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Assimilation and Partition: How Settler Colonialism and Racial Capitalism Co-produce the Borders of Indigenous Economies

The history of colonialism in Canada has meant both the partition of Indigenous peoples from participating (physically, politically, legally) in the economy and a relentless demand to become assimilated as liberal capitalist citizens. Assimilation and segregation are both tendencies of colonization that protect the interests of white capital. But their respective prevalence seems to depend on the regime of racial capitalism at play.

This essay attempts to understand this contingency, focusing on how state jurisdiction is maintained as paramount to Indigenous territorial authority through racial constructions of "indigeneity." As Jodi Melamed (2011: 183) writes, "the knowledge apparatuses sustaining economic globalization have had to bring indigenous peoples into representation in a matter that explains their exploitation as inevitable, natural, or fair." In Canada today, each branch of government is beset with two irreconcilables: it must protect colonization, organized through heavy investment in the natural resource sector, *and* commit to decolonization in response to growing recognition of histories of state violence.[1] As a way out of this paradox, depending on circumstance, I argue that the economic rights of Indigenous peoples can be seen as both an obstacle and a new access point to capital.

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This paper examines the intersection of settler colonization and racial capitalism to shed light on the status of Indigenous economic rights in Canada. I ask, to what extent are Indigenous peoples understood to have economic rights[2]—defined here as the governing authority to manage their lands and resources—and, how we can we analyze these rights to better understand the conjoined meanings of colonialism and capitalism as systems of power today?

One way to approach this problem is to contemplate a theoretical frame that can encompass both the enormous *barriers* to Indigenous participation as workers or owners in the capitalist system, and tremendous *pressures* (through increasing incentives) to assimilate.[3] In this paper, I look at two sites to address this problem: first, I examine how the Supreme Court of Canada has defined the "Aboriginal right" to commercial economies since the patriation of Aboriginal rights into the *Constitution* in 1982; and, second, I examine how these rights are configured through state resource revenue-sharing schemes with First Nations, in particular from extractive projects, over the past few years. Each case study provides critical material for analyzing the economic opportunities available to First Nations through democratic channels of state "recognition,"[4] as well as *when* and *why* tensions between state policies of segregation and assimilation emerge.

In the first case, Indigenous peoples are partitioned from participation in the market economy by virtue of how their jurisdiction is circumscribed by the court through a racist cultural anthropology of "indigeneity"; one that denies their proprietary interest, therefore governing authority, in lands and resources. Here, their jurisdiction as Indigenous nations is denied, and the governments' authority to control economic matters is ensured. In the second case, Indigenous peoples are encouraged to participate in the market economy through sharing the spoils of resource extraction in the form of financial re-distribution, but they retain no authority to determine whether the permits, leases, or licenses for development are granted. In this way, the governments' authority to control economic matters is also ensured. In both cases, through partition and assimilation, white capital is secured.

I chose these particular case studies because they offer insight and access into key moments and places of knowledge production around Indigenous economic rights. On the question of Indigenous peoples' economic rights in Canada, I want to contribute to a broader theorization of colonialism by examining how terms of recognition for Indigenous peoples' economic rights in Canada are produced through constructions of racial difference *or* sameness, depending on what the circumstances demand.

Colonialism, Race, Capitalism

In earlier writing (2014) I have argued that jurisdiction is a key means of organizing authority in settler states. In my book on the Algonquins of Barriere Lake (2017a), I look at a slate of policies aimed at transforming inherent forms of jurisdiction, such as Indigenous customary governance systems, into delegated forms of authority that draw down their power from federal and provincial governments. I examine the myriad, quotidian ways that jurisdiction, as a legal mechanism of authorizing law, organizes sovereignty on the ground.

In this essay, I try to understand how jurisdiction works to organize economic power. Economic power is a component of political power; without the authority to control the leasing, permitting, and licensing on their lands, Indigenous peoples face increasing land alienation and loss of meaningful possibility for self-determination and independence. Nations need a land base to survive, but also the governing authority to manage it without constant obstruction. The problem of Indigenous assertions and exercised of jurisdiction for capital is a particularly revealing site of settler colonial power, as witnessed at the massive NODAPL camps at Standing Rock. The insecurities born of an unperfected sovereignty render visible the ongoing wars over land that began with white settlement and continue today. These challenges to state jurisdiction can be resolved in two ways: denial or mitigation, as we will see.

This research builds on critical scholarship linking systems of race and colonialism in the history of Canada, drawing from Indigenous Studies and theories of racial capitalism grounded in the black radical tradition. Racial capitalism is a theory of the inseparability of race and capitalism that was developed by black intellectuals in South Africa (Hudson 2017) and brought to bear in full force on Western civilization by Cedric Robinson in *Black Marxism* (1983). Unlike what Marx predicted—that the rise of capitalism would homogenize workers through the blunt force of exploitation—Robinson found that capitalism requires difference to grind into its gears as fuel for accumulation. As Melamed (2015) puts it, "[c]apital can only be capital when it is accumulating" and it does so by producing, exacerbating, and organizing extreme inequality between people and naturalizing it through fictions of "differing human capacities, historically race" (77). Therefore, theories of racial capitalism understand "the state and concomitant rights and freedoms to be fully saturated by racialized violence" (77). This is true for the origins of the state, founded in colonization and slavery, but also in the ongoing reproduction of this violence through political-economic governance today.

Two fields of research within Indigenous studies are particularly insightful on the relationship between race and colonization: Métis studies and Indigenous feminism. For the former, Chris Andersen's book (2014:6) exemplifies the deeply troubling idea of the Métis nation—the only Indigenous nation to form post-contact through intermarriage between Cree, Anishinaabe, and Scottish and English settlers—to be one of "mixed" blood or race, asking simply and poignantly, *why* this has been the case, and *how* the reproduction of racialization has been central to Canadian colonialism. Though mixedness and Métis are often interlaced in public and academic discourse, Andersen insists that a hyper-emphasis on the racialization of Indigenous identity is not only a misguided understanding of indigeneity and Métis territorial authority, but also broader problem with understandings of indigeneity that are exclusive to his nation. He writes that racialization "has been part of a larger set of colonial projects through which administrators have attempted to usurp all the Indigenous territories upon which colonial nation-states such as Canada have been produced and legitimated and Indigenous peoples displaced and dispossessed" (2014:11). Germain to this history of racialization, he shows, are various links construed by the state connecting "real" Indigenous peoples to land entitlement.[5] The loss of Métis land that was justified by racial logics helped open the west to settlement, energy development, transportation construction, agricultural production, and other commodity markets that supported the industrialization of central Canada (Panitch 1981).

Indigenous feminists have traced a long history linking the ways gender oppression is seared with racialization in the history of colonization. For example, the loss of Indian status for women who married non-Indigenous men caused massive disruption to Indigenous families and governance systems. Indigenous women who "married out" suddenly gave birth to "White" children according to the legal alchemy of the *Indian Act*, and for many years (at times, forever), has meant the loss of formal access to their homelands.[6] As Mohawk scholar Audra Simpson writes (2016:4), the reification of this law through the *Indian Act* in 1876, revealed "a white, heteropatriarchal and white setter sovereignty ascend and show us its face." The expulsion of native women from their communities undermined the self-determination of Indigenous nations and led to a cultural genocide of displacement, dispossession, and disconnection (Gabriel 2011).

Bringing capitalism into sharper focus as an intersecting logic with race and colonization, I also build here on anti-capitalist critiques by Indigenous intellectuals, especially their accounts of the co-constitution of colonialism

and capitalism. Leaders in the Red Power movement published critical work in this area. Thinkers like Métis theorist Howard Adams (1975) chronicled how westward expansion throughout the nineteenth century was driven at base by the clash of two economic systems competing to survive. He theorized that capitalism replaced the fur trade economy through industrialization and rendered the Indigenous prairie communities largely surplus to production. Moreover, Adams theorized that the social institutions that developed to control Indigenous peoples, like Residential Schools, promoted "[f]ear, conformity, hierarchy, authority: all indoctrinations to white capitalist settler society."

During this same period, Lee Maracle (1975) also articulated discrepancies between how radical left political theorists understood capitalism compared to how Indigenous peoples saw the necessity of its co-articulation with the institutions of colonization. In *Bobbi Lee, Indian Rebel,* Maracle writes in response to the confident Marxist platitudes prescribing anti-capitalist revolution, that,

> My experience just wouldn't let me accept these wooden arguments about proletarian unity and revolution. "Look, do you want me to believe that those guys I had so much trouble with, who went over to the Reserve looking for Indian women—raping and plundering—are going to make a revolution to free us all from oppression? You gotta be kidding!" (146)

A critique of capitalism that did not account for the reality of colonization, and its particular investments in racism and patriarchy, was literally a joke to the Sto:lo activist. Adams and Maracle demonstrate the importance of understanding the institutions of capitalism from an Indigenous perspective and many other critical Indigenous scholars take up this work (Coulthard 2014; Estes 2019; LaDuke 1992; Simpson 2017; Yazzie 2018).

These anti-capitalist Indigenous articulations are more substantive, historical, and global in nature than represented here. But in this essay, I want to emphasize some of the relationships between colonialism and capitalism already noted, and to articulate an extension of this thinking—in particular, to open the space for discussion of the contingencies of socio-economic geographies, or local regimes of accumulation to these intersections.

The "Income-Bearing Value of Race Prejudice": A Spatial Theory

Insights of the black radical tradition focused on socio-spatial constructions of racial difference are extremely helpful to understanding the economic rights of Indigenous peoples in Canada today. In his paper on W. E. B. Du Bois

and Richard Wright, Bobby Wilson (2002) reflects on both thinkers' gradual realization that much of the "race-connected-practices" of segregation fell outside of the scope of the civil rights movement.[7] Du Bois in particular came to see how racial inequality would persist beyond the movement because of uneven development in urban centers. He had undertaken an intensive study of redlining in Philadelphia and saw how pervasively racial fear and hatred could structure economic inequality through real estate markets in ways that would impact for generations. Du Bois called this the "income-bearing value of race prejudice [that] was the cause and not the result of theories of race inferiority" (1986:649). In other words, the inferiority of black people was the necessary construct for the accumulation of white wealth (see also Barker 2018, Karuka 2017).

In Canada, there has also been a long *spatial* history of colonial policy, law, and practices that have structured the enrichment and class advantage of white settlers. Despite advances in legal rights to Indigenous peoples as a result of their own civil rights movement (in particular, one that culminated in the 1980s, which will be discussed below), poverty levels remain exceedingly high compared to the general Canadian population (StatsCan 2016). The state's systemic disinvestment in Indigenous communities is the primary source of disparity coupled with widespread dispossession (AGC 2011; Metallic 2018; Blackstock, 2015; Pasternak 2017b), but the ways in which Indigenous peoples are integrated into or excluded from the market economy has also played a significant role in producing structural inequalities (see especially Altamirano-Jiménez 2004, 2014).

The "income-bearing value of race prejudice" against Indigenous peoples, however, often fails to register, even in well-meaning studies like the infamous "Harvard project" on Native American economic development (Cornell and Kalt 1998). As Sami scholar Rauna Kuokkanen (2011: 284) writes, "the Harvard project is plagued by the same problem as many other current considerations of Indigenous economies: the narrow focus on fairly standard economic development—that is, entrepreneurship and creation of businesses—while 'traditional' economic activities and their continued significance are rarely discussed." She points out that a pervasive weakness in work that promotes participation in neoliberal markets as key to poverty alleviation is that it naturalizes poverty as an outcome of *lack* of participation in markets, rather than seeing poverty as a function of "systemic socio-economic, gender and other inequalities" (284), like land dispossession, that are further exacerbated by capitalist economies.

The dispossession of land from Indigenous peoples enabled development and industrialization in Canada. Happening concurrently with the emergence of industrial capitalism was both ardent assimilation and segregation policies aimed at Indigenous peoples. For example, segregationist policies were introduced restricting Indigenous peoples from starting businesses, selling commodities, and joining wage labour forces. The race-based prejudice legislated in the *Indian Act*, 1876, which reified apartheid law in Canada, is shaped throughout history by space-based practices and local needs of settlers for land-based accumulation. The colonial government also simultaneously took an integrationist approach, for example, encouraging incorporation into the same wage labor market, conversion to Christianity, and transiting Indian Reserves into models of municipal governance. Some of these tensions can be attributed to strategic differences between liberal and Tory paternalism (Brownlie 2009). But while these approaches appear significantly different, examining them from the perspective of jurisdiction shows how they were each aimed at replacing Indigenous jurisdiction with the paramountcy of the state.

Let's take the example of farming. In the prairies, assimilation policies incentivized Indigenous participation in the farming industry, as did Indigenous desire to adapt to new economic opportunities with the decimation of the bison. When Cree farmers became successful competitors to white farmers, however, new statutory restrictions in the *Indian Act,* 1880, were introduced to prohibit the sale of agricultural products by "Indians" to "non-Indians" (Carter 1993).[8] In Ontario, the *Indian Act* amendments, along with further regulations introduced the following year, also deterred the sale of Ojibway agricultural produce to non-Indigenous customers, collapsing a growing, powerful agricultural industry in its prime (Waisberg, and Holzkamm 1993:186). So, despite state fears of Indigenous economic dependency and therefore a drain on public resources that motivated Indigenous assimilation policies, policies designed to support Indigenous participation in the agricultural sector were undermined by the white power base of Canadian politics and white supremacy in its legal order.

Indigenous peoples have been subject to these policies of dispossession and partition but have also powerfully shaped the limits of capitalism and colonialism in Canada. That is because, as many scholars have noted, settler colonialism is not just a form of racialized violence, but a form of domination that is itself constituted by the materiality of land theft and genocide (Byrd, 2011). As Jodi Byrd writes, to conflate these systems, "masks the territoriality of conquest" and the ways land underwrites accumulation (xxiv).

Melamed concurs, arguing that as auxiliary to this claim, identifying the relationships between racial capitalism and settler colonialism provides not only critique but also tools for resistance. Compelled by Ruth Wilson Gilmore's definition of racial capitalism—defined as "a technology for reducing collective life to the relations that sustain neoliberal democratic capitalism" (2015, 78)—Melamed narrows in on its central feature of *antirelationality*. Racial capitalism is a structure that is built through social relations that individuate and isolate communities from deeper webs of reciprocity. While liberal societies are increasingly structured by such instrumental rationalities, Melamed argues that Indigenous movements for decolonization—such as the massive Idle No More movement by Indigenous peoples that exploded in Canada in 2013–2014—embody alternative forms of sociality, or *countersovereignty* principles of deep relationality, not just with other humans, but with water, land, and other-than-human beings within a kinship network (2002: 261). She believes it is these grounds of authority that can undo racial capitalism.

Echoing here the work of Anishinaabe theorists like Deborah McGregor, who understands water as relation (2005; 2014; 2015–16), or Sylvia Plain, who understands her work with canoes to be governed by the water (2019), or Métis scholar Zoe Todd's work on fish kinship (2014), Melamed concludes that *countersovereignties* provide "a principle completely antagonistic to, and capable of superseding, the differentiations racial capitalism requires between people, of territories, and in value" (84). Indigenous forms of life are "valences of reproduction"—of life itself, in its deep relationality—and when "analyzing the co-constitutive dynamics of racial capitalism and settler colonialism, it is important to note that although both forms of power and dominion imagine themselves to be in some sense total, inevitable, and in perpetuity, both in fact remain partial, incomplete, and vulnerable to fundamental undoing" (Goldstein 2017: 48). One site of this undoing takes place through the counter-assertions of jurisdictional authority to the state's rendering of Indigenous economic rights.

Be "Indian" or Prosper

In this section, I examine how the courts have carved out and defended the exclusivity of the state to control Indigenous economies, in particular, the regulation of commercial activities by Indigenous people. In the first court cases following the patriation of the *Constitution Act*, 1982, that "recognized and affirmed" Aboriginal and Treaty rights in section 35, the courts in *Sparrow*

and *Van Der Peet* set out to define the nature of these new rights. In *Sparrow,* the case centered around the size of Ronald Sparrow's drift net in relation to the regulations of the *Fisheries Act,* 1985. Sparrow was a Musqueam man who had been fishing in the Fraser River delta and who made his living in the commercial fishery of British Columbia (BC). The Supreme Court of Canada (SCC) refused to speak on the matter of whether Sparrow had a commercial right to fish, but rather deliberated on the limit of the state's legislative authority in relation to section 35 rights. The court concluded that to elicit protection, these Aboriginal rights must derive from "the culture and existence of that group" (1078). So, the commercial rights of Aboriginal people would need to derive from an evaluation of the community's culture, which was then left to the court to define.

The "integral to the distinctive culture" test was established six years later in *Van Der Peet*. The test established that when First Nations people asserted Aboriginal rights, they must prove these rights are connected to customs, traditions, and practices that *preceded* contact. The *Van Der Peet* case itself concerned the alleged criminality of Dorothy Marie Van der Peet, a member of the Sto:lo nation in BC, who was charged with selling salmon without a license. The court determined that she had to prove that fishing—which sustained the nation for thousands of years, but more importantly was sustaining her that day—was "integral to the distinctive culture" of her people. Referred to by Borrows (1998) as the "frozen rights" approach, Indigenous culture is constrained from being understood as inherently adaptive and dynamic; "Aboriginal is retrospective" and "not necessarily about what is central, significant and distinctive to the survival of these communities today" (43). It is constrained by expectations that "real" Indigenous practices preceded European contact, restricting social adaptation in a radically changing environment.

Another aspect of the *Van Der* Peet test is the *continuity* requirement, which ensures Indigenous peoples cannot claim rights that do not conform to the court's understanding of their indigeneity.[9] As such, it also constructs Indigenous economies as essentially survivalist. In her dissent in *Van der Peet*, L'Heureux-Dubé (1996: 515) actually recognizes this problem and argues for an interpretation of Aboriginal rights as "dynamic," that permits their evolution over time. She stated that, among other reservations, the entrenchment of frozen rights "embodies inappropriate and unprovable assumptions about aboriginal culture and society." L'Heureux-Dubé J. also allowed for nuance between livelihood and commercial uses of a resource.

But Chief Justice McLachlin, also dissenting, countered that *all sale* is commercial. McLachlin contrasts commercial use with sustainable use, the

latter of which she identifies as an integral aspect of Aboriginal culture. As such, the Indigenous right should not extend "beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource"—which she defines as "basic housing, transportation, clothing and amenities," and "what was required for food and ceremonial purposes" (518). Indigenous culture is here enmeshed in assumptions about Indigenous economies as discouraging surplus, and defines sustainability as a basic *need* that forms a constitutive cultural practice. Indigenous governance and social orders are evacuated here of any sense of organization or planning, *as well* as being "frozen" in time.

These commercial rights have been tested across the country and nowhere is the competition between Indigenous and white commercial traders clearer than in "*Marshall 1* and *2,*" heard in 1999. In Mik'maqi territory in the Maritime provinces, these two cases (respectively) at first awarded, then almost immediately qualified commercial fishing rights for Indigenous harvesters. The Mik'maq argued that the Peace and Friendship treaties of 1760 and 1761 conducted with the British were the source of their commercial rights to fish (*R v. Marshall (No 1)* [1999] 3 S.C.R. 456). In particular, they referred to the "truckhouse" clause in the treaty that gave the British exclusive trading rights with their nation. The *Marshall* decision recognized these commercial rights, which it noted, however, were limited to securing "necessaries" to "achieve a moderate livelihood" (3). In addition, in a subsequent application for a rehearing by the West Nova Fishermen's Coalition, the Supreme Court issued an unprecedented clarification ("*Marshall 2*") emphasizing that *the Crown* has regulatory authority respecting the Mi'kmaq limited commercial "right to fish." However, these infringements on Indigenous rights must be "justified on conservation or other grounds" (*R v Marshall (No 2)* [1999] 3 S.C.R. 533, page 2). Following *Marshall 1,* an immediate and violent backlash erupted against Mik'maq fishers who rushed to lawfully exercise their Treaty rights, throwing lines for eel and dropping lobster traps into the water.[10]

Legal theorist Gordon Christie concludes that while the courts have granted rights to hunt and fish, they "have traditionally been reluctant to extend the validity of Aboriginal claims to cover rights to resources in the pursuit of commercial ends" (245) because of a real fear of interfering with non-Aboriginal access to land and rights. In rare cases, though, the centrality of surplus production and trade in a particular resource has been proven unequivocally to be an integral part of the nation's culture prior to contact, such as in *R. v. Gladstone,* where the Heiltsuk proved the commercial role

the herring fishery played in their society, pre-contact. They successfully argued that federal fishery regulations infringed on this Aboriginal right (see also: *Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2018 BCSC 633). But where Indigenous peoples have asserted commercial rights as a general component of the right to self-government, these arguments have been dismissed. A key precedent-setting case in this regard is *R. v. Pamajewon*, where the Shawanaga First Nation and Eagle Lake First Nations authorized gambling on their lands and fared badly. When charged for violating federal legislation regarding gambling, they challenged section 206 of the *Criminal Code* by asserting their section 35 rights. The Supreme Court found that since there was insufficient evidence of pre-contact gambling in these Indigenous societies to pass *Van Der Peet*'s "integral to the distinctive culture" test, it did not constitute an Aboriginal right.[11]

The importance of this bingo and lottery income to maintain these First Nations' vitality as societies today was considered irrelevant in the case by the court. With the money Eagle Lake First Nation was generating through the lotteries, they were able to build a community arena, resort, lodge, conference center and a local school with gymnasium, as well as subsidize construction for Band member homes (Morse 1997). Without this income, most communities are dependent on the federal government to build infrastructure, for which there is a massive deficit across the country (Senate 2015).

The Supreme Court of Canada has reserved conditions for governments to infringe on Aboriginal rights for "valid legislative purpose" (*Sparrow* at 1113). But determining this validity has meant *explicitly* weighing Indigenous economic rights versus liberal capitalist rights, as the landmark *Delgamuukw v. British Columbia*, 1997, held—permitting infringement of Aboriginal rights for "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims" (at para 165). While the *Delgamuukw* decision was the first declaration of Aboriginal title in Canada—that is, the first legal decision that recognized that provincial legislation cannot arbitrarily extinguish First Nations' proprietary interest in the land—the Gitskan and Wet'suwet'en plaintiffs had to contend with these racist brackets of infringement. While the SCC claims "the recognition of the prior occupation of North America by aboriginal peoples," as its purpose, regulations that infringe Aboriginal constitutional rights in favor of non-Indigenous commercial rights remain the norm (McNeil 1997: 35).

This competition is particularly salient in Canada in the tobacco wars. In Audra Simpson's work (2008) on the cross-border tobacco business in Haudenosaunee territory, she describes the "problem" of Indigenous commerce as blatantly about "lost revenue" to state and industry. She writes, "when the political subject is indigenous, citizenship takes on a temporal and economic form due to the societal expectation that Indians belong in a certain relationship to capital accumulation, that they be in another time (while simultaneously being within this world), and that they be poor" (194). While oil-rich First Nations are held up as model citizens and subjects by right-leaning think tanks for their *participation* in the resource economy (Bains 2013), the independent Mohawk tobacco industry poses a *threat* to the Canadian economy, rather than a useful crutch. In other words, the limits of liberal tolerance for Indigenous difference can be expressed in two interrelated temporal and economic forms: so long as they are *primitive* and *poor*.

In addition, without Indigenous commercial rights, the consequence of participating in *unrecognized* Indigenous commercial trade has serious legal repercussions. The criminalization of the Mohawk tobacco trade is emblematic of self-government policies that exclude commercial rights out of consideration. Bill *C-10* passed to amend the Criminal Code in 2014, for example, introduced harsher penalties for "trafficking in contraband tobacco," explicitly mentioning First Nations' trade. Pamela Palmater (2018) points out the irony of these restrictions, given that, "Part of the traditional practice of trading in tobacco was trading with Europeans—which is in fact how Europeans came to enjoy tobacco today." Mohawks, who are heavily invested in this production and trade, have insistently linked this economic issue to their *jurisdiction* as inherent rights and Treaty holders (Pratt and Templeman 2018). Here their difference is framed as "threat"—not just to the economic order, but to the national social and legal order—as securitization is justified through association of Indigenous tobacco trade with smuggling, fraud, counterfeit, black markets, terrorism, and illicit gun and drug trade (Pratt and Templeman 2018: 346).

Perceptions of economic rights and political rights are clearly intertwined; often wrapping around ideas of culture. When people learn that Jessica Cattelino's research (2005) concerns a lucrative bingo hall established by the Florida Seminole, it almost always prompts the question of whether gambling makes Native Americans "lose" their culture. She reflects that, "These concerns rest on the assumption that money, more than poverty, erodes culture and difference" (194). Here we could ask: if the courts' objectives in *Sparrow* and *Van der Peet* concern Crown obligations to ensure the

continuity of Aboriginal culture, could poverty not be considered a primary target for elimination? Conversely, could commercial rights not be considered fundamental to the continuity of culture? Cattelino theorizes that, "[i]f indigenous non-ownership of property was the founding myth of settler colonialism, then indigenous poverty and its imaginings may be one of neocolonialism's most potent contemporary forms" (195). The *continuity* of culture that courts seek to protect, in effect, entrenches and reproduces Indigenous poverty. It forces Indigenous peoples to perform an *essence* of Indigenous identity that breathes from the air of racist mythology.

Indigenous peoples can, of course, be both grounded in their culture, and participants in a modern market society. But from Canada's perspective, Indigenous difference must be carefully managed to secure access to land. In *The Cunning of Recognition* (2002), Elizabeth Povinelli notes that only what came through the fire of colonial atrocities in Australia is latched upon by settler society as authentic Aboriginal identity. This culture, extracted painfully from post-contact realities, acts to soothe the national conscience of settler violence by creating objects of Aboriginal resilience in their cultural difference. But it also forces Indigenous peoples to attach their subjectivity to a series of "lost indeterminable" objects. The state integrates a *pre-contact story of existence* in order to purify and redeem the nation. Defending Indigenous culture, then, (much like in Canada) becomes an exercise of public reason defending an immobile ancient culture that cannot compete with capital. It can, however, join: on the right terms.

Sharing the Taxes of Capitalist Profits

There is always more to parse doctrinally to make the argument that Indigenous economic rights are stunted by their interpretation in the courts. But I have cited many key precedents that roughly lay out the legal context of these rights for Indigenous peoples in Canada. Interpretation of Indigenous economic rights by the courts has been based to a considerable extent on a discursive construction of Indigenous culture as "frozen" and subsistent. Now I want to turn to an auxiliary model of Indigenous economic rights recognition—provincial resource revenue sharing—and examine the way Indigenous economic rights are rendered through these institutional arrangements, posing the question again of what this says about state configurations of Indigenous jurisdiction.

There is a growing emphasis in Canada on the need for Indigenous peoples to "share" in the resource wealth of the country as an element of rec-

onciliation (Coates and Crozier 2018). While there are various mechanisms for this—private contracts between companies and First Nations (see Scott in this issue), equity ownership (see Cowen and LaDuke in this issue)—I want to focus here on the emerging agreements between Indigenous peoples and provincial governments known as government resource revenue sharing (GRRS).

There are hundreds of millions of dollars to be made in benefit sharing deals for First Nations when companies want access to their territories. Impact and Benefit Agreements (IBAs) are private commercial contracts that are increasingly being negotiated between Indigenous peoples and industry in the consultation phase of a project. These agreements were rare before Indigenous peoples gained constitutional rights; they also point to the power of Indigenous peoples to shape the resource economy of Canada. There are four provinces in Canada that have GRRS policies for First Nations and they all differ in formulas and application. In addition, though we do not have space here to cover these here, Quebec, Newfoundland and Labrador, Northwest Territories, Nunavut, and Yukon all have GRRS policies that were negotiated through land claims agreements with Indigenous governments.

GRRS agreements typically take the form of legal contracts between provincial Crowns and Indigenous people to share revenue from oil, gas, mining, hydro, or forestry can take many forms and may be negotiated in endless configurations, such as with individual Bands, tribal councils, Treaty groups, or clusters of regionally-affected Bands. The Conference Board of Canada (Pendakur and Fiser 2017:3) defines their scope as:

> Any formal agreement between a Crown-representative national or subnational government and an indigenous community for the purposes of sharing government revenues generated from natural resource extraction or use. The revenues in question, that said governments may receive from various natural resource sector activities, differ across jurisdictions and may include royalties, taxes, fees, and so forth.

For mining, in particular, government-allocated RRS always takes its percentage point of First Nation sharing from provincial or territorial tax payments, never from the value of the commodities or company profits. The dollar value of corporate mining profits is inaccessible to Ministries that manage GRRR because company earnings are proprietary information held by Finance departments. Therefore, so much depends on taxation rates and royalties across jurisdictions, as well as federal income taxes and incentive programs. In other words, the rent is paid to the state and then divided further

among First Nations. Provinces are under no legal obligation to devise these schemes and some, like Ontario, explicitly refrain from describing them as a legal right, compensation, or reparations (McLean and Karwacki 2019). Rather, they are framed in broad or nebulous "reconciliation" language that critics commonly refer to as "social license" (Browne and Robertson 2009).

The way these revenues are calculated and allocated also differs greatly between jurisdictions. For example, in Ontario there is a fixed standard for GRRS, and beginning in fall 2019, partner First Nations will receive 45 percent of government revenues from forestry stumpage and 40 percent of the annual mining tax and royalties from active mines at the time the agreements were signed, and 45 percent from future mines in the areas covered by the agreements (MEMD, 2019). There are currently thirty-one First Nation communities, represented by the Grand Council Treaty #3, Mushkegowuk Council, and the Wabun Tribal Council who have signed agreements with the Province. With the monies received through these agreements, First Nations cannot spend these funds for per capita distribution to community members, redistribute them to other First Nation communities, use them to cover any costs of litigation, or invest the money to accrue returns without first advancing five key areas: economic development, community development, cultural development, education, and health (Fasken 2018).

On the matter of financial allocation, though: what is being shared? The Narwhal calculated that in 2017 Barrick Gold extracted gold valued at almost $250 million from its Helmo mine in northwest Ontario and paid $14.4 million in taxes, amounting to a mere 5.8 percent of the gold's market value (Wilt 2018). Partner First Nations will receive 40 percent of the annual mining tax and royalties from the mine, which seems significantly less when compared to net profits. Seventeen out of Ontario's thirty-eight operating mines are located in the areas now covered by revenue-sharing deals (MEMD, 2019). But as Scott and Boisselle (forthcoming) argue

> If Ontario recognized Indigenous governing authority and the communities exercised jurisdiction to approve or reject industry permits, then RRS—with the proportions to be "shared" negotiated in this renewed treaty context, and the tax rate increased to ensure that appropriate revenues could be generated—could be a viable long-term mechanism for ensuring mutual benefit from the territory, as long as the development was consistent with the affected communities' visions for their homelands.

In Ontario, the share is generous, but the net benefits low, and the cost high—accepting its basis on Crown jurisdiction and rental authority.

Provinces keep very little of the revenues extractive industries generate to attract business because provinces and the federal government are willing to create an extremely low tax barrier for companies. There are multiple mechanisms for companies to underreport earnings, as well, and Joan Kuyek outlines many of these in her book, *Unearthing Justice* (2019). If provinces promise fair sharing it is important for First Nations to see how much of this revenue they are actually accessing, at what percentage of total company profits. *Base erosion* and *profit sharing* (BEPS) as two central practices that reduce taxable profits and shifts profit between subsidiaries to hide earnings and it is a global problem.[12] The mining tax and royalties collected by provinces represent a fraction percentage of net profit (see Barrick Gold example above). Companies then convert losses in credit against future mining taxes, called "tax assets."

But more than just raising questions of fair redistribution, a deeper matter of jurisdiction is also at stake, which we can examine by focusing here on BC. The first jurisdiction in Canada to introduce a program to share the revenues from extraction with First Nations was the province of BC in 2008. BC first introduced a GRRS policy in October 2008 in a brief news release that remains to this day the only official written document the province has presented on the policy. In part, the policy emerged through request by First Nations and was discussed with First Nations Leadership Council (Clark 2009). But the provincial rationale for the new policy is provided in the brief, linking it to the New Relationship announced in 2005 a few months after the *Haida* decision came down. This is important because in 2004, the "duty to consult" legal precedent was established in both the *Haida First Nation v. British Columbia (Minister of Forests)*,2004, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004, SCC decisions. These cases found that the federal and provincial governments have a duty to consult with First Nations that are asserting their constitutional rights—even in the pre-proof stage of rights and title. Established rights are subject to the federal government's *fiduciary* obligations and trigger a range of other legal protections (Luk 2003; McNeil 2015).

BC is ground zero for resource extraction in Canada, with much of its regional economy dependent on forestry, and mining to a lesser extent. The text of the New Relationship document (2005) states that BC is "building a new relationship with First Nations founded on mutual respect, recognition and reconciliation, which will support Aboriginal people's participation in the province's economic and social progress" (3).[13] In a presentation in 2009, the Government added additional guidance to the policy, including an

instructive statement that BC wishes to "minimize litigation," and to "de-emphasize the legalistic aspects" of Indigenous land interests.

These incentives are particularly salient in BC, where a court case changed the resource economy in that province when the *Delgamuukw* decision came down in 1997. *Delgamuukw* is one of five foundational title cases heard in the Supreme Court of Canada that includes: *Calder v. Attorney General of British Columbia*; *Delgamuukw v. British Columbia*; *R. v. Marshall; R. v. Bernard*; and *Tsilhqot'in Nation v. British Columbia*. Taken together, the courts have found Aboriginal title to be "held by Aboriginal nations or polities that are the descendants or successors of the Aboriginal people that were in exclusive occupation of their traditional territories at the time of Crown assertion of sovereignty" (McNeil 2016: 17). Aboriginal title encompasses the right to exclusive use and occupation of the land for a range of purposes not limited by traditional use, for example including mineral rights (*Delgamuukw* at para 122). The *Delgamuukw* case, mentioned earlier, also raised the bar of Indigenous jurisdiction from a requirement of consultation to consent, as the court stated: "Some cases may even require *the full consent of an aboriginal nation*, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands" (*Delgamuukw* at para 168, emphasis added). Though the burden of proof for Aboriginal title, and the cost of bringing a case to court, remain substantial barriers, Indigenous peoples' governing authority over their land potentially opened the door for participation in the resource economy in new ways.

Rather than engage Indigenous peoples as property owners and title holders, the New Relationship re-defined "partnership" in such a way as to maintain the state's exclusive authority over resource regulation and approvals in forestry and mining. One of the ways it accomplishes this is to structure GRRS such that Indigenous parties would share from the profits only once a project approval moved forward from the Ministry of Environment and Climate Change for new or expanding mines. The details of the policy include negotiation on a case-by-case basis. There are in fact very few mining projects in the province—either new and expanding mines—but almost two hundred fifty Forest Consultation and Revenue Sharing Agreements have been signed (BC 2019). The Conference Board of Canada (2017) reports that these payments constitute approximately ten per cent of First Nations' total annual revenues (3).

If we take a closer look at the formulas, we can see that what the large print gives, the small print takes away. The openness of governments to include Indigenous peoples in the market economy through GRRS shows

how *erasing the presence of Indigenous peoples on the landscape and denying their governing authority*, as in the jurisprudence cited above, starts to take a backseat to the *urge to maintain access for capital*. GRRS also denies governing authority—through the de facto decision-making power to authorize extraction remaining with the province—but the new efforts at inclusion hold hands with previous colonial histories of enfranchisement into the body of Canada, and the entrance price is concession to the authority of the state (Milloy 1991). Whereas in the first case study of SCC decisions, Indigenous peoples' governing authority over their participation in the commercial economy was denied, in the second case, it is readily accepted. But in both cases, Indigenous jurisdiction is an extremely attenuated thing. The courts and provinces ensure that only a delegated form of authority is recognized, never an inherent right of self-determination.

Conclusion: Racial Capitalism, Frozen Rights, and Sharing Extractive Profits

On the relationship between colonialism, capitalism, racism, I examined how courts and state policy makers allocated value to land along a spectrum of difference called "indigeneity." What at first look like contradictory tendencies in colonial policy to both assimilate and exclude Indigenous peoples from participating in market society upon closer examination reveal a colonial political economy of racial differentiation that is configured according to spatio-specific regimes of accumulation.

In a sense it is assimilation writ large across both these scenarios. GRRS is a way of answering a basic liberal urge for "inclusion" without allowing any questioning of the underlying proprietary interests—just as the denial of commercial rights to Indigenous peoples through the courts is a way of managing the limits of Indigenous jurisdiction and authority, even in light of legal admissions and recognition of underlying Aboriginal title and proprietary interest. As Brenna Bhandar writes, "Being an owner and having the capacity to appropriate have long been considered prerequisites for attaining the status of the proper subject of modern law, a fully individuated citizen-subject" (2019: 5). By being denied this status, Indigenous peoples maintain their quasi-sovereign collective rights (as understood by settler courts) but they also experience the liminal gray zone of never being fully considered proper subjects or or independent nations.

Indigenous peoples are caught in the bind of larger, stickier circuits of capital that require their participation, acquiescence, and surplus status all at once (Pasternak and Dafnos 2017). Racial differentiation is essential

to these flows, as Bhandar notes, "The transatlantic slave trade, and the appropriation of indigenous lands that characterized the emergence of colonial capitalism on a worldwide scale, produced and relied upon economic and juridical forms for which property law and a racial concept of the human were central tenets" (6). Therefore, we return to the "valences of reproduction" and counter-sovereignties described above to see outside these containers.

Theorizing Indigenous economies, Dara Kelly pushes back against precisely the ways liberal capitalist discourse attempts to integrate Indigenous economies into Western epistemes. She writes, "The challenge ahead for Indigenous people contesting the foundations of capitalism lies in questioning who benefits from economic success, and who pays the cost of exploited land and resources" (107). While the state shows ambivalence on whether alliances between Indigenous peoples and industry are critical to the perfection of sovereignty or threatening, the deeper questions involve the underpinning questions about who has the authority to authorize land and water use on these lands.

Notes

1 https://www.oecd.org/tax/beps/.

2 See, for example, the recent report on Missing and Murdered Indigenous Women and Girls that names state policies as genocidal and demands redress (www.mmiwg-ffada.ca/final-report/).

3 There is also a small but interesting literature on Indigenous people's participation in wage labor markets, but it is not the central focus here. See, for example, High 1996; Jamieson 1962; Knight 1996; Laliberte and Satzewich 1999; and Lutz 1992.

4 There is another paper to write on the class politics of Canada and its intersection with colonization. In particular, federal policies of austerity provoke racial antagonism by the middle and lower classes against Indigenous peoples. This form of scapegoating masks massive state divestment in social welfare programs, but this analysis will have to wait for another day.

5 Here I refer to Glen Coulthard's critique (2014) of state paradigms of recognition that represent a continuation of colonization through the asymmetrical field of power upon which the state defines and determines the limits of Indigenous authority.

6 Other scholars have focused closely on Treaty history and the exclusion of the Métis as signatories to agreements premised on their racial identity (Adam 1975; Adese 2011; Augustus 2005; Macdougal 2016).

7 For more on Indigenous women's re-enfranchisement efforts over the years, see McIvor, Day, and Palmater 2018; and Gehl 2000.

8 Wilson defines "race-connected practices" as "practices resulting from racism — negative attitudes groups of people or individuals belonging to one race hold about individuals or groups of people belonging to a different race" (31).

9 Though it was deeply flawed, one such assimilationist policy was the Home Farm program, which subsidized agricultural training and provisions for prairie First Nations reeling from the extermination of the bison (Daschuk 2013; Waisberg and Holzkamm 1993). Where successful, it was thwarted by racism, when fear of uprising created a pass system to control Indigenous political movement but was applied to restrict participation in agricultural markets.

10 Proof of "continuity" of practices, customs, and traditions pre- and post-European contact are essential when claiming post-contact practices, customs, and traditions as Aboriginal rights, or post-contact occupation of lands (McNeil, 2004). Therefore, while continuity does not require an *unbroken* chain of use, the integral aspect of this practice to culture in pre- or post-contact times can be an essential aspect of proving Aboriginal rights.

11 For more on the aftermath of the *Marshall* decisions in terms of the First Nation commercial fishery, see Wiber and Milley 2007.

12 In response to the First Nations' self-government claims, the court relied on *Sparrow*'s limit-making declaration on Aboriginal rights to conclude that this right was extinguished prior to 1982. The authority by which this disappearance was legalized is apparently the doctrines of discovery: "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown," *Sparrow*, at 1103.

13 "The Transformative Change Accord" also seems to have had an influence – signed in 2005, explicitly about closing the gap and reconciling ab title and rights with those of the Crown.

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