

# Erasure and Erosion: Exploring Federal Government Efforts to Complicate Socio-Legal and Environmental Obligations Owed to Indigenous People

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## ABSTRACT

The Canadian federal government has fallen short of its reconciliatory objectives with Indigenous peoples and preventing anthropogenic climate change. In recognizing these issues, the Government of Canada implemented several policy initiatives to realign industrial production and consumption at the national level, as well as to grow Indigenous participation in capitalist production as a means of approaching a form of self-government. As part of this policy agenda, the state targets Indigenous communities as leaders who hold the potential to implement more sustainable methods of energy production to encourage them to become Canada's environmental stewards. However, we contend that such policy initiatives also erode the socio-legal and environmental obligations owed to Indigenous peoples by the Canadian federal government. To articulate the impact of these policies on the interests of

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Indigenous communities, we explore certain efforts of the Canadian state, through the lens of neoliberal settler colonialism, to identify its striking consistency with past approaches of dislocating colonized populations and reclaiming power bases that are still within settler state control. We recommend the arrest of the Canadian settler state's modern approach to eroding its obligations to Indigenous peoples, while also proposing further measures be taken to recognize and strengthen Indigenous and environmental rights.

**Keywords:** Canada; federal government; Indigenous peoples; rights; environment; erosion; settler colonialism; climate change; exploitation; justice.

## I. INTRODUCTION<sup>1</sup>

The Canadian government has fallen short of its reconciliatory objectives with Indigenous peoples<sup>2</sup> and of preventing anthropogenic climate change. In recognizing these issues, the Government of Canada has implemented several policy initiatives to realign the operations of industrial producers and consumers, and increase participation of Indigenous communities in capitalist production as a means of approaching a form of self-government in the spirit of reconciliatory assimilation. The *Pan Canadian Framework on Clean Growth and Climate Change* (PCF) introduced a suite of measures to encourage consumers to reduce their consumption of atmospherically harmful

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<sup>1</sup> Aspects of this paper have been discussed elsewhere; see Shawn Singh, "Red, White, and Green: White Paper Assimilation Strategies in an Era of Environmental Crisis" in James Gacek & Richard Jochelson, eds, *Green Criminology and the Law* (Palgrave Macmillan, 2022). However, this paper builds upon theoretical and analytical discussions derived from earlier work. It is important to note that while our critique of the current federal Liberal government under Prime Minister Justin Trudeau, and the former federal Liberal government under Prime Minister Pierre Elliot Trudeau (Justin Trudeau's father) is of significant focus in the paper, we recognize that federal governments operated by federal Liberal and Conservative parties since the beginning of Canada's confederation have not adequately or meaningfully addressed socio-legal and obligations owed to Indigenous peoples.

<sup>2</sup> We recognize the definitional distinctions between "Aboriginal" and "Indigenous"; the former refers to the first inhabitants of Canada and includes First Nations, Inuit, and Metis peoples, and this term came into popular usage after 1982, when Section 35 of the *Constitution Act, 1982* defined the term as such. In terms of the latter, Indigenous refers to people whereby lands were provided to them by the Creator, and as such, it belongs to them and their past and future generations. For this reason, Indigenous peoples have argued they retain inherent land rights to traditional territories. In effect, we use the terms as appropriately warranted within the given contexts outlined in the paper.

greenhouse gas (GHG) emissions by putting a price on the carbon consumed in productive processes to generate investment capital for the implementation of more sustainable consumption practices in the future.<sup>3</sup> As part of this policy agenda, the Canadian state targets Indigenous communities as leaders in implementing more sustainable methods of energy production. PCF initiatives for Indigenous communities build into the Government of Canada's *Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, which formalizes a series of legislative pathways for Indigenous leaders to assume managerial responsibility for lands currently held under Aboriginal title or used for sustenance under Aboriginal right.<sup>4</sup>

Although international environmental science organizations like the Intergovernmental Panel on Climate Change (IPCC) call for stronger state intervention in natural resource consumption and the production of energy and derivative products, the PCF alternatively works to limit the growth of non-renewable resource consumption by encouraging a shift towards stronger utilization of renewable energy sources like solar and wind power.<sup>5</sup> In other words, the PCF maintains our current structures of natural resource extraction and consumption but offers several pathways of opening untapped resource bases to support the state's growth objectives, as they relate to the capitalist treadmill of production.<sup>6</sup> While governments and industrial proponents

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<sup>3</sup> Environment and Climate Change Canada, *Federal Actions for a Clean Growth Economy: Delivering on the Pan-Canadian Framework on Clean Growth and Climate Change* (Ottawa: ECCC, 25 January 2016), online: GC Publications <[www.canada.ca/content/dam/themes/environment/documents/weather1/20170119-en.pdf](http://www.canada.ca/content/dam/themes/environment/documents/weather1/20170119-en.pdf)> [perma.cc/YQ4A-2M35] [Pan Can Fed Action]; Environment and Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's plan to address climate change and grow the economy* (Ottawa: ECCC, 25 January 2016), online: GC Publications <[publications.gc.ca/site/eng/9.828774/publication.html](http://publications.gc.ca/site/eng/9.828774/publication.html)> [publications.gc.ca/pub?id=9.828774&sl=0] [Pan-Canadian Framework].

<sup>4</sup> Crown-Indigenous Relations and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: CIRNA, 15 September 2020), online: GC Publications <[www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136](http://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136)> [perma.cc/AKH4-QBZ6].

<sup>5</sup> Intergovernmental Panel on Climate Change, "IPCC Fact Sheet: What is the IPCC?" (2013), online: IPCC <[www.ipcc.ch/site/assets/uploads/2018/02/FS\\_what\\_ipcc.pdf](http://www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf)> [perma.cc/F4DY-DYNM] [IPCC Fact Sheet]; Intergovernmental Panel on Climate Change, "Special Report: Global Warming of 1.5C - Summary for Policy-Makers" (2018), online: IPCC <[www.ipcc.ch/sr15/chapter/spm/](http://www.ipcc.ch/sr15/chapter/spm/)> [perma.cc/K64W-LC6D].

<sup>6</sup> Pan-Canadian Framework, *supra* note 3; see Allan Schnaiberg, Kenneth Gould & David Pellow, "Interrogating the Treadmill of Production: Everything You Want to Know About the Treadmill But Were Afraid to Ask" (2004) 17:3 *Organization & Environment* at 296-

around the world herald the PCF as a meaningful approach to addressing our unsustainable consumption practices, other environmental advocates are critical of the substantive effect of these policies in meeting environmental scientists' dire recommendations.<sup>7</sup> They highlight that Canada's GHG reduction targets are woefully insufficient to counteract global warming to the 1.5 degrees above pre-industrial emission levels that groups like the IPCC state are necessary to preserve our ways of life.<sup>8</sup>

The imperative nature of recommendations from environmental scientists and the inadequacy of policies like the PCF raises several questions about the Canadian state's ability to achieve sustainable natural resource extraction in ways that further its reconciliatory objectives with Indigenous peoples. Stakeholders note the PCF's insufficiency in meeting its environmental conservation objectives, but discussion of its effects in terms of using Indigenous land for economic production is notably absent. Our paper addresses this gap in the literature by offering a critical analysis of the federal government's diffusive approach to opening Indigenous territories for capitalist production. To these ends, we assert the Canadian state's perennial objectives of achieving economic growth consistently comes at the cost of our government's obligations to Indigenous peoples and environmental sustainability. To articulate the impact of these policies on the historical interests of Indigenous communities, we consider the environmental agenda of the Canadian state through the lens of neoliberal settler colonialism. In doing so, we will identify the state's striking consistency between both its historical and modern approaches to exploiting Indigenous populations, as well as the

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316 [Schnaiberg, Gould & Pellow]; Allan Schnaiberg, *Environment: From Surplus to Scarcity*, (Oxford: Oxford University Press, 1980) [Schnaiberg].

<sup>7</sup> See Climate Analytics & New Climate Institute, (2020). "Canada: Country Summary and Assessment" (2020), online: *Climate Action Tracker* <[climateactiontracker.org/countries/canada/](https://climateactiontracker.org/countries/canada/)> [perma.cc/R4RE-P5J8]; Sierra Bein, "Global Climate: Five years later, the Paris Agreement is not aging well", *Globe & Mail* (7 December 2020), online: <[www.theglobeandmail.com/canada/article-globe-climate-five-years-later-the-paris-agreement-is-not-aging-well/](https://www.theglobeandmail.com/canada/article-globe-climate-five-years-later-the-paris-agreement-is-not-aging-well/)> [perma.cc/M8FL-QKDY].

<sup>8</sup> See Charles F. Parker, "Assessing the European Union's Global Climate Change Leadership: From Copenhagen to the Paris Agreement" (2017) 39:2 *J EU Integration* at 241; Council of the European Union, "Preparations for the 21th Session of COP 21 to the UNFCCC - Council Conclusions Press Release," *Council of the European Union* (18 September 2015), online: *EU* <[www.consilium.europa.eu/en/press/press-releases/2015/09/18/counclussions-un-climate-change-conference-paris-2015/](https://www.consilium.europa.eu/en/press/press-releases/2015/09/18/counclussions-un-climate-change-conference-paris-2015/)> [perma.cc/XG5T-GUQF].

state's persistent interest in eroding its more finite socio-legal and environmental obligations to Indigenous peoples in the process.

To highlight the remarkable regularity of state strategies regarding the erasure of Canada's colonial past, we critically consider the objectives contained in Prime Minister Pierre Trudeau's 1969 White Paper in contrast to the state's current approach of fragmenting Indigenous land entitlements under First Nation Land Management Agreements (FNLMA). This analysis includes FNLMA prerequisites, such as PCF criteria and others like the Indigenous Natural Resource Partnership program, which are believed to work in tandem to encourage the operation of industrial resource extraction within Indigenous jurisdictions. In essence, the economic, social and political circumstances that emerged as a consequence of totalitarian control under the *Indian Act* established conditions where Indigenous communities can only access state-controlled resources if they release the Crown from its fiduciary obligations to deal with entitled communities in their best interests.<sup>9</sup> Once the Crown is released under an FNLMA, the community assumes authority for management decisions like land leases, access to natural resources and creating processes to allow productive enterprises to enter the community to foster economic prosperity.

After considering the role of these policies towards opening Indigenous jurisdictions for capitalistic exploitation, we turn to projecting the ecological effects of doing so through the green criminological lens of environmental racism. As Goyes and South contend, processes of epistemicide, amnesia, and absence have been identified as common state approaches to managing Indigenous relations throughout justice-related discourses. Documentary evidence clearly reflects the state's historical distribution and control of

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<sup>9</sup> As Wolfe contends, settler colonialism is inherently eliminatory; the "primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism's specific, irreducible element"; see Patrick Wolfe, "Settler colonialism and the elimination of the native" (2006) 8:4 *J Genocide Research* at 388, 397-409 [Wolfe]. However, critics like Englert (2018) suggest Wolfe's understanding of settler colonialism excludes a holistic understanding of exploitation, wherein settler colonialism can transition from elimination to exploitation in its relation to Indigenous peoples, beyond Wolfe's conception of the term; see Sai Englert, "Settlers, Workers, and the Logic of Accumulation by Dispossession" (2018) 52:6 *Antipode* at 1647-1666. Recognizing this debate within settler colonial studies itself alongside the discipline's privileging of analysis in the Anglo-settler world, in our paper we examine settler colonialism through a balanced approach which attempts to understand aspects of elimination and exploitation together and as they relate to the ongoing erosion of inherent rights and obligations owed to Indigenous peoples in Canada.

knowledge and power over matters such as environmental harm and crime when it comes to Indigenous peoples in Canada. This has taken place with such regularity that Canadians (un)intentionally ignore abuses of human rights and cases of victimization regarding Indigenous peoples, those who live in the Global South, and other colonized communities.<sup>10</sup> Rather than improving conditions within these communities, the authors contend that political actors have employed and continue to deploy neoliberal logics to ensure a “treadmill mentality” as Indigenous spaces are opened for production and consumption. Strategies of inclusion are being used to distinguish “progressive” environmental practices that maintain reliance on traditional productive structures from those that denounce unsustainable consumption practices like most traditional Indigenous knowledges or paradigms. We argue that these strategies are being utilized to demarcate acceptable perspectives of environmental action to co-opt the social momentum associated with climate change to further the assimilative objectives of the Canadian settler-colonial state. By defining acceptable versions of environmental justice—acceptable, in the sense that “justice” can occur only when the state gets what it wants from Indigenous communities—the state can continue to allocate destructive environmental practices beyond the visible scope of Canadian society. In other words, these strategies work to manufacture the consent of Indigenous communities and their settler sympathizers to accept the containment of environmental destruction and pollution in Indigenous land while keeping these harms away from settler subjects that could take issue with these practices. While the federal Crown (helmed throughout Canada’s history by either the federal Liberal or Conservative parties) remains bound to honour the English Crown’s preliminary duty to protect Aboriginal interests as national equals, it appears that the burden falls once again to Indigenous peoples to ensure their rights are upheld and their interests are not eroded as the Canadian settler state searches for new ways to fuel the treadmill of capitalist production. With this approach in mind, we now turn to consider the theoretical treadmill of production and its endless consumption of resources to generate energy, raw resources, and capital for investment – all at the direct expense of local environments.

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<sup>10</sup> See David Rodriguez Goyes & Nigel South, “Green Criminology before ‘Green Criminology’: Amnesia and Absences” (2017) 25:2 *Critical Criminology* at 165-181.

## II. UNDERSTANDING THE TREADMILL OF CAPITALIST PRODUCTION – AND EXPLOITATION

Allan Schnaiberg, Kenneth Gould and David Pellow<sup>11</sup> first introduced the treadmill of production as a concept, which captures the environmental degradation that took place in the post-WWII period and continues today. Per Schnaiberg and colleagues, powerful forces work to encourage capital-intensive economic expansion at the expense of a biosphere that contains a finite inventory of resources. Systematic additions to or withdrawals from natural systems are considered as a biophysical variable, which holds potential to deplete ecosystems of their ability to support life. The authors posit that the growing level of investable capital during the post-war and subsequent shifts in its distribution in later years resulted in an increased demand for commodity production across the Western world, which subsequently increased demand for natural resources. As greater quotients of capital became available for international business ventures, concentrated investments from Western stakeholders allowed for rapid development of new technology, which progressively replaced manual labour with processes that predominantly rely on energy and chemical consumption. Reducing labour costs means higher profit margins, which continues to incentivize structural managerial practices that minimize labour expenses and allows for alternative investment in better productive machinery. As a result, the treadmill of production inherently prioritizes investment structures that encourage a greater generation of profits and a higher demand for natural resources. As the hunger for generative production increases, conditions for the environment and for workers deteriorate in direct proportion. While these harms continue to take place in growing proportion, the rationalization of achieving adequate profit levels to keep people working and generating enough product to meet projected consumption expectations continues to persuade political executives that treadmill operations must be accelerated to sustain the flawed ways of life that we have come to know and love.<sup>12</sup>

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<sup>11</sup> Schnaiberg et al., *supra* note 6; Schnaiberg, *supra* note 6.

<sup>12</sup> John Belamy Foster, “The absolute general law of environmental degradation under capitalism” (1992) 3:1 *Capitalism, Nature and Socialism* at 77-81. John Belamy Foster, “Marx’s theory of metabolic rift: Classical foundations for environmental sociology” (1999) 105:1 *Am J Soc* at 366-405. John Belamy Foster, *Marx’s Ecology: Materialism and Nature* (New York: Monthly Review Press, 2000). John Belamy Foster, *Ecology against Capitalism*. (New York: Monthly Review Press, 2002).

In addition to capturing the persuasive strategies used to convince workers and community members to destroy their local environments, the treadmill of production also articulates the growth of the economic and political power held by capitalist shareholders, such as investors, managers, and political actors. Governmental decision makers are continuously induced to support the acceleration of production to make jobs, attract support from investor-managerial groups and maintain the quality of life that was established as a consequence of wartime prosperity.<sup>13</sup> During this period, exponential environmental degradation took place to fuel economic expansions – the subsequent effects of doing so were not a concern because decision-makers viewed technological innovation as a solve-all solution that would address issues peripheral to production as they arose. Contemporary concerns regarding the pace of energy consumption and the saturation of pollution were ignored in favour of driving economic expansion at the time in question.<sup>14</sup> Instead of investigating solutions to these problems, the effects of consuming resources and generating pollution at this rate were not adequately researched. Rather than finding suitable ways to manage waste production, “common” environmental spaces like the air, land and water became choice locations for undesirable effluence, even though these spaces continue to be shared as a society.

While pollution is often concentrated in public spaces, gradually the direct effects of environmental degradation became allocated to spaces inhabited by workers and others without the power to be elsewhere. White collar elites and some members of the middle class had the means to occupy spaces that remained upstream from the harms created by treadmill consumption practices. These groups could avoid the direct effects of environmental harm because their skills maintain systems that encourage profit growth. As key operators of treadmill processes, these workers could assume positions away from productive processes that degrade environments and generate pollutants. Alternatively, frontline workers were encouraged to live downstream or in close proximity to sources of pollution by the combined effect of their lower earning

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<sup>13</sup> See Schnaiberg, Gould & Pellow, *supra* note 6; Schnaiberg, *supra* note 6.

<sup>14</sup> As Charles Louisson suggests, the propagation of agnosis in relation to historical pollution continues to raise challenges, especially for those living in/near polluted environments alongside the social, political and economic mechanisms normalizing implicatory or interpretive denial of environmental harm and human victimization; see Charles Louisson, *Seeping Ugly* (Masters of Criminology, University of Wellington, 2021).



potential and the reduced property costs in marginal spaces.<sup>15</sup> Indeed, exposure to such environmental harm can act as a delineating indicator between racialized frontline workers and white-collar, elite populations in Canada. To be discussed below, this is a prime circumstance for paradigms of environmental racism to emerge.

Schnaiberg Gould, and Pellow note that separation of corporate and government executives from sources of direct environmental harm likely influenced their decisions to extract natural resources and destroy local ecosystems.<sup>16</sup> They explain that, at the time the treadmill of production was introduced as a concept, Western decision-makers were devoted to accelerating the pace of production as a response to a global post-war decline of capitalistic productivity. The authors identify a discursive shift at that time, where executives uniformly demanded higher productivity levels from workers to address shortfalls in profit generation that emerged across the Western world. At the same time, such discourses revealed the economic, social, and political motivations that encouraged Western states to relocate global production processes in order to maintain profit expectations that could support the western standard of life.

To achieve the long-term maintenance of profit growth, executive leaders acted to relocate domestic sites of production to nations in the Global South. Michael Lynch and Paul Stretesky underscore how working conditions and labour laws in Southern nations allowed managers to reduce the cost of labour beyond Western minimum wage thresholds and under-developed institutional oversight allowed for virtually unlimited access to environmental resources.<sup>17</sup> Workers were often nonunionized and regional leaders were eager to access the commodified wealth that proliferated in the Western world. Relocation to Southern jurisdictions allowed for rapid deployment and acceleration of treadmill operations, but the structural distribution of its benefits reflected the stratified social structures that emerged in the Global North. Southern prosperity amounted to marginal improvements in domestic living conditions, exponential depletion of natural resources, and drastic increases in environmental contamination. Per Lynch and Stretesky, Southern locals

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<sup>15</sup> See also Singh, *supra* note 1.

<sup>16</sup> Schnaiberg, Gould & Pellow, *supra* note 6 at 298.

<sup>17</sup> Michael J Lynch & Paul Stretesky, "Green criminology and native peoples: The treadmill of production and the killing of indigenous environmental activists" (2018) 22:3 *Theoretical Criminology* at 318-341 ["Treadmill and Native Peoples"].

continue to resist capitalistic mentalities with the common result of social conflict and state efforts to eradicate such resistance.<sup>18</sup>

In a similar logic to relocating the harms of production to the Global South, decision-makers acted to transfer environmental harms to previously inaccessible domestic spaces, such as lands held by Indigenous peoples.<sup>19</sup> While decisions were being made to export treadmill operations to Southern nations, action was also being taken to move domestic harms away from metropolitan regions and into remote areas where marginalized people could become workers. Canada was (and continues to be) built on a history of unilateral settler colonial expansion across territories that were traditionally inhabited by Indigenous peoples. This history continues through policies intended to open these spaces for productive consumption and reclaim them through sovereign authority. The Canadian approach was articulated in the Pierre Trudeau government's 1969 White Paper, but could not be unilaterally imposed because of historical obligations undertaken by the Crown in the Royal Proclamation of 1763.<sup>20</sup> Because Indigenous peoples benefit from a special relationship with the federal Crown, new strategies were deployed to manufacture its consensual elimination by Indigenous leaders. The objectives, factors and outcomes that compose Canada's settler colonial history are complex. To articulate the connection of this history to the treadmill of production and contemporary attempts to open Indigenous jurisdictions for capitalization, we now turn to consider the intricate and ongoing relationship between settler colonialism and neoliberalism.

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<sup>18</sup> *Ibid.*

<sup>19</sup> It is important to note that, as Morgensen suggests, settler colonialism remains naturalized within theories of biopower and theories of its relation to coloniality, inasmuch as “[w]hite supremacist settler colonization produces specific modes of biopolitics that sustain not only in settler states but also in regimes of global governance that inherit, extend, and naturalize their power”; see Scott Lauria Morgensen, “The Biopolitics of Settler Colonialism: Right Here, Right Now” (2011) 1:1 *Settler Colonial Studies* at 52.

<sup>20</sup> See Hamar Foster, “Canada: ‘Indian Administration’ from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights” in Paul Havemann, ed, *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 1999) at 351- 377 [Foster].

### III. EARLY STATE EFFORTS TO ERASE INDIGENEITY VIA SETTLER COLONIAL ASSIMILATIONIST STRATEGIES<sup>21</sup>

What is now known as “Canada” was first claimed for European settlement by King George III under the Royal Proclamation, 1763. British colonies were established in North America under the Proclamation’s authority, but the document explicitly recognized Aboriginal title over all North American lands until ceded to the Crown by way of treaty. The Royal Proclamation included rudimentary criteria for treaty-making, such as representation and consent requirements. Settlers were not permitted to claim lands from Aboriginal peoples directly. Rather, the Crown was the only entity that could purchase lands from First Nations, who could then allocate the space to settlers. Although the document defined processes for dealing with land claims, John Burrows explains how the Royal Proclamation was crafted unilaterally by British colonists without Aboriginal input.<sup>22</sup> By establishing the guidelines for British dominion over North American lands in this way, it laid the groundwork for the Crown’s monopoly over lands historically inhabited by Indigenous peoples.

Despite these legalistic guarantees, European dominion over North America continued with the intention of assuming complete control over the jurisdiction. In Canada, several policies were introduced to dislocate Indigenous communities to eliminate their opposition to the expansion of colonial operations. Bonita Lawrence explains that, from its inception, the *Indian Act* enabled the federal state’s highly invasive and paternalistic approach

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<sup>21</sup> We recognize not all settler colonial efforts to assimilate and/or erase Indigeneity and Indigenous peoples are included in our paper. Due to page space and length, we include efforts pertaining to the contexts of our discussion while remaining mindful of the various tragedies and atrocities committed by and in the name of the Canadian settler state, including but not limited to the Indian residential school system and the child welfare system; see Alexander Laban Hinton, Andrew Woolford & Jeff Benvenuto, eds, *Colonial Genocide in Indigenous North America* (Durham: Duke University Press, 2014); Andrew Woolford & James Gacek, “Genocidal carcerality and Indian residential schools in Canada” (2016) 18:4 *Punishment & Society* at 400-419; Elizabeth Comack, “Corporate Colonialism and the ‘Crimes of the Powerful’ Committed Against the Indigenous Peoples of Canada” (2018) 26:1 *Critical Criminology* at 455-471; Nathan Sunday, “‘For the Good of the Child’: The Colonial Machinations of Child Welfare in Canada” (2019) 5:1 *Invoke* at 36-44.

<sup>22</sup> John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) at 155-172.

to Indigenous relations.<sup>23</sup> The *Indian Act* codified Canada's unilateral authority over every aspect of Indigenous life, such as defining acceptable categories of "Indian," controlling the decision-making processes of Indian bands, and allocating claims to reserved lands. The *Indian Act* empowered the federal state to make all Aboriginal peoples their legal wards and even to regulate the permissibility of practicing Indigenous cultural traditions.<sup>24</sup> From the start, Aboriginal peoples resisted their legalistic oppression by advocating for meaningful participation in defining their rights in law and against the criminalization of their cultural practices. Rather than meet their requests, the state amended the *Indian Act* to outlaw the hiring of lawyers and legal counsel by Indians. Effectively, state actors sought to bar Indigenous peoples from using the legal system to recognize or validate their rights.<sup>25</sup> While their voices remained unheard, communities resisted by continuing cultural practices in underground locales. In response, *Indian Act* policies were expanded to the extent that virtually any gathering of Indigenous peoples amounted to a criminal act that would result in imprisonment. The effects of settler colonial criminalization continue today in Canadian criminal justice systems, where Indigenous peoples are disproportionately represented in virtually every aspect of criminal justice.<sup>26</sup>

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<sup>23</sup> Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 *Hypatia* at 3.1; *Indian Act*, RSC 1985, c 15 [*Indian Act*].

<sup>24</sup> See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, Vol 1 (Ottawa: the Royal Commission on Aboriginal Peoples, 1996) at 250 [RCAP]; *Indian Act*, *supra* note 23 s 141.

<sup>25</sup> See Alfred Scow, Royal Commission of Aboriginal Peoples (RCAP), *Transcriptions of Public Hearings and Round Table Discussions*, Vol 1 (Ottawa: Royal Commission on Aboriginal Peoples, 1992-1993) at 344-345.

<sup>26</sup> See Report of the Aboriginal Justice Inquiry, *Chapter 4 - Aboriginal Over-Representation* (Manitoba: AJIC, 2001), online: *AJI* <[www.ajic.mb.ca/volume1/chapter4.html](http://www.ajic.mb.ca/volume1/chapter4.html)> [*AJI*]. Indeed, one can even argue the existing parallels between the Canadian settler state and the Canadian carceral state, the latter referring to a series of settler institutional configurations and actors that prioritize punishment, containment, detention, and/or incarceration for treating social inequality such as poverty and marginalization; see e.g. James Gacek & Richard Sparks, "The Carceral State and the Interpenetration of Interests: Commercial, governmental, and civil society interests in criminal justice," in Kevin Albertson, Mary Cocoran & Jake Phillips, eds, *Marketisation and Privatisation in Criminal Justice* (Bristol: University of Bristol Policy Press, 2020) at 47-58; Jarod Shook, "The Canadian Carceral State: What is to be done? Ask Prisoners!" (2019) 1:1 *Canadian Dimension*, online: *Canadian Dimension* <[canadiandimension.com/articles/view/the-canadian-carceral-state-what-is-to-be-done-ask-prisoners](http://canadiandimension.com/articles/view/the-canadian-carceral-state-what-is-to-be-done-ask-prisoners)> [perma.cc/Q75Q-VC3L]. It is not lost on us the overrepresentation of

The *Indian Act* authorized the state's draconian efforts to eliminate all aspects of Indigeneity in Canada, at least until the post-war period. Global recognition of human rights and the totalitarian control that Western nations had taken over Aboriginal life led Canadians to recognize that Indigenous peoples were the most disadvantaged in their society. As Western executives committed to the *United Nations' Universal Declaration of Human Rights*, federal decision-makers amended the *Indian Act* in 1951 to remove its most oppressive provisions. The Royal Commission of Aboriginal Peoples described these changes as a return to the original *Indian Act* of 1876.<sup>27</sup> In essence, the international equality movement of the time encouraged the 1969 Trudeau government to recast the legal identity of First Nations from incapable wards of the state into populations that could be saved through assimilation into the socio-economic ethos of the broader nation.

Their approach to assimilation culminated with a proclaimed intent to abolish the *Indian Act* and progressively eliminate the Department of Indian Affairs. Prime Minister Pierre Trudeau proposed "The White Paper" in 1969, which called for the end of Crown's special legal relationship with Aboriginal peoples.<sup>28</sup> The government's expressed intention was to achieve equality for all Canadians by eliminating "Indian" as a distinct legal status. In other words, *Indian Act* policies were considered discriminatory because it created legal processes that could only be accessed by Aboriginal peoples. By removing their special status, the White Paper asserted how Indigenous peoples would be free to redevelop their cultures on the same legal, social, and economic grounds as non-Indigenous Canadians. Rather than creating pathways to include Indigenous perspectives in the development of governance and policy, Sally Weaver highlights the White Paper's latent objective of converting reserve lands into private property that could be sold by community leaders -elected using *Indian Act* processes that were unilaterally defined by the settler state. Transforming territorial rights into property rights could allow communities to become economic participants and the state was ready to provide limited funding support to help them complete their transition into the economic

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Indigenous peoples in the Canadian justice system, and we would be remiss if we did not acknowledge this unfortunate fact here.

<sup>27</sup> RCAP, *supra* note 24 at 310-311.

<sup>28</sup> Canada, Indian and Northern Affairs, *Statement of the Government of Canada on Indian Policy* (Ottawa: Department of Indian and Northern Affairs, 1969).

order.<sup>29</sup> Put simply, White Paper policies would allow the state to enter protected Indigenous spaces while maintaining limits on their ability to hold settlers accountable by law.

The White Paper policy agenda was informed by the research of Harry Hawthorn, who investigated the socio-economic condition of Indigenous peoples in Canada.<sup>30</sup> Hawthorn concluded that Aboriginal peoples were Canada's most marginalized populations. He attributed their circumstances to historical state failures, such as the Indian residential school system, which left Indigenous peoples unprepared as economic participants. Hawthorn recommended the implementation of Aboriginal-specific programming and targeted resources to allow Indigenous communities to choose their own lifestyles, whether they remained in reserve communities or elsewhere. He encouraged the removal of all forced assimilation programs, especially residential schools. Based on these recommendations, Jean Chrétien, Minister of Indian and Northern Affairs Canada (INAC) in the Pierre Trudeau government, engaged a national consultation program with local First Nations communities and brought regional representatives together for a round-table consultation in Ottawa. Indigenous leaders expressed united concerns about the status of Aboriginal and treaty rights, the processes and contents of title to land, the legal recognition of a right to self-determination, as well as ongoing access to education and health care systems. While these concerns were expressed, Minister Chrétien ignored them outright when proposing the White Paper as the best solution to improve socio-economic conditions for Aboriginal peoples in Canada.

The White Paper was and remains an abysmal failure to recognize the historical grievances between Indigenous peoples and the Canadian state, which immediately galvanized First Nations into political action. In essence, White Paper policies were received by Indigenous peoples as the culmination of Canada's genocidal desire to assimilate Indigenous peoples into mainstream society. Harold Cardinal, Cree leader of the Indian Association of Alberta, described White Paper policies as "a thinly disguised programme of extermination through assimilation" that he viewed as a form of cultural

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<sup>29</sup> Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970* (Toronto: University of Toronto Press, 1981).

<sup>30</sup> MA Tremblay, FG Vallee & J Ryan, ed by HB Hawthorne, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* (Ottawa: Indian and Northern Affairs, 1967), online: CAID <[caid.ca/HawRep1a1966.pdf](http://caid.ca/HawRep1a1966.pdf)> [perma.cc/CE6Q-5EH6].

genocide.<sup>31</sup> Cardinal rejected the White Paper on behalf of the Indian Association of Alberta in *Citizens Plus*, which became popularly known as the “Red Paper.” Cardinal’s position was quickly adopted as the Indigenous response to the state’s proposal.<sup>32</sup> Prior to Cardinal’s rejection of the White Paper, other Aboriginal leaders like Rose Charlie, Philip Paul and Don Moses brought First Nations in British Columbia together to develop their own rejection of White Paper policies in a document that is now known as the “Brown Paper.”<sup>33</sup> The socio-political momentum of the united Indigenous peoples of Canada could not be ignored. The mobilization of Indigenous communities across Canada signalled the beginning of a political and legal revolution in Aboriginal rights and entitlement recognition through jurisprudential interpretation of s. 35 of the *Constitution Act, 1982*. Constitutional recognition of Aboriginal rights was a monumental achievement in protecting Indigenous entitlements in Canada, but closer analysis of the juridical interpretations of s. 35 reveals the state’s ongoing erosion of these rights through Canada’s courts. To explore and articulate the neoliberal shift in recognizing Indigenous rights and entitlements, we now consider the constitutionalization of Aboriginal rights under s. 35, as well as its jurisprudential interpretation by the Supreme Court of Canada (SCC).

#### IV. THE RISE AND FALL OF CONSTITUTIONAL ABORIGINAL RIGHTS: THE BEGINNINGS OF EROSION

The socio-political momentum of the Indigenous movement in Canada played an important role in recognizing and affirming Aboriginal rights as part of patriating the Constitution from British Parliament. England retained exclusive power to approve constitutional amendments, but the power to do so could be assumed by the federal government under the *Statute of Westminster 1931*. With this avenue in mind, the Pierre Trudeau government successfully assumed sovereign authority from the Parliament of the United Kingdom with the passing of the *Canada Act 1982*.<sup>34</sup> Patriation was subsequently confirmed with the passage of the *Constitution Act, 1982* by Canadian Parliament, which

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<sup>31</sup> Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1999).

<sup>32</sup> Indian Association of Alberta, *Citizens Plus “The Red Paper”* (Edmonton: Indian Association of Alberta, 1970).

<sup>33</sup> Union of British Columbia Indian Chiefs, *A Declaration of Indian Rights: The B.C. Indian Position Paper* (Vancouver: UBCIC, 1970).

<sup>34</sup> *Canada Act 1982*, c 11 (UK).

includes the *Charter of Rights and Freedoms* in Part I, recognition and affirmation of existing Aboriginal and treaty rights in Part II, and several other substantive parts. Separation of Aboriginal rights from Part I ensures that federal governments cannot override them in the same fashion as *Charter* rights.

Constitutional patriation was a hotly contested battle between the federal government and its provincial counterparts: eight Canadian provinces opposed the model proposed by the federal government. Provincial resistance led to constitutional challenges to the SCC,<sup>35</sup> which questioned whether the federal government could patriate the constitution without securing consent from the provinces. Ultimately, the SCC ruled that unilateral patriation by the federal government was within its constitutional limits, with or without the consent of the provinces. Once patriation was ratified by British Parliament, the federal government negotiated the *Constitution Act, 1982* to complete the process. In doing so, the *Constitution Act, 1982* included the *Charter of Rights and Freedoms* to limit state powers in the spirit of post-war caution and s. 35, which constitutionally recognized the existence of Aboriginal rights.

The powerful political capacity that Indigenous leaders accrued in response to the White Paper allowed for a strong Indigenous presence during these negotiations. Aboriginal rights were not included in initial drafts, but Indigenous demonstrations and campaigns persuaded lawmakers to constitutionally recognize Aboriginal rights. Indigenous peoples were not invited to the negotiating table, but they still meaningfully raised concerns about the preservation of Aboriginal rights and title as they were established by the British Crown, as well as their legal status as autonomous decision-makers at the federal level. Due to the White Paper, Indigenous peoples were already suspicious of the Pierre Trudeau government and believed that repatriation was just another avenue of completing his government's assimilationist vision of the Canadian settler state. Advocates like the *Constitution Express* worked diligently for two years to persuade international and domestic audiences before the Canadian government agreed to include s. 35 in the repatriated constitution. Notably, clauses (3) and (4) were added to s. 35 because of Aboriginal consultations that took place in 1983.<sup>36</sup>

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<sup>35</sup> *Manitoba (Attorney General v Canada (Attorney General); Canada (Attorney General) v Newfoundland (Attorney General); Quebec (Attorney General) v Canada (Attorney General)*, [1981] 1 SCR 753, [1981] SCJ No 58; *Reference re: Amendment of Canadian Constitution*, [1982] 2 SCR, [1982] SCJ No 101.

<sup>36</sup> See Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Agincourt: Methuen, 1984) at 30.



Section 35 recognizes and affirms that Aboriginal rights existed prior to the *Constitution Act, 1982*, but does not create these rights or establishes their contents. Rather, legal validation of Aboriginal title activates the affirmation of cultural, social, economic, and political rights for the applicant community. These entitlements can include the right to land, to make use of land resources for sustenance, to practice culture and/or to establish land use agreements.<sup>37</sup> The content of s. 35 came to be defined under SCC jurisprudence in *R v Calder*.<sup>38</sup> In this landmark case, the SCC recognized that Aboriginal title to land existed, but the *Calder* court remained split on the issue of whether Aboriginal title continued to exist once a treaty or land use agreement was struck. The perpetual existence of Aboriginal rights was later confirmed in *R v Guerin*, where Aboriginal title was declared a *sui generis* right.<sup>39</sup> Further, recognition of these rights imposed a fiduciary duty on the federal Crown to protect the land in question to ensure that entitlements can be met for both current and future generations. Justice Dickson, as he then was, confirmed that the Crown's obligations regarding Aboriginal title could only be alienated with consensual surrender of these rights to the Crown, as per ss. 37-41 of the *Indian Act*.<sup>40</sup> Surrender can also be affected by way of treaty or land claim agreement, which extinguishes the Crown's fiduciary relationship with titleholders by virtue of the new terms the parties assented to. That said, the federal Crown remains bound to honour newly agreed terms with the Indigenous community in question.

The bright-line legal standards that were established in *Calder* and *Guerin* were followed by SCC decisions that prescribed criteria that could allow Indigenous communities to establish a *bonafide* claim to Aboriginal title, as well as alternative criteria that could be met by the state to justify its infringements on established Aboriginal entitlements. Previous decisions told us that recognition of Aboriginal title and its associated rights requires the claimant to sufficiently demonstrate their traditional and historic relationship to the disputed lands using evidence recognized by settler state institutions. To meet this expectation, the SCC prescribed several criteria that would sufficiently demonstrate a valid claim to Aboriginal title in *R v Van der Peet*.<sup>41</sup> In that case, the accused was charged for selling salmon that was caught under an Indian

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<sup>37</sup> *Ibid*; see also Foster, *supra* note 20.

<sup>38</sup> *R v Calder*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder*].

<sup>39</sup> *R v Guerin*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*].

<sup>40</sup> *Ibid* at para 94-95.

<sup>41</sup> *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van Der Peet*].

food-fishing licence. While the Stó:lō peoples were entitled to fish for sustenance and to engage in complex trade and barter relations with other First Nations, the majority concluded that the accused's Indian food-fishing licence did not include general trade in salmon, meaning that the accused was not entitled to sell salmon for profit and he was therefore guilty. In reaching their conclusion, the Court outlined ten criteria that must be met before a practice can benefit from constitution protection under s. 35. Writing critically of this decision, Russell Barsh and James Henderson explain that the *Van der Peet* test can allow the Crown to extinguish Aboriginal rights in the same moment they are recognized by the courts.<sup>42</sup>

Contrasting the burden imposed on Indigenous peoples to legally recognize their rights, SCC jurisprudence also established a three-part test that can legally justify state infringements on spaces subject to already-recognized Aboriginal entitlements. In *R v Sparrow*, Chief Justice Dickson and Justice La Forest quashed the claimant's conviction and ordered a new trial. While doing so, their judgement established several criteria that, if sufficiently met by government, would legally authorize state encroachments on recognized Aboriginal rights under the common law.<sup>43</sup> The claimant was charged under s. 61(1) of the *Fisheries Act* for fishing with a drift net that was longer than the permissible length under his Indian food fishing licence. Chief Justice Dickson provided three contextual questions that, if met, could justify a *prima facie* infringement on s. 35(1) rights, such as those claimed by Sparrow. If state-imposed limits are reasonable, do not cause undue hardship, or deny the claimant of their preferred method of exercising their recognized rights within its limits, the court may validate the state's encroachment, despite its implications on the recognized rights of the individual. If these criteria are met, the burden shifts to the Crown to demonstrate the legitimacy of its legislative objective, such as improving natural resource management in the area of dispute. Crown objectives are then balanced against the state's fiduciary obligations to the claimant community. In Sparrow's case, the majority found that his fishing fell within the scope of his recognized rights, meaning that his charges were groundless. While the Court ruled as such, Sparrow was forced to undergo a new trial before being exonerated for his "offence."

Our discussion has thus far highlighted the historical objectives of the Canadian settler colonial state, the powerful social resistance that Indigenous

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<sup>42</sup> Russell L Barsh & James Y Henderson, "The Supreme Court's Van der Peet Trilogy: Native Imperialism and Ropes of Sand" (1997) 42:1 McGill LJ at 998.

<sup>43</sup> *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

leaders presented at a key time in history, and its culmination in the constitutional recognition and affirmation of Aboriginal title and rights in Canada. Achieving constitutional recognition is a triumph that can neither be overstated nor underappreciated. While enshrining Aboriginal rights into Canada's constitutional framework holds positive potential in reconciling the state's settler colonial history, SCC jurisprudence demonstrates how the objectives of the state continue to move forward under the authority of the common law. Indigenous peoples came together to effectively resist the White Paper's blatant elimination strategies, but the settler state's objectives were simply repositioned from formal statutory regulation and into the narrower focus of Canada's courts. To describe the modern Canadian state's strategy of employing rights to impose responsibilities on their holders before their contents can be activated, we now explore how growing neoliberal logics, as espoused by the Canadian settler state, welcomes the recognition of marginalized groups in exchange for such groups' demonstrated acceptance of the dominant social, economic, and political orders.

## V. NEOLIBERAL APPROACHES TO INDIGENOUS RIGHTS RECOGNITION IN CONTEMPORARY CANADA

The Canadian settler colonial state reasserted sovereignty over the territories of Indigenous peoples with the patriation of its constitution and, in doing so, created legal processes to maintain its dislocation of Indigenous communities, reclaim desirable land bases, and eradicate their ways of life as counter-cultural to the dominant social ethos. State policies sought to separate, manage, and eliminate Indigenous culture by reconstructing their rights under law. After recognizing Aboriginal rights in the *Constitution Act, 1982*, the federal government lost the ability to extinguish entitlements that were not relinquished under treaty or land use agreement. Although positive for Aboriginal claimants, elevating their claims to the realm of constitutional law allowed judges to create new pathways to consider the activation and contents of s. 35. The SCC used constitutional ethics to create a body of common law principles that are applied when s. 35 is involved. In essence, the SCC developed a framework where constitutional rights only activate when the claimant demonstrates the necessary criteria to justify activating the right in the context of the case. This, of course, must be established using evidence that is accepted by state actors. Simultaneously, the state can also meet defined criteria to justify policies that encroach on the constitutionally protected rights of

relevant parties. In other words, SCC jurisprudence can allow the state to legally enact policies that are contrary to Canadian constitutional rights by virtue of a contextually justified, principled approach.

In our view, neoliberalism involves the practice of using rights to impose responsibilities on groups aspiring for enfranchisement. In the context of settler colonialism, Elizabeth Strakosch asserts that settlers apply the neoliberal rule of law to replace colonized peoples on their land and to justify their decisions to do so.<sup>44</sup> The substitution of Indigenous ways of life with majoritarian mentalities is gradually naturalized using a dispersive governmental approach, where fragmented policies work in tandem to create conditions where the state can justify the relocation of Indigenous peoples away from desirable land and into those considered averse by majority populations. In this framework, colonized populations are encouraged to assimilate because no alternatives are available to meet the necessities of local communities, such as protecting their territory, or meeting basic needs like housing and access to potable water.

Political actors employ discourses of inclusion to draw colonized populations into the state order and contrast their “capability” against state-defined “Euro-normative” criteria to determine what rights of colonized populations should be, as relative to the majority population. Neoliberal decision-makers govern through polarities of compliance – freedoms are recognized when target groups align with Euro-centric definitions, meaning their rights will be upheld by the rule of law. Alternatively, totalitarian regimes are assigned to those that reject the dominant social order, such as those of Indigenous peoples in Canada. From a settler colonial perspective, discourses of compliance are utilized when interpreting the contents of s. 35, meaning that state executives can justify their appropriation of Indigenous lands, resources, and jurisdiction for failing to comply with the state’s social, political, and economic expectations. Put differently, state decision-makers can justify their decisions to re-establish and maximize Canada’s territorial dominance against criteria that they define unilaterally, as opposed to the democratic processes that we value as a Western nation.

If integration is not statistically successful, the state can push colonized groups to the edges of the acceptability matrix, meaning they are subject to near-authoritarian regimes that define many aspects of their daily lives. Coercive measures are re-applied by the state to crush non-compliant behaviour by

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<sup>44</sup> Elizabeth Strakosch, *Neoliberal Indigenous Policy: Settler Colonialism and the 'Post-Welfare' State* (London: Palgrave Macmillan, 2015) [Strakosch].

restricting access to certain social spaces or state resources. Under neoliberal frameworks, those identified for state intervention are viewed as “takers” that decrease productivity and present a risk of becoming a perpetual burden on state resources or a barrier to achieving state objectives overall. To avoid these presumptions, the individual must maintain self-reliance, consistently pay their dues, and ultimately remain unidentified by state actors.<sup>45</sup>

To encourage marginalized populations to work towards state acceptability, “exceptionalist” programs are deployed to instill pro-social behaviours. Strakosch rightly underscores how desired state resources are held hostage in these programs to incentivize target populations to participate in pro-state activities, such as joining pro-social labour markets, generating capital, and opening new spaces for enterprise.<sup>46</sup> In so doing, programs are established for a limited time to encourage assimilation before they close. Failure to adopt target behaviours within the defined period allows state actors to end the incentive program, declare the target population as “incapable,” and relegate participants to totalitarian regimes where their rights do not apply.

Coupled with a settler colonial perspective, exceptionalist programs require the consensual surrender of the Crown’s fiduciary duty to the titleholding community to access much-needed state resources.<sup>47</sup> After a community engages the state’s acceptability matrix, they forfeit their fiduciary relationship with the Crown. This means that the community’s relationship with the Crown cannot be restored to its original status. Rather, failure to assimilate into Euro-centric neoliberal ideals allows the settler state to concentrate its authority over the claimant, reassert its authoritative dominance, and declare the claimant’s inability to manage their own affairs. The colonized are expected to conform with neoliberal state ethics before accessing program resources and must demonstrate compliance through their ability to attract investment capital. Discourses of risk, statistical deviance, and national insecurity are deployed to operationalize the status of the colonized as a failed enterprise, which can be used to justify their criminalization as “unable to participate in the market.”<sup>48</sup> New forms of provisional citizenship emerge, where benefits in the traditional context must be earned in relation to the latent hierarchies of rights-access that are re-assessed each day.<sup>49</sup>

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<sup>45</sup> *Ibid* at 25-28.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at 27-32.

<sup>49</sup> *Ibid.*

Considering the battle to constitutionally recognize Aboriginal rights under Canadian statute and common law, it is evident how Strakosch's focus aptly articulates the legal pathways that exist to justify the state's progressive encroachment into Indigenous jurisdictions. Section 35 embodies the existence of Aboriginal rights, which can be affirmed and enforced if the criteria defined in *Calder* and *Guerin* are met. Before the Court issued benchmarks that could validate claims to Aboriginal title, the SCC created common law processes allowed the state to justify policies that minimize Indigenous authority over lands imbued with Aboriginal title, such as matters of natural resource management, allocation of lands, and opening spaces for economic production. In addition, the SCC's rulings in *Sparrow* and *Van der Peet* provided several criteria that must be met before a *bona fide* claim to Aboriginal rights can be acknowledged and enforced. Rights cannot be recognized unless the defined criteria are sufficiently demonstrated in court, using evidence recognized by the state. Even if those entitlements are acknowledged, the state may enact policies that infringe on those rights unless the claimant can demonstrate the policy causes "undue hardship." In other words, the state retains the opportunity to justify infringements imposed unilaterally by settler decision-makers.

Returning to the expressed intentions articulated in the White Paper, the sum effect of these measures appears to achieve the government's 1969 objectives through modern, yet fragmented means. The intention of the White Paper was to eliminate the Crown's special relationship with Indigenous peoples to allow them to pursue the revitalization of their culture and communities on "equal grounds" with other Canadians. Indigenous solidarity consecrated their fiduciary relationship with the Crown in the Constitution, but, rather than moving forward in the spirit of meaningful reconciliation with Indigenous peoples, the settler state took an alternative approach to achieve its own objectives under the common law, despite its constitutional obligations to Indigenous right-holders.

It is evident how the SCC's jurisprudential groundwork allowed the Canadian settler state to progressively erode Indigenous jurisdictions that remain subject to s. 35. As these measures are deployed to further marginalize Indigenous resistance to the settler state ethos, statutory mechanisms have also been put in place to encourage claimants to forfeit their rights in exchange for access to capital investment, community revitalization and pathways to greater community autonomy. But what examples exist of modern approaches to

eliminating the Crown's fiduciary obligation to Aboriginal right-holders? We outline several policies and programs below.

## VI. FEDERAL REFRAMING OF CROWN-INDIGENOUS RELATIONS: NUANCED EROSION OF OBLIGATIONS

In contrast to the 1960s approach, modern assimilation methods apply discourses of reconciliation to “break away” from Canada’s colonial history, but state objectives remain the same. With the successful majority-election of the federal Liberal Party in 2015, Prime Minister Justin Trudeau expressed an intention to renew the Crown-Indigenous relationship in ways that are based on respect, cooperation, partnership and recognition of Indigenous rights.<sup>50</sup> This intention was codified in the *Indigenous Rights, Recognition and Implementation Framework* (IRRIF).<sup>51</sup> The IRRIF was followed by several policies that act to reorient the settler-state’s institutional management apparatus regarding its relationship with Indigenous peoples. For example, INAC service functions were separated from “Crown-Indigenous Relations,” a Ministerial working group was struck to “decolonize” Canada’s laws, and a series of principles were codified regarding the Crown’s future relations with Indigenous populations.<sup>52</sup> Arguably, the titles of these initiatives appear positive, but the substantive effects of these changes are not clear.

Hayden King and Shiri Pasternak of the Yellowhead Institute caution against taking these platitudes at face value.<sup>53</sup> King and Pasternak conclude that

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<sup>50</sup> Prime Minister of Canada, “Government of Canada to create Recognition and Implementation of Rights Framework” (14 Feb 2018), online: PMO <[pm.gc.ca/en/news/news-releases/2018/02/14/government-canada-create-recognition-and-implementation-rights](http://pm.gc.ca/en/news/news-releases/2018/02/14/government-canada-create-recognition-and-implementation-rights)>.

<sup>51</sup> Crown-Indigenous Relations and Northern Affairs Canada (CIRNA), “Recognition and Implementation of Indigenous Rights Framework: Engagement Guide, (2018) online: GC Publications <[www.publications.gc.ca/site/eng/9.851603/publication.html](http://www.publications.gc.ca/site/eng/9.851603/publication.html)> [publications.gc.ca/pub?id=9.851603&sl=0]; Crown-Indigenous Relations and Northern Affairs Canada, “A Recognition and Implementation of Indigenous Rights Framework” (10 Sept 2018), online: GC Archive <[www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708#chp4](http://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708#chp4)> [https://perma.cc/EP4M-XADJ].

<sup>52</sup> *Ibid.*

<sup>53</sup> Hayden King & Shiri Pasternak, “Executive Summary: Canada’s Emerging Indigenous Rights Framework: A Critical Analysis” (5 June 2018), online (pdf): *Yellowhead Institute* <[yellowheadinstitute.org/wp-content/uploads/2018/06/executive-summary-rights-framework-yi-final.pdf](http://yellowheadinstitute.org/wp-content/uploads/2018/06/executive-summary-rights-framework-yi-final.pdf)> [https://perma.cc/M9V6-JL6T] [King & Pasternak].

the IRRIF creates a renewed suppression of Indigenous capacities to achieve self-determination and to govern their own affairs. Much like Minister Chrétien's consultations prior to issuing the White Paper, Prime Minister Trudeau developed the IRRIF after "national consultations" between the Minister of Crown-Indigenous Relations and Northern Affairs (CIRNA) and Indigenous leaders across the country. Rather than creating pathways to substantive autonomy from the Canadian state, they argue that the IRRIF pushes Indigenous communities into a narrower model of achievable self-government that retains elements of *Indian Act* policies. Contrary to the discourses of the Justin Trudeau federal government, King and Pasternak assert that the Crown's modern approach to Indigeneity is simply a return to discredited approaches that were already taken in Canada's settler colonial past.<sup>54</sup>

The state's principled approach to its relationship with Indigenous peoples retains its historical emphases on the supremacy of Canada's constitutional framework while significantly restricting available avenues for Indigenous self-determination; the only substantive changes that were found in the IRRIF related to adopting the state's new inclusivity terminology into policy.<sup>55</sup> For example, Bill C-69 was introduced to overhaul the federal environmental assessment process to separate Indigenous consultations from broader resource development approvals, as part of meeting the state's larger commitments related to the IRRIF.<sup>56</sup> The National Energy Board (NEB) was separated into the Canadian Energy Regulator<sup>57</sup> (CER) and Impact Assessments Agency of Canada (IAAC)<sup>58</sup>. Contrary to the Crown's inclusivity discourses, the purpose of separating the NEB is to minimize barriers to resource development projects and the effect of community consultations on achieving the state's economic objectives.<sup>59</sup> Yet, the new process completely fails to consider whether an affected Indigenous community provides free, prior, and informed consent to land and resource extraction decisions on their territorial lands. The IAAC now assumes federal responsibility for carrying out and enforcing

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *National Energy Board Act*, RSC, 1985, c N-7; *Forest Ethics Advocacy Assn v National Energy Board*, 2014 FCA 245.

<sup>57</sup> *Canadian Energy Regulator Act*, SC 2019, c 28 [CERA].

<sup>58</sup> *Impact Assessment Act*, SC 2019, c 28 [IAA].

<sup>59</sup> See Omar Ha-Redeye, "Duty to Consult is not a veto" (2020), online: SLAW <[www.slaw.ca/2020/02/09/duty-to-consult-is-not-a-veto/](http://www.slaw.ca/2020/02/09/duty-to-consult-is-not-a-veto/)> [perma.cc/43RQ-3MDB].



environmental impact assessments and consultations with affected stakeholders, such as Indigenous communities.<sup>60</sup> The *Impact Assessment Act* also serves to concentrate executive powers to the IAAC and shortens assessment timeline expectations from 450 to 300 days. Alternatively, the CER is empowered to direct Indigenous governing bodies, governments, or any other holder of resource assets to enforce its directives in respect of the asset in question.<sup>61</sup>

King and Pasternak characterize the IRRIF as a modified reification of the settler-colonial status quo. Rather than moving towards a meaningful “nation-to-nation” relationship, these discourses veil the Crown’s real intent of eroding Indigenous jurisdiction outright.<sup>62</sup> The IRRIF policy acts to entrench reserve-based administrative models of governance that reflect municipal structures. Instead of improving methods of service delivery, transparency, or accountability, the IRRIF establishes a new fiscal relationship that links ten-year funding grants to performance metrics that are related to economic capacity building. Land entitlements that fall outside the *Indian Act*’s reserve designation are no longer linked to state financial support, meaning that Indigenous communities must generate own-source-revenues (OSRs) by extracting natural resources for sale from within their traditional territories. Arguably, this approach is premised on training Indigenous peoples to integrate into the market economy by forfeiting their special relationship with the federal Crown, forcing them to exploit their territorial environments, and terminating the relationship outright if they fail to meet state expectations.<sup>63</sup>

A key component of generating OSRs depends on the extraction of natural resources from lands imbued with Aboriginal title or rights. While this framework was implemented by the Justin Trudeau government, these processes build on the *Economic Action Plan* (EAP) that was introduced by his predecessor Prime Minister Stephen Harper’s federal Conservative government. Anna Stanley highlights how the EAP reconfigured Canada’s resource regulation framework to minimize Indigenous consultation requirements and introduce new financial incentive regimes to aggressively

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<sup>60</sup> IAA, *supra* note 58, ss 1, 12.

<sup>61</sup> *Ibid.*, ss 10, 93-94.

<sup>62</sup> King & Pasternak, *supra* note 53.

<sup>63</sup> *Ibid.*

promote natural resource extraction in Canada.<sup>64</sup> The EAP elicited strong opposition from Indigenous communities, but its policies remain in place. Rather than address these concerns, EAP programs were allocated a broader budget in 2018. In essence, policies like the IRRIF build on the incentives created under the EAP to establish a tandem enclosure of existing Indigenous land rights. The limited exceptionalism of programs like the EAP and the IRRIF are deployed to manufacture Indigenous consent to capitalist exploitation in their protected environmental spaces. Put simply, the Canadian settler state has taken care in using policy to enclose Indigenous territories and to ensure that participation in capital production is the only way they can support their communities.

Incentive programs may have been introduced equally between industrial proponents and Indigenous communities, but Indigenous communities have much more to lose before they qualify for access. Indigenous groups are expected to relinquish their historical relationship with the federal Crown before incentives can be accessed. One example of this is the First Nations Land Management Agreement (FNLMA) program. The following section reviews the FNLMA program, how it specifically enables the state's expectations regarding capitalistic production, and its role towards socializing participants into accepting pro-state economics.

## VII. FNLMAS: OPENING INDIGENOUS LANDS FOR BUSINESS, EXPLOITATION, AND DIMINISHED CROWN RELATIONS

The first step that a holder of Aboriginal title or rights must undertake to participate in the management of their lands is to enter a FNLMA with the federal Crown. Doing so creates new obligations between the parties, which has the effect of releasing the Crown from its fiduciary duty to the Indigenous claimant. Shaylene Jobin and Emily Riddle of the Yellowhead Institute describe FNLMA as a contemporary erosion of *Indian Act* protections, which facilitate the applicant's economic independence by setting expectations that Indigenous applicants will support their own members by increasing economic activity on Indigenous lands.<sup>65</sup> They rightly assert that FNLMA download the Crown's

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<sup>64</sup> Anna Stanley, "Resilient Settler Colonialism: 'Responsible Resource Development,' 'Flow-Through' Financing and the Risk Management of Indigenous Sovereignty in Canada" (2016) 48:12 *Environment and Planning* at 2423-2428.

<sup>65</sup> Shaylene Jobin & Emily Riddle, "The Rise of the First Nations Land Management Regime in Canada: A Critical Analysis" (Sept 2019), online (pdf): *Yellowhead Institute*

fiscal and environmental responsibilities to the applicant community while removing the fiduciary nature of their relationship. The Crown was previously liable for environmental destruction that took place on Indigenous lands by virtue of their stewardship under the *Indian Act*, but FNLMA holders become solely liable for environmental harms that are discovered after the FNLMA Land Code takes effect.

Building into the capital-attraction framework established under the EAP, Jobin and Riddle suggest the primary intention of FNLMA is to open reserve lands to international market forces that can use capital investment to incentivize economic development.<sup>66</sup> This is a drastic shift, insofar that Indigenous communities exclusively dealt with the federal Crown, who remained duty bound to uphold their best interests and assumed liability for any consequential mismanagement. By removing this legal duty from the federal government and opening the negotiating table to global capital investors presents novel challenges that will likely place Indigenous communities at risk. Considering the risks FNLMA hold for applicants, we parallel Jobin and Riddle's concern that Indigenous decision-makers should seriously consider the Crown's underlying rationalities when deciding whether to enter a FNLMA.<sup>67</sup>

Moreover, Jobin and Riddle highlight how FNLMA operationalize the Crown's interests in tapping into Indigenous resources, both natural and human, to increase residual profit generation for the Canadian state.<sup>68</sup> First Nations have a demonstrated ability to work at the speed of business, meaning that opening enterprises on reserve, working with industry, and building business relationships on reserve is easier for Indigenous communities because of their relatively isolated status. This allows for the rapid roll-out of business operations and a nearly immediate capitalization on investment. These profits eventually flow into the Canadian economy, which acts as an incentive for Canada to remove barriers to capital enterprise on reserve. While positive on its face, the rapid deployment of capitalist production and international capital investment may negatively impact First Nations management of their lands and their nations. Flows of capital into Indigenous communities may increase, but they still lack the legal authority to hold investors accountable.

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<[yellowheadinstitute.org/wp-content/uploads/2019/09/fnlma-report.pdf](https://yellowheadinstitute.org/wp-content/uploads/2019/09/fnlma-report.pdf)>  
[[perma.cc/THG9-4R7H](https://perma.cc/THG9-4R7H)] [Jobin & Riddle].

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

FNLMAAs do not consider the impact of opening their lands for business in traditional Indigenous legal systems and culture. Jobin and Riddle assert that programs like FNLMAAs alienate Indigenous peoples by actualizing on the logics of settler colonialism. By assuming outright ownership of Indigenous lands at the behest of the Crown, Indigenous peoples are opening themselves to the latent governance regimes of the exploitative, global capitalist marketplace, while closing avenues of legislative recourse that were previously available under the *Indian Act*. Accepting a FNLMA requires the applicant to opt out of *Indian Act* controls over land, resource, and environmental management in exchange for the removal of general Ministerial oversight and, more specifically, that office's approval in terms of authorizing land use choices.<sup>69</sup> In doing so, local law-making becomes accessible to band councils, who are still elected using processes defined by the *Indian Act*. The powers allocated under the FNLMA program are attractive because they offer greater authority and control over Indigenous affairs to local communities, but this authority comes at the cost of developing local environments to fuel capitalistic extraction and production. Despite these concerns, FNLMAAs do not force communities to cede Aboriginal title or to relinquish control over their lands.<sup>70</sup> While there are legitimate concerns regarding the forfeiture of existing Indigenous entitlements to the Crown, Jobin and Little found the FNLMA program to act as a "test" before the Canadian state would allow an applicant community to assume the comprehensive responsibilities of self-government.

The 2018 approach to Crown-Indigenous relations mirrors the challenges that arose in the 1960s, where First Nations were forced to defend the *Indian Act* to protect their rights from state erosion.<sup>71</sup> While leaders like Harold Cardinal rejected the Crown's proposals at that time, it appears that the same modalities are being mobilized in the modern era. FNLMAAs appear to be the state's primary vehicle for pushing a diminished form of self-governance on Indigenous communities while making them responsible for their own economic prosperity and associated environmental harms.<sup>72</sup> Therefore, FNLMAAs offer Indigenous communities an opportunity to redevelop their cultures on similar legal, social, and economic grounds as non-Indigenous Canadians by relinquishing their special relationship with the federal Crown,

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

in similar fashion to the federal government's intention that was codified in the 1969 White Paper.

In sum, FNLMA program lays the groundwork for the opening of Indigenous jurisdictions for capitalistic production using White Paper assimilation strategies. In line with Canada's settler colonial history, the federal government has constructed a series of conditions where Indigenous peoples cannot access resources to revitalize their communities outside of the confines of the *Indian Act*. While this legislation is a living artefact of Canada's colonial history and present, it unfortunately continues to be the authority that protects Indigenous spaces from capitalist expropriation.<sup>73</sup> The Crown's long-term goals of Indigenous assimilation are a historical feature of its all-encompassing ethos from the time of first contact by European settlers and it continues today. While strong social resistance from Indigenous leaders prevented the Canadian settler state's manifest efforts to eliminate its special relationship with Aboriginal peoples in the past, modern approaches seek to compartmentalize aspects of the *Indian Act* into new programs that can only be accessed once the Crown is released from its fiduciary duty. Even if a community rejects the state's modern approach, the Crown may still progressively infringe on their territorial spaces under the constitutional justifications granted by the SCC. Renegotiation of the Crown's obligations to Indigenous peoples has demonstrated the federal government's interest in maximizing their ability to attract capital investment, facilitate economic growth in their jurisdictions and

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<sup>73</sup> Protection of the environment may be based on conceptions of the rights of nature and/or duties to nature. Various legislative and regulatory mechanisms may thus be invoked in promoting an eco-centric approach, ranging from laws granting legal personhood of rivers through to laws that entrench a general environmental duty of care towards non-human entities; see Lidia Cano Pecharrroman, "Rights of Nature: Rivers That Can Stand in Court" (2018) 7:13 Resources 13; Arie Freiberg, "General duties as regulatory tools in environmental protection: principles, practice, problems" (2019) 36:1 Environmental and Planning LJ at 40-56; Abigail Hutchison, "The Whanganui River as a Legal Person" (2014) 39:3 Alt LJ at 179-182, online.; Rob White, "Ecocentrism and Criminal Justice" (2018) 22:3 Theoretical Criminology at 342-362; James Gacek, "Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals" (2019) 42:4 Man LJ at 315-342; James Gacek, Richard Jochelson & Alicia Dueck-Read, "Critiquing the Conception of 'Crimes against Nature': The Necessity for a New 'Natural' Law" (2022) Intl J Offender Rehabilitation & Comparative Criminology 66:4 345.

ultimately manufacture consent to accepting the environmental costs of capitalistic production. To articulate these latent effects, we now consider the impacts of accelerating the Canadian treadmill of production – this time, in the untapped regions that fall within the traditional territories of Indigenous peoples.

## VIII. SYSTEMATIZING NEOLIBERALIZED ACCEPTANCE OF TREADMILL ACCELERATION

Perennial acceleration of the treadmill of production has resulted in a global climate crisis. Countries around the world recognize the imperative nature of reducing carbon emissions, limiting natural resource extraction, and shifting to stronger reliance on sustainable energy sources. That said, global growth of capitalist production continues so Western nations can endlessly generate profit. When we consider these challenges alongside Canada's international obligations to meet carbon reduction targets, it is possible that climate change may become the penultimate reason that can justify the settler state's termination of their special relationship with Indigenous peoples. As programs like the FNLMA are accepted by Indigenous communities in their attempts to approach autonomy from the Canadian state, they assume sole responsibility for the environmental harms that are exacted in their jurisdictions. Climate change has created an atmosphere of global crisis; the Canadian state may assert that Indigenous applicants who fail to meet program performance targets are incapable of sufficiently managing their own affairs.

The trajectory of the policies of the Canadian settler-state and the neoliberal potential noted above can be aptly described using Michael Lynch and Paul Stretesky's discussion of environmental racism. Advocates against environmental racism fight for egalitarian environmental decisions, proportionate distribution of environmental harms, and elimination of harmful production processes that primarily affect communities of colour.<sup>74</sup> In Canada, environmental racism movements fight for the legal recognition of

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<sup>74</sup> Michael J Lynch & Paul Stretesky, "The Meaning of Green: Contrasting criminological perspectives" (2003) 7:2 *Theoretical Criminology* at 217, 223-224 ["Meaning of Green"]; see also Singh, *supra* note 1; Jeffrey Monaghan & Kevin Walby, "Surveillance of environmental movements in Canada: critical infrastructure protection and the petro-security apparatus" (2017) 20:1 *Contemporary Jus Rev* at 51-70; Andrew Crosby & Jeffrey Monaghan, *Policing Indigenous Movements: Dissent and the Security State* (Halifax: Fernwood Publishing, 2018).

Indigenous environmental stewardship, with particular focus on their traditional lands and territories. Connecting this focus with the broader historical and contemporary policy agendas of the Canadian settler state, executive decisions to translocate the consumptive practices of the treadmill of production have followed a seemingly racialized pathway. Such decisions to move treadmill operations into the Global South successfully deferred the environmental costs of production in the past. Now, modern decision-makers are working to open Indigenous territories for capital enterprise so production can continue to accelerate and nation states can keep kicking the proverbial can of environmental reconciliation further down the path.<sup>75</sup> As international economic structures continue to shift during a time of global climate crisis, settler nation-states are taking steps to consensually access the last remaining environmental spaces that have yet to be transformed into profits or to take lands away from those who will not comply.

Moreover, modern settler colonial states like Canada continue to engage in discourses of false “inclusivity” to encourage Indigenous populations to adopt capitalist mentalities as part of its efforts to assimilate them into the state ethos. For example, we discuss above how neoliberal decision-makers deploy limited exceptionalist logics and programs to incentivize the shift of marginalized populations into accepting dominant economic mentalities, as well as to manufacture their submission to the greater influence of the international flows of investable capital.<sup>76</sup> Following this line of reasoning, the Canadian settler colonial state continues to develop programs that exchange legislative recourse for access to the flow of capital to attract Indigenous leaders that want to achieve community autonomy and prosperity. In other words, within the constitutional supremacy of the Canadian settler state, FNLMA allow Indigenous communities to exploit their land so they can access international capital investments, facilitate business enterprise on reserve, and become alleged masters of their own, individual destinies.

FNLMA are the primary vehicle for achieving initial independence for Indigenous communities, which then unlocks access to other exceptionalist programs that work together to entice Indigenous communities to become pro-social economic participants. For instance, the federal *Pan-Canadian Framework on Clean Growth and Climate Change* (PCF) contains such programs to encourage Indigenous participation in the green transition. The PCF designates

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<sup>75</sup> *Ibid.*

<sup>76</sup> Strakosch, *supra* note 44.

Indigenous peoples as leaders in the transition to a low-carbon economy. Indigenous peoples are framed as critical players in adopting, adapting, and innovating new technologies that can preserve local environments and defeat the threat of near-certain climatic catastrophe. The so-called “green” practices that the federal Crown trusts Indigenous peoples to create are viewed as the solution.<sup>77</sup> As partners with industry and government, the Crown claims Indigenous peoples hold the necessary potential and knowledge to develop the scientific evidence to advance clean growth and address climate change at the same time.<sup>78</sup>

In a similar approach to designating Indigenous peoples as the saviours of climate change, the federal Crown also implemented another limited exceptionalist incentive program to encourage Indigenous participation in capitalistic production under the Indigenous Natural Resource Partnership program. Natural Resources Canada expressed their intention to partner with Indigenous peoples and energy sector leaders to create several forums to engage Indigenous businesspeople in energy governance, the development of industrial best practices, and outright ownership of traditional and clean energy projects.<sup>79</sup> These commitments have been codified into the Indigenous Natural Resources Program, which intends to grow Indigenous capacity to capitalize on business opportunities, to facilitate their access to capital through generative production and attracting investments, as well as to provide financial support for community engagements related to oil and gas infrastructure projects. The INRP was enacted in 2019 and was renewed until 2022.<sup>80</sup>

Considering the settler state’s exceptionalist logic and programs together, we recognize how the *Pan-Canadian Framework on Clean Growth and Climate Change* lays the foundation for the capitalistic treadmill of production to enter

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<sup>77</sup> Pan Can Fed Action, *supra* note 3; Pan-Canadian Framework, *supra* note 3.

<sup>78</sup> Pan-Canadian Framework, *supra* note 3.

<sup>79</sup> Natural Resources Canada, “Generation Energy Council Report: Canada’s Energy Transition” (2018) at 27-33, 46-50, online (pdf): *NRCan* <[www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/CoucilReport\\_july4\\_EN\\_Web.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/CoucilReport_july4_EN_Web.pdf)> [perma.cc/WTN4-DDFQ].

<sup>80</sup> Natural Resources Canada, “Indigenous Natural Resource Partnership Program” (2020), online: *NewsWire* <[www.newswire.ca/news-releases/government-of-canada-extends-funding-to-increase-indigenous-participation-in-oil-and-gas-infrastructure-development-889192468.html](http://www.newswire.ca/news-releases/government-of-canada-extends-funding-to-increase-indigenous-participation-in-oil-and-gas-infrastructure-development-889192468.html)> [perma.cc/D7W2-4TYQ]; Natural Resources Canada, “Indigenous Natural Resource Partnerships program information page” (2020), online: *NRCan* <[www.nrcan.gc.ca/our-natural-resources/indigenous-natural-resources/indigenous-natural-resource-partnerships/22197](http://www.nrcan.gc.ca/our-natural-resources/indigenous-natural-resources/indigenous-natural-resource-partnerships/22197)> [perma.cc/969G-5JER].



Indigenous communities in terms of generating renewable energy sources and extracting natural resources. FNLMA holders can access the PCF and INRP exceptionalist programs to begin transforming territorial environments into capital. In doing so, they assume full responsibility from the federal Crown for any environmental harms that take place. Further to this, global capitalists and governmental executives are free to negotiate with FNLMA holders directly. Considering the loss of legal protections that are associated with entering a FNLMA and the exponential level of risk that is being assumed in the process, one can provide an educated guess that the Canadian settler-state has longer-term exploitive objectives in mind.

The Canadian state has implemented a series of policy initiatives to appropriate land that is currently unavailable for capitalist production by virtue of the *Indian Act* and the federal Crown's fiduciary duties. By placing powers of self-governance beyond the scope of the rights enjoyed by Indigenous peoples, the Crown is working to manufacture Indigenous consent to the expropriation of lands held under Aboriginal title or resources held under Aboriginal right to fuel the endless acceleration of the treadmill of production. Once consent is achieved under programs like FNLMA's, the Crown is absolved of its duties to preserve the status of the land and to deal with First Nations in their best interest. In addition, FNLMA's open Indigenous lands to capital investment, which is intended to facilitate the rapid expansion of business enterprise and, perhaps most importantly, to grant access to the natural resources that have been locked in place since confederation.

Expanded access to natural resources can drive economic growth in Canada in ways that have not been achieved since the post-WWII era began. Global flows of capital have become restricted because of the challenges presented by climate change, shifts in desirable resources and the concentration of capital in northern economies. Globalization carried beneficial effects in terms of economic growth for some time, but accessible land has been continuously depleted to support the accelerating treadmill of production and resources are running out. Post-war capitalists exported treadmill operations out of domestic economies and into the Global South.<sup>81</sup> While regulatory limits on treadmill processes have yet to reach their Global North potential, Southern executives and workers have come to understand the harmful scope of these practices. The marginal benefits exchanged for the effluence of Western economies has been further restricted in a new era of international

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<sup>81</sup> "Meaning of Green," *supra* note 74; "Treadmill and Native Peoples," *supra* note 17.

trade agreements, stronger labour protections, and a global concern for the long-term effects of climate change.

In effect, and to maintain social expectations regarding domestic ways of life, the Canadian settler state must find new spaces to fuel the treadmill of production that does not have the authority to resist. Indigenous land offers a suitable fit for this proverbial gap because their natural resources remain untapped, their peoples have yet to achieve a fulsome recognition of self-determination, and Canada's settler colonial history has interrupted the sustainability of Indigenous ways of life. The federal government can absolve its immediate economic issues by opening these jurisdictions for business and postpone the need to meaningfully evaluate their consumption practices until circumstances make such an evaluation necessary.

The FNLMA program lays the foundation for the operationalization of these perennial objectives. FNLMA's require applicant communities to absolve the federal Crown of its fiduciary duties, as well as to make use of their lands and its resources to generate sufficient OSRs to replace direct funding that was previously received from the state.<sup>82</sup> Indigenous communities that desire autonomy over their own affairs are encouraged to enter FNLMA's because doing so allows the state to alter the structure of financial transfers related to non-reserved lands. Investor-managers have benefited from the export of treadmill operations to Southern jurisdictions and have a vested interest in shifting the collective Indigenous paradigm into acceptance of capitalistic production. Removal of the Crown's fiduciary obligations under the *Indian Act* also removes their protection from the dispersive negotiation tactics that can be employed by international capitalists, whose only interest is the growth of their own, individual profits.<sup>83</sup>

The Canadian settler state stands to benefit from the transition of Indigenous land into economically viable alternatives and has taken action to incentivize their transformation. Policy programs like the EAP create tax and financial incentives that can attract the investment of international capital to jumpstart economic production in Indigenous territories. Policies associated with the IRRIF were implemented to minimize bureaucratic impediments to the environmental assessment and Indigenous consultation process. FNLMA's establish a workable framework for these investors to encourage Indigenous participation in the consumption of their environments to fuel the treadmill of production. In effect, the policy agenda of the settler-colonial state has

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<sup>82</sup> Jobin & Riddle, *supra* note 65.

<sup>83</sup> *Ibid.*

effectively removed the legislative barriers put in place to protect Indigenous territories from the tyranny of local majorities. The federal Crown has turned back the clock on the *Indian Act* to allow capitalist production in reserved spaces to complete the settler state's historical objective of assimilating Indigenous peoples into the capitalistic economic order. While these outcomes are dire, the real consequences of opening these jurisdictions to environmental exploitation has yet to be uncovered.

## IX. CONCLUSION

Canada is both a capitalist and colonial society, one that is founded on the seizing of Indigenous lands for capitalist purposes. Despite Canadian settler colonial history of dispossession, erasure, and displacement, Indigenous people continue to publicly exercise their sovereignty and refuse conditions of disappearance. As Baloy reminds us, "the unfinished business of settler colonialism produces spectral effects"<sup>84</sup> shaping settlers' imagination of Canada. The logic of Indigenous elimination continues into the present as Indigenous peoples continue to confront settler practices of elimination in contemporary Canada.<sup>85</sup> Our paper supplements growing clarion calls to combat this erasure by exploring ongoing efforts to erode socio-legal and environmental obligations considering the current treadmill of capitalist production and exploitation.<sup>86</sup>

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<sup>84</sup> Natalie JK Baloy, "Spectacles and spectres: settler colonial spaces in Canada" (2016) 6:3 209 *Settler Colonial Studies* at 212.

<sup>85</sup> See Wolfe, *supra* note 9; Matt Wildcat, "Fearing social and cultural death: genocide and elimination in settler colonial Canada - an Indigenous perspective" (2015) 17:4 *J Genocide Studies* at 391-409. Such logic of elimination includes, but is not limited to, residential school denialism. In 2017, Lynn Beyak, then Canadian Senator, delivered a controversial speech defending Canada's Indian residential school system as being "well-intentioned;" as Carleton contends, Beyak's public comments demonstrate how anti-Indigenous racism still permeates throughout Canadian public discourse as it employs residential school denialism to attack and undermine truth and reconciliation efforts for Indigenous peoples in Canada. See Sean Carleton, "I don't need any more education': Senator Lynn Beyak, residential school denialism, and attack on truth and reconciliation in Canada" (2021) *Ahead-of-Print, Settler Colonial Studies* 1.

<sup>86</sup> Per Whyte, to this day settler colonialism remain an "environmental injustice" (p. 165) insofar as the ecological bases of Indigenous cultures are destroyed or altered by settler colonial tactics (such as law-making) and technologies (such as those in law enforcement); see Kyle Powys Whyte, "The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism" (2017) 19:1 *Red Ink: Intl J Indigenous Literature, Arts, & Humanities* at 154-169.

The Canadian government is making use of the global climate crisis to further its colonial objectives of assimilating Indigenous peoples into the capitalistic economic ethos, as well as opening their territorial environments to the treadmill of capitalist production in the process. The federal Crown recognized issues related to environmental sustainability, supporting economic growth, and including Indigenous peoples in the state's acceptability matrix. We contend the consumptive way of life in Canada is not sustainable and has resulted in irreparable harm to environments around the world.<sup>87</sup> That said, government and corporate executives remain committed to growing profits by accelerating the treadmill of production and exploitation, whether that is in the Global South or previously locked domestic (i.e., Indigenous and/or other environmental) land. Treadmill operations achieved acceptable levels of profit growth for many years, but Southern leaders have come to understand the deleterious effects of allowing environmental degradation to take place at this scale in their jurisdictions. In response, executive leaders are taking steps to open Indigenous territories to relocate the treadmill of production and maintain their profit expectations.

Recognizing once again that the Canadian government has fallen short of its reconciliatory objectives with Indigenous peoples and of preventing anthropogenic climate change, immediate action and long-term measures must be taken to strengthen Indigenous and environmental rights. One progressive step in the right direction would be the elimination of the *Indian Act*. Law is a human construct, and if we understand law as a barometer of social tolerance,<sup>88</sup> it is safe to say that harms against Indigenous peoples and the environment are exhaustingly tolerated in most Western societies. However, this is not to say that it will remain that way. Action must be taken to reframe Canadian Crown-Indigenous relations in ways involving meaningful relationships, as well as recognizing and respecting Indigenous and environment rights. While the *Indian Act* continues to violate common conceptions of “governing their own

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<sup>87</sup> From an eco-centric perspective, sustainability is linked to ecological integrity: to maintain the integrity of an ecosystem means taking into account a number of characteristics of ecosystems. In effect, this requires sensitivity toward and knowledge of how ecosystems operate and their intrinsic complexity; see Rob White (forthcoming), “Environmental Crime, Ecological Expertise, and Specialist Environmental Courts” in James Gacek and Richard Jochelson, eds, *Green Criminology and the Law* (Palgrave Macmillan, 2022); Klaus Bosselmann, “Losing the forest for the trees: Environmental reductionism in the law” (2010) 2:1 *Sustainability* 2424.

<sup>88</sup> See Emile Durkheim, *The Division of Labour in Society*, translated by W D Halls (New York: MacMillan, 1984).

lives and affairs”<sup>89</sup> for Indigenous peoples, it simultaneously enable Canada’s history of paternalism, assimilation, oppression, and colonization against these communities today.<sup>90</sup>

Moreover, should legislative changes of this nature carry any genuine benefit for Indigenous communities, programs like FNLMA must be radically overhauled to ensure Indigenous peoples are not only meaningful FNLMA participants, but also leaders in environmental stewardship in partnership with the federal government’s socio-legal and environmental obligations owed to Indigenous peoples. FNLMA should not absolve the federal Crown of its responsibility to recognize and respect both Indigenous rights and environmental rights. Instead, FNLMA should work in concert with authentic federal government support and services to address Indigenous and environmental justice concerns meaningfully and holistically. Given the inextricable link between humanity and nature,<sup>91</sup> as well as the intricate, intimate connection between Indigenous peoples and their environment, any further erosion of the federal government’s socio-legal and environmental obligations must be discontinued. Canada’s international obligations to meet carbon reduction targets and combat climate change must be upheld in tandem with its ongoing respect for the rights of Indigenous peoples; the former cannot be disentangled from the latter. The interweaving of ecojustice and Indigenous sovereignty illustrates how important it is for settler states to critically reflect on

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<sup>89</sup> See AC Hamilton, & CM Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba (Vol. 1)* (Winnipeg: Queen’s Printer, 1991) at 117.

<sup>90</sup> We recognize that the elimination of the *Indian Act* does not solely solve the crux of the problem regarding meaningful nation-to-nation building between the Canadian federal government and Indigenous peoples. Reconciliation for race-based and cultural genocide committed against Indigenous peoples requires a holistic solution where Indigenous rights are respected, and Indigenous self-determination is recognized. As Pam Palmater contends “If we get this nation-to-nation partnership process part right, then the *Indian Act* becomes irrelevant, but at a pace that works for First Nations without any risks to their rights. The honour of the Crown and the spirit and the intent of the treaties demand no less;” see Pam Palmater, “Abolishing the Indian Act means eliminating First Nations’ rights” *Maclean’s*, online: <[www.macleans.ca/opinion/abolishing-the-indian-act-means-eliminating-first-nations-rights/](http://www.macleans.ca/opinion/abolishing-the-indian-act-means-eliminating-first-nations-rights/)> [perma.cc/L6JQ-E48B]. In effect, our hope is that aspects of arguments outlined in the paper can lead towards the eventual irrelevancy of the *Indian Act*.

<sup>91</sup> Nearly all human activities have an impact on our environment as we cannot live independently from the rest of the biosphere. In fact, the distinction between humanity and the so-called natural environment or the nature/culture divide is artificial; see Andreas Philippopoulos-Mihalopoulos, “Critical environmental law as method in the Anthropocene” in Andreas Philippopoulos-Mihalopoulos & Victoria Brooks, eds, *Research Methods in Environmental Law* (Cheltenham, UK: Edward Elgar 2017) at 136.

their current “rights-based” approaches to environmental management that potentially reproduce neoliberal and colonial logics.<sup>92</sup> In a time of environmental crisis, true Canadian-led environmental stewardship, coupled with Indigenous rights, is the only way forward.<sup>93</sup>

It is evident from our focus in this paper that time and again, federal conservative governments create incentive programs to attract capital investment and business enterprise, while federal liberal governments deploy discourses of inclusion and incentive programs to encourage Indigenous peoples to adopt pro-treadmill mentalities.<sup>94</sup> Thanks to the Canadian settler state, this perpetual cycle has worked to erode Indigenous jurisdiction over their lands, wear down the federal Crown’s special relationship with Indigenous claimants, and to download responsibility for the state’s historical oppression of Indigenous peoples to individual communities. Given the environmental climate crisis our world currently finds itself, the efforts by Canadian federal governments to eradicate and erode Indigenous claims to autonomy and self-government must be halted. Doing so ensures that environmental practices that are undertaken by Indigenous communities can sufficiently be implemented to protect their rights, lands, traditional ways of life as they are connected to nature, and the future lives of Indigenous peoples.

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<sup>92</sup> Such paradigms eclipse the fact that Indigenous peoples have been successfully “managing” the environment for millennia; see Erin O’Donnell et al, “Stop Burying the Lede: The Essential Role of Indigenous Law(s)” (2020) 9:3 *Transnational Environmental L* 403; Elaine Hsiao, “Whanganui River Agreement - Indigenous Rights and Rights of Nature” (2012) 42:1 *Envtl Pol’y & L* 371; Sarah Monod de Froideville and Rebekah Bowling (forthcoming) “Te Awa Tupua: An Exemplary Environmental Law?” in James Gacek and Richard Jochelson, eds, *Green Criminology and the Law* (Palgrave Macmillan, 2022).

<sup>93</sup> As Pierre Cloutier de Repentigny suggests, humans must be held responsible for our place in the world or, as Cloutier de Repentigny contends, the “ecological continuum,” and our role in fostering environmental harm must be fully taken into account by environmental law if it is to be the tool of environmental protection it claims to be. In other words, law needs to move toward embracing a holistic and meaningful understanding of anthropocenic responsibility; see Pierre Cloutier de Repentigny, “To the Anthropocene and beyond: the responsibility of law in decimating and protecting marine life” (2020) 11:1-2 *Transnational L Theory* 180.

<sup>94</sup> See also Singh, *supra* note 1.