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Land, Property and Assimilation of Culture: First Nations Property Ownership Initiative

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Abstract

Centuries of colonial legislation and policy in Canada continue to restrict Native peoples' access, ownership and sovereignty over traditional lands. This, along with other policies of control, has resulted in levels of poverty in Native communities far greater than the rest of the population, and in some areas resembles that in 'developing' countries. Some scholars, Crown government and Native leaders have argued that private property ownership is key to reducing poverty in Indigenous communities. Inspired by Peruvian economist Hernando de Soto's influential book, *The Mystery of Capital*, the First Nations Property Ownership initiative (FNPO) is being proposed in Canada. This initiative would revert underlying title of land from Crown to participating Native band ownership. A legally secure and understandable tenure system of private property ownership is hypothesised by proponents to encourage outside development and enable investment assets, in turn reducing poverty. In this paper I argue that the FNPO initiative, is an ideological framework that has deep rooted limitations because of colonial policies and legislation.

Ⅰ. Introduction

The spiritual attachment and relationship to ancestral land and territories, and the collective stewardship and usage of those lands and their resources, are understood as the key to which continued cultural existence of many Indigenous peoples is possible. The concept of terra nullius, vastly employed in Canada during the colonizing era, enabled the settler governments and populations to view vast tracts of land as 'uninhabited' and 'empty', therefore being in need of settlement and development. Native people were moved and relocated to boundaried areas (Native[1] reserves in Canada), often far away from their ancestral lands, in areas that were not targeted for colonial settlement. Indigenous social relations and ways of governance were changed in order to be more in line with the settler governments. As a result, lineage was invariably reformed to be patrilineal, women lost their position in governance (Ladner, 2009), and kinship ties between families were dissuaded and severed through institutions of cultural assimilation such as residential schools. Through government policy reserve property was originally denied to women and reallocated to male heads of households (Deveaux, 2006; Smith, 2005) and Indian women still do not have legal matrimonial rights to property on many reserve lands (Alcantara, 2006). These dramatic impositions, designed to 'civilize' Native peoples, in turn contributed to the ability of the colonial governments to dispossess them from their lands. The loss of traditional lands and access to them through imperial advancement, as well as colonial legislation and policy, has had devastating and persistent effects on the lifestyle, governance, land rights and sustainability of Indigenous communities all over Canada.

Centuries of colonial legislation and policy in Canada continue to result in levels of poverty in Native communities far greater than the rest of the population, and in some areas resembling that in 'developing' countries. Women have been particularly disadvantaged by colonial policies and continue to be disproportionately affected by poverty, poor housing, violence, poor health and education (D. Macdonald & Wilson, 2013). Coupled with the momentum that neoliberal restructuring has taken in the capitalist economy in the global South, it is little surprise that some researchers, government and Native leaders have argued that private property ownership is key to reducing poverty in Indigenous communities in the 'developed' North. Inspired by Peruvian economist Hernando de Soto's influential book *The Mystery of Capital* (2003), which hypothesizes that the world's poor are impeded by an inability to obtain documented ownership to the land that they live on, parallels were quickly drawn in the media to the Canadian context between the high levels of poverty among Native communities, and lack of access to the formal Canadian private property system of ownership on Native reserve land. The basic premise of the thesis maintains that unused land is 'dead capital' with the inability of the 'poor' people utilizing the land to use it in ways to generate capital. Lack of clear and understandable property ownership tenure, which creates reluctance for businesses to set up on reserve land (Dobra, April 2014), is argued to result in poverty on Indian reserves (see Flanagan & Alcantara, July 2002).

Since 2010, the First Nations Property Ownership (FNPO) initiative has been proposed by leading academics and some First Nations leaders. This initiative proposes to return property ownership of current reserve lands to First Nations communities and confirm their jurisdiction over those lands, transferring underlying title to the participating band[2]. To advocates of this proposal, this is believed to be a step towards just Indigenous land claims and increased self-determination.

However, this legislation is not without controversy. The policy narrative oversimplifies the causes of Indigenous poverty as well as overstates the merits of the economic solution. Cultural imposition is glossed over and redescribed, focusing rather on the economic answers to poverty as a general community-based problem, when, in large part, poverty has been institutionalized and gendered according to colonial policies and interventions. Also, as the basis of the Indigenous rights movement is underpinned by communal land ownership and systems of collective cultural rights, legislation which promotes individual property ownership seems to be in direct contradiction to Indigenous ways of being and identity.

In this paper I argue that the FNPO initiative is an ideological framework that has deep rooted limitations because of its roots in colonial policies and legislation. While presented as liberatory, it potentially undermines the decolonization process by reinforcing the power relations and ideologies that benefit state governance and business development, further entrenching the status quo of Western-style, individual land ownership. The ideological neoliberal underpinnings of the proposal potentially pull Native communities further into assimilation and in turn potentially stifle Indigenous ways of being and knowledge that are not consistent with the free market project. Furthermore, and of key importance, is the gender-neutral stance of the policy discussions. It is difficult to envision how the economic, cultural and political dispossession of Indigenous women is going to be relieved by individual ownership of land.

As Canadian identity proudly engenders the national identity of multiculturalism, the pressure is glaring on Native peoples to either assimilate or perish at their own choice. The proposal is presented as an opt-in choice, and not a cultural imposition, which is strongly opposed in Canadian multiculturalism policy. However, the lack of acknowledgement of cultural differences in land tenure, and poverty due to colonial policies, means that economic development rather than cultural protection is being prioritized by the state through this policy. The opt-in characteristic of the policy potentially obscures the historical imposition and colonial institutional structure of

poverty, and the centuries of forced racial and gender subjugation. I argue that this present initiative of private property will most likely achieve an enhanced level of cultural assimilation and standardization of land tenure which, without strategic and obtrusive governance intervention, will most likely benefit outside investors, as well as emulate the current economic trends which tend to benefit certain groups of individuals over others.

Finally, the transfer of underlying title is argued by proponents to be a key factor in this policy to enable enhanced sovereignty. In other words, Indigenous governance and customary laws will be able to protect the underlying title of the land and access to it. However, if certainty is the key driver in this economic development model then investors may not be attracted to limited ability to alienate and differing governing policies of local Indigenous governments.

This paper begins by outlining some key policies and legislations, which have led to the introduction of the FNPO initiative, including the Nigsa'a Nation's success and changes to land ownership. Then some reasons why privatization of land ownership are argued to be beneficial and how this coalesces with neoliberalism, are discussed. In the next section, some reservations to the proposed changes, highlighting some gendered issues are presented, arguing that the undergirding of neoliberalism is a cause for caution as it has not boded well for protecting marginalized groups in general, and women in specific.

Ⅱ. Policies

Ⅱ.1. Indian Act

The Indian Act, passed in 1876 by the federal government of Canada, has regulated almost every aspect of daily life of Aboriginal peoples. It officially refers to Native communities as bands and imposes a form of governance on them generally via band councils. While federal sovereignty over the whole of Canada is recognized by both domestic and international courts (Flanagan, Le Dressay, & Alcantara, 2010, p. 27), the Constitution Act of 1867 and the Indian Act ensure title to reserve land is held in trust for Indian bands by the federal government. More recently, amendments to the Indian Act have given more autonomy in some areas to some First Nations governments; however, underlying title is ultimately retained by the Crown. The Act has conflicting guiding philosophies: on the one hand, protectionist policies prevent Native land from being alienated so that land is not lost through fragmentation, as well as ensure land is tax free; and on the other hand, clear objectives to 'civilize' Indigenous peoples through education and religion were used "encouraging him [sic] to assume the privileges and responsibilities of full citizenship" (RCAP, 1996, p. 255). Although the goal of enfranchisement and assimilation into Canadian citizenship has proved to be a very unsuccessful endeavor, the Indian Act has however, "normalized and legitimized" male privilege in Native communities (Barker, 2008) to be aligned with Eurocentric norms, as well as "permeated the ways in which Native peoples think of themselves" (Lawrence, 2003, p. 4).

Ⅱ. 2. White Paper

Privatization of reserve land has been previously proposed in Canada and Indigenous peoples have rejected land subdivisions by the state since the 1840s (Pasternak, 2015, p. 4). Private property rights on reserves were introduced in the Enfranchisement and Assimilation Acts of 1857 and 1869. In 1963, the federal government commissioned anthropologist Harry B. Hawthorn to investigate the social conditions of Aboriginal peoples across Canada. In his report, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* (1963), Hawthorn concluded that Aboriginal peoples were the most disadvantaged and marginalized population in the country. The

then Prime Minister Pierre Trudeau and his Minister of Indian Affairs Jean Chrétien proposed the *Statement of the Government of Canada on Indian Policy*, a 1969 policy white paper, with the goal of achieving equality among all Canadians by eliminating 'Indian' as a distinct legal status and by regarding Aboriginal peoples simply as citizens with the same rights, opportunities and responsibilities as other Canadians. The aim was assimilation of Aboriginal peoples into the mainstream Canadian citizenry, and the eradication of any special status in order to improve equality:

> This Government believes in equality…open the doors of opportunity to all Canadians, to remove the barriers which impede the development of people. (White Paper, 1969)

Not only did the 1969 white paper state the economic benefits that were believed to follow from ownership of land but it also outlined the obligations that would follow:

> The Government believes that full ownership implies many things. It carries with it the free choice of use, of retention or of disposition. In our society it also carries with it an obligation to pay for certain services. (White Paper, 1969)

The message was clear—that with underlying title ownership would come taxation. Aboriginal leaders ultimately rejected the white paper, partially as they felt the policy would jeopardize treaty and other rights, and also they felt they were not part of its design process. These fears were arguably well founded. The white paper was further criticized as destroying the legal mechanism that protected Aboriginal and treaty rights, thus enabling the government to withdraw from its fiduciary duty to dispossessed Native peoples (see Cardinal, 1969; and more recently Turner, 2006). Both Cardinal (1969) and Turner (2006) write about the failure of the white paper to spotlight the root causes of poverty in Indigenous communities and expose the socio-political history of marginalization and oppression, which has fostered the extreme poverty and dependency of Native peoples on government support. Without the support of the Aboriginal governments, the white paper was withdrawn in 1971 by the Canadian government. It is still actively criticized by most Indigenous scholars as being a policy tool of assimilation and enfranchisement.

Ⅱ. 3. Nisga'a Nation Land Rights

At a similar time, the 1969 *Calder v. Attorney General of British Columbia* case, by the Nisga'a Nation in British Columbia claimed title to their traditional territory. While the case was initially lost in the British Columbia Supreme Court, the decision by the Supreme Court of Canada ruled partially in their favour stating the Nisga'a had a pre-existing title to the land based on their longtime occupation, possession, and use of the traditional territory. This ruling helped prompt the creation of the Comprehensive Land Claims (CLC) policy introduced in 1973 (Göcke, 2013, p. 114) resulting in a system of "collective fee simple title" of much of the land held by Indigenous peoples in Canada, meaning that the land is held in common by all the members of the community.

The *Calder* case is generally regarded as the beginning of the modern Aboriginal title doctrine (Göcke, 2013, p. 97), and as the precursor to the FNPO initiative. It was the first time that the court had acknowledged that Aboriginal peoples had rights to their lands regardless of the recognition of these rights by the Crown. After the *Calder* ruling it became clear to many governments in other countries that further claims from Indigenous peoples would emerge

outside of historical land cession treaties, especially as Indigenous peoples in Canada started to more assertively reclaim their identity, and in doing so their claims to their ancestral lands. Under the CLC policy, all claims by Indigenous groups were to be ultimately settled by either extinguishing or ending all future claims to traditional territory in return for the transference of "precise and secure collective fee simple title to a certain part of the traditionally used land" (Göcke, 2013). All agreements made under the CLC have a clause that makes it impossible for Indigenous groups to claim Aboriginal title or rights in the future (Alcantara & Whitfield, 2010; Göcke, 2013, p. 114). Under the CLC policy, 6.1% of the total area of Canada has been transferred to Indigenous groups in the form of collective fee simple title (Göcke, 2013, p. 115).

Since these lands are held in "collective fee simple", there are certain legal restrictions and protections placed on them that are different from usual "individual fee simple" title. For example, reserves are tax-free land areas whereas individual fee simple[3] land is liable to government taxation, and many of the CLC agreements protect the land from being seized due to non-payment of taxes (Göcke, 2013, p. 120), as does clause 89(1)[4] in the Indian Act. In many models, title to land usually includes the right to exclusive use and exclusion of others. However, many of the CLC agreements contain clauses to allow other individuals the right to enter the land for the purpose of recreation and transit (Göcke, 2013, p. 119; Nisga' a Final Agreement, 1998 s 6.2).

Ⅱ. 4. First Nations Property Ownership Act

The more recent wave of private property policy is being proposed by federal legislation in Canada, and is very controversial within many First Nations communities and the wider Canadian community. Since 2010, the concept has been advocated by Manny Jules of the First Nations Tax Commission, as well as some key academic scholars, specifically Tom Flanagan and Christopher Alacantara. This initiative is proposed to be one more step in the direction of privatization of Indigenous lands. This policy is promoted to rectify the extreme inequality between First Nations peoples and Canadian citizens by means of raising capital. Several Native leaders criticize the discrepancy between the rights of Native peoples and the rights of Canadian citizens in terms of wealth generation and ownership of property:

> We just need what other Canadians take for granted: the right to own our homes, access to a mortgage or a business start-up loan, the ability to bequeath our assets to the next generation, and the capacity to resolve disputes related to estates and marital breakdown with marketable assets. (Chief Shane Gottfriedson, 2013)

The FNPO initiative includes implementing fee simple land registration supported by a Torrens-style land registration. The commission strongly believes in the economic development theory and predictions made most famous by de Soto—that fee simple property rights allow people to generate capital, create wealth and alleviate their own poverty. On this view, "property rights that are privately held, easily defined, enforceable and easily measured are the foundation upon which market forces create wealth" (Fiscal Realities Economists, 2007, p. 1), and it is therefore critical that land systems conform to the private property system in order to create certainty, which will in turn generate investment and support economic growth. It is believed that land registry, title, and surveying systems will provide certainty and security especially to outside lenders and investors. This is in contrast to the historically implemented collective property tenure that is seen as stymieing growth.

The FNPO initiative will replace the existing Crown ownership of Native lands and will include First Nations "reversionary rights and expropriation powers" (FNPO, 2012). This legislation will be optional, allowing individual

First Nations communities to choose whether or not to adopt the legislative framework for their communities, or to remain under one of the existing land ownership frameworks. The significant point is that it promotes fee simple ownership among individuals in Native communities rather than communal ownership. In this way, it is argued that Native individuals would have much more access to the same rights to land ownership as other Canadian citizens. The FNPO initiative would allow First Nations to: opt-out from the reserve land system under the legislation of the Indian Act; transfer underlying land title from the federal government to First Nations governments; and adopt a Torrens land title system. However, while Torrens-style land registry is arguably a better system than is presently used via the Indian Act and Land Codes, fee simple ownership is not a pre-requisite for implementing the system (Mahony & Browne, 2011, p. 2). Although the FNPO initiative would transfer the underlying title to the band, Pasternak (2015) questions how this is possible as it is potentially in conflict with the fiduciary obligations outlined in the Canadian constitution.

This legislation proposes to allow First Nations to manage and make land and development laws independently, enable use of land as security (eg. mortagages), and provide options to transfer reserve property to non-status members (Mahony & Browne, 2011), as well as non-Native people. In the FNPO initiative, the First Nation's government would still retain the right of underlying title, so the Crown would have no claim to it. In this way, advocates argue that the Native land is protected and under the control of the particular Nation and therefore enables more sovereignty (Flanagan et al., 2010; Flanagan, 2008). Pasternak (2015) cautions that the "reserve privatization bill currently being proposed in Canada exposes multiple, overlapping, and contradictory agendas of Indigenous, state, and private appeals for fee simple property rights on reserves" (p. 2). This will be discussed further on in the paper.

Ⅱ. 5. Nisga'a First Nation example

In the *Calder* legal case, the Nisga'a ruling was the precurser to the development of the direction of conceptions of Indigenous land rights. The Nisga'a First Nation was the first Native community to utilize the system of fee simple, private property in Canada. According to the Nisga'a Final Agreement (NFA) of 1998, ratified by the British Columbia government in 1999, it is now possible for Nisga'a First Nations members to sell, lease, mortgage, and encumber land. The Nisga'a was the first British Columbia Indian band to sign a modern treaty with the provincial and Canadian governments. In 2009, the Nisga'a Lisims government passed the Nisga'a Landholding Transition Act, giving members of the band the opportunity to own their own homes. In November 2013, almost 15 years after the NFA, three citizens of the Nisga'a Nation in northwestern British Columbia became the first private owners of property on their tribal land. Thirteen more bands in Canada have shown interest in this property system.

The Nisga'a government retains the authority to regulate the use of the land consistent with traditional values of the community. Graben (2014) writes that the Nisga'a NFA distinguishes between the "power affected through private property rights and the power affected through governance" (p. 424). This is a very important distinction as during the Dawes Act in the US, Indian peoples lost both their land and their right to govern it. Even in the event of a sale to a third party outside of the community, the Nisga'a government still retains the right to govern the land. This authority over their lands in the Nass Valley, according to Graben (2014), is of "positive psychological value" (p. 425), particularly for members of the community.

The Nisga'a FNA outlines more enhanced abilities than fee simple. For example, even though the Nisga'a still maintains the underlying title to the land, if for whatever reason it is transferred to the Crown due to escheatment or otherwise, the Crown must transfer the land back to the governing authority of the Nisga'a. Thus, the Nisga'a

are able to regulate how land is used and how disputes are resolved. In this way, it will be possible for the government to utilize customary laws and practices. However, in the case of disputes and the enforcement of property rights, it may be necessary to evict members of the band from property. Graben (2014) cautions this will not be a very popular practice for the Nisga'a leaders. In addition, the costs in the courts would be very costly and time consuming. Provincial law still applies on Nisga'a land so it seems probable that many disputes will utilize both state and Nisga'a courts. To what degree a provincial appellate court would uphold a Nisga'a court ruling is unknown (Graben, 2014).

Graben (2014) predicts that Nisga'a citizens are "likely to advocate for understanding the impacts of property on community relations and residency, for laws that recognize cultural practices related to the distribution of property" (p. 424). They will not be willing to trust that the market will regulate itself and redistribute assets fairly as is predicted in much of land reform theory. She predicts that members of the Nisga'a will use the power of the Nisga'a government to "disrupt the use of land solely as a tool for economic development" (p. 424). Pasternak (2015) critiques the focus on the "denial of capitalism on reserve lands" as the 'only' cause of the legacy of poverty. This glossing over of the devastating effects of centuries of colonialist legislation (Pasternak, 2015, p. 2) is problematic as it potentially narrows the vision of how to conceptualize and enact alternative solutions and also runs the risk of mimicking the problems associated with free market systems, especially for marginalized peoples.

However, there is perhaps a misguided, or at least unsubstantiated, trust that the legislative and executive authority that bands would have under these privatization schemes would necessarily foster or maintain a significant cultural and spiritual connection to the land under free market regulation, which "can obfuscate how ownership may preclude ameliorative lawmaking following titling" (Pasternak, 2015, p. 426).

Ⅲ. Private property ownership

Ⅲ.1. Neoliberal underpinnings

MacDonald (2011) explores the overlap of Indigenous self-governance and the policies of neoliberalism and interrogates the discourse of the concept of 'autonomy'. The Indigenous idea of "rejection of state intervention and the need to assert their own jurisdiction" (F. MacDonald, 2011, p. 262), as well as the libertarian idea of individual autonomy from Giddens and Hayek (Jones, 2012), superimpose in places. This overlap is pertinent as it draws in the various camps on the debates for and against privitization of Indigenous lands. Despite this common ground between the two discourses, MacDonald cautions, "how much ground will depend on which understanding of self-determination is privileged" (p. 261). Integral to the discussion of the FNPO initiative is how neoliberal and Indigenous self-determination discourses coincide. Some scholars have cautioned against the "marketization of indigenous citizenship" (Altamirano-Jiménez, 2004, p. 349) or been particularly wary or critical of the overlap of neoliberal and Indigenous self-determination discourse (Bargh, 2001; F. MacDonald, 2009). Hale (2002) has argued in the Latin American context that the best opposition to neoliberal regimes is to "refuse the dichotomy altogether" rather than to try and resist. State neutrality should not be assumed. Much of the current literature critical of neoliberalism has illuminated the "market and the family as key areas that are being (re)defined by the neoliberal context" (F. MacDonald, 2011, p. 258). The privatization of Native land may be another key area of redefinition by the state.

Indigenous scholars, activists and leaders call for a stop to state intervention and more self-governance in areas of community management, access to natural resources and land rights. MacDonald (2011) points to the "intersection

between Indigenous claims to autonomy and neoliberal critiques of state authority" (p. 262). Slowey (2008) notes, "since neoliberalism favours a system of policies and processes designed to assist the marketplace, First Nations self-determination becomes more attractive than First Nations dependence on the state" (xiv). Unsettled land claims are not conducive to the necessary stable environments that are needed to attract investment. Thus it would be in a government's interest to resolve outstanding Indigenous land claims in order to attract investment. Moreover, especially in poorer reserve areas, which are often isolated and lacking in mineral resources and therefore essentially unattractive in the market sphere, off-loading administration of remote land would mean less government overhead costs.

The concept of privatization has evolved and expanded from the "sale of government assets to the private sector" to the "contraction and re-regulation of the public as well as the expansion of the private" (F. MacDonald, 2011, p. 258). Neoliberalism, or the politics of privatization, can be seen to be emerging in Aboriginal governance (Campbell, 2007). Slowey (2008) cautions that neoliberalism could "ultimately threaten the well-being of First Nations communities through its restructuring of market-state-First Nations relations and its reduction of the welfare state upon which so many First Nations rely" (Slowey, 2008, p. xiv). Many areas of governance are being offloaded on Native communities in the areas of child welfare (Harris-Short, 2012) and education. MacDonald (2011) writes of the emergence of what she calls neoliberal Aboriginal governance in which she refers to "specific state-crafted responses to Indigenous demands that are part of a broader governmental strategy of neoliberalism" (p. 257). This strong policy current of "privatization" within liberal democratic states serves the government agenda and MacDonald (2011) argues their effects often run in "opposition to meaningful autonomy for Indigenous peoples" (p. 257).

Advocates for Indigenous land reform have argued, "the barrier to prosperity on First Nation land is an inability to provide the institutional legal framework to support investment" (Fiscal Realities Economists, 2007). Graben (2014, p. 439) predicts that "rather than support differential local reforms that reflects the authority of Indigenous governments, investors are likely to call for the widespread adoption of laws with which they are familiar" (p. 439). Because land titling is premised on creating legal certainty mostly for outside investors, the local governments may not have the "political will" to utilize protective legislative tools, which may in fact be counter to the status quo (Graben, 2014, p. 438).

Ⅲ. 2. Promised economic stability and prosperity

Advocates of the FNPO initiative endorse it as means to ending poverty on reserves and closing the wide social economic gaps between Indigenous peoples and non-Indigenous Canadians. The proposal is meant to "strengthen the economies of First Nations by giving them access to modern, effective property rights" (Flanagan et al., 2010, p. 6) and to possess the "underlying or reversionary title, which is now held in most cases by the provincial Crown" (Flanagan et al., 2010, p. 5). The proposal identifies the limited nature of land ownership on reserves and the lack of autonomy in creating and managing First Nations peoples own wealth on reserve lands, and to manage their lands "through their own Land Code and land management laws" (Mahony & Browne 2011, p. 4). The 2.7 million hectares of Native reserve land is believed to be a large, unused economic asset that "could and should make a major contribution to raising First Nation's standard of living" (Flanagan et al., 2010, p. 3).

For the provincial and federal governments, unsettled land claims are potentially costly. It has been estimated that the cost to the province of British Columbia of not settling land claims was $1 billion in lost investment. The key factor to reduce this loss is thought to be the economic stability generated by settling comprehensive land claims so that investors (mainly outside) will feel secure in their investment. The Canadian government promotes the idea that, "economic stability will create a climate that encourages private investment, leading to increased economic activity,

and new partnerships between Aboriginal and non-Aboriginal groups" (AANDC, 2003, p. 9).

Ambiguity and uncertainty generated by the Indian Act among third parties, or non-First Nations peoples, such as utility companies (telephone, electric, pipeline) highway departments and private developers, is believed to have severely hindered the development of Indian reserve land (Isaac, 2005, p. 1047). This uncertainty, from a legal standpoint, regarding ownership of First Nations land is mainly sourced to two sections of the Indian Act (Graben, 2014, p. 411): section 29 which states, "reserve lands are not subject to seizure under legal process" (Indian Act, 1985, c 1-5, s 29) and section 81(1) which lists 17 principles that "the council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister" (Indian Act, 1985, c I-5, s 81[1]). These protective measures ensure that land will not be alienated to non-native peoples, which in a very paternalistic way, protects the integrity of communal lands. However, these measures also result in limiting the ability of individual band members and band governments to leverage land for economic or other purposes. Reserve land can in fact be leveraged via customary rights, certificates of possession and leaseholds, albeit with complications. However, outside lenders are often reluctant to take risks as they may not be able to recover lost assets.

Ⅳ. Concerns of land reforms

The causes of poverty have a long history of entrenched colonial policies and legislation, which do not factor into the design of the proposed changes. Mahony and Browne (2011) feel that the FNPO initiative may be worth exploring but that there are many factors to be cautious about:

> However, it shares many of the same challenges as Treaty negotiations and implementing aboriginal title. It is a long-term prospect with difficult-to-predict outcomes. In our view, there are many factors that trap First Nations in a cycle of poverty including lack of land, lack of land in or near to urban centres, lack of capacity, lack of infrastructure, etc. A rapid transition to fee simple ownership is more likely to create opportunities for a few non-First Nation developers than to create widespread wealth for First Nations and their members. (p. 4)

Ⅳ. 1. Distribution of resources

Property relations are culturally determined and contextual. Who is a beneficiary and who is not of property is often determined by very inflexible cultural factors. Socio-cultural relations, based in local contexts, are difficult to change. As opposed to legal changes that can be swift, change in social relations especially around valuable resources and power, often take years to enact. Graben (2014) notes that:

> Ownership of land, like that of other property, generates a subset of social relations that is determined by a bundle of institutionalized rights and obligations sanctioned by law that regulate the access to land and its products among governments, corporations, individuals, families, social groups, and communities. (p. 420)

This kind of internal redistribution and challenge to the status quo is often seen as destructive to the community and so undergoes a lot of resistance. Critics are wary that only a few already privileged members of the community may benefit from this system.

Mimicking the Western version of free market and fee simple property ownership, there is a possibility that some more affluent, powerful or resourceful members of the community may benefit more than others. Land value can be

very different and thus the criteria for determining who gets what parcel of land would have to be very complex in order to pursue any substantive level of equity between peoples. Graben (2014) rightly cautions, "based on the historical preponderance of historical allocations to men under the Indian Act, it seems likely that Nisga'a men will more often receive entitlements for land where houses have already been built" (p. 423). Due to lack of suitable housing on most reserves, it is likely that many members would receive allotments without a suitable structure and thus it would be much more prohibitive to utilize and benefit from a vacant property.

Ⅳ. 2. Feared Land Loss

Graben (2014) summarizes very nicely the possible ways in which an individual and a community might lose land under property privatization. For example, in the Nisga'a Landholding Transition Act, each Nisga'a citizen will receive a maximum of a .2 hectare residential plot of land free of any mortgage. However, if the person wants to erect a house then they would most probably use the property as collateral against a mortgage and in the event of non-payment would lose any claim to the land and the land would most likely go into foreclosure, meaning that the lending person would sell the land to regain the mortgage. Also, if the landowner is unable to pay property taxes this may be another way they could lose ownership. Third is that now the land is vulnerable to a civil claim against it. Finally, Graben (2014) outlines the complications that can arise with spousal entitlement. In the Nisga'a case, communal family lands are subject to the BC Family Law Act, which states that each spouse is entitled to one-half of the assets. If a separation or divorce necessitates the division of property, under BC Family Law Act for example, the assets are divided between spouses but each spouse can do with it what she or he wants, thus making home or equity security tenuous.

Another very valid fear is that non-community members will acquire land and be able to own and sell it and in this way break up the community, and perhaps identity of the Nation. However, Graben points out the likelihood of that happening to remote reserve areas is less likely than absentee landlords. Baxter and Trebilock (2009) provide a lengthy discussion of the real dangers of fragmentation of land due to absentee owners. By the very nature of an absentee owner, someone who can make claims and not have to be present, the possibility to "contribute to rapid declines in community cohesion and the erosion of social networks" (Baxter & Trebilock, 2009, p. 98) are real. Graben writes (2014) "there are also linkages between absentee ownership and the economic and physical devaluation of property" (p. 421) in general circumstances.

Some First Nations Indigenous leaders such as Grand Chief Joe Hall, have criticized the FNPO initiative as not only potentially reducing the land base but also making future land claims more difficult to achieve (Bambury, Friday, January 11, 2013). In order to achieve settled land claims from the government, Native bands have typically had to accept small definitive areas of land and give up any future claims to other traditional lands. Campbell (2007) believes "land-privatization would destroy Reserves as homelands and be a heavy blow against Aboriginal rights and a major advance for 'civilizing' assimilationism" (p. 221). Campbell (2007) uses the example of the failed 1887 General Allotment Act, more commonly referred to as the Dawes Act, in the United States to argue that policies of privatization of Native land may have devastating effects on communities. For example, previous treaty promises to protect land were broken by the US government which suddenly allowed for the fragmenting of tribally held Indian reserve land and their allotment to individual Indians. The Dawes Act effectively linked citizenship to land title by granting US citizenship to Native peoples who 'accepted' individual title to land. This Act applied to all Indian reserves and made provisions for 'allotted' or individualized land titles, allotting each family head 160 acres on certain reservations that were deemed for Allotment. In the event of death of the family head, the land was then

further subdivided to heirs to the point that often the land was too small to utilize effectively. After a trust period of 25 years these allotments were to be converted into fee simple titles and were freely alienable and could be sold to non-Indians. By the time the Dawes Act was reversed in 1934, Aboriginal land base had shrunk from approximately 150 million acres to only about 48 million (Holford, 1975, p. 18 as cited in Campbell 2007, p. 237). It was rare that Indian people had enough capital to buy any land (Holford, 1975, p. 14-15 as cited in Campbell, 2007, p. 225). This resulted in many areas of "checker-board patterns of land tenure" (Campbell, 2007, p. 225). In addition, land that was deemed surplus by the government was most often sold to non-reserve peoples. The Indian Reorganization Act of 1934 did alter the course of the allotment system, however, it did not "reverse anything" (Clemmens as cited in Campbell p. 229) nor improve the land situation for Native peoples.

In a fee simple system of land privatization, individuals and communities could suffer further land losses, which they are protected from under the present system. These types of radical changes in the system need to be explained very carefully to members as it is easy to foster misunderstandings and gaps in understandings especially when a foreign system is being instituted. Writing about 19th and 20th century land individualization in New Zealand, Boast (2013) cautioned that it is possible and necessary to "combine individualization with community controls on alienation"(p. 161). Customary laws may be able to protect the underlying title of the land; however, if certainty is the key driver in this economic development model then investors are not going to be attracted to limited ability to alienate and the local government would not want to have to be reabsorbing the costs incurred by people who lose their lands to outside investors.

Very importantly, "the right of an individual to occupy reserve land has been grounded in group membership" (Graben, 2014, p. 420). Graben goes on to write that in this way the very idea of an individual member owning land and potentially losing or alienating it to a third-party, and especially to a non-member, means also that the member could lose the right to live in the community. This would require further policy and legal mechanisms that need to be created in order to protect members of the community.

Ⅳ. 3. Grounded Identity

Land has economic value in the global market depending on several factors—location being highly significant, but it is often trumped by valuable natural resources. The intangible value of land is harder to understand. History, culture, sacredness, and community association are often spoken about and acknowledged but it is difficult to use in transactions. Nor do these intangibles easily translate into economic value. Simpson (2004) explains that Indigenous knowledge is "tied to the land itself" (n.p.). The most widely cited characteristic held by all the world's widely diverse Indigenous peoples is their spiritual and cultural connection to specific land areas. This is a key argument in land claims and is used to delineate Indigenous philosophy from Western ones, especially in terms of land. Meinzen-Dick and Mwangi (2009) write that "instead of focusing on alienation rights, many indigenous systems of property rights regard land as inalienable—as belonging to more than the individual in the present, but also to the group—past, present, and yet to come" (p. 2).

Historically, Aboriginal state policy has tended towards making the Aboriginal peoples understandable, "legible" through a process of assimilation (Manzano-Munguía, 2011, p. 404). Goeman (2008) states that the delineation of boundaries in the colonial history "was largely done with the intent to claim land and make it readable as property" (p. 25-26), continuing that "necessary to decolonization is reclaiming land physically and ideologically" (p. 25). The European concepts of property are, according to Turner (2006) "the cornerstone of not only liberal theories of justice but also of Western European economies" (p. 24). Property, as a European, Lockean concept (Arneil, 1996; Henderson,

1977) that fastens together labour, land and conquest (Goeman, 2008, p. 26) is alien to Indigenous people's traditional view of land. Land leveraged for capital may indeed have beneficial economic outcomes, but it may also have far reaching effects on community relations and cultural practices.

Ⅳ. 4. Communal Land, Individual Property

Individualizing customary land titles has a "rich and elaborate nineteenth century genealogy" (Boast, 2010, p. 147). In various regions under colonization, communal lands were being enclosed and privatized by "strong believers in economic liberalism" (Boast, 2010, p. 148). This present wave of land individualization is also criticized as being based in neoliberalism and serving the purpose of the state in terms of off-loading related costs to Indigenous peoples and emphasizing the market and socio-economic advantages. Pasternak (2015, p. 2) believes "the struggle between individual and collective rights comprises the politically contested terrain of settler-colonialism today" and warns:

> The FNPOA legislation is discursively framed to acknowledge Indigenous land rights while the bill simultaneously introduces contentious measures to individualize and municipalize the quasi-communal land holding of reserves. This cultural recognition of Indigenous difference is meant to disarm resistance while it circumscribes the proprietary aspect of Indigenous sovereignty. (Pasternak, 2015, p. 2)

There has been a longstanding mistrust and misunderstanding of Aboriginal communal ownership of land. The concept of Native land ownership has been conceptualized, in the Canadian psyche, as one juxtaposed to the 'dominant' model of liberal private ownership, or fee simple title. Policy makers throughout recent Canadian history have framed the issue of Aboriginal poverty as being embedded in their "communal lifestyle" (Minister of Interior, David Laird, 1873, cited in Flanagan et al., 2010, p. 66). In 1873, the Minister of Interior David Laird argued in parliamentary debates[5] that private property ownership would end Indian dependence on government welfare assistance, which he believed was rooted in their communal lifestyle (cited in Flanagan et al., 2010, p. 66). Subsequently in 1876, Laird introduced the location ticket system for Indians living on reserves, which gave access to a limited version of private property rights (p. 66).

According to Miller (2001), Aboriginal peoples had individual and family property in the pre-contact period and they had complex understandings of not only private property but also free market, capitalist economic activities (p. 764). Although the historical practice of balance between individual ownership of property and collective responsibility in Native communities (Manny Jules in Flanagan et al., 2010, p. ix) occurred before European contact, those practices were altered or eradicated after contact. Manny Jules and other advocates of the FNPO, argue that non-Aboriginal peoples do not understand the nuances as historically the settlers could only view Native governance, culture and behaviour in relation to Western practices (Manny Jules in Flanagan et al., 2010). This has resulted in an oversimplification of Native ideas of property and land ownership that still pervades mainstream society and even much scholarship today. Ideas of communal ownership, 'sacredness' and identity to land, has created cultural misunderstandings throughout the colonizing and de-colonizing process.

Proponents of private property ownership either downplay, or sometimes avoid, raising the issue of Native communal property ideology. Many researchers believe that the practice or ideology of communal property ownership is at the core of the poverty issue and believe that "developing workable systems of private property rights to facilitate market transactions will be a necessary, if not sufficient, precondition to attaining widespread prosperity on Indian reserves" (Flanagan & Alcantara, July 2002, p. 4). However, Maciel and Vine (2012) believe

that justice cannot be achieved without the conception of recognition alongside redistribution. Material resources, or rights alone cannot reach the level of decolonization that would be necessary to even out the power imbalances between Indigenous and settler state. Fraser and Honneth (2003) see recognition as the core of injustice and that redistribution of resources or rights are only necessary because of the lack of recognition. Justice primarily through redistribution focuses on material imbalances and sees the answer in redressing that discrepancy. Other types of 'soft' disadvantage such as social marginalization are not addressed in this theory. In the case of Aboriginal peoples, redistribution is not enough considering the economic inequality, social disadvantage and lack of social respect (Maciel & Vine, 2012).

Ⅴ. Conclusion

Within a liberal democracy such as Canada and with the rise of recognition and identity politics, it is no longer socially or politically acceptable to impose policy that is generally understood to diminish autonomous agency of a minority cultural group. Policies such as the FNPO have effectively utilized the language of self-determination obscuring the complexity and the overlap with neoliberal economic agendas. The method of opt-in legislation, which seemingly indicates that the policy is based on the idea of rational choice and enhanced agency, is one example of this confusing discursive overlap.

Privatization of land and the implicit idea of individual and exclusive ownership has been argued by some to not be alien to Indigenous communities but rather understood and utilized differently than Western concepts. However, Deinigner and Feder (2009) caution that one important insight is that "a simplistic and undifferentiated call for "formalization" that lacks awareness of the complexity and long history of existing institutional arrangements is inappropriate and can make matters worse" (p. 234). The effects of such a change would be political, social, cultural and economic and authors such as Graben (2014) and Baxter and Trebilcock (2009) call for a more nuanced approach to the proposals of land tenure reform, tailored to each context although they recognize that may be difficult.

The main points promoted by supporters of the FNPO initiative are: that the legislation will be opt-in, thereby circumventing any fears of cultural imposition; transfer of underlying ownership of land title; the ability to alienate land; and increased sovereignty in terms of governance and self-determination. The promised benefits are argued to increase economic development due to perceived legislative certainty by outside investors, and more autonomy in terms of wealth generation, especially for individual members. Fee simple property rights are argued to be more in line with the rights and privileges of Canadian citizens, in order to facilitate freely participating in the market place, and thus an issue of human rights for Native peoples.

However appealing this initiative sounds in theory, individual ownership of newly titled lands may not necessarily ensure improved economic prosperity and may impact cultural and community systems, for example, on peoples' deeper, spiritual, cultural connection with the land. Feared land loss due to land fragmentation via alienation to non-band members and the impacts on cultural and social cohesion, are worrisome. Depending on the location, quality, size, etc. of land parcels, community members, especially women, will most likely benefit unequally on the market. Therefore, it is necessary to interrogate how the market economy can co-exist with the Indigenous ideological framework and what are the gendered implications. This either-or-type of understanding of relationship to land, as either communal and kept in its natural state, or utilized for economic gain, presents difficulty in the process of decolonization.

Notes

1 The terms Native (primarily used in Canada), Aboriginal and Indigenous are used in this paper. The term Indian in Canada is still used, especially in terms of state-Indigenous relations.

2 This is the term used by the government of Canada to signify a Native governing body.

3 This term is used to indicate the private, individual characteristics of this very common land tenure in opposition to communal ownership of land.

4 89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

5 Canadian Parliament, House of Commons Debates (Ottawa: 1873), A1879. (Flanagan, Le Dressay, & Alcantara, 2010)

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