergétique et les droits issus des traités qui débordent de rationalités éliminatoires. L'auteur soutient que ces logiques sapent non seulement les compétences et les revendications territoriales autochtones au profit de structures constitutionnelles existantes et d'intérêts économiques non autochtones, mais servent également à présenter les peuples autochtones comme des « Canadiens » cherchant des formes d'intégration au sein des structures sociales et économiques plus large de la société colonisatrice. Au bout du compte, l'auteur démontre que les discours conservateurs entourant la « marchandisation » et la « réconciliation » ont travaillé en tandem pour déposséder les peuples autochtones et maintenir les limites juridiques, sociales et territoriales de l'État canadien. Il conclut l'article en se penchant sur la question à savoir dans quelle mesure le nouveau gouvernement libéral de Justin Trudeau embrassera vraiment les compréhensions autochtones des relations et des responsabilités territoriales qui ne sont pas exploitrices ou s'il continuera la trajectoire politique renforcée par les conservateurs de Harper qui consiste à traiter les territoires autochtones comme des sites colonisateurs (coloniaux) de potentiel économique non réalisé pour le bien et la protection de la nation « canadienne » en son ensemble.*

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## Introduction

While the relationship between Indigenous peoples and the Canadian federal government ostensibly appears to be changing with a renewed focus on the “recognition of rights,” the long overdue calling of an inquiry into missing and murdered Indigenous women and girls, and the cessation of measures of compliance under the *First Nations Financial Transparency Act*, it remains to be seen to what extent the newly elected Liberal government under Justin Trudeau will truly transform the political and discursive legacies of former Prime Minister Stephen Harper and the Conservative government. In this regard, one particular area of emphasis under the previous government concerned a greater prominence given to invocations of “Canadian” territory and increasing “private property ownership” on Aboriginal reserves. While discursive maneuvers of this sort can signal efforts to both undermine Indigenous rights to land and ensure that those lands can more easily be acquired for developmental purposes, it is unclear to what extent the Liberal government will truly transform the institutional legacy left behind by the Conservative government. In this respect, it is still an open question as to how Prime Minister Justin Trudeau understands the “nation-to-nation” relationship that is to be at the centre of his government’s approach to Indigenous issues. Will this “nation-to-nation” approach serve to recognize alternate territorial relationships, political systems, and legal orders, or will it continue to offer forms of “reconciliation” that ultimately serve to work Indigenous peoples further into existing “Canadian” legal, political, and economic structures?

In an effort to engage these questions, this paper will examine how political and legal actors during Stephen Harper’s time in office both imagined and represented past historical events, present arrangements, and future possibilities in the context of Aboriginal rights and reconciliation. Indeed, in the domain of Indigenous constitutional politics, legal and political actors have regularly appealed to notions of “reconciliation” over the course of the last two decades when confronted with an ever-increasing number of Indigenous legal and political challenges. While the Supreme Court of Canada has utilized reconciliation in a multitude of ways — from attempts at restraining federal power<sup>1</sup> to efforts arguably aimed at reinforcing the sovereignty of the Crown<sup>2</sup> — Canadian governments, on the other hand, have tended to invoke the term

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1 *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

2 See e.g. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; *Mitchell v Minister of Natural Revenue*, [2001] 1 SCR 911, 199 DLR (4th) 385 [*Mitchell*].

as the animating framework or “goal” underpinning a variety of Aboriginal policy considerations.<sup>3</sup> However, due to spatial constraints, the primary focus of this paper will concern governmental policies surrounding issues of land and territory in the context of reconciliation. Given that Indigenous peoples have not only asserted pre-existing rights to land, but also rights to engage in practices and traditions that flow out of particular territorial relationships and alternate legal systems, this focus has the benefit of examining the extent to which foundational relationships to land have either been reflected or excluded within governmental policies.

While the focus of this paper is on the legacy of Stephen Harper in the area of Aboriginal policy, it is worthwhile to recall that many of the Conservative government’s policies concerning Aboriginal rights to land and governance did not emerge overnight but rather found their origins in the long established desires of the “new right” to reduce governmental interventions — particularly in the areas of social policy and support for so-called “special interests” — in favour of free-market principles of private sector competition, transparency, and individual entrepreneurship.<sup>4</sup> As such, this paper will briefly trace a broad array and well-established set of discourses concerning land and territory in the context of Aboriginal rights. The paper will begin by outlining theories of settler-colonialism before turning its attention to conservative policies and understandings of reconciliation. The paper will show not only a committed effort during Stephen Harper’s tenure as Prime Minister to establish private property regimes on Aboriginal reserves, but also the creation of a policy framework surrounding land, energy infrastructure, and treaty rights which radiate with eliminatory rationalities. This paper will argue that these logics not only undercut Indigenous jurisdictions and territorial claims in favour of existing constitutional structures and non-Aboriginal economic interests, but also serve to represent Aboriginal peoples as “Canadians” seeking forms of integration into the broader structures of settler society. Ultimately, this paper will show that conservative discourses surrounding “marketization” and “reconciliation” have

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3 See Canada, Indian Affairs and Northern Development, “Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the occasion of the unveiling of Gathering Strength — Canada’s Aboriginal Action Plan” (7 January 1998), online: <<https://www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>>; See also Prime Minister Stephen Harper, “Statement of apology to former students of Indian Residential Schools” (11 June 2008), online: <<https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>>.

4 For a detailed account of some of the underlying ideological positions of the “new right” in Canada, see David Laycock, *The New Right and Democracy in Canada* (Don Mills Ontario: Oxford University Press, 2002).

worked in tandem to dispossess Indigenous peoples and sustain the legal, social, and territorial boundaries of the Canadian state.

## **Territorial logics of settler colonialism**

When considering how territories are represented, demarcated, and controlled, it is useful to reflect upon the work of Patrick Wolfe and his writings on settler colonialism. For Wolfe, settler colonialism should be understood as “a structure rather than an event,”<sup>5</sup> given that ongoing rationalities of Indigenous elimination and territorial expropriation continue to fuel the development of those societies and their corresponding political regimes. In Wolfe’s estimation, these “logic of elimination,” driven as they are by an “insatiable” desire for territory, not only require the erasure of Indigenous peoples and claims to land in order to obtain control over their territories, but can also be located within a variety of discursive practices, institutional structures, and societal relations.<sup>6</sup> In effect, Wolfe’s temporal severing of the territorial logics and violent effects of settler colonialism provides a means of tracing the various discursive continuities and complementary “logics of elimination” that continue to manifest and produce ongoing forms of territorial control and expropriation. Indeed, as Indigenous scholars such as Glen Coulthard have recently noted, the eliminatory logics of settler colonialism work through, and are inextricably linked to, capitalist relations and forms of accumulation. According to Coulthard, not only do “colonial-capital” relations require Indigenous lands for economic development and exploitation, but also the “interpellation” of Indigenous peoples into “subjects” of colonial rule.<sup>7</sup>

These eliminatory logics can be seen in the manner in which populist parties of the “new right” in Canada expressed their “support” for Indigenous claims during the 1990s. Not only did populist parties such as the Reform and Canadian Alliance parties trumpet the rights of “individual” Aboriginal entrepreneurs over the “collective” claims of Aboriginal communities, but they also consistently appealed to a territorial discourse that undermined Aboriginal claims to land by privileging the existing boundaries belonging to “Canada.” For instance, on the one hand, party leaders on the right regularly argued that issues surrounding high rates of Aboriginal poverty, unemployment, and inadequate housing stemmed from the fact that Aboriginal peoples lacked fee-simple

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5 Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” (2006) 8:4 J of Genocide Research 387 at 402 [Wolfe, “Settler Colonialism”].

6 *Ibid.*

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

title on reserves.<sup>8</sup> In their estimation, enabling individual Aboriginal people to acquire “private property rights” on reserves<sup>9</sup> and the ability to access the “market economy” would help to alleviate Aboriginal economic dependence and marginalization. However, while these proposals were presented as a means of ending the dependence and marginalization of Aboriginal peoples, they also function as a means of shoring up specific territorial concerns by demarcating present boundaries, interests, and areas of control. As the Reform Party’s policies concerning Aboriginal land claims flatly stated: “Property owners forced to defend their property rights as a result of Aboriginal land claims will be compensated for defence of the claim.”<sup>10</sup> In effect, under its policies dealing with Aboriginal affairs, the existing property “rights” of non-Aboriginal people were to be placed in a privileged position relative to the constitutionally entrenched rights of Aboriginal peoples. Regardless as to how such property “rights” may have been acquired in the past, the party’s policies offered a clear vision of settler-colonial *territoriality* in which the already established boundaries<sup>11</sup> and economic interests of non-Aboriginal peoples were to be prioritized and vigorously defended.

Indeed, Wolfe has argued that settler colonialism is characterized by the following “insatiable dynamic”: “settler colonialism always needs more land . . . . The whole range of primary sectors can motivate the project. In addition to agriculture, therefore, we should think in terms of forestry, fishing, pastoralism and mining . . . . In this way, individual motivations dovetail with the global

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8 See Preston Manning, *House of Commons Debates*, 36th Parl, 2nd Sess, No 11 (26 October 1999), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?pub=Hansard&doc=11&Language=E&Mode=1&Parl=36&Ses=2#T1055>> at 1055-1155> [Manning, “Debates”].

9 Under the Indian Act, a “reserve” is defined as “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band,” see *Indian Act*, RSC 1985, c I-5, s 2. While reserves have been created in a number of ways — ranging from such means as treaty agreements to colonial allocations — the Supreme Court of Canada has noted the general inalienability of Aboriginal reserve lands: “The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee,” see *The Queen v Devereux*, [1965] SCR 567 at 572, 51 DLR (2d) 546. Of course, reserve lands should not be conflated with the traditional territories of Aboriginal peoples that, generally speaking, tend to refer to much larger geographic areas which Aboriginal peoples occupied, used, and governed prior to contact and which continue to hold cultural, social, political, and legal significance.

10 Reform Party of Canada, *Blue Book: Principles and Policies* (Reform Fund Canada, 1996-1997) at 24; see also Reform Party of Canada, *Blue Book: Principles and Policies* (Reform Fund Canada, 1999) at 10.

11 The Reform Party continually invoked references to “our land” and the need to “explore” and “develop” Canada’s natural resources. See Reform Party of Canada, *Blue Book: Principles and Policies* (Reform Fund Canada, 1990) at 4; (1991) 1; (1995) at 6.

market's imperative for expansion."<sup>12</sup> This motivation and desire to both protect non-Aboriginal lands as well as develop and exploit Indigenous lands for economic gain can be observed in the reactions issued by Reform Party leader Preston Manning in the wake of the Nisga'a Treaty negotiated in 1999 between the Nisga'a Nation and the governments of Canada and British Columbia. Not only did Manning criticize the "special status" accorded to Aboriginal peoples and the lack of fiscally "accountable" forms of democratic governance, he also suggested that a fundamental flaw of the federal government's approach to Aboriginal affairs was a failure to provide "all the tools of the marketplace and private enterprise for economic development."<sup>13</sup> In Manning's estimation, it was imperative that Canadian governments "find ways and means of adapting private enterprise and market based tools of economic development to the needs of [A]boriginal people. That means finding a way to establish private property and contract rights on reserves. That would do more to stimulate economic development than all of the collectivism in the agreement put together."<sup>14</sup> In other words, the primary position advanced by Manning and the Reform Party was not simply a desire to enhance Indigenous economic prosperity within their reserve lands, but rather to open those lands up and bring "free markets to bear on [A]boriginal government and [A]boriginal economic development."<sup>15</sup> As such, the underlying logic surrounding the establishment of private property and "contract rights" on Aboriginal reserves serves as a further means of dispossession by enabling non-Aboriginal interests and private corporations to develop and exploit Aboriginal lands.<sup>16</sup>

I briefly draw attention to these desires to establish "private property regimes" and "contract rights" on Aboriginal reserves to highlight the fact that they have long been an established part of the "new right's" agenda in Canada.<sup>17</sup> This agenda did not substantially change upon the formation of the Conservative Party of Canada (CPC) in 2003. In fact, if anything, it is an

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12 Wolfe, "Settler Colonialism" *supra* note 5 at 395. While it should be noted that Wolfe suggests that it is the "permanency" of agriculture that ultimately sustains the other sectors, his directive to consider a range of areas that may motivate the settler-colonial project is worthy of attention, especially as his list bears a remarkable resemblance to those specified by the Supreme Court of Canada as justifiable "infringements" of Aboriginal title, see *Delgamuukw*, *supra* note 2 at para 165.

13 Manning, "Debates" *supra* note 8 at 1100.

14 *Ibid* at 1145.

15 *Ibid*.

16 The prioritization granted to non-Aboriginal economic interests can also be seen in the founding policies of the Canadian Alliance. See Canadian Alliance, *Canadian Alliance Declaration of Policy* (The Alliance, 2000) at 7.

17 For more detailed discussion of the positions expressed by the Reform and Canadian Alliance parties in this area, see Michael McCrossan, "Delegating Indigenous Rights and Denying Legal Pluralism: Tracing Conservative Efforts to Protect Private Property Regimes and 'Canadian' Territory," in J.P.

agenda that became far more explicit and entrenched under the CPC and the leadership of Stephen Harper. Not only did the CPC continue this private property program through a variety of policy proposals and legislative enactments, it also created a policy framework whose underlying logic seemingly works Indigenous peoples further into the existing political, legal, and social structures of the Canadian state.

## **Private property regimes and settler colonial logics of elimination**

The CPC's territorial focus and representations of Indigenous peoples can be observed in the party's 2004 electoral platform "Demanding Better." Under the section entitled "Better Communities," one can find not only a brief mention of the party's policy in relation to Aboriginal peoples, but also the areas of concern that would figure prominently over the course of the government's tenure. For instance, the party stated that they would "work to improve the economic and social conditions of all [A]boriginal Canadians and their communities."<sup>18</sup> In order to realize this objective, the party outlined the following plan:

A Conservative government led by Stephen Harper will support the development of a property regime on reserves to allow individual property ownership that will encourage lending for private housing and businesses. A Conservative government will also create a matrimonial property code to protect spouses and children in cases of marriage breakdown.<sup>19</sup>

It is likely significant that these consecutive statements form a single paragraph in the party's plan. On the one hand, this desire to establish a "property regime" on reserves continues the former Reform objective of "bringing free markets to bear" on Aboriginal reserve land. However, when considered alongside the creation of a "matrimonial property code" it becomes clear that the CPC ultimately viewed Aboriginal reserve lands as objects that could potentially be severed from communities and historic relationships through forms of individual demarcation, distribution, and economic utilization.

For instance, in June 2006, during the Conservative government's first term in office, Wendy Grant-John was appointed as Ministerial Representative

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Lewis and Joanna Everitt, eds. *The Blueprint: Conservative Parties and their Impact on Canadian Politics* (Toronto: University of Toronto Press, forthcoming).

18 Conservative Party of Canada, *Demanding Better*, (Conservative Party of Canada, 2004) at 33 [Platform 2004].

19 *Ibid.*

to “assist” and “advise” Indian and Northern Affairs Canada (INAC), the Assembly of First Nations (AFN), and the Native Women’s Association of Canada (NWAC) in developing “a viable legislative solution” for addressing the issue of “matrimonial real property.”<sup>20</sup> While provincial and territorial laws govern the division of property upon a marriage or relationship breakdown, for persons living on reserves, particularly First Nations women, such laws have not been accessible due to the constitutional division of powers granting the federal government jurisdictional authority under section 91(24) of the *Constitution Act, 1867* for “Indians and lands reserved for the Indians.”<sup>21</sup> As such, given that the federally imposed *Indian Act* did not regulate the distribution of property assets in the event of marriage or relationship breakdowns on reserves, this legislative “gap”<sup>22</sup> produced situations where “women experiencing the breakdown of their marital relationship, experiencing violence at home, or dealing with the death of their partner [would] often lose their homes on reserve.”<sup>23</sup> In an effort to rectify this “legislative gap,” the Harper Conservatives announced in their 2011 Speech From the Throne that the government intended to “introduce legislation to ensure that people living on reserve have the same matrimonial real property rights and protections as other Canadians.”<sup>24</sup> The government fulfilled this intention when Bill S-2, the “Family Homes on Reserves and Matrimonial Interests or Rights Act,” was introduced on 28 September 2011. The legislation received Royal Assent on 19 June 2013. However, while the Act<sup>25</sup> does stipulate that First Nations can enact their own laws to govern the

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20 Office of the Ministerial Representative, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserve*, by Wendy Grant-John (Ottawa: Indian and Northern Affairs Canada, 2007) at Appendix A.

21 For an example of the operation of these divisions of powers in the context of matrimonial property on reserves, see *Derrickson v Derrickson*, [1986] 1 S.C.R. 285, 26 D.L.R. (4th) 175.

22 Aboriginal Affairs and Northern Development Canada, “Matrimonial Real Property on Reserves,” online: <<https://www.aadnc-aandc.gc.ca/eng/1100100032553/1100100032557>>. This, of course, is not to suggest that matrimonial property codes were completely absent on reserves. First Nations operating under the First Nations Land Management Act are required to establish a land management code that includes rules and procedures regarding the division of interests in land upon the breakdown of marriage, see *First Nations Land Management Act*, SC 1999, c24, s 6 (1)(f).

23 Native Women’s Association of Canada, *Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper* (January 2007) at 5 [NWAC]. For further discussion of the gendered forms of inequality perpetuated by federal policy in this area, see Kiera L Ladner, “Gendering Decolonisation, Decolonising Gender” (2009) 13:1 *Austl Indigenous L Rev* 62 at 67-70.

24 Government of Canada, Privy Council Office, “Speech from the Throne to Open the First Session of the 41st Parliament of Canada,” (3 June 2011), online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2011-eng.htm>>.

25 *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 [Matrimonial Property Act]. The Act itself has a lengthy legislative history, see: Indigenous and Northern Affairs Canada, “Backgrounder - Family Homes on Reserves and Matrimonial Interests or Rights Act,” online: <<https://www.aadnc-aandc.gc.ca/eng/1371645998089/1371646065699>>.



division of property in the event of a relationship breakdown or death of a common law partner or spouse,<sup>26</sup> it has been the subject of much criticism from Indigenous organizations and legal scholars.

For example, both NWAC and the AFN noted the lack of financial resources and limited access to lawyers and courts that First Nations women located on isolated reserves would still encounter when attempting to access the new remedies under the Act.<sup>27</sup> In fact, while NWAC has worked on addressing issues surrounding matrimonial real property since the 1990s,<sup>28</sup> representatives from the organization were opposed to the government's approach, characterizing the powers being granted to First Nations as simply a form of "delegated law-making authority" that did not respect inherent jurisdictions.<sup>29</sup> Both organizations also raised concerns regarding the consultation process that was used to develop the legislation, arguing that the timeframes were insufficient to adequately engage the issue with First Nations members in any substantive manner.<sup>30</sup> As well, Indigenous legal scholars such as Pamela Palmater were critical of the government's proposed bill, suggesting that it had the potential to ultimately create long-term interests on reserve lands for non-Aboriginal people.<sup>31</sup>

However, perhaps equally revealing is the fact that INAC's Ministerial Representative noted in relation to governmental understandings of the "legislative gap" surrounding matrimonial real property that "[t]he federal analysis of this gap is rooted in non-[A]boriginal notions of individual property ownership and the relationships of property, family and the proper role of law in regulating relationships to land and family relations."<sup>32</sup> This is an important assessment to consider. Given the long-established "private property" emphasis by the "new right" in relation to Aboriginal reserves, it is perhaps not sur-

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26 *Ibid.*, s 7.

27 Standing Committee on the Status of Women, *Committee Evidence*, 41st Parl, 1st Sess, No 74 (2 May 2013) at 2 (Jody Wilson-Raybould, AFN Regional Chief); see also Standing Committee on the Status of Women, *Committee Evidence*, 41st Parl, 1st Sess, No 76 (8 May 2013) at 2 (Michèle Audette, NWAC President).

28 NWAC *supra* note 23 at 5.

29 Senate Standing Committee on Human Rights, *Committee Evidence*, 40th Parl, 3d Sess, No 3 (31 May 2010) at 13 (Jeannette Corbiere Lavell, NWAC President); see also Audette, *supra* note 27 at 1. It should be noted that representatives from the AFN also highlighted similar concerns. See Wilson-Raybould, *supra* note 27.

30 NWAC, *supra* note 23 at 33; see also Senate Standing Committee on Human Rights, *Committee Evidence*, 40th Parl, 3d Sess, No 3 (31 May 2010) at 17 (Jody Wilson-Raybould, AFN Regional Chief).

31 Pamela Palmater, "Murdered, Missing and Still Excluded: Indigenous Women Fight for Equality," *Rabble.ca* (12 October 2011), online: <<http://rabble.ca/blogs/bloggers/pamela-palmater/2011/10/murdered-missing-and-still-excluded-indigenous-women-fight-eq>>.

32 Grant-John, *supra* note 20 at 19.

prising that the Harper Conservatives linked both individual property ownership and the creation of a matrimonial property code in their 2004 electoral platform. While the Minister claimed that the proposed bill would “strick[e] a practical balance between individual rights and collective interests,”<sup>33</sup> one could argue that the orientation observed by Grant-John above continued to structure the “preferred” content of “matrimonial real property” on reserves by not only privileging non-Aboriginal legal conceptions of “individual” ownership and corresponding rights of “exclusion” in the defaulting to provisional federal rules,<sup>34</sup> but also visions of the land itself as a principally commodified “object.”<sup>35</sup>

In effect, what one can observe over the course of the last twenty years is a clear orientation on the part of conservative parties in Canada towards not only guarding and protecting non-Aboriginal property interests, but also a vision of the “proper” or “preferred” way of using land which dovetails with colonial-capital logics of territorial exploitation. For example, the continuing aspiration to open Indigenous territories up for development and “bring the free market to bear” on reserve lands became more explicit during the Conservative government’s first majority term in office. For instance, in its March 2012 budget the government declared its aim “to explore with interested First Nations the option of moving forward with legislation that would allow private property ownership within current reserve boundaries.”<sup>36</sup> This declaration of moving forward with “interested” First Nations not only bears a resemblance to former policies of the Reform and Canadian Alliance parties, but also to the writings of Tom Flanagan, Stephen Harper’s former chief of staff and Conservative Party campaign manager. In 2010, Flanagan, along with André Le Dressay and Christopher Alcantara, argued that the federal government should work towards “a regime of fee-simple ownership that First Nations can opt into *voluntarily*.”<sup>37</sup> In this respect, the authors were writing in support of the First Nation Property Ownership Act, a proposed piece of federal legislation advocated by C.T. (Manny) Jules, Chief Commissioner of the First Nations Tax Commission and former Chief of the Kamloops Indian

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33 Senate Standing Committee on Human Rights, *Committee Evidence*, 40th Parl, 3d Sess, No 3 (31 May 2010) at 80 (Minister Chuck Strahl, Indian Affairs and Northern Development).

34 See also Brian Egan & Jessica Place, “Minding the gaps: Property, geography, and Indigenous peoples in Canada” (2013) 44 *Geoforum* 129 at 135.

35 *Matrimonial Property Act*, *supra* note 25 at s 28.

36 Canada, *Jobs, Growth, and Long Term Prosperity — Economic Action Plan* (March 2012) at 165.

37 Tom Flanagan, Christopher Alcantara & Andre Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal & Kingston: McGill-Queen’s University Press, 2010) at 53, emphasis in original [Flanagan et al, *Beyond the Indian Act*].

Band.<sup>38</sup> According to Flanagan, adopting “voluntary” forms of private property on reserves would not only help to “emancipate” Aboriginal peoples from the Indian Act, but also “strengthen the economies of First Nations by giving them access to modern, effective property rights.”<sup>39</sup> However, while this push towards “voluntary” forms of property ownership was presented as a means of ending Aboriginal economic marginalization and colonial relations of power, it is clear that the proposal continues to advance a particular way of relating to land that is infused with an eliminatory or “disposable” logic.

For instance, in its literature surrounding the First Nations Property Ownership Initiative, the First Nations Tax Commission detailed the differences in land holding that would occur under its proposal. While under the Indian Act “First Nations or First Nation members cannot have full ownership rights,” under their property proposal, First Nations hold title to land and “can choose to grant full ownership to individuals.”<sup>40</sup> In other words, the preferred “choices” available to Aboriginal people under their proposal do not simply revolve around “First Nations members” obtaining ownership rights, but rather for First Nations to transfer those rights to “individuals,” or possibly even to non-members. As Flanagan, Le Dressay, and Alcantara argue, “[t]he intended result is to enable First Nations to use their land and natural resources effectively in the modern economy. As they benefit from capitalizing on their assets, so will other Canadians; for a market economy is a wealth-creating, positive-sum game in which all [sic] can benefit from the progress of others.”<sup>41</sup> In Shiri Pasternak’s estimation, such “market-political rationalities” serve to produce “a landscape where ideal Indigenous citizens are constructed as enterprising, capitalizing subjects.”<sup>42</sup> Indeed, although the proposal was billed as strengthening forms of self-governance through the “voluntary” choices available to Aboriginal peoples, it is clear that its underlying vision of the preferred or “effective use” of land is one where Aboriginal peoples would behave just like any other rational non-Aboriginal economic actor who can “exercise all the rights of ownership ... exclude others, use and manage their property, and dispose of it ...”<sup>43</sup> Though the proposed legislation was never passed by

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38 For an insightful account of the numerous alliances underpinning the Act and its relationship to neoliberal regimes, see Shiri Pasternak, “How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada” (2015) 47:1 *Antipode* 179 [Pasternak, “Capitalism”].

39 Flanagan et al, *Beyond the Indian Act*, *supra* note 37 at 5-6.

40 First Nations Tax Commission, “Background on the First Nations Property Ownership Initiative” (1 July 2012), online: <<http://fntc.ca/background-on-the-first-nations-property-ownership-initiative/>>.

41 Flanagan et al, *Beyond the Indian Act*, *supra* note 37 at 29.

42 Pasternak, “Capitalism,” *supra* note 38 at 183.

43 Flanagan et al, *Beyond the Indian Act*, *supra* note 37 at 28.

Parliament, it was supported by an entrenched set of interests, including “right wing” scholars and organizations, mainstream journalists, and bureaucratic officials<sup>44</sup> who very well could continue to frame the discussion around logics that serve to make Aboriginal lands more easily disposed of and exploited by “other Canadians” within the larger free-market economy.

This settler-colonial conception of land as a commodity solely to be controlled and exploited does not accord with the understandings of land regularly presented by Indigenous scholars. For instance, Glen Coulthard has argued that the foundation of Indigenous worldviews are fundamentally “place-based” and “deeply *informed* by what the land *as a system of reciprocal relations and obligations* can teach us about living our lives in relation to one another and the natural world in nondominating and nonexploitive terms.”<sup>45</sup> Likewise, Mary Ellen Turpel has also recognized this non-exploitative relationship in the context of the significance of the matrimonial home for Aboriginal women on reserves. According to Turpel, “[t]he significance of matrimonial property for [A]boriginal women must be understood in the context of what the reserve represents: it is the home of a distinct cultural and linguistic people . . . . The economic value of the land is secondary to its value as shelter within a larger homeland — the homeland of her people, her family.”<sup>46</sup> However, under the policies espoused by conservative parties over the course of the past twenty years, these reciprocal relationships have attempted to be severed in favour of a perspective that treats Indigenous territories and homelands as spaces whose primary “value” resides in their ability to be individually demarcated, dominated, and ultimately thrust towards the volatile and extractive impulses of the marketplace. If there are any relationships that are recognized, it is the already existing property relations and rights to own and dispose of land possessed by non-Aboriginal people that are prioritized. In regards to Aboriginal people, on the other hand, these proposals work towards transforming Aboriginal peoples into similar property owners who can dispose of and “surrender” their rights to land in the name of economic development and “progress.”<sup>47</sup> In effect, the underlying vision found within the policies of the Conservative Party under the leadership of Stephen

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<sup>44</sup> Pasternak, “Capitalism,” *supra* note 38 at 183-7.

<sup>45</sup> Coulthard, *supra* note 7 at 13, emphasis in original.

<sup>46</sup> Mary Ellen Turpel, “Home/Land” (1991-2) 10 Can J Fam L 17 at 32-33.

<sup>47</sup> Indeed, as Jeff Corntassel has noted, “[w]hen market transactions replace kinship relationships, Indigenous homelands and waterways become very vulnerable to exploitation by shape-shifting colonial powers . . . one should be wary of any citizenship models grounded in capitalism/neoliberalism to the exclusion of responsibility-based governance”: Jeff Corntassel, “Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination” (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 69 at 95.

Harper appears to be one that is premised upon the integration of Aboriginal peoples into the “freely competitive market economy”<sup>48</sup> while also undermining the potency of collective claims to land by limiting the authority of Aboriginal communities to determine how their lands will be used.<sup>49</sup>

## Reconciliation, Indigenous elimination, and policy “renewal”

This priority granted to non-Aboriginal economic interests can be seen in the interim policy framework dealing with section 35<sup>50</sup> rights that Stephen Harper’s Conservative government produced near the end of its tenure. The interim policy itself was bookended by two reports written by Douglas R. Eyford, a lawyer and former federal negotiator appointed by the government to provide advice on Aboriginal participation in west coast energy projects and to lead engagement with Aboriginal peoples on “renewing” and “reforming” Canada’s comprehensive land claims policy. It is useful to consider all three documents together as they not only build upon and reference one another, but also produce a unified vision of “reconciliation” that is replete with eliminatory rationalities in relation to Aboriginal peoples and their territories. In fact, both the first and second Eyford reports deserve consideration as a policy framework for understanding the government’s position in relation to Aboriginal rights as they still feature prominently on the departmental websites of Natural Resources Canada<sup>51</sup> and the newly renamed Indigenous and Northern Affairs Canada.<sup>52</sup>

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48 Conservative Party of Canada, *Policy Declaration* (Amended 11 June 2011).

49 In 2012 the Harper Conservatives passed Bill C-45, a controversial omnibus budget bill that made significant amendments in a number of policy areas, including changes to the Indian Act which make it easier for bands to “surrender” their lands for economic purposes, see Department of Finance, “Background Document: Bill C-45 — Jobs and Growth Act, 2012,” at part 4, div 8, pages 1-2, online: <<http://www.fin.gc.ca/pub/c45/c45-eng.pdf>>. The underlying logic of the Harper government during this period has been characterized as fundamentally premised upon ‘termination.’ See Russell Diabo, “Harper Launches Major First Nations Termination Plan: As Negotiating Tables Legitimize Canada’s Colonialism,” (2012) 10:7-10 *First Nations Strategic Bulletin* 1. However, it should be noted that Bill C-45 was one of the primary motivating factors behind the Indigenous grassroots social movement known as “Idle No More.” For discussions of the movement, see The Kino-nda-niimi Collective, ed, *The Winter We Danced* (Winnipeg: ARP Books, 2014).

50 Section 35(1) of the Constitution Act, 1982 reads as follows: “The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed” *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 35.

51 Douglas R Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development* (29 November 2013), online: <<http://www.nrcan.gc.ca/publications/1138>> [2013 Eyford Report].

52 Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ministry of Natural Resources, 2015), online: <<https://www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207>> [2015 Eyford Report].

A reading of all three documents together ultimately reveals a commitment to maintaining and enlarging the existing legal and spatial boundaries of the Canadian state relative to the claims of Aboriginal peoples. The documents produce not only a representation of Aboriginal peoples that fundamentally undercuts their sovereignty and prior citizenship regimes, but also a narrative of reconciliation seemingly designed to merge Aboriginal peoples further into the legal, territorial, and economic spaces presently regulated by Canada.<sup>53</sup>

For instance, Douglas Eyford's first report presents Aboriginal peoples as "Canadians" seeking inclusion and integration into the broader Canadian economic environment. Noting Canada's desire to pursue energy opportunities in "expanding markets," Eyford declares the following:

Aboriginal Canadians understand the value of the proposed energy projects to their communities. However, they emphasize that environmental sustainability and prevention of significant environmental harm are necessary conditions for their support ... . Aboriginal Canadians also expect long-term economic benefits for their communities and a meaningful role in project-related activities including environmental monitoring and protection.<sup>54</sup>

While "environmental sustainability" and "economic prosperity" are certainly significant values that many individuals would be likely to support, this reference to "Aboriginal Canadians" should not go unnoticed. Eyford consistently refers to "Aboriginal Canadians" throughout his report. In fact, outside of select Supreme Court citations interspersed throughout the text,<sup>55</sup> there is only one reference made by Eyford to "Aboriginal peoples."<sup>56</sup> Instead, substituted in its place are references to "Aboriginal Canadians," "communities," and individual Aboriginal "people." This representation of Aboriginal peoples as "Canadians" is significant as it situates Aboriginal peoples firmly within the all-encompassing authority of the Canadian state and its citizenship regime.<sup>57</sup> As such, this discursive construction eliminates the existence of alternate ex-

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53 For discussions of the discursive logics of "reconciliation," see Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation': Geographic Commitments Underpinning Aboriginal Rights Decisions," (2013) 31:2 Windsor YB Access Just 155 at 157-8 [McCrossan, "Judicial Conceptions"]; see also Coulthard, *supra* note 7 at 106-7.

54 2013 Eyford Report, *supra* note 51 at 3.

55 *Ibid* at 12, 32.

56 *Ibid* at 7.

57 Similar representations can be observed in the jurisprudence of the Supreme Court. See Kiera L. Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James B. Kelly & Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 273, 280. For a discussion of these logics in relation to 'the market system' and broader neoliberal policies, see Cornthassel, *supra* note 47.

pressions of sovereignty and nationhood in favour of a unified understanding of Aboriginal identity as coterminous with Canadian identity.<sup>58</sup> In effect, much like Supreme Court characterizations of Aboriginal identity,<sup>59</sup> this construction takes the existing structures, boundaries, and economic interests of the state as the foundation for considering — and integrating — the rights available to Aboriginal peoples while at the same time treating Aboriginal perspectives as relatively undifferentiated and homogenous in scope.<sup>60</sup>

As the report notes, in the context of “pursu[ing] export opportunities in emerging markets” and “fostering” Aboriginal “inclusion” in oil pipeline projects, the following challenges need to be met:

The challenge for governments, industry, and Aboriginal communities is integrating Aboriginal people into pipeline safety processes and plans given the differing jurisdictions of the federal and provincial governments, the varying stages of development for each of the proposed pipelines, and how project proponents implement regulatory requirements.<sup>61</sup>

In effect, it is the existing federal and provincial jurisdictions that are naturalized within a report dealing with resource extraction and energy development. There is no indication that Indigenous peoples might have their own laws governing the regulation and conservation of resources within their territories. Instead, Indigenous territories in the province of British Columbia, where relatively few treaties were signed with the Crown, are recast as “their *asserted* traditional territories”<sup>62</sup> while the ability of federal and provincial governments to exercise authority over those territories and the “Aboriginal Canadians” residing therein remains unquestioned.<sup>63</sup> More significantly, in the context of “Crown-Aboriginal Relations,” Eyford’s report notes that “Industry understands, perhaps more directly than governments, that Projects may be placed at risk if Aboriginal and treaty rights are not addressed. Industry questions why Canada is not doing more to address unresolved Aboriginal rights claims ...”<sup>64</sup>

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58 Indigenous scholars have regularly questioned the imposition and conflation of Indigenous identity with Canadian identity. See Kiera L Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalisms,” in Francois Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism* (Peterborough: Broadview Press, 2003) at 183-6.

59 See McCrossan, “Judicial Conceptions,” *supra* note 53 at 174.

60 As the report declares, “. . .all Aboriginal Canadians want to share in the wealth and prosperity of this country.” See 2013 Eyford Report, *supra* note 51 at 8.

61 *Ibid* at 17.

62 *Ibid*, emphasis added.

63 It should be noted, however, that Indigenous peoples have continued to question and resist settler-colonial forms of territoriality through a variety of strategies and tactics. See Coulthard, *supra* note 7.

64 2013 Eyford Report, *supra* note 51 at 8.

The fact that the misgivings of industry are highlighted and expressed in the context of “Crown-Aboriginal Relations” suggests that the primary concerns underpinning the report are not simply about a desire to “include” Aboriginal peoples within resource development projects, but rather to ensure that their presence does not act as a hindrance to the extractive projects themselves. To minimize this threat, Eyford’s report not only recasts Aboriginal peoples as “Canadians” under the jurisdictional and territorial authority of the federal and provincial governments, but also as undifferentiated groups who “view natural resource development as linked to a broader reconciliation agenda.”<sup>65</sup> It is this linkage between “resource development” and a “broader reconciliation agenda” that would be given far greater shape in both the government’s interim policy and Eyford’s second report.

For instance, the Harper government’s September 2014 interim policy report begins by situating itself as a proposed “starting point” for dialogue and discussions with “Aboriginal partners across the country.”<sup>66</sup> However, while Aboriginal peoples are presented as “partners” with Canada, they are also simultaneously represented as subjects of the Crown whose place within the territorial borders of Canada is already settled. In fact, it is “reconciliation” itself that serves as the lynchpin for this movement. Immediately following the discussion of “partnership” and the need to “renew” Canada’s policy framework, the interim report notes the following:

Aboriginal rights recognized and affirmed by Section 35(1) are best understood as, firstly, the means by which the *Constitution* recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, secondly, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfilling [sic] both of these purposes.<sup>67</sup>

While this draws from the Supreme Court’s representation of “reconciliation” in *Van der Peet*,<sup>68</sup> it is also important to recognize that the Court’s understanding of reconciliation is built upon a fundamentally spatialized conception of Canada “which fully locates Aboriginal people inside the geographic and temporal boundaries of the Canadian state.”<sup>69</sup> Indeed, much like the first Eyford

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<sup>65</sup> *Ibid* at 1.

<sup>66</sup> Aboriginal Affairs and Northern Development Canada, “Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights” (September 2014) at 3, online: <<https://www.aadnc-aandc.gc.ca/eng/1408631807053/1408631881247>> [Interim Report].

<sup>67</sup> Interim Report, *ibid* at 6-7.

<sup>68</sup> *Van der Peet*, *supra* note 2 at para 36.

<sup>69</sup> McCrossan, “Judicial Conceptions” *supra* note 53 at 173.



report — which the interim policy also acknowledges it is building upon<sup>70</sup> — Aboriginal people are constructed as Canadians whose economic interests coincide fully with those of the broader community.<sup>71</sup> With this construction in place, the interim policy then proceeds to advance a “renewed” understanding of reconciliation itself. According to the interim policy, “Canada recognizes that reconciliation can lead to economic prosperity. Reconciliation promotes a secure climate for economic and resource development that can benefit all Canadians and balances Aboriginal rights with broader societal interests.”<sup>72</sup> However, given the concerns of industry expressed in the previous Eyford report, this recognition of the potential to realize forms of economic and resource “security” through processes of reconciliation appears designed specifically to address and assuage these concerns by privileging the economic interests of resource developers over the constitutionally protected rights of Aboriginal people. In fact, in the Supreme Court’s historic *Tsilhqot’in Nation* decision where an Aboriginal title claim under section 35 was recognized for the first time, the Court noted that “[t]he issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group’s ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.”<sup>73</sup> However, both the interim policy and Eyford’s first report sidestep such justification requirements and ensure that the interests of third party developers will ultimately be protected through the construction of a vision of reconciliation that implicitly suggests that Aboriginal consent has already been granted by presenting Aboriginal peoples as an undifferentiated totality of “communities” in Canada who “view natural resource development as linked to a broader reconciliation agenda.”<sup>74</sup>

Representations of Aboriginal consent can also be found in Eyford’s second report on “advancing Aboriginal and treaty rights.” Although the government’s interim policy did not reference the Supreme Court’s recent *Tsilhqot’in Nation* decision, Eyford begins the introduction to his second report with a history concerning treaty making that is remarkably similar to the one found in the Court’s decision: “[t]hroughout present-day Canada, the Crown entered

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70 Interim Report, *supra* note 66 at 3.

71 As the Report notes, “It is in *our collective interest* to balance the rights and interests of *all Canadians* and enable Aboriginal communities to access development opportunities that create jobs, economic growth and prosperity,” *ibid*, emphasis added.

72 *Ibid* at 8.

73 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 124 [*Tsilhqot’in Nation*].

74 2013 Eyford Report, *supra* note 51 at 1; for a similar construction, see Interim Report, *supra* note 66 at 6.

into treaties with Aboriginal peoples who surrendered their claims to land in return for reserves and other consideration.”<sup>75</sup> In effect, Eyford expands upon previous representations of Aboriginal consent to the economic objectives and social structures of Canada with a representation that views Aboriginal peoples as consenting to the existing territorial borders themselves. Suggesting that Aboriginal peoples “surrendered” claims to land in exchange for reserves not only ignores the manner in which reserve boundaries were often drawn up and limited by settler-colonial officials,<sup>76</sup> but also presumes that Aboriginal responsibilities and ongoing relationships to “Canadian” territories can be neatly bracketed-off and severed. However, given the territorial interests expressed in previous reports and governmental policies, it is perhaps not surprising that Eyford draws attention to the fact that while “the Court [in *Tsilhqot’in Nation*] reiterated that incursions on Aboriginal title land are permitted when justified by a ‘compelling and substantial purpose,’ there has been little acknowledgment or discussion of this important qualification, despite the current range of proposed resource development projects that may qualify.”<sup>77</sup> In other words, Eyford specifically highlights the “legality” of justifiably “invading” Aboriginal title lands in order to realize broader developmental projects. Ultimately, in Eyford’s estimation, “[r]econciliation is intended to address in a contemporary manner the historic fact that the Crown obtained control over the lands and resources that were in the control of Aboriginal peoples prior to European settlement of present-day Canada.”<sup>78</sup> This vision of reconciliation contained in Eyford’s report, and supported by previous Supreme Court jurisprudence, represents Aboriginal rights through the prism of existing territorial boundaries and refracts the “given” nature of the “colonial present”<sup>79</sup> back into the past. As such, the protection offered by section 35 — and the ability of Aboriginal peoples to maintain territorial relationships and responsibilities according to their own laws — appears to be effectively discounted and delegitimized by a politico-historical perspective which filters prior Aboriginal claims to land and governance through the lens of “present” constitutional structures, taken-for-granted territorial boundaries, and ongoing desires to realize the developmental “potential” of Aboriginal lands themselves. Lost within this myopic settler-colonial vision of the present, however, is any space for Aboriginal jurisdictions, governing institutions, and alternative understandings of territory.

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75 2015 Eyford Report, *supra* note 53 at 8; see also *Tsilhqot’in Nation*, *supra* note 73 at para 4.

76 See Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective,” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) at 197.

77 2015 Eyford Report, *supra* note 52 at 30.

78 *Ibid* at 34.

79 Derek Gregory, *The Colonial Present* (Malden, MA: Blackwell Publishing, 2004).

## Conclusion

While this extractive and integrationist perspective pursued by Stephen Harper's Conservative government appears to provide little room for understandings of Indigenous nationhood, the 2015 Canadian federal election saw the reemergence of a "nation-to-nation" discourse amongst opposition party leaders in relation to Aboriginal peoples. For instance, during the campaign, Liberal leader Justin Trudeau promised to "renew" a "nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, cooperation, and partnership."<sup>80</sup> In fact, one month before the writ dropped, Trudeau spoke at the annual general meeting of the Assembly of First Nations where he promised to call a formal inquiry into the issue of missing and murdered Indigenous women and girls, to develop a "reconciliation" framework in "partnership" with Indigenous peoples, and to "conduct a full review of the legislation unilaterally imposed on Aboriginal Peoples by Stephen Harper's government."<sup>81</sup> While historically voter turnout amongst Aboriginal peoples in Canadian elections has tended to be significantly lower than non-Aboriginal people,<sup>82</sup> the 2015 federal election saw a substantial increase in Aboriginal participation rates.<sup>83</sup> This increase was likely due to a combination of factors, including not only the "positive" array of promises made by opposition leaders during the campaign, but also, and more importantly, a resounding effort within Aboriginal communities to mobilize voters in response to the policies of the Harper Conservatives.<sup>84</sup>

Upon winning the 2015 federal election and forming a majority government, the Liberals under Prime Minister Justin Trudeau have already begun to make policy changes in relation to Aboriginal peoples. Not only has the government launched an inquiry into missing and murdered Indigenous women and girls, but in addition to ending all compliance measures related to the *First*

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80 Liberal Party of Canada, "A New Nation-to-Nation Process" (2015), online: <<https://www.liberal.ca/realchange/a-new-nation-to-nation-process/>>.

81 Liberal Party of Canada, "Remarks by Justin Trudeau at The Assembly Of First Nations 36th Annual General Assembly" (2015), online: <<https://www.liberal.ca/realchange/justin-trudeau-at-the-assembly-of-first-nations-36th-annual-general-assembly/>> [Trudeau Remarks].

82 Kiera L Ladner & Michael McCrossan, *The Electoral Participation of Aboriginal People* (Ottawa: Elections Canada, 2007).

83 Chinta Puxley, "Voter Turnout Up by 270 per cent in Some Aboriginal Communities," *The Toronto Star* (25 October 2015), online: <<https://www.thestar.com/news/federal-election/2015/10/25/voter-turnout-up-by-270-per-cent-in-some-aboriginal-communities.html>>.

84 Tanya Talaga, "Behind the Scenes on the Push to Rock the Indigenous Vote," *The Toronto Star* (23 October 2015), online: <<https://www.thestar.com/news/canada/2015/10/23/behind-the-scenes-on-the-push-to-rock-the-indigenous-vote.html>>.

*Nations Financial Transparency Act*,<sup>85</sup> has also reinstated funding frozen under the Act itself. In fact, Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, announced that in keeping with the government's commitment to renewing a "nation-to-nation" relationship, "the Government of Canada will suspend any court actions against First Nations who have not complied with the Act."<sup>86</sup> However, it is still uncertain just how the government intends to define this "nation-to-nation relationship" or how it will ultimately develop over time.<sup>87</sup> Will this nation-to-nation relationship continue to seek forms of integration premised upon the territorial desires and authority of Canada, or will it offer understandings of territory and governance that are more aligned with Indigenous conceptualizations? For instance, what is interesting about the remarks made by Justin Trudeau during his speech in Montreal to the Assembly of First Nations is that he referenced the Two-Row Wampum treaty whose "renewal" could fundamentally reimagine Canada's current conceptions of territorial authority and control. According to Trudeau, the government's commitment to a renewed relationship will be centred upon a long history of relations "symbolized by treaties, and in this part of the country, by the two-row wampum."<sup>88</sup> As a number of scholars have noted, for the Haudenosaunee Confederacy, the Two-Row Wampum conveys an understanding of their treaty relationship with the Crown, or a relationship predicated upon mutual respect and peaceful coexistence in which neither culture or legal system would occupy a position of dominance over the other.<sup>89</sup> By invoking the Two-Row Wampum, Trudeau could have arguably signalled the beginning of a movement away from understandings of "reconciliation" premised upon Indigenous integration and settler-colonial forms of territorial control.

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85 See *First Nations Financial Transparency Act*, SC 2013, C7.

86 Canada, "Statement by the Honourable Carolyn Bennett on the First Nations Financial Transparency Act" (18 December 2015), online: <<http://news.gc.ca/web/article-en.do?nid=1024739&tp=980>>.

87 Lynn Gehl has also recently raised similar questions in relation to the signing of an agreement in principle between the governments of Canada, Ontario, and the Algonquins of Ontario. See Lynn Gehl, "The ratification process for the Algonquin agreement in principle is an example of what is wrong with Canada's approach in land claims and self-government negotiations," *Policy Options* (15 November 2016), online: <<http://policyoptions.irpp.org/magazines/november-2016/deeply-flawed-process-around-algonquin-land-claim-agreement/>>.

88 Trudeau Remarks, *supra* note 81.

89 See Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999) at 36-8. Likewise, in contrast to interpretations predicated upon strict separation, Susan Hill reminds that the agreement contains principles for enduring forms of connection: Susan M. Hill, "Travelling Down the River of Life in Peace and Friendship, Forever': Haudenosaunee Land Ethics and Treaty Agreements as the Basis For Restructuring the Relationship with the British Crown," in Leanne Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring, 2008) at 30.

However, in the same speech Trudeau also declared that the renewed nation-to-nation relationship would be “guided by the spirit and intent of the original Treaty relationship, and one that respects the decisions of our courts.”<sup>90</sup> Not only has the Supreme Court constructed representations of Aboriginal identity and territory as “inescapably Canadian,”<sup>91</sup> but members of the Court have also advanced their own understandings of the Two-Row Wampum. According to former Justice Ian Binnie, the Two-Row Wampum is emblematic of the “modern” settler-colonial “realities” in which Indigenous peoples are presently situated:

The modern embodiment of the “two-row” wampum concept, modified to reflect some of the realities of a modern state, is the idea of a “merged” or “shared” sovereignty. “Merged sovereignty” asserts that First Nations were not wholly subordinated to non-[A]boriginal sovereignty but over time became merger partners ... Whereas historically the Crown may have been portrayed as an entity across the seas with which [A]boriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders ... [“merged sovereignty”] must include at least the idea that [A]-boriginal and non-[A]boriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing [A]boriginal and treaty rights must be reconciled.<sup>92</sup>

Ultimately the challenge for both legal and political actors will be whether they can move beyond a “totalizing vision of Canadian sovereignty and territorial space”<sup>93</sup> which continues to recast Indigenous peoples as voluntarily agreeing to give up rights to sovereignty in favour of possessing membership within the borders of the “modern” Canadian community.<sup>94</sup> It remains to be seen whether Trudeau’s invocation of the Two-Row Wampum will truly embrace Indigenous understandings of non-exploitative territorial relationships and responsibilities, or whether he will continue the policy trajectory strengthened by the Harper Conservatives of treating Indigenous territories as settler-colonial

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90 Trudeau Remarks, *supra* note 81.

91 McCrossan, “Judicial Conceptions” *supra* note 53 at 179.

92 Mitchell, *supra* note 2 at para 129, emphasis in original.

93 Ladner & McCrossan, *supra* note 57 at 279.

94 For discussions of how notions of “consent” were represented in the Mitchell decision, see Mark D. Walters, “The Morality of Aboriginal Law” (2006) 31:2 *Queen’s LJ* 470 at 511; see also Gordon Christie, “The Court’s Exercise of Plenary Power,” (2002) 16:2 *SCLR* 285 at 294.

sites of unrealized economic potential for the benefit, and protection, of the larger “Canadian” nation.<sup>95</sup>

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95 Although this article was originally written during the Liberal government’s first four months in office, it should be noted that Trudeau has perhaps signaled the continuation of a similar trajectory. For example, Trudeau’s November 2016 announcement of an Oceans Protection Plan has been viewed by commentators as a sign that the government could very well be moving, in the face of “opposition” from “indigenous communities and environmentalists,” towards the approval of major oil pipeline projects. See Josh Wingrove, “Trudeau Clears Path for Canada to Approve Kinder Morgan Pipeline” *Bloomberg.com* (14 November 2016), online: <<http://www.bloomberg.com/news/articles/2016-11-14/trudeau-clears-path-for-canada-to-approve-kinder-morgan-pipeline>>