

Bureaucratic Territory: First Nations, Private Property, and 'Turn-Key' Colonialism in Canada

Jeremy J. Schmidt, Department of Geography, Durham University

Abstract

Since 2006, successive Canadian governments have worked to create private property regimes on lands reserved for First Nations. This article examines how the state framed the theory and history of Aboriginal property rights to achieve this goal. It then shows how, under the pretense of restoration, bureaucrats developed legislation that would create novel political spaces where, once converted to private property, reserved lands would function as a new kind of federal municipality in Canada. These changes took place in two ways: first, bureaucrats situated Aboriginal property within the state apparatus and reconfigured Indigenous territorial rights into a series of 'regulatory gaps' regarding voting thresholds, certainty of title, and the historical misrepresentation of First Nations economies. Second, the government crafted legislation under what is known as the First Nations Property Ownership Initiative that, by closing 'regulatory gaps,' would produce private property regimes analogous to municipal arrangements elsewhere in Canada. These bureaucratic practices realigned internal state mechanisms to produce novel external boundaries among the state, Indigenous lands, and the economy. By tracking how bureaucratic practices adapted to Indigenous refusals of state agendas, the article shows how the bureaucratic production of territory gave form to a new iteration of settler-colonialism in Canada.

Keywords: Bureaucracy, territory, property, Canada, settler-colonialism

Shortly after coming to power in 2006, the Conservative Party of Canada (CPC) began developing policy to allow lands reserved for Indigenous First Nations to be converted into private property. When the proposal was floated publicly in 2010, the Assembly of First Nations (2010)—the largest political organization of First Nations in Canada—formally rejected it and sent notice to John Duncan, then the federal cabinet minister for Indian Affairs and Northern Development. In theory, the AFN resolution against the proposal might have quashed it; legal changes that may adversely affect Aboriginal or Treaty rights in Canada trigger a duty to consult those affected, and the AFN resolution stated the proposal was in “direct contradiction to First Nation sacred responsibilities and distinct relationship to our territories” (ATIP 2011, 292). The ruling CPC party, however, continued to pursue the private property agenda alongside a suite of reforms designed to further exploit resources on the territories of First Nations (see Stanley 2016, Peyton and Franks 2016, Hoogeveen 2015). With the value of resource developments affecting First Nations territories estimated at \$400 billion (CAD) by the Assembly of First Nations (2011), and with other estimates reaching \$600 billion (Bains 2013), the stakes were high.

In autumn 2015, the CPC lost power when the Liberal Party of Canada swept to majority victory in the federal election. This too might have ended the private property agenda. The Liberal Party (2015, 42) had won on an election platform that promised reconciliation with Indigenous peoples and to govern in accordance with “Aboriginal and Treaty rights and the United Nations Declaration on the Rights of Indigenous Peoples.” The former rights establish the duty to consult, while the latter require free, prior, and informed consent on decisions affecting Indigenous peoples. Yet, under Liberal rule, the private property proposal did not end. Instead, as detailed below, bureaucrats realigned the program to fit the priorities and rhetoric of the

incoming government and to strategically introduce new ministers to what is known as the First Nations Property Ownership Initiative, or FNPO.

This article traces the theoretical, historical, and political strategies used to develop the FNPO. It draws on Access to Information and Privacy (ATIP) requests from government ministries, government committee testimony, media accounts, and publications designed to support the FNPO, focusing especially on policy development from 2010-2016. After reviewing how bureaucratic realignments sit amidst larger contests over Aboriginal property and title in Canada, the article examines how the FNPO: (1) Conceptualized historical burdens towards Aboriginal peoples in Canada and framed the FNPO as a restorative project vis-à-vis Aboriginal territory and property rights; and, (2) Crafted the FNPO such that questions of Aboriginal territory and property were transliterated into a series of ‘regulatory gaps’ that positioned liberal institutions as restorative, even caring, in the creation of private property regimes. Through this process of transliteration, bureaucrats wrote Indigenous claims in the language of the state. They did so in the name of restoring Aboriginal property rights yet nevertheless extended structures of dispossession. Companion to this process, bureaucrats realigned the internal network of the state in order to recognize new external boundaries among the state, Indigenous lands, and the economy. As these boundaries were articulated, settler-colonial structures of dispossession took new form. Through the FNPO, bureaucrats created the conditions to transform reserved lands into spatial configurations akin to municipalities but which would operate under unique federal arrangements. The regulatory footwork undertaken through the FNPO thereby produced space for a new kind of federal municipality that, through a suite of bureaucratic practices, repackages dispossession as the restoration of Aboriginal territory and property.

Contested Aboriginal Title and Property

There is deep contest over territorial and property rights in Canada, and of the forms of Aboriginal title identified as being held by Indigenous peoples—which colonizers sought to extinguish through various treaties, agreements, and laws in order to legitimate their own claims (see Lavoie 2011, Asch 2014, Borrows 2016). The geographic practices associated with Canada’s territorial consolidations reveal the many registers employed for pursuing these ends: the effective granting of sovereignty to colonial companies, legal surveys, cadastral maps, enclosures of common lands, and boundary practices that construct and entrain relations of race, gender, ethnicity, and kin into structures of dispossession (Borrows 1997, Harris 2002, Blomley 2003, Cavanagh 2011, Nadasdy 2012, Coulthard 2014, Rueck 2014, Hogue 2015). Often, these practices were—some remain—supported by bureaucratic devices that determined membership rosters, certified ethnicity, starved populations, defined how marriage practices affected Aboriginal status, or which regulated land use practices, from hunting to climate adaptation, in ways that reinforced state logics (e.g. Nadasdy 2005, Schmidt and Dowsley 2010, Daschuk 2013, Cameron 2012, Simpson 2014).

Judgments by Canada’s Supreme Court recognizing Aboriginal land claims, and recently of Aboriginal title, have opened a complex space regarding how different legal orders come to bear on claims to land, resources, sovereignty, and private property (e.g. Tully 1994, Pasternak 2014, Borrows 2015a, 2015b). For instance, previous studies of proposals for creating “fee simple” estates of private property on Aboriginal lands (i.e. private property and associated bundles of rights regarding use, exclusion, and transfer) reveal how these proposals are entangled with multiple historical practices and rationalities found within and across Aboriginal laws,

colonial practices, and common law (Egan and Place 2013, Blomley 2014, 2015). In the case of the FNPO, scholars have argued the proposed private property system extends settler-colonial structures of dispossession through neoliberal logics that capitalize on moments of accumulation associated with the conversion of reserved land into private property (Pasternak 2015). Dempsey, Gould, and Sundberg (2011), for instance, argue the social transformations that accompany such neoliberal programs effectively produce “entrepreneurial-subjects” and new sets of relationships that undermine both Indigenous modes of sovereignty (or a non-colonial corollary) and autonomy.

Bureaucratic practices are central to these contests, and to the FNPO, because they are crucial to the workings of both law and economic regulation. To situate the bureaucratic aspects of the FNPO, this article follows Mitchell’s (1991) argument that governing networks maintain order by realigning internal mechanisms in ways that produce boundaries that appear external, but which secure, entrench, and often extend the reach of the state. Although represented as impersonal and rational, Weber (2009) argued that modern bureaucracies frequently align governing mechanisms with the temporal demands of capital. To navigate tensions between claims to rationality and agendas of political economy, states must generate symbolic capital in order to ensure any new realignment does not undermine the legitimacy claimed for previous arrangements (Bourdieu 2015). As Gupta (2012) argues, the contingent ways bureaucratic realignments proceed reveal how both structural violence and care can co-exist as state officials make and test forms of justification to navigate between rationality and political economy. Colonial bureaucracies, for instance, sought to rationalize the tension between violent practices of extraction and accumulation, on the one hand, and claims of care regarding colonized peoples (i.e. the civilizing mission) on the other (Lowe 2015). In settler-colonial contexts, bureaucratic

realignments structurally separate the rationale for the dispossession of Indigenous peoples from state claims to legitimacy, even though the former is the condition for the latter (see Byrd 2011). In Canada, realignments undertaken in the name of political recognition maintain this separation by generating a “field of power through which colonial relations are produced and maintained” in ways that ensure ‘recognition’ of Indigenous claims is grounded in forms of legitimacy that are kept separate from structures of dispossession (Coulthard 2014, 17). The result is that harms to Indigenous peoples are treated through state interventions made in the name of recognition but which are premised on the structural violence of Indigenous dispossession (Stevenson 2014, Povinelli 2011).

Bureaucratic realignments of mechanisms internal to the state are key to understanding how external boundaries are produced in ways that reposition liberal institutions of private property as agents of restorative justice. Indeed, accumulating symbolic power to this end was salient in the FNPO in two key respects. First, like World Bank land-titling programs in Peru, the FNPO sought to articulate the boundary between “dead assets” and economic life in a way that used property rights as a mechanism to alleviate economic hardship (Mitchell 2007). Second, and similar to land-titling programs in Central America, the FNPO claims a form of “compensatory justice” in which states seek to recognize cultural difference by creating new rights regimes putatively designed to provide Indigenous peoples with cultural security but which in operation are driven by economic logics (Hale 2011, 195). Finally, and uniquely, the Canadian government needed space in which private property on reserved lands could be recognized without undermining its own territorial sovereignty. That is, dispossession had to become a historical event—not an on-going structure—that could be kept separate from state claims to legitimacy (see Wolfe 1999).

These considerations allow the Canadian case to speak to more general challenges. For instance, central to Mitchell's (1991, 90) account is the claim that the boundary between the state and society does not mark a perimeter, but "is a line drawn internally, *within* the network of institutional mechanisms through which a certain social and political order is maintained." The state, on this account, is "not an actual structure" but a "metaphysical effect of practices that make such structures appear to exist" (Mitchell 1991, 94). In settler-colonial contexts, however, Indigenous peoples who resist the state's institutional mechanisms mark these boundaries in ways that also refuse the "metaphysical effect" of the state. In Canada, these refusals often come with an attendant form of specificity to lands, territories, and laws (Mack 2010, Simpson 2014, Coulthard 2014, Borrows 2016). Whereas the goal of state boundary exercises is to make cultural differences internal to the institutional network of the state, such refusals affect not only the reach of this network but also the kind of network the state is able to extend. The response of settler-colonial states to the specificity of Indigenous refusals forms the crux of this article's contribution, which focuses on how bureaucrats transliterated this specificity into the language of the state. In this case, new spatial forms for recognizing Indigenous claims were an external expression of internal realignments of the institutional networks through which the state responds to Indigenous refusals.

The outcome of this bureaucratic work was not obvious straightaway. Instead, the realignment of various institutions in the network of the Canadian government—departments of Aboriginal affairs, natural resources, and finance, to name a few—all took on new forms even as they gave form to the FNPO. In this, the bureaucratic production of space exhibits a kind of plasticity as the state reworks how it will write laws in ways that give semblance to past events—at times to render on-going traumas historical—in relation to desired futures (cf. Malabou 2012).

While there is a political economy that links land-titling programs in Canada to World Bank efforts to extend the global economy, Canadian bureaucrats are not only interested in the conversion of political contests into technical discourses (cf. Li 2007). Rather, bureaucrats needed to rationalize their own response to the refusals they encountered. Their practices transliterated Indigenous claims to specificity into the language of the state and employed new spatial formations to subsume cultural difference. By producing novel external boundaries that conform to the separation of state legitimacy from Indigenous dispossession, these new spatial forms reinforce the structure of settler-colonialism. As this article shows, Canadian bureaucrats transliterated First Nations territorial claims into “regulatory gaps” that they claimed unjustly kept Aboriginal economies from flourishing. What appears a technical exercise, however, demanded bureaucrats attend to state histories in relation to desired futures. Ultimately, bureaucrats described their efforts as “myth-busting” exercises that restored Aboriginal property rights as part of First Nations history and culture (ATIP 2016, 516). The bureaucratic telling and busting of ‘myths’ combined with regulatory closures to render complex histories of dispossession into programs that claim restorative probity yet entrench and extend state power.

Conceptualizing the First Nations Property Ownership Initiative

On 25 May 2010, stations across the national public radio network of the Canadian Broadcasting Corporation transmitted an interview with Manny Jules, a former Chief of the Kamloops Indian Band and the chair of the First Nations Tax Commission. The occasion for the interview was, in part, the publication of a new book, *Beyond the Indian Act: Restoring Aboriginal Property Rights*. A leading proponent of transferring fiscal control from government to First Nations, Jules

had written the book's foreword, which was co-authored by: Tom Flanagan, a political scientist and erstwhile strategist for the CPC government, another political scientist, Christopher Alcantara, and André Le Dressay, the director of Fiscal Realities, a company that facilitates private investment in First Nations communities. In his foreword, Jules made his case for creating private property on lands reserved for First Nations (Flanagan, Alcantara, and Dressay 2010). The argument began from a premise on which there is little disagreement: Canada's 1876 *Indian Act*, which sets out the positions of, and restrictions on, Aboriginal Peoples—First Nations, Métis, and Inuit—is anachronistic, paternalistic, and continues to perpetuate many injustices. Despite agreement that the *Indian Act* is flawed, there is little agreement over how to reform it; the act is an archetype of settler-colonial law that dispossesses Aboriginal peoples in Canada from lands and resources and structures exclusion using institutions, accounting techniques, and boundary practices that perpetuate and extend state policies of violence, oppression, and elimination (Neu 2000, Wolfe 2006, Coulthard 2014, Simpson 2014).

Following the publication of *Beyond the Indian Act*, the authors gave numerous interviews and excerpts of the book appeared in national newspapers, such as the *National Post* (2010). Many other media articles extolled the virtues of private property for First Nations and echoed the argument that the existing tenure system on reserved lands was such a hodgepodge of patchy regulations, ad hoc decisions, and neglect that not only could reserved lands not be mobilized for individual security (such as through mortgages leveraging land values for credit) but that economic uncertainty would persist until developers could make secure investments (ATIP 2011, 2014). As the FNPO was subsequently developed, Flanagan, Alcantara, and Dressay's (2010) proposals were explicitly mobilized within the state's bureaucratic apparatus. There were several moving parts as the government monitored media responses to the proposal,

funneled money to the project, and facilitated the FNPO agenda through other changes it attempted to keep separate from it. To order these dynamics, this section explicates the theoretical and historical claims of Flanagan, Alcantara, and Dressay (2010), which the CPC and bureaucrats used as rationale for addressing deficiencies in the *Indian Act* through the FNPO.

History and Theory of First Nations Property

Despite broad agreement that Canada's *Indian Act* is flawed, there is little agreement on what to do about it. For its part, the CPC government left no ambiguity about how the history and theory of Aboriginal property rights fit with the FNPO, which it interpreted as rectifying the economic limitations of the *Indian Act*. The CPC government's position was explicitly based on Flanagan, Alcantara, and Dressay's (2010) book; internal government memos recommended referencing the book in press releases, media briefs, as background reading for reporters, and cited it in ministerial briefs (ATIP 2011). The government closely monitored media reports on the FNPO, and bureaucrats dutifully circulated media articles in-house and organized them into comparative charts to strategize on messaging and potential problems (ATIP 2011, 2014).

Flanagan, Alcantara, and Dressay's (2010) position is that, prior to European settlement, many Aboriginal peoples in North America held private property. Their thesis, fortified by appeals to Hernando de Soto's (2000) arguments regarding property rights in general, proffered that the *Indian Act* had unjustly stripped Aboriginals of private property rights in the 19th century, which limited their prospects for economic and political freedom. In October 2010, and as part of an early effort to raise the profile of the privatization initiative, Hernando de Soto was brought in as a keynote speaker for a conference in Vancouver. Expectations were high for de

Soto's lecture, as he had previously stated that, "You don't have to travel to Zambia or Peru to see dead capital. Go see your own Indian reserves. That's dead capital. You've got people there who own a whole bunch of things, but they can't convert these assets to capital. These assets are frozen into an *Indian Act* of the 1870s" (ATIP 2014, 4402). The solution, according to de Soto and the Peruvian Institute for Liberty and Democracy that he founded with support from the Nobel laureate economist Friedrich Hayek, was to unlock 'dead' assets through clear property titles that provided certainty of ownership (cf. ATIP 2011, 3260). Despite widespread application in Peru, studies of the World Bank's land-titling program revealed it never had the kind of success it promised (Mitchell 2005). Despite the lack of empirical success, however, the land-titling program had been instructive for Manny Jules. Under his leadership, the First Nations Tax Commission entered a memorandum of understanding with the Institute for Liberty and Democracy to promote private property in the other's country (Jules 2009). And, during testimony for failed legislation designed to provide "certainty" regarding First Nations title (Bill C-63), Jules (2009) parroted Hernando de Soto's view, stating that, "...you don't have to travel to Zambia or Peru to see dead capital; all you have to do is visit a reserve in Canada" (see also Gauthier and Simeone 2010).

In Ottawa, government staff that had attended the Vancouver conference reported on de Soto's argument that "clarity is of the essence" in creating wealth and capital and that "property rights is [sic] a tool that captures the collective memory of the relationship between a resource and a person/peoples" (ATIP 2011, 1792). It was a position largely congruent with Flanagan, Alcantara, and Dressay's (2010) proposal, which emphasized that legal certainty was the precursor to investment. Flanagan, Alcantara, and Dressay (2010) also justified the FNPO from the premise that histories of Aboriginal property not only existed in Canada, but that Aboriginal

private property practices were, like their western counterparts, grounded in the concept of ownership. For Flanagan, Alcantara, and Dressay (2010), a critical error of the *Indian Act* was that colonists presumed that no other cultural forms of private property existed. In their view, this created a “dualism” between colonizers and Aboriginal peoples, where the latter’s economies were misrepresented as having no forms of private property while the former took it upon themselves to civilize Aboriginals through a series of contradictory, assimilationist policies that were almost “schizophrenic” (Flanagan, Alcantara, and Dressay 2010, 61). The effect of this historical misrepresentation was the unjust establishment of the boundary between ‘dead’ assets from those with economic life.

As an event of misrepresentation, Flanagan, Alcantara, and Dressay (2010) then considered how the Lockean account of private property—the mixing of human labor with passive nature—could be used to restore Aboriginal rights. In their argument, the Lockean view is critical for restoring Aboriginal property rights because it naturalizes property to the ownership of bodily labor. Recognizing ownership was not just analytically desirable, however, but also historically situated as the original event of economic misrepresentation. To mobilize the Lockean story to recover and explain both Aboriginal and non-Aboriginal property ownership, Flanagan, Alcantara, and Dressay (2010) argue that the evolution of modern nation states bifurcated spatial claims into those the state holds in collective title and under sovereign jurisdiction—territory—and the rights of private ownership held by individuals, families, or corporations. In this case, collective title (i.e. territory) provides the enabling condition for private exchange. As Flanagan, Alcantara, and Dressay (2010, 24; original emphasis) write,

“The collective title of the community became identified with the *territory* of the state under the jurisdiction of sovereign authority. Ownership became identified with *property*, held by individuals, families, or corporations under laws created and enforced by the state.”

On this argument, states own land in collective title—territory—and provide for fee-simple estates in private property. To backstop claims regarding the bifurcation of collective and individual claims, and in order to rescue the Lockean story as the basis for ownership, Flanagan, Alcantara, and Dressay (2010) argue that the distinction between territory and individual property is an evolutionary fact. Awkwardly following Richard Dawkins’ (2006) selfish gene argument, they claim private property is like an “extended phenotype” of human-environment interactions that results from universal drivers of human biology. Private property thereby becomes a vehicle for individual survival as people labor for their needs and wants, while collective territory forms the social context for group survival. Drawing on analogies with other primates, Flanagan, Alcantara, and Dressay (2010, 17) argue that as groups “...struggle for *Lebensraum* [living space], they drive away or even exterminate other bands and incorporate their territory into their own.” Of course, Flanagan, Alcantara, and Dressay (2010) acknowledge, humans are more socially complex than other primates. Then, explicitly drawing on Sack’s (1986) notion of human territoriality, Flanagan, Alcantara, and Dressay (2010) argue that private property is an extension of culturally mediated forms of recognition of individual labor and, more deeply, of the biological impulse to survive. In sum, the Lockean story provides an explanation of universal, evolutionary facts about the relationships between individual and collective claims to space. Further, it tidily replaces the eliminative impulses of settler-colonial

states with a naturalized account of group competition. By redressing dispossession as an event of misrepresentation of Aboriginal property rights, Flanagan, Alcantara, and Dressay (2010) make space for liberal institutions as means to restore them.

The account of territory and property offered by Flanagan, Alcantara, and Dressay (2010) establishes a central claim regarding how the government of Canada should restore Aboriginal property rights; namely, because the ownership of private, bodily labor holds as an evolutionary fact across cultures, the government should pursue forms of recognition that restore Aboriginal property in ways congruent with the transferal of collective title to the lands reserved for First Nations and which the government currently holds in fiduciary trust. Once this happens, the boundary separating First Nations property from the global economy will vanish, and ‘dead’ capital will come alive as Aboriginal property rights are restored alongside the recognition of collective certainty of title—territory—for First Nations. By grounding claims to territory in the extension of private property to forms of collective title, Flanagan, Alcantara, and Dressay (2010) confirm their view that a principal deficit of the *Indian Act* is that, in its refusal to acknowledge Aboriginal property rights, it unjustly denies collective security to Aboriginal economies.

Flanagan, Alcantara, and Dressay’s (2010) proposed reforms to the *Indian Act* are likewise oriented to individual ownership and collective title. At the individual level, they advocate fee-simple tenure in which private property rights on reserved land would operate much the same as prevailing forms of private property in Canada. At the level of collective title, they argue that reversionary title to land should be transferred to Aboriginal peoples. The transfer of reversionary title is vital to collective security, according to Flanagan, Alcantara, and Dressay (2010), because when private property falls out of individual ownership (i.e. if somebody dies

with no heir), the property reverts to the territory of the political community holding sovereign claims to that land. By transferring reversionary title to First Nations, Flanagan, Alcantara, and Dressay (2010) seek to overcome a shortcoming of the *Dawes Act* of the United States, where collective territorial claims were lost as private lands of Native Americans exchanged hands with non-Indigenous property owners in a form of free-market colonialism. By contrast, Flanagan, Alcantara, and Dressay's proposed revisions to the *Indian Act* would transfer reversionary title to First Nations to ensure that collective title—territory—cannot be lost. The benefits, according to Flanagan, Alcantara, and Dressay (2010), are that First Nations would have Aboriginal property rights restored while enhancing economic freedom and collective security.

Historical and Theoretical Problems

The argument from Flanagan, Alcantara, and Dressay (2010) is as hurried as it is flawed, but it is nevertheless their entry point for restoring Aboriginal property rights. Before considering how their arguments were mobilized within Canada's bureaucratic apparatus, it is worth highlighting some central errors. The critique is not for its own sake, but instead has two aims. The first is to provide context for how the repositioning of liberal institutions as agents of restoration transliterates claims regarding the specificity of Indigenous territories into problems that bureaucratic realignments can generically solve. Bureaucrats in Canada drafted and circulated a “mythbusters document” designed to show how ‘myths’ regarding the historical absence of First Nations private ownership could be exposed, and countered, through the FNPO (ATIP 2014). The second aim is to position the forthcoming analysis in a political context where bureaucrats on the FNPO file monitor responses to it. By examining the mistaken historical and theoretical

background to the FNPO, a corrective is offered to the “mythbusting” exercises of bureaucrats. There are two critical defects in the history and theory backing the FNPO proposal: (1) the consolidation and naturalization of property in ownership and, (2) the conflation of collective title with territory.

(1) Flanagan, Alcantara, and Dressay (2010) consolidate property in the concept of ownership, yet ownership neither exhausts nor sufficiently supplies the content for property. There are numerous reasons why, but the most salient is that while the idea of property evokes concepts of ownership, private property is in fact a social institution that involves multiple relationships (Underkuffler-Freund 1996, Glenn 2007). As a social institution, ownership claims to private property are never absolute. In fact, and *in deed*, many limitations are often put on private property to protect owners and non-owners. These can include claims on private property, like liens, easements, and covenants, and also include laws affecting nuisance, zoning, and taxation as well as broader social goods such as security, distributive fairness, social justice, public welfare, and environmental protection (see Harris 1996, Singer 2000, Ziff 2014). In short, social relations affect the institution of private property far beyond the limited concept of ownership. Flanagan, Alcantara, and Dressay’s (2010) attempt to naturalize ownership through appeals to evolution gains (at best) limited purchase on how restoring private property, qua ownership, would restore Aboriginal property rights since it says very little about how broader relationships constraining Aboriginal social institutions would remain affected by the *Indian Act*.

Flanagan, Alcantara, and Dressay’s (2010) consolidation of property in a naturalized view of ownership also ignores the racial categories used to legitimate the establishment of private property institutions in Canada and the United States. Racially constructed notions of “whiteness” in the United States, for instance, were enrolled in exclusionary claims against both

Black and Native American groups to disqualify them from property ownership (Harris 1993). Other racial categories, such as ethnicity and blood lineage, have likewise been used to curtail access to rights affecting Aboriginal land tenure in Canada (Harris 2002, Pulla 2012; cf. Tallbear 2013). In many cases, these racial constructions were part of broader colonial agendas that denied legal “personhood” to Indigenous peoples altogether (Farooq 2016). As a result, not only is the Lockean story inadequate for understanding the origins of private property in North America (Singer 2011), practices and discourses of property in settler-societies cannot be hived off in favor of naturalized, evolutionary accounts. To do so in Canada ignores how legal discourses construct social relations and institutions of property in ways that legitimate certain forms of sovereignty, subjectivity, and collectivity over others (Tully 1995). In sum, the claim that restoring Aboriginal property rights is a matter of correcting misrepresentations of ‘ownership’ does not square with the social institutions or power structures of Canadian property regimes (see also Blomley 2014, 2015, Pasternak 2014).

(2) Flanagan, Alcantara, and Dressay (2010) conflate collective title with a trans-cultural account of territory such that providing certainty regarding the former *ipso facto* satisfies Aboriginal claims regarding the latter. There are two problems here. First, the modern notion of state territory is a specific social idea, not a universal concept that naturally emerges from biosocial dynamics of human territoriality that are simply mediated by culture. The specificity of state territory, and its relation to claims of sovereignty, has been carefully articulated with respect to the techniques, practices, and discourses that shape modern geopolitics (e.g. Elden 2013). For instance, establishing territory in Canada and the United States—including significant portions of the boundary between them—combined forms of symbolic, physical, and calculative violence in ways that instrumentalized the knowledge and networks of Aboriginal peoples to

produce landscapes conducive to the state agendas that ultimately oppressed them (Hogue 2015). The upshot is that “territory” is not a trans-cultural marker for collective title but, rather, an extension of programs for establishing and maintaining particular forms of political space, including the forms of territory specific to Indigenous peoples and their practices of self-governance (see Merino 2017).

A second aspect of the problem of conflating collective title with territory is that it naturalizes territory to the aggregation of individual claims. Critics of the FNPO have argued that fashioning territory as the collective sum of individual claims is part of a neoliberal effort to structure property relations in ways that allow for collective assets to be disaggregated for capital accumulation (Pasternak 2015, Dempsey, Gould, and Sundberg 2011). Flanagan, Alcantara, and Dressay (2010), however, were keen to avoid this charge, which is why they proposed a transfer of reversionary, collective title that would maintain territorial integrity under new property regimes. Canadian officials were also very concerned about the appearance of privatizing Aboriginal territory. Bureaucrats, however, were also concerned not to recognize Aboriginal rights in ways that could call Canada’s own territorial claims into question. The result was that the conflation of collective title to territory required producing a unique political space within Canadian federalism. In fact, as bureaucrats went about “myth-busting” in the name of restoring Aboriginal property, they realigned internal mechanisms of government in ways that would produce novel external boundaries among the state, Indigenous lands, and the economy. These new spaces—bureaucratic territories—used the conflation of collective title with territory to craft new settler-colonial formations in Canada wherein reserved lands function as federal municipalities.

Crafting the FNPO: from territory to municipality

Canada's CPC government began funding the FNPO in 2006. Between 2007-2009, the Lands Branch of Indigenous and Northern Affairs Canada (INAC)—Aboriginal Affairs and Northern Development Canada after May 2011—provided almost one million dollars to the First Nations Tax Commission to conduct feasibility studies. Between 2006-2011, INAC spent just over \$2.68 million to “research, develop, and conduct outreach activities on the initiative” (ATIP 2011, 284). The estimated cost to implement the project over five years for just ten First Nations communities was \$21.8 million. Despite this financial support, the government was adamant the FNPO not be seen as a government endeavor just in case it would trigger a duty to consult First Nations. When, in 2010, the minister of Indian Affairs, John Duncan, received notice of the Assembly of First Nations' resolution against the FNPO, he responded that it was an initiative of Manny Jules' First Nations Tax Commissions (FNTC), writing that, “It is important to note that the First Nations Property Ownership Initiative is not a federal initiative” (ATIP 2011, 1773). As Duncan's letter passed via email among bureaucrats working on the file, the result was a changed pitch regarding the FNPO. As one stated, “The biggest change is to lowball references to consultation since the [Duncan] letter requests that the efforts of the FNTC should not be considered consultation” (ATIP 2011, 1772).

In 2011, the CPC won a majority in the federal election. Stronger control on government offered more latitude to funnel state resources into what was repeatedly referred to as the “First Nations-led” FNPO initiative. A key strategy in developing the FNPO was to identify “regulatory gaps” in First Nations economic development. One of the first gaps officials identified was the voting threshold required for implementing decisions on reserves. When

bureaucrats met with Manny Jules in October 2011 and decided to “escalate” the FNPO from an “exploratory proposal into a more formal policy proposal” (with \$550 000 going to the FNTC in the process), the issue of “voting thresholds” was identified as a key issue alongside the title registry system and survey needs for clear legal boundaries (ATIP 2011, 2964). Various proposals were considered as the voting threshold issue was converted into a regulatory gap. One bureaucrat mused about whether “off-reserve” bands might be workable, and asked “is a land base absolutely necessary?” (ATIP 2011, 1958). The next year, the 2012 omnibus federal budget, Bill C-45, amended the *Indian Act* to change voting thresholds. Once amended, majority approval of band members would no longer be required to make changes to land policies on reserve. Rather, a majority of those who voted on a particular measure would suffice. Bill C-45, which also made significant changes to environmental laws, galvanized an Indigenous movement in Canada known as Idle No More. In a *Globe and Mail* editorial, Flanagan (2012) wrote in defense of Bill C-45 and against Idle No More, arguing that the change to voting rules “simply makes it easier for First Nations to lease land” and, perhaps giving away too much about CPC strategy, remarked that, “consultation has become a shibboleth of our time.”

Lowballing consultation and changing voting rules worked with other strategies that ensured the FNPO would not trigger a duty to consult. In particular, the FNPO would be an “opt-in” program that First Nations were free to take up or not. This point was stressed in the testimony Alcantara (2012) and Dressay (2012) gave to the standing committee on Aboriginal Affairs and Northern Development in February and June 2012. Even though the FNPO required changes to the *Indian Act*—which affects all Aboriginal peoples—the CPC government skirted the duty to consult by claiming First Nations could choose to adopt what Dressay (2012, 3) described as a “turnkey legal framework that is more harmonized with adjacent jurisdictions.”

Contrasting testimony from lawyers specializing in Canadian Aboriginal law described a more complicated landscape inflected by land claim disputes and economic geographies. As Christopher Devlin (2012, 6) testified, “there is a fundamental difference between first nations that are located in urban or semi-urban areas and the bulk of first nations lands, which are in the hinterland, and frankly have almost no value to them unless they happen to be sitting on a big pool of oil.” Center-periphery relationships and unsettled land claims do not vanish through opt-in forms of legislation. As provincial experiences in Canada reveal, agreement regarding how fee-simple property might operate within larger legal discourses and landscapes presents a much more nuanced spectrum of possibilities than simple claims that certainty of title translates automatically into political and economic freedom (Blomley 2014, 2015). Consequently, choosing to “opt-in” to legislation was not a risk free proposition since any new land tenure regime would be set in contexts steeped in political, and often legal, contests.

Within the bureaucracy, the tidy framework offered by Flanagan, Alcantara, and Dressay (2010) was churned over for how it would affect a whole suite of mechanisms. As early as November 2010, the Assistant Deputy Minister for Indian Affairs and Northern Development Canada requested a summary of how the FNPO initiative would benefit Canada. As officials batted around responses, they considered how the “main benefits for Canada would be the end of the fiduciary relationship for reserve lands and concomitant costs, although the special historical relationship would continue” (ATIP 2011, 463) Pressed further, this “special historical relationship” was articulated as being “...primarily symbolic. It conjures up links to the British Crown, the giving of presents, allies in warfare” (ATIP 2011, 463). The proposed ending of the federal government’s fiduciary relationship implied Canada would no longer hold reserved lands in trust for First Nations. Later, this became a source of unease as bureaucrats worried that

drawing a hard distinction between fiduciary and historical relationships could be spun by opponents of the FNPO as a government sell-off of reserved lands, or as potentially creating a “checkerboard” system where First Nations territory was gradually broken up by sales to non-Indigenous landowners (ATIP 2011).

Navigating the relationship between the FNPO and fiduciary duties pivoted on territory. Recall Flanagan, Alcantara, and Dressay’s (2010) proposal that “reversionary title” be transferred from Canada to First Nations to preserve territorial integrity (as collective title). As this idea was pursued, it became clear this simplification did not reflect the complex ways Aboriginal title might be claimed, or may operate, with respect to other forms of title or private property (see also Borrows 2015a). The task of navigating this legal terrain was given to a Joint Working Group created in 2012, which was comprised of the First Nations Tax Commission, the Department of Justice, representatives from Indigenous and Northern Affairs Canada (INAC), officers from the Surveyor General’s Office of Natural Resources Canada, and experts in real estate law and title registry design (ATIP 2014, 2016). The working group met every two months to strategize on how government departments could realign regulations to enact the FNPO. During this time bureaucrats were careful to keep information from public view, with one remarking that, “Given that most of the correspondence on FNPO is secret I will provide them [others working on the FNPO file] with a USB key” (ATIP 2014, 5095). The secrecy attached to the FNPO made significant portions of public policy development inaccessible, not unlike governments elsewhere that valorize neoliberal norms of transparency but use ad hoc workarounds to avoid scrutiny (Sharma 2013). As the Joint Working Group hammered out proposals for draft legislation into 2015, government documents argued the FNPO would only remove the government’s role as “trustee” for First Nations land while other fiduciary duties

would remain unchanged, such as those for social programs (ATIP 2016, 32). There was no clear consensus, however, since the same draft document also states that, “Canada will continue to hold title to First Nation land, although Canada will have no management authority over the land” (ATIP 2016, 21). That is, even under the FNPO Canada would continue to hold land in trust.

The centerpiece of the Joint Working Group’s efforts was a Technical Discussion Paper that included draft legislation clauses and supporting rationale. The paper circulated within government to solicit responses regarding how the FNPO may affect laws and regulations affecting both First Nations and other sectors, such as resource rights and the environment. A central facet of the Technical Discussion Paper was what to do about Aboriginal title. Ultimately, it was clarified that, under the FNPO, “The ultimate, or allodial title continues to rest with the Federal Crown” (ATIP 2016, 309). Here, the transfer of “reversionary rights” that claimed to provide territorial certainty was departing from the Flanagan, Alcantara, and Dressay (2010) model (though the idea still lingers in a footnote). Instead, what would be granted was fee-simple estate in reserve lands that individual First Nations could choose to lease or sell as desired, and in accordance with the limitations of common law. Critically, First Nations that “opted-in” to the FNPO must accept this arrangement for all reserved lands. That is, individual First Nations could not “opt-in” such that only a portion of their reserved lands would be held in fee-simple.

Stipulations regarding title and fee-simple estates were part of what the Technical Discussion Paper described as a “turn-key” feature of the legislation (ATIP 2016, 310). This feature was touted as allowing First Nations to know precisely what they were “opting-in” to, while having a structure in place to uniformly replicate private property on-reserve across Canada. If and when First Nations opted-in to the FNPO, the government would transfer

management authority over land to the First Nations and, simultaneously, First Nations would “opt out of 43 land-administration sections of the *Indian Act*.” Here, the internal mechanisms of the state produced new boundaries that appeared external, as First Nations property, but which reflect a large internal reworking of state mechanisms that would clear the slate of previous land administration policies without reference to the histories of legal and political contests surrounding them.

By August 2015, the draft Technical Discussion Paper was circulating with comments from various ministries on: mineral and resource rights, potential needs to transfer existing property rights, oil and gas laws, and the voting requirements for First Nations to “opt-in” to the FNPO (ATIP 2016). Since many of these laws varied provincially, background documents provided comparative tables for different jurisdictions across the country while remarking on how federal laws, particularly those affecting environmental and resource considerations, would interact with the new property regime. As comments were gathered into spring 2016, staff on the FNPO file began to push for the finalization of the Technical Discussion Paper as the “core of the initiative” so that formal workings for new land-use regulations, survey requirements, building codes, and so forth, could begin (ATIP 2016, 171).

Yet, if the government no longer planned to transfer anything like the allodial title of absolute jurisdiction to First Nations, or even forms of collective title, how was the FNPO not privatization by another name? This question had become paramount when the CPC lost the 2015 federal election and bureaucrats readied themselves for the new Liberal government. As bureaucrats sought face time with the new minister, they strategized on how the FNPO could be represented at geographic scales other than territory. Instead of establishing the certainty of Aboriginal claims with respect to territory, bureaucrats began to rescale the FNPO as more akin

to having reserves function like municipalities. In this sense, bureaucrats argued, “Canadian municipalities have the right to manage lands within their jurisdiction using local land laws, taxation and zoning bylaws. No matter the nationality of the property owner, the property is subject to the zoning and land laws of the municipality in which the lands are located” (ATIP 2016, 309). This language, placed carefully in a box titled “analogy” in government documents, began to transliterate the FNPO from a territorial transfer into a spatial form of recognition in which reserved lands would be held, not with the specificity of laws and lands claimed by First Nations, but rather like other collectivities recognized in Canada.

The municipal analogy evolved as bureaucrats introduced the new government to the FNPO file. Tables comparing the relative differences of the FNPO to other programs of First Nations Land Management, leasing arrangements, certificates of possession on reserve, and Métis lands circulated as simple technologies for making the FNPO legible with respect to existing programs (ATIP 2016). Erased from the ledger was how these categories parsed state-led dispossession from the restorative register claimed for the FNPO. In fact, the municipal analogy was even claimed to solve the “threat of dispossession [which] is also heightened by the prospect of sharing reserve lands with non-members who may possess an economic advantage and potentially outnumber Aboriginal residents on the reserve” (ATIP 2016, 304). The comparative tables and regulatory background reports prepared by bureaucrats realigned state mechanisms in ways that produced space for the FNPO such that only the exchange of property—not liberal institutions of property per se—presented concerns over dispossession. Moreover, they portrayed changes to the internal, regulatory mechanisms required to create this distinction as an external option for maintaining, indeed even securing, the boundaries of recognition for Aboriginal space, rather than as the outcome of the internal realignments themselves. For a brief time after the

Liberal Party of Canada was elected, the FNPO file was “in stasis” as bureaucrats waited to meet with the new minister (ATIP 2016, 381). During this period, careful attention was paid to where needs arose to “re-write the FNPO components” to align with the priorities of the new government (ATIP 2016, 431).

One of the first tests for staff on the FNPO file came when the new minister requested responses to the Senate Standing Committee Report on Infrastructure and On-reserve Housing. Crises over on-reserve housing were a central issue for the new government, especially as winter approached and electoral promises of reconciliation with Indigenous peoples translated into political pressure. Sensing an opportunity, bureaucrats responded to the housing report by stating that the FNPO could form part of a solution because facilitating private property on reserve would increase land values and allow latitude for fiscal solutions to housing crises. The suggestion was not well received. In fact, those on the FNPO file received a sharp message from the Assistant Deputy Minister: “The Minister is not here!!” (ATIP 2016, 528). Subsequently, bureaucrats reworked their submission to gently situate the FNPO as an exploratory option now being considered by a Joint Working Group, with possible legislative requirements needed to implement an “opt-in regime” (ATIP 2016, 529). As with the lowballing of consultation, the new minister was to be given a soft landing into a file now holding a decade of bureaucratic inertia.

How best to bring the new minister on board with the FNPO file? As bureaucrats began to reposition the FNPO, they noted the new Justice Minister’s comments that, “First Nations should be given the opportunity to pursue greater jurisdiction and control in sectors of their choosing” (ATIP 2016, 254). The registers of jurisdiction, control, and choice were subsequently used to position the FNPO astride the new government’s agenda. In March 2016, a draft discussion paper was circulated on, “A Blueprint to Enhance First Nation Jurisdiction and

Control Over Reserve Lands.” The paper is emblematic of programs that remake cultural differences into formats legible to liberal institutions; it cites the United Nations Declaration on the Rights of Indigenous Peoples and the recommendations of Canada’s Truth and Reconciliation Commission to “repudiate concepts used to justify [Crown] sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*” (ATIP 2016, 358). The paper then argues these historical injustices imply that the lack of clear land title/tenure restricts economic development on-reserve, and that the FNPO provides a way beyond the impasse. Further, the FNPO does so by enhancing jurisdiction and control over lands for First Nations while increasing choice—all under the banner of reconciliation that fit with the rhetoric of the new government.

Once aligned with the new federal agenda, and with the idea of treating FNPO lands as akin to municipalities, bureaucrats returned to the question of how “regulatory gaps” could be understood in a restorative register. The March 2016 discussion paper had argued a number of regulatory gaps exist on reserve because they do not have the same kind of federal and provincial coordination enjoyed by other municipalities. By the end of April, a draft paper on “Understanding the Regulatory Gap on *Indian Act* Reserve Lands” was in circulation. As one bureaucrat stated, it was quite possibly the first “complete review of the regulatory gap on reserve” undertaken by Indigenous and Northern Affairs Canada (ATIP 2016, 211). Critically, the bureaucrat emphasized: “Our overarching theme, or objective, in the development of our lands reform work has been how can we provide First Nations with greater jurisdiction and control over THEIR lands” (ATIP 2016, 211; original emphasis). The paper positioned the ‘regulatory gap’ on reserve through municipal comparisons, where clear regulatory frameworks “provide for the safety, security and quality of day-to-day life” (ATIP 2016, 224; original

emphasis). Ubiquitous regulations, the paper argued, “operate invisibly to create the backdrop of modern life” (ATIP 2016, 224). Invisible regulatory mechanisms, it went on to state, were given direct expression through clear titles to land. Furthermore, extending this certainty to reserved lands could unlock the key assets of First Nations. In short, the internal mechanisms governing regulations could produce exactly the external boundaries among the state, economy, and Aboriginal property required by the FNPO if ‘regulatory gaps’ were conceived of at the municipal scale.

As the Regulatory Gap paper rescaled reserved lands into municipalities, the closing of “regulatory gaps” was described through two mechanisms that many provinces had already developed. The first was to declare municipalities “natural persons” (ATIP 2016, 228). This enables municipalities to enter into contracts and to otherwise function like corporate firms. For instance, under this model Canadian municipalities can generate new revenue streams based on comparative advantages for services like water delivery (Furlong 2016). Such arrangements exist in several Canadian provinces, including Alberta and Ontario. The second mechanism was to supplement the loss of prescriptive authority municipalities suffered when they transitioned from a delegate of the province to “natural persons.” In place of prescriptive authority, municipalities instead enjoyed new “spheres of jurisdiction” that enabled broader fiscal and managerial freedom to abide under relevant federal and provincial legislation as they themselves saw fit (ATIP 2016, 228). Closing the “regulation gap” on reserve was envisioned as effectively similar, yet with the large and unremarked upon shift that rescaled the FNPO from treating reserved lands as territories of Indigenous nations to treating them as municipal units of corporate persons.

Converting reserved lands from territories to municipal units was the end result of numerous bureaucratic efforts—from conceptualizing the FNPO, quietly steering it politically,

openly pursuing it, and realigning it with the priorities of a new government. By 29 April 2016, a new draft summary and analysis of the FNPO was in circulation. It consolidated the project succinctly, and gave special place to the “turn-key design” of the legislation—the FNPO would have a full legal and regulatory framework at the ready so that First Nations choosing to “opt-in” would have certainty and clarity with respect to governance powers, relevant laws, and rules designed to close regulatory gaps unique to the circumstances that may vary from province to province (ATIP 2016). The “turn-key” design had 24 regulatory features that redrew the internal boundaries of state mechanisms and separated those that were inflexible from those potentially adaptable by First Nations (see Figure 1). Importantly, a majority vote was deemed appropriate to “opt-in” to the program despite the large protests that had accompanied changes to on-reserve voting in 2012. So understood, “opting-in” to the FNPO would set a First Nations community on a path to becoming a unique kind of federal municipality in Canada. In hard terms, the new arrangements opened and closed regulatory gaps in a 2:1 ratio that installed property laws, voting rules, and numerous other social relations of settler-colonialism under the auspices of restoring Aboriginal property rights.

[FIGURE 1 ABOUT HERE]

Figure 1. Fixed versus Flexible Regulatory Changes under FNPO (ATIP 2016, 310-312).

Bureaucratic territory and ‘turn-key’ colonialism

Through its bureaucratic apparatus, Canada’s FNPO proposal transliterates claims to Indigenous territory into the language, geography, and structure of the settler-colonial state: uncertainty over

Aboriginal title becomes soluble once written in the state alphabet of regulatory gaps and once territory is lettered to rescale the specificity of Indigenous laws, lands, and territories into spatial forms analogous to municipalities already recognized by governing networks. Together, the collective political claims of First Nations to territory become akin to the “natural persons” recognized in Canadian law. This is bureaucratic territory at work—a spatial reckoning that realigns the institutional mechanisms internal to the state such that the transliteration of competing claims can be given spatial forms that secure social and political order conducive to state aims. When the metaphysical “effect of the state” is refused, however, there is a corollary demand for revision to the metaphysics that accompany the recognition of new spatial forms, such as those of Aboriginal property rights in the FNPO. This bureaucratic ‘mythbusting’ was undertaken through the mundane churnings of emails, conferences, media monitoring, and reports from working groups that created the conditions for working out new forms of dispossession that are not entirely dissimilar to those of capitalist frontiers elsewhere, such as Indonesia (cf. Li 2014). What is unique is that, for settler-colonial states, such frontiers must not appear as pockets that disrupt its claims to territory. Rather, they must manifest as gaps in regulations or moments of historical misrepresentation. So understood, these gaps and failures reflect internally resolvable considerations, not the work of actors and communities outside state networks or which confront the state imaginary itself. The refusals of these actors—First Nations, Métis, or Inuit—are not recognized as such. Instead, the rationalization of its own myth is how Canada’s bureaucracy makes cultural difference internal to its governing network and to extending structures of settler-colonialism through new spatial forms.

Bureaucratic territory makes dispossession into an event of historical misrepresentation, a myth regarding the failure to recognize Aboriginal property that now needs to be busted. Here,

dispossession is placed across a historical chasm even though Indigenous refusals inflect everyday settler-colonial practices, such as bureaucratic efforts to change voting thresholds or to skirt duties of consultation. In the case of the FNPO, bureaucrats incorporated favorable, yet flawed arguments regarding property and territory in order to maintain the foundational, yet illusory division of Canadian institutions from structures of dispossession. In practice, this bureaucratic strategy retells the Canadian narrative in terms of what went wrong (historical misrepresentation of Aboriginal property) while justifying new institutions that would clear the historical slate of previous state interventions, violence, and obligations. Worked out in policy, this takes place in two ways. First, the “turn-key” design of the FNPO wipes clean dozens of other regulations in its mandatory requirement that “opting in” to the FNPO means “opting out” of other land management arrangements. Second, by requiring that all of a given First Nations reserved lands must be converted to private property under the FNPO. Taken together, there is to be no space remaining through which to connect dispossession to the rationale for private property.

The FNPO is a kind of turn-key colonialism in which the realignment of internal mechanisms of governance appear as external recognition of Aboriginal property. The bureaucratic production of space, however, cannot so easily erase previous land policies or their on-going effects when pressed upon from networks outside the state. Owing to the specificity of Indigenous refusals, this kind of bureaucratic territory has no generalizable form. Instead, it must find ways to append and out-flank Indigenous refusals from within its own history or, alternately, that which it makes historical. The spaces produced take shape through a kind of plasticity that takes form as internal realignments transliterate Indigenous refusals through bureaucratic practices that render them legible within the structure of settler-colonialism (cf. Malabou 2012).

This helps to explain how bureaucratic practices themselves condition, and are conditioned by, the territorial practices the FNPO produces. Monitoring, secrecy, and procedural workarounds that attend the FNPO—reporting on media coverage, covertly passing USB drives, and lowballing consultation—create a particular form of territory structured in response to Indigenous refusals, from letters from the Assembly of First Nations, resistance under the Idle No More campaign, and persistence in the face of chronic structural violence. It also reveals how bureaucratic machinations produce space through which liberal institutions render injustice, marginalization, and cultural genocide as simple mistakes of misrepresentation that can be reformulated to suit incoming governments—and therefore as amenable to numerous forms of governance available to the structure of settler-colonialism.

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JEREMY SCHMIDT is Assistant Professor of Geography at Durham University, Durham, UK.

E-mail: jeremy.schmidt@durham.ac.uk. He researches issues of ethics, governance, and environmental policy and the social and geological conditions of inequality.