Property in Canada's Land Claims Policy: A Case Study of The Tsawwassen First Nation Final Agreement

by

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Abstract:

In 1995, Canada implemented the *Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (hereafter, the land claims policy*)*. Since then, the land claims policy has been the primary way Canada engages with land claims. The policy is a continuation of a settler colonial logic of abstraction whereby land is considered simultaneously commodity and not owned by anyone prior to colonial settlement. There is no room in the land claims policy for alternative ways of relating to land. This thesis seeks to understand why this is so, why Canada engages with the policy, and why land modernization more generally has become a favoured policy choice in recent years. Thus, the research question asks *how is the property produced and legitimated through the land claims policy*? This question is addressed through a political economy theoretical framework and a case study of the Tsawwassen First Nation Final Agreement (TFNFA), signed in 2007 between the Tsawwassen First Nation, British Columbia, and Canada. The thesis begins with a historical analysis of Canada and British Columbia's engagement with land claims. Following this, attention turns to the Tsawwassen land claim and a document analysis of the TFNFA. The TFNFA makes visible the ways that the land claims policy is aimed at facilitating the accumulation of territory and capital through dispossession, though it is not the only means used to pursue this goal. The policy relies on the transformation of contested territory into property owned by the state. This produces certainty over land ownership and jurisdiction and enables unimpeded land and resource development while restricting possibilities for First Nations' self-governance.

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Glossary of Terms

Aboriginal title is a category of Aboriginal rights. It is the legal right to occupy and possess land that has not been ceded to the Crown through treaty (Isaac & Knox, 2004).

Sovereignty is often understood as political autonomy, coupled with ownership *over* land. However, this relationship is contested by many First Nations who understand political autonomy as entailing relationships *to* the land (Smith & Wilson, 2009, 184).

Comprehensive land claims: Federal policies classify land claims into either comprehensive (where no treaties have been signed, such as in British Columbia [BC]), or specific (where signed treaties have not been upheld or *Indian Act*, RSC, 1985, c I-5 (hereafter, Indian Act) obligations have been violated) (Hurley, 1999). The British Columbia Treaty Process (BCTP) is a treaty-making process that handles comprehensive claims, including the Tsawwassen First Nation Final Agreement (TFNFA), which is the focus of this research. As BC has historically denied the existence of Aboriginal title, and the land was not settled under the *Royal Proclamation of 1763*, 1763, RSC, 1985, App II, No 1 (hereafter, Royal Proclamation), the province has been left primarily unceded (with the exception of the Douglas Treaties on Vancouver Island and Treaty 8 which crosses provincial borders between Northern BC, Alberta, and Saskatchewan).

Calder *et al. v Attorney General of British Columbia*, [1973] SCR 313 (hereafter Calder), was the first time that Canadian law recognized that Aboriginal title predates Crown sovereignty and is not derived from statutory law, nor does it require Crown recognition to exist. However, the decision still upheld Canadian sovereignty and land rights (Reid, 2010, 346).

The Royal Proclamation simultaneously dismissed First Nations' sovereignty and recognized Aboriginal rights (within Crown sovereignty) through regulation of trade between Indigenous peoples and licensed non-Indigenous people (Reid, 2010). The Royal Proclamation disallows the sale of Indigenous land without prior cession of the land to the Crown (Pasternak, 2014b). In doing so, the *Royal Proclamation* obligates the Crown to settle land disputes

Chapter 1: Introduction

1.1. Background

Many areas in what is largely known as Canada remain unceded by First Nations. Historically, colonizers have denied or ignored Aboriginal title to these territories, particularly in British Columbia (hereafter, BC). However, due to legal and physical resistance by many First Nations, as well as economic pressures on the state, Canada has relatively recently shifted policy away from denial of title to negotiations. In 1995, policy changed officially and *The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (hereafter, the land claims policy) became the primary way the state manages land disputes.[1] Policy makers have presented the shift as a turn away from past colonial policies aimed at dispossession and exclusion. However, critical readings of the land claims policy show that Canada is using the process as a modern settler colonial attempt to assert state sovereignty and gain increased access to land and resources (Rynard, 2000; Altamirano-Jimenez, 2004).

The land claims policy enables every province to create its own negotiation process. In BC this is the British Columbia Treaty Process (hereafter, BCTP). BC did not immediately follow Canada's lead after Calder, and instead waited to adopt its land claims process until 1993.[2] The BCTP operates as a six-stage negotiation process between the federal government, the BC

[1] Although policy officially changed in 1995, Canada has been engaging with modern land claims since 1973 through the Comprehensive Land Claims (hereafter, CLC) process. The process seeks to address unceded lands through a "cash for land approach" ([Angus, 1992] Rynard, 2000, 216). It involves the exchange of Aboriginal title to land for cash payments by the government (Rynard, 2000, 216).[1] The federal government began this engagement after the Supreme Court of Canada (hereafter, SCC) ruled in *Calder v. British Columbia (1973)* (hereafter, Calder), that Aboriginal title exists independent of Crown recognition of it.

[2] The first modern agreement formed in BC was the Nisga'a Agreement. Negotiations between the Nisga'a and the federal government began in 1976. However, BC refused to join these negotiations until 1990, for reasons that will be explained more below (Nisga'a First Nation website, n.d., n.p.). This agreement was not formed though the BCTP.

government and members of the First Nation making a land claim. It is facilitated by the British Columbia Treaty Commission (hereafter, BCTC), an independent body chosen by the three parties.

Negotiations are considered less costly and preferable to the judicial system by many on all sides. The use of the courts is expensive, often takes decades, and can be politically ineffective for First Nations even when legal victory against the state is attained (Godlewska and Webber, 2007; Foster, 2007; Asch, 2007). However, many scholars have critiqued the BCTP for transforming collective territory into private property (Nadasdy, 2002; Egan, 2012; Blomley, 2005), failing to question Canadian sovereignty (Borrows, 2001), failing to account for territorial overlap (Rosenberg & Dickson, 2016, 509; Thom, 2009), focusing on the future and production of certainty without atonement for historical injustices (Tully, 2001; Woolford, 2005, Borrows, 2001; Stevenson, 2000), the extinguishment of prior Aboriginal rights in exchange for newly defined treaty rights (Corntassel 2012; Pasternak, 2015; Blackburn, 2005; McKee, 2009; Tully, 2001; Rynard, 2000; Low & Shaw, 2012), and the marketization of these new rights, which constrict possibilities for self-governance and offer market participation as the only path forward (Pasternak and Dafnos, 2017; Altamirano-Jimenez, 2004).

As evidence of these failings, many negotiations have stalled, and several First Nations have ended their participation with them due to state-imposed negotiation parameters. Both Musqueam and Quatsino First Nations stopped negotiations in the 1990's over state refusals to negotiate compensation payments for past injustices (BCTC Annual Report, 2002, *Looking Back, Looking Forward*, 8). Five of the six nations of the Okanagan Nation Alliance (comprised of the Lower Similkameen, Okanagan, Osoyoos, Penticton, Upper Similkameen, and Westbank First Nations) did not engage with the BCTP, instead choosing to negotiate with the state outside of the process (Okanagan Nation Alliance - Province of British Columbia, n.d.). Of this group, only the

Westbank First Nation even entered into BCTP negotiations and suspended its engagement in 2009 (Okanagan Nation Alliance - Province of British Columbia, n.d.). Since the start of the BCTP, only three agreements have been ratified: the Tsawwassen Agreement (2008), Maa-nulth Agreement (2011) and Tla'amin Agreement (2016). Several others are in the final stages of negotiations.

1.2. Research Question

The policy is a continuation of a settler colonial logic of abstraction (Bhandar, 2015) whereby land is simultaneously considered commodity and unowned prior to colonial settlement. There is no room in the land claims policy for alternative ways of relating to land. This thesis seeks to understand why this is so, why Canada engages with the policy, and why land modernization more generally has become a favoured policy choice in recent years. Thus, the research question asks *how is the property produced and legitimated through the land claims policy*? To answer this question, I argue that the land claims policy is another, relatively new, attempt towards land accumulation by dispossession. The transformation of land into property enables Canada to establish certainty and finality over land ownership and Aboriginal rights. This process transfers large amounts of land to the state, limits possibilities for self-governance to market participation, and prevents future challenges to Canadian sovereignty or resistance to land and resource development.

My research question is important to the field of Canadian politics for several reasons. First, negotiations are a relatively recent form of state engagement with land claims. The land claims policy is a response to Indigenous peoples' resistance to dispossession. Disputes over land ownership impact large areas of territory claimed by the Canada, making them extremely relevant to questions of Canadian sovereignty. Moreover, as resource extraction and urbanization have expanded, negotiations have become prominent and their relevance has continued to impact

Canadian policies surrounding resources and development. The land claims policy has been criticized by all sides, showing that analysis of land claims has already made significant impact on the study of Canadian politics, and that it remains an area of relevance to the field. My research builds on this literature to identify specific exchanges that took place in the TFNFA. It does so to more clearly understand what material gains the state makes from land claims. Finally, I deploy the theoretical concepts of settler colonialism, capitalism, and neoliberalism in this analysis, which itself illuminates more clearly how these conceptual tools, as processes, operate in Canada.

1.3. Research Design

In order to understand how Canada continues to pursue accumulation of territory through the land claims policy, this thesis conducts a case study of the BCTP and the Tsawwassen First Nation Final Agreement (hereafter, TFNFA). BC is an important area of focus because the province followed a unique path during colonization, denying both Aboriginal title and the applicability of the Royal Proclamation (1763) until Calder made it impossible to do so. Because of this, the province remains almost entirely unceded (with the exception of the Douglas Treaties and Treaty 8, discussed below, and the formation of three successful modern agreements with the Tsawwassen, Maa-nulth, and Tla'amin First Nations). Lack of cession has created uncertainty over land ownership and instability for investment in land development and resources. As BC's economy is so largely based on resource extraction, the land claims policy is very significant in the province.

Within this policy context, research focuses on the TFNFA because it was the first agreement signed through the BCTP. Thus, it impacts what is possible from future negotiations. Moreover, territory claimed by the Tsawwassen surrounded the city of Vancouver, including areas on which the surrounding municipalities of Delta, Richmond, and Surrey were built. Because of this, the agreement has unique significance in land value, as well as the type of land in question. It

shows how the attribution of economic value to land, in this case driven by high-priced urban land value, fails to account for alternative ways of relating to land and impacts land claims by restricting the amount of territory First Nations can gain.

To conduct this case study, I use two methods: historical analysis and document analysis. I start with historical analysis of land claims in Canada and BC, focusing on shifts in federal policy following key legal and constitutional events, and the province's response to these shifts. I then turn to the specific events that lead to the Tsawwassen land claim itself. Second, I conduct document analyses of the 2007 TFNFA Report to understand precisely what the province gave and gained through the final agreement, specifically the rights, land and money exchanged. I conduct this analysis through a theoretical lens of political economy and deploy analytic concepts of *settler colonialism*, *capitalism,* and *neoliberalism* to understand how economic, social, and political processes intersect to shape the current landscape in Canada today, and how the land claims policy operates within these intersections.

A case study is the most appropriate methodology for answering the question of how the state is engaging with land claims. My analysis is concerned not solely with the TFNFA, but also with how the state engages with land disputes generally. Case study methodology is useful where there is an interest in understanding the context under analysis (Yin, 2003; Baxter and Jack, 2008, 545) and when contemporary events are under examination (Yin, 2003, 5). A case study enables exploration of the contemporary and historical contexts of land claims, both in terms of why they are happening and how the state engages with them.

1.4. Breakdown of Chapters

This first chapter offered an introduction and context to land claims in Canada. It presented the research problem and explained my research design and methodology, offering the reader insight into research methods and how this thesis will unfold. Next, *Chapter 2: Theoretical*

Framework, will explain how a political economic lens can situate the land claims policy within broader settler colonial and capitalist processes. To do this, the chapter will explain what I mean by *settler colonialism*, *capitalism*, and *neoliberalism*, before bringing these analytics together to explain how a political economy analysis of the transformation of land into private property is key to understanding the land claims policy.

Chapter 3: The Context of Land Claims in Canada, then uses this theoretical framework to conduct historical analysis of federal engagement with land claims. The chapter begins with federal engagement prior to 1973. It then turns to the impact of the Calder decision, the formation of the CLC, the Meech Lake and Charlottetown Accords, and finally to the implementation of the 1995 official land claims policy. Next, the chapter looks at provincial engagement with land claims in BC, beginning with the provincial land claims policy prior to 1990. It explores BC's shift away from the denial of title towards the province's implementation of a policy of negotiation after 1991. This historical trajectory in the province is discussed in relationship to BC's desire for certainty over land ownership for the purposes of development and resource extraction.

Finally, *Chapter 4: The Tsawwassen First Nation Final Agreement*, explains the specific exchanges of rights, land, and financial transfers that took place through the TFNFA. The chapter begins by offering historical context to the Tsawwassen claim, including the impacts of the construction of the BC Ferry Terminal and Roberts Bank Coal Port on Tsawwassen land. Then, the chapter explains how negotiations and the formation of the TFNFA took place. Document analysis of the TFNFA follows. The final chapter of this thesis, *Chapter 5: The Conclusion*, offers discussion and implications of my work.

Chapter 2: Theoretical Framework

2.1. The Political Economy of Land in Canada

I use a theoretical framework of political economy to analyze the land claims policy. To do so, I draw on Caparaso and Levine's (1992) understanding of economic processes as both sites of political agenda, and also as political in and of themselves. This lens is appropriate because the land claims policy acts alongside the First Nations Property Ownership Initiative (hereafter, FNPOI), which proposes changing reserve land into individual, fee-simple plots in order for individuals to access mortgage credit, as relatively new and neoliberal attempts towards colonial management of land (Schmidt, 2018). Land modernization transforms land into private property. This is not a new state goal, but rather has been central to the production of the Canadian state. What is relatively new however, is the way land is transformed through discourses of modernization and recognition, rather than racialized exclusion. In place of the denial of Aboriginal rights or Indigenous peoples' humanity, land modernization and the land claims policy recognize Aboriginal rights through their extinguishment, and the formation of new rights which are separated from land. Thus, the policy promotes a marketized form of Aboriginal citizenship (Altamirano-Jimenez, 2004), which does not challenge development of land, free movement of capital, or assertions of state sovereignty. It is aimed at producing certainty over land ownership by transferring large areas of land to the state and seeks to create the conditions for unencumbered investment and development.

2.2. Settler Colonialism, Capitalism, and Neoliberalism

Within this theoretical framework, I deploy analytic concepts of settler colonialism, capitalism, and neoliberalism to show how land claims are negotiated within specific economic and political processes. These processes have shaped the political and economic landscape in

which the state engages with land claims. However, they are not relegated to the past and continue to shape and restrict policy possibilities. In the case of the land claims policy, these processes enable further accumulation by dispossession.

2.2.1. Settler Colonialism

Settler colonialism is a form of colonialism where settlers do not leave the colonized territory, and instead set up permanent institutions. Settlers accumulate land through physical violence and the production of property while attempting to erase Indigenous peoples as rightful owners (Stasiulis & Yuval-Davis, 1995; Wolfe, 1999; Veracini, 2010; Tuck and Yang, 2012; Rowe and Tuck, 2017). Settler colonialism is a "persistent social structure" rather than an historical event (Rowe and Tuck, 2017, 4; Wolfe, 2006). Examples of settler colonial states include Canada, the United States, Australia and New Zealand. In Canada, attempts at erasure of Indigenous peoples has been guided by the doctrine of discovery and idea of terra nullius; that land in Canada did not belong to anyone prior to colonial settlement. While the doctrine asserted land did not belong to anyone, it also simultaneously considered it property. Brenna Bhandar (2015) explains this as a "logic of abstraction" where land was considered commodity that was not owned by anyone (256). The obvious conflict in this reasoning demanded racialized exclusion where some were unable to own property at all.

The doctrine of discovery is a "dogmatic body of shared theories" and belief systems that legitimize settler institutions, based on the supposed discovery of land by colonial powers (Lindburg, 2010, 94). Jacinta Ruru (2010) writes that it relied on the idea that when lands "were not being used in a fashion that European legal systems approved, [they became considered] as being 'vacant' and available for first discovery claims" (260). In other words, the lack of private ownership and exploitation of land provided, in the minds of colonizers, justification for taking it.

This idea had grounds in John Locke's labour theory of property, where property ownership is derived from exerting one's labour onto nature (Locke, 1821). Discovery involves the idea of terra nullius, or empty lands, which allowed colonizing powers to claim territory over already occupied areas because First Nations' legal and political institutions were considered non-existent.

This justification was reliant not only on dissenting ways of relating to land. It was also anchored in assumptions of racialized superiority and inferiority, invalidating Indigenous peoples' humanity as well as their ownership of land, for the purpose of removal (Lindberg, 2010, 95). Removal is a primary motivation of settler colonialism. Property ownership organized, and organizes, racial identities and differences (Bhandar, 2018, 123), and is conflated with "a larger economy of social and political rank and value" (Simpson, 2014, 101). Thus, property as land mixed with labour could only belong to certain people, specifically those who related to it as property (Simpson, 2014, 101 [Moreton-Robinson, 2000]). In Canada, settler colonialism progressed through numerous policies and practices, all reliant on the rationale of discovery and terra nullius. In BC, a key policy of dispossession was the reserve system, whereby many First Nations were confined to small areas of land. About 1500 reserves were created. They took up less than half a percent of the land across the province. This racialized exclusion from land ownership facilitated the geographic reorganization of the province, enabling resource development by colonial powers, and the formation of BC's resource economy because it removed Indigenous people from the land (Harris, 2004).

Property became a colonial imposition on the arrangement of Indigenous space and was naturalized as the dominant, and seemingly only legitimate mode of relating to land (Blomley, 2015, 2005). There are differences between private property and many Indigenous understandings of territory. While Western or liberal philosophies understand property as commodity, many

Indigenous people understand territory as dwelling, involving social and historical relationships to land (Thom, 2009; Coulthard, 2010; Barker & Pickerell, 2012). Thom (2009), writes land "is not so much a commodity of real-estate or a base area of jurisdiction, as it is a way of ordering kin relations and relationships of sharing" (185). Therefore, any separation of governance from land changes possibilities for governance and social relations. Differences between Western and Indigenous understandings of property extend beyond differences in owning and possessing. They demonstrate different ways of relating to the world and organizing relationships between humans and between humans and the natural world (Bryan, 2000, 17).

This de-politicization and naturalization of property has made it difficult to resist, even conceptually. Robert Nichols (2018) argues that the very concept of dispossession, meant to challenge colonial land theft, reinforces a normative investment in property and a commoditized model of relating to land by presupposing a prior ownership of land that was then lost through theft (14). He writes there is "conceptual ambiguity" surrounding the term and this creates a dilemma wherein Indigenous people must either claim ownership of land as a recognized form of property or refuse to conceptualize past or present relationships to land as proprietary. The first option challenges what Aileen Morton-Robinson (2004) terms the "possessive logic of white patriarchal sovereignty"[3] in a way that reaffirms property as social organization, and the second resists this affirmation but undermines critique of state accumulation through dispossession (11). In effort to clarify the term, Nichols (2018), offers a definition of dispossession as a historical process where property is created through the separation of Indigenous peoples from land (14).

[3] Moreton-Robinson (2004), writes the possessive logic of white patriarchal sovereignty discursively and ideologically naturalizes the nation as a white possession. Person-hood and property were each defined by white men who controlled and shaped institutions, such as the law. They defined who was white and offered rights to land to only those people. This produced relationships between race and property that continue to the present through state resistance to Aboriginal title (Moreton-Robinson is writing in the context of Australia but her ideas are equally applicable to the Canadian context).

This process created rights to land which may only be exercised by Indigenous peoples through their alienation from it, as the right to sell land became the way Indigenous people could be recognized as human (Nichols, 2018, 15 [Deloria, [1969], 1988, 30]). Policies of exclusion have since shifted to policies of recognition and discourses of inclusion but in service of similar outcomes. This will be discussed more below.

The concept of settler colonialism has limitations for analysis, as it can make settler colonial organization seem inevitable, or reproduce colonial relationships by privileging settler experiences (Macoun & Strakosch, 2013, 435; Snelgrove et. al., 2014). However, it can also make settler investments in structural violence visible, politicize settler colonial narratives and interactions that present themselves as neutral, and disrupt the historicization of colonization (Macoun & Strakosch, 2013, 427, 431, 432). Therefore, the concept remains a valuable tool in analysis of Canada's engagement with land claims. Understanding the land claims policy within the Canadian settler colonial context reveals how the state continues an agenda of land accumulation through the land claims policy and that land remains central to Canadian sovereignty.

2.2.2. Capitalism and Neoliberalism

Though separate processes, capitalism and colonialism are interwoven with one another in many ways and property has featured central in both. In Europe, the first stage of capitalism, primitive accumulation, occurred through the enclosure of communally held land. This enclosure allowed elites to accumulate wealth that previously belonged to the masses, eventually cutting workers off from the means of production, and generating the creation of wealth (Marx, Capital: Volume 1, 785). In settler states such as Canada, enclosure did not occur as it did in Europe. Instead, dispossession took place through a variety of state strategies and acts of violence, aimed

at removing and managing Indigenous people as a "surplus population" (Lloyd and Wolfe, 2016, 110). The central method for doing so was changing land into private property. This was, as explained above, interwoven with racialized domination and guided by the doctrine of discovery.

Property has been critical to the colonial accumulation of capital as well as in conceptualizing the humanity of certain people and not of racialized others (Bhandar, 2018). Cheryl Harris (1993) explains that

> …the settlement and seizure of Native American land supported white privilege through a system of property rights in land in which the "race" of the Native Americans was rendered their first possession rights invisible and justified conquest…and embedded the fact of white privilege into the very definition of property (1721).

In other words, in addition to changing land into property, colonists made it possible for only white men to own that property. This made it difficult to relate to land in non-proprietary ways and at the same time excluded Indigenous people from becoming property owners.

The latter half of the 20th century saw a shift in capitalism from Keynesian to neoliberal economic policies (Palley, 2005). Neoliberalism as a global economic and governance regime builds on values within classical liberalism such as emphasis on the individual, organization around free markets, and non-intervention by the state. Unlike early stages of capitalism, neoliberalism has emerged as a hegemonic mode of governance whereby market logic dictates how people relate to each other (Springer, 2011). It is a form of capitalism where the state is oriented towards facilitating the integration of "local and national economies into the institutions of global capitalism" (Abele, 1997, 129) and is comprised of three parts, ideology, policy (policy agendas that arise from such ideology), and reality (the result of these policies). This content is widely agreed upon. However, many scholars disagree on how these aspects actually take form (Kotsko, 2017).

One view is that neoliberalism's defining characteristic is class struggle (Harvey, 2005). This view sees property rights, in addition to individual rights, as most important (Harvey, 2016). Another perspective considers the discursive repression of alternatives to be central to neoliberal reproduction (Mirowski, 2013). Still another sees neoliberalism as defined by the attempt to smother the political in favor of the economic, favouring market competition as the purest form of democratic decision-making (Brown, 2015). In this view, government provision is seen as interference that denies people the freedom to conduct their own market choices (Kotsko, 2017, 498). While each of these readings of neoliberalism is helpful, I incorporate Philip Mirowski's (2013) attention to the repression of alternatives and Wendy Brown's (2015) emphasis on market solutions to political problems in my reading of the land claims policy.

In Canada the repression of alternative forms of organization is uniquely tied to First Nations and their land. Land modernization attempts have not been limited to the land claims policy. One example of this is the FNPOI, which is considered by proponents to be a means of alleviating poverty on reserves. However, Shiri Pasternak (2015) contends it runs counter to "*collective* territorial rights" and challenges Indigenous self-determination (180). Moreover, it hides the ways that dispossession has created disproportionately higher rates of poverty among Indigenous people than the non-Indigenous population (Abele, 1997, 129). Neoliberal policies such as the land claims policy and the FNPOI, seek further integration into global markets and limit public spending. These outcomes, as well as efforts to break down environmental and labour regulations, are often felt more strongly by Indigenous people. The aim to minimize government responsibility has created an uneasy tension between discourses of self-determination and recognition on the one hand, and assimilation and market participation on the other (Palmater, 2011, 120). This tension is at the heart of land modernization efforts.

Brown's (2015) emphasis of the economic over the political helps to understand Pasternak's critique of the FNPOI. Pasternak writes the FNPOI demonstrates how capitalism and colonialism have produced a specific neoliberal settler colonial context (2015, 179). She writes,

> [p]rivatization does not mean a transfer of ownership in the traditional (though problematic) sense of "public" versus "private" ownership here, but rather the transfer from one type of social system to another: in this case, exchanging colonial regulatory oversight for a more capitalist-oriented real estate market (182).

The FNPOI, as a form of land modernization alongside the land claims policy, seeks to depoliticize settler colonial violence, individualize blame for poverty, and provide an economic solution that does not challenge the state's drive for ever greater land acquisition. Moreover, it relies on understanding property ownership through, what Brenna Bhandar (2018) calls an "ideology of improvement", whereby property is seen as a teleological good, improving land and including previously excluded racialized people (34).

Although neoliberalism involves a withdrawal of the state, particularly around service provision, a neoliberal state is not simply a diminished form of the traditional nation-state. Likewise, deregulation has not simply involved lifting restrictions, but instead meant that businesses have become regulated in new ways aimed at efficiency and competition, and guided by "market discipline" (Kotsko, 2017, 496). The traditional dominance and role of the nation-state is preserved under neoliberalism. However, power is enacted differently and directed towards global market participation, specifically the movement of capital across borders, including foreign direct investment (Peck & Tickell, 2002, 30). The desire to determine ownership over land is tightly bound to the desire to attract this investment in areas in BC, notably for land development and resource extraction. Disputes over ownership may threaten development projects, and consequently, the willingness of multinational corporations to invest.

Several academic and public commentators have asserted that we are in a post-neoliberal era (Altvater, 2009; Stiglitz, 2013). They write that neoliberalism as an economic theory is in crisis, unable to account for changes in global economics following the global financial crisis of 2008. Simon Springer (2015) rejects this idea, writing that despite resistance to neoliberal structures, exemplified through movements such as Occupy, neoliberalism continues to prevail. He writes that "[those who consider neoliberalism to be in crisis] treat neoliberalism as a monolithic entity and fail to recognize its particularities as a political project, its hybridities as an institutional matrix, and its mutations as an ideological construct" (2015, 6). Therefore, we should understand neoliberalism as verb rather than a noun, or in other words as "neoliberalizing practices" (Springer, 2015, 7). Even though it may face crisis, this does not signal the end of neoliberal economic ordering because neoliberal regimes are adaptive (Springer, 2015, 8; Guizzo and de Lima, 2017).

Manuel Aalbers (2013) also rejects the idea that neoliberalism is dead. However, unlike Springer (2015) and Guizzo and de Lima's (2017) attention to adaptiveness, Aalbers writes that free markets are not the markers of neoliberalism's strength. Although free markets may have been destabilized after the crash, this fact is inconsequential to the endurance of neoliberalism because the strength of neoliberalism depends not on the ideology of free markets, but rather the policies of privatization. In his view, as long as privatization of land ownership prevails, so does neoliberalism. Each of these perspectives supports the use of neoliberal theory in this work. Neoliberalism may indeed be in crisis. It may no longer reflect government policies as populism gains increasing ground worldwide. However, the land claims policy is a neoliberal policy aimed at increasing accumulation by dispossession through inclusion and recognition. Thus, analysis of it should see it as such.

2.3. The Separation of Rights from Land

As this chapter has discussed, a political economic theoretical lens is appropriate for this analysis because it shows how the production of property has been political in its own right, rather than a natural or purely economic mode of land organization. The framework also demonstrates that the transformation of land into property has given rise to specific political and economic processes of settler colonialism and neoliberalism. These processes have created the conditions within which land claims are negotiated today. Land modernization demands a transformation of land into property. While historically this was achieved through the exclusion of Indigenous people, policies now involve discourses of inclusion and recognition. Despite a difference in tactics, these attempts seek to produce the same outcomes as those of the past, with an orientation towards accumulation of capital. The state seeks to accumulate land through the marketization and separation of rights from land. It does so in order to produce certainty over land ownership through dispossession.

2.3.1. Recognition

While past government policies aimed to remove Indigenous people from their land through physical violence or assimilation, the land claims policy instead emphasizes the recognition of First Nations' right to self-determination. Many have argued that politics of recognition serve the same ends as policies of assimilation (Coulthard, 2007, 2014; Wakeham, 2018, Altamirano-Jimenez, 2004; Alfred, 2005). Pauline Wakeham (2018) explains that recognition in Canada seeks to limit "land, sovereignty, and duration of atonement" (4). Limitations on First Nations' land bases and sovereignty, as well as a view towards the future rather than the past, are all state imposed parameters of land claim negotiations. In the case of the land claims policy, recognition is tied to transformation of land. As a key step, previously

ambiguous Aboriginal rights are extinguished in exchange for newly defined rights and some law-making authority over minimal land bases. These rights, as noted already, emphasize access to global markets and the movement of capital across borders.

The recognition of Aboriginal title has to precede any settlement negotiation, for if there were no title to begin with, settlement of claims would not be necessary. This was central in BC. For centuries, the denial of title allowed for settlement in the province without land cession by original owners of the land. But recognition is more complicated than simply the legal and political recognition of title. It is also, some argue a means by which the state is able to continue policies of dispossession without the use of physical violence or direct force (Coulthard, 2014, 2018; Alfred, 2005). As explained, land as property is a way of racially excluding some people from land in order to appropriate it (Bhandar, 2018). While this racialized appropriation occurred through exclusion in the past, land claims today aim to achieve the same goals through inclusion. Recognition of Indigenous land claims by the state does not challenge structures of dispossession; instead, it is grounded in continued dispossession (Schmidt, 2018; Coulthard, 2014).

2.3.2. Certainty

BC's economy is based in resource extraction. This means the province has to create investment stability to attract and facilitate global movement of capital and development of land. The fact that the majority of the province remains unceded has made investment in land or resource development unstable. Legal and direct-action resistance has proven effective at stopping or delaying development projects for long periods of time. First Nations' claims to land and sovereignty can impede the circulation of capital and the state has reorganized its relationships with Indigenous peoples in the attempt to mitigate this (Pasternak and Dafnos, 2018). Canada now seeks to integrate First Nations into the private sector through partnerships in order to securitize land and infrastructure necessary for the circulation of capital (Pasternak and Dafnos, 2018).

The protection of "existing Aboriginal rights and title" (McKee, 2009, 29) has been confirmed through court cases including Sparrow (1990), Van der Peet (1996), Delgamuukw (1997), and Haida Nation (2004), making it clear neither the provinces nor the federal government can unilaterally extinguish Aboriginal rights (Low & Shaw, 2012). Thus, the province is under significant pressure to settle land disputes in order to create certainty over land ownership and stability for investment. Certainty means that first and foremost, "conflicts between Aboriginal and Crown title be resolved so that there is clarity with regard to who owns and has jurisdiction over lands in British Columbia" (Woolford, 2005, 2). Brian Egan (2012) describes Crown policies towards certainty as seeking to create a "post-historical and post-political space where land and resource development can proceed unimpeded" (411). He and others (Woolford, 2005; Borrows, 2001; Tully, 2001) have identified the BCTP as a space of tension between competing drives for justice, in atoning for past offenses, and certainty, with a focus on relationships moving forward. This aspect of the process exemplifies Brown's (2015) assertion that neoliberal policies seek economic solutions to political problems.

Certainty can also concern rights, as section 35 Aboriginal rights remain ambiguous. Many First Nations have pursued certainty over rights. However, many people contest the necessity of blanket extinguishment of their existing rights. Surrender creates uncertainty for Indigenous people, as previous rights are taken away (Blackburn, 2005). In order to make this strategy more palatable, the land claims policy incorporates discourses of recognition and accommodation instead of extinguishment (Woolford, 2004a). Concern over Aboriginal rights, and the extinguishment of poorly defined section 35 rights is noted in a 1997 report issued by the First Nations Education Steering Committee, the BC Teacher's Federation, and the Tripartite Public Education Committee's Understanding the B.C. Treaty Process: An Opportunity for Dialogue. The

report critiques state policies demanding the surrender of Aboriginal rights tied to title. Notwithstanding policies of extinguishment, the report does express desire on the part of many First Nations to have rights clearly defined by treaty agreements. Policies of extinguishment have also been criticized by the UN Human Rights Commission (UNHRC) for being irreconcilable with international laws and rights to self-determination (Gilbert, 2007).

In the case of the land claims policy, the transformation of land into property enables the establishment of certainty over land ownership. Certainty facilitates neoliberal free movement of capital across borders. This outcome has significant economic and political implications in its own right. However, one would be remiss if they did not also account for how property in and of itself is political, particularly as a colonial and racialized construct and as a site of the reproduction of relationships of domination and subordination (Harris, 1993).

2.3.3. The Marketization of Citizenship

Neoliberal privatization and decentralization of social provisions in Chile produced what Veronica Schild (2000) terms 'market citizens', as citizens become transformed into clients and political engagement shifts to market participation (276). Isabel Altamirano-Jimenez (2004) uses the concept of marketized citizenship to explain the separation of land from self-government in Canada (349). She explains that the state marketizes citizenship by meeting First Nations' demands through market integration and cultural recognition (Altamirano-Jimenez, 2004, 350). Ratner, Carroll, and Woolford (2003) write that the state's pursuit of neoliberal marketized forms of Aboriginal citizenship ignore "the capitalist economic practices, sanctioned by states, that cut against the grain of democratic communicative action [and subordinate] Aboriginality not through political edict but through disciplines issuing from the world market" (218). In this way, self-

government can have the effect of simply transferring regulation by the state to dependency on the "totalizing discipline of the market" (Ratner, Carroll & Woolford, 2003, 218).

Land claims are often presented solely as issues of land ownership, but they are also contestations over the meanings of Aboriginal citizenship (Altamirano-Jimenez, 2004; Rossiter and Wood, 2005). Patricia Wood (2003) writes that "[b]y definition, the politics of Aboriginal identity, culture and citizenship complicates the idea of citizenship in postcolonial societies, often challenging the very existence of the nation-state" (371). In explaining how these politics confront the state, Wood writes that claims to sovereignty have two important aspects. The first is the demand for recognition as a sovereign group and the right to self-governance and the second is sovereign authority over a specific place (2003, 376). Land claims separate these two claims. The policy promotes a specific form of marketized citizenship and self-governance, where law-making authority is concentrated on market participation. In conjunction with this, land claims allow Canada to assert sovereignty over large areas of land, limiting the land bases on which First Nations are able to practice self-governance.

The transformation of land into property separates self-government from land. This occurred in the Nisga'a Agreement. As Paul Rynard (2000) writes, the limited amount of land the Nisga'a First Nation gained through the Nisga'a Agreement is particularly problematic to further land negotiations because "rebuilding Aboriginal nations may lack a sufficient land base" (241). As I will show later, the Tsawwassen now face an even smaller land base than the Nisga'a, largely due to the high value of urban land exchanged through the TFNFA. This further impedes possibilities for self-governance. As Altamirano-Jimenez (2004) argues, a neoliberal understanding of Aboriginal rights constricts self-understandings of Indigenous citizenship. Likewise, Paul Nadasdy (2002) explains that property is a "cultural concept", embedded in

hegemonic values and norms, and the denial Indigenous worldviews and ways of relating to the land are a settler colonial attempt to incorporate First Nations into the market economy (252). The centralization of property separates identity, culture, and self-government from territory and redefines social relationships (Altamirano-Jimenez, 2004). It is not possible to practice self-governance that is anchored in relationships to land when negotiations limit the land base that belongs to those who would practice this form of governance.

Land claims are organized around the trading of land for defined Aboriginal rights, and in addition, financial transfers and self-governance capacities. The imposition of liberal conceptions of rights and property, through the land claims policy has discouraged many First Nations from entering, or substantively engaging in negotiations. In negotiations that do advance, the imposition of liberal understandings of rights has been integral to the separation of self-governance from land. When self-governance is detached from land, the state is able to uphold the constitutionally protected Aboriginal right to self-governance while also dramatically limiting land bases. This transfer of land demands that land be changed into property (Nichols, 2018). Land modernization attempts are the most current iteration of accumulation through dispossession. Land modernization involves discourses of recognition and inclusion to separate Aboriginal rights from land and promote a marketized form of Aboriginal citizenship which does not challenge development of land, free movement of capital, or assertions of state sovereignty. It is aimed at producing certainty over land ownership by transferring large areas of land to the state, seeking to create the conditions for unencumbered investment and development.

2.4. Chapter Conclusion

Canada claims many areas where lands remain unceded and ownership is disputed. Historically, the state has largely denied First Nations' claims to these lands; however, more

recently it has begun engaging in negotiations. Understanding the land claims policy in Canada through a political economy lens shows how Canada was formed through the dispossession of Indigenous people from their land and how policies aimed at dispossession continue today. Modern state attempts towards dispossession and the transformation of communally held land into private property are motivated by the ability to assert state sovereignty and access resources for economic development. Concepts of settler colonialism, capitalism, and neoliberalism are necessary because they make settler colonial and neoliberal motivations visible. These motivations are increasing accumulation of territory and facilitating global movement of capital and investment in Canada. These economic, political, and ideological imperatives drive the imposition and limitations of a marketized form of Aboriginal self-governance over small land bases. Understanding these processes allows for best analysis of the TFNFA.

Chapter 3: Land Claims in Canada, a Historical Analysis

3.1. Introduction

The land claims policy is one means through which the Canadian state has attempted to increase its access to territory and resources. It operates through the transformation of land and the separation of self-governance from it, largely through an exchange of rights for land. Land claims in Canada are preoccupied with finalizing ambiguous Aboriginal rights found in section 35 of the *Constitution Act (1982)* (hereafter, Constitution Act). This objective continues to inform state engagement with negotiations, which operate through asymmetrical relations of power between the state and First Nations. A historical analysis shows how this asymmetry has been produced. Moreover, it shows that the policy enables Canada to obtain large areas of land through real estate-style transactions, in exchange of money and rights (Rynard, 2000). Though different in practice from historical policies of accumulation by dispossession, which were enacted through exclusion and violence, the land claims policy achieves similar outcomes.

Canada's engagement with land claims took different paths at the federal and provincial level in BC. The province was reluctant to acknowledge Aboriginal title or respond to a federal shift to land claim engagement. Policy change at the federal level was prompted by legal pressures to reconcile the Crown's obligations to First Nations and the failure to address ambiguous definitions of Aboriginal rights in the Constitution. In contrast, BC began participation with land claims because of economic pressures; The lack of land cession in the province made investment in resource development unstable. In effort to manage this threat, BC began engaging with land claims in order to establish certainty and finality over land ownership, pursue development projects and interact with global markets.

3.2. Federal Engagement after Calder

First Nations in Canada were, and in many cases still are, regulated by the Indian Act (1876). The act governs Indigenous people as "objects of jurisdiction rather than subjects in nation-to-nation relationships" (Pasternak, 2014, 152). It prohibited Aboriginal people from hiring lawyers or litigating between 1927-1951 for any purpose (De Costa & Knight, 2011, 219). It was therefore impossible for Indigenous people to use the courts to resist the imposition of Crown title over their land until the act was amended and this restriction was removed. Once this happened, judicial paths opened that enabled legal challenges against dispossession. Two decades later, judicial paths led to the SCC's holding in Calder that the Royal Proclamation applies in BC, and that Aboriginal title predates Crown sovereignty.[4] As explained, this case was very significant to land claim negotiations in Canada and acted as impetus for the initiation of the federal CLC strategy (McKee, 2009, 112; Curry, Donker & Krehbiel, 2014, 293).[5]

Calder was brought to court by members of the Nisga'a First Nation who sought recognition of their title over territory in the Nass Valley, located in Northern BC, and to resist settler and industry encroachment (Godlewska & Webber, 2007, 1). The SCC ruled that Aboriginal

[4] The Royal Proclamation was a key founding document is Canada and entrenched Canada's obligation to settle land claims (Reid, 2010). It set in place procedures through which the Crown engaged with First Nations during settlement. It divided certain areas of land and jurisdiction between First Nation signatories and the Crown in effort to minimize conflict between them (Borrows, 1994). Within the confines of the Royal Proclamation, the British government pursued policies that recognized Aboriginal ownership independent of Crown sovereignty (The Report of the BC Task Force 1991), as it prohibited settlement until Aboriginal title to land was formally extinguished and surrendered to the Crown (Barman, 2007). The Royal Proclamation is significant to Aboriginal title, rights, and self-government because it recognized Aboriginal title to land and restricted the alienability of that title to the Crown (Pasternak, 2014). This is relevant to modern land claims for two reasons. First, the Royal Proclamation simultaneously affirmed Aboriginal title regardless of state recognition, while at the same time, subordinated this title to Crown sovereignty. Second, it placed an obligation on the Crown to settle land disputes.

[5] Federal policies classify land claims into either comprehensive (where no treaties have been signed, such as in BC), and specific (where already signed treaties have not been upheld or Indian Act obligations have been violated) (Hurley, 1999).

title exists and predates Crown sovereignty because Aboriginal peoples used and occupied the land prior to European settlement. Therefore, Aboriginal title does not require recognition by the Crown (Bell & Asch, 1997). In the end, the court ruled against the Nisga'a. However, it did determine Aboriginal title exists (where it has not previously been exchanged through treaty or other agreement), and this prompted federal policy to address Aboriginal land claims (Godlewska & Weber, 2007). In BC, this was particularly relevant as the ruling contradicted longstanding provincial assertions that the land was terra nullius prior to colonial settlement (De Costa, 2004, 135).

Michael Asch (2007), writes that Calder was significant to federal policy preceding the formation of the CLC (101). The case was determined only shortly after the Liberal federal government attempted to pass the White Paper, a policy which attempted to assimilate Indigenous people into the general Canadian population. Large-scale resistance to the White Paper in conjunction with the SCC ruling in Calder forced the government to abandon this attempt, at least formally. Federal attempts at assimilation then shifted to policies of recognition, propagating similar goals through different language. In 1973, immediately following the decision, the federal government-initiated treaty discussions over unceded land. This approach formed the basis of the CLC process. The CLC process has produced several modern treaties including the James Bay and Northern Quebec Agreement (hereafter, JBA) (1975), as well as several Yukon First Nations Final Agreements.

Since Calder, many First Nations have continued to use the judicial system as a way to assert Aboriginal title. However, as explained, use of the courts is a costly and lengthy process. Moreover, this path remains contentious as colonization in Canada occurred partly through the imposition of Western legal systems and the courts are unlikely to question Crown sovereignty

(Borrows, 2001). Nevertheless, in some instances, the law has proven to be a useful tool for resisting colonial structures and organization (Asch, 1997). Although negotiations are preferable to the courts in determining land claims, it is important that the judicial system validate self-government rights in order for First Nations to negotiate from a place of strength (McNeil, 2007). Since 1995, and following concerns over constitutional changes to section 35 rights, the state has pursued negotiations as official policy, generating institutional pressures towards negotiations and constricting alternative resolution possibilities.

3.3. Federal Engagement through the Comprehensive Land Claims Policy (1973) and the James Bay and Northern Quebec Agreement (1975)

In 1972 Inuit and James Bay Cree took joint legal action against the Quebec government for its plans to develop a hydro-electric project in James Bay. However, before the case could proceed through the courts, negotiations began, prompted by the judicial affirmation of Aboriginal title in Calder (Rynard, 2000). Negotiations took place through the CLC, and in 1975 concluded with the formation of the JBA. The JBA was the first modern treaty in Canada and the first formed since 1930 (Rynard, 2000, 212). It was ratified by the Inuit, James Bay Cree, Quebec, and Canada. As the first CLC agreement, it has set parameters for subsequent comprehensive land claim negotiations.

The JBA organized land into three categories; Category III refers to provincial lands on which the Cree hold rights to harvest wildlife and fish. Category II lands are similar except that the Cree hold exclusive rights to harvest. Category I lands are under Cree ownership; however, Quebec holds rights to subsurface minerals (Rynard, 2000). Treaty rights were formed in exchange for the extinguishment of Aboriginal title. The timing of the agreement matters, not only in terms of the impact of the Calder ruling, but also because the constitutional protection of Aboriginal rights did not happen until 1982. This meant that, although Calder upheld the existence of

Aboriginal title, there was no constitutional protection of Aboriginal rights. Negotiations have been consistently organized through unequal relations of power between the state and First Nations, but in the JBA this asymmetry was intensified in a unique way because it was negotiated prior to the constitutionalization of Aboriginal rights (Rynard, 2000, 217). This is a relevant difference, as the TFNFA and other treaties were negotiated following the creation of section 35 rights and have negotiated the extinguishment of those rights. The drive to extinguish pre-existing Aboriginal rights and title through negotiations is generated by the need to create certainty over land ownership for resource development. These aspects of the agreement all set a precedent from which the land claims policy proceeds today.

3.4. Constitutional Debates: Federal Engagement during the Meech Lake (1987) and Charlottetown (1996) Accords

Following the entrenchment of section 35 rights, Aboriginal self-government became an issue of contention. Constitutional conferences over three consecutive years (1983-85) sought to define self-government, and the issue also featured in the failed Meech Lake and Charlottetown Accords (Hall, 1986, 78). At each of these meetings, then Prime Minister, Brian Mulroney, acted as a proponent of a marketized view of self-government which emphasized market participation (Hall, 1986, 77). This form of self-government was an attempt at assimilation and was meant to act as justification for the intended future removal of funding and service provision directed at Indigenous peoples (Hall, 1986). Though all constitutional amendment attempts failed, this type of thinking is still evident in land modernization attempts (Pasternak, 2015) and Western ideological understandings of property as improvement (Bhandar, 2018).

The Meech Lake Accord was a compilation of proposed amendments to the Constitution Act. Negotiations took place between the federal and provincial governments in 1987. Discussions at Meech Lake were concerned with a broad array of constitutional concerns, including an attempt

to create the conditions through which Quebec would sign the new Constitution. In addition to Mulroney's marketized understanding of self-government, the Meech Lake Accord complicated demands for self-governance because it aimed to increase the power of the provinces. Meech Lake failed specifically because it aimed at increasing the powers of Quebec and other provinces but did not guarantee Aboriginal rights. The accord was blocked by MLA Elijah Harper and other Indigenous leaders in Manitoba and was not signed before the mandated ratification date in 1987.

Meech Lake and the conferences that occurred between the accords in 1983, 1984, and 1985, all sought to define Aboriginal rights but failed. Following this, the Charlottetown Accord endeavored to constitutionally entrench and define the right of First Nations to self-government, but this never came to fruition because of its failure to pass as well (Howlett, 1994, 640). There were several reasons for this, including the perception of Western provinces of a consolidation of power in Ontario and Quebec. Some were not in favour of the accord because they believed that it either gave Quebec too much or too little power and status, depending on a person's position on the issue. Others opposed the accord because they disagreed with senate reform (Johnston, R., 1993, 44). [6]

The official federal policy shift to negotiate land claims with First Nations in 1995 was largely a response to the failures of the Meech Lake and Charlottetown Accords. There was deep public resistance to the amendment attempts, which were endorsed by the majority of political leaders, and this led to a shift in policy making across the country. During the1993 federal election,

[6] Popular opinion attributed the failure of Meech Lake to the closed-door nature of negotiations. In 1992, at Charlottetown, the federal and provincial governments tried once again to pass amendments to the Constitution Act. This time, they aimed for transparency through a public referendum. This decision to use a national referendum was also prompted by recent changes in three provinces: BC, Alberta, and Quebec, which made referendums mandatory prior to constitutional amendments. In order to pursue a uniform process across the country, this was extended to all provinces (Stein, 2009). The referendum, if passed, would provide political legitimacy to legislative acceptance of the accord, even though it was not constitutionally necessary, as the amending formula for the Constitution only demanded provincial legislative consent.

the Conservatives lost almost the entirety of their seats in the House of Commons. The Liberals gained power partly through a promise by Jean Chrétien not to pursue further Constitutional amendments. This promise necessitated he find another way to address what the Meech Lake and Charlottetown Accords intended to do, define Aboriginal rights and self-government. Even though Constitutional amendment was not possible through the Meech Lake and Charlottetown Accords, matters of Aboriginal rights and self-government were not left completely unanchored.[7] Protection of both were already provided for in the Constitution Act, as section 35 recognizes and affirms Aboriginal rights and treaty rights.[8] Therefore, the government was, and is, obligated to negotiate land claims. Chretien's response to his dilemma was a policy shift away from the denial of title to the official policy of treaty negotiations, a path which was already being pursued through the CLC process in many instances.

While historic treaties were formed between the Crown and one or several First Nations, modern land claims demand negotiations occur between the First Nation, the federal government, and the provincial government. Unlike historic treaties, modern land claim agreements also deal with self-government. The policy approach aims to establish agreement on the definitions of Aboriginal rights and self-government and avoid the use of the courts. In an effort to form agreement on these definitions, the land claims policy lists the areas over which the First Nation may self-govern, should negotiations between all three parties lead to agreement. The policy heavily emphasizes market participation and offers a goal of reducing First Nations' financial

[7] There are two types of Aboriginal rights in Canada, generic and specific. Rights of the first form are held by all First Nations in Canada and those of the second are held by one or several specific First Nations (Slattery, 2000, 215). Aboriginal title and the right to self-government are both generic rights. However, while applicable to all First Nations, self-government in each case can vary, dependent on many factors (Slattery, 2000, 215).

[8] Section 35 does not recognize Aboriginal title. Aboriginal title is understood to be in a complicated relationship with aboriginal rights, defined by some as a specific category of rights and by others as the foundation from which aboriginal rights are derived (Nadasdy, 2002, 248). Understanding title in this second sense, as the foundation for other rights, demonstrates that the source of the right to self-government is based on the First Nation's prior occupancy and an assumption of ownership of the land (Nadasdy, 2002, 248-249).

reliance on federal and provincial governments. One of the stipulations given in this list is the caveat that self-government arrangements must prioritize the social and economic priorities of the federal and provincial governments.

3.5. Land Claims in BC

BC underwent settlement late compared with the rest of the country. Large numbers of settlers did not arrive in the area until the mid 1800's and settlement in general did not involve cession of land through treaties. There were two areas of exception to this. First, on territories on Vancouver Island, James Douglas, chief official of the Hudson's Bay Company, and later Governor of Vancouver Island, signed 14 treaties with First Nations, known as the Douglas Treaties.[9] These land purchases were part of a project of attempted assimilation of Indigenous people into a European model of private property. This project began through Douglas, as one of assimilation, whereby in surrendering land, Indigenous peoples could obtain private property and assimilate into settler society as equal landowners. However, this policy was changed after Douglas' retirement when provincial legislation prohibited Indigenous people from obtaining private land at all, instead confining them to reserve land (The Report of the BC Task Force, 1991). As discussed in this work's theoretical chapter, in BC this reserve system was dictated by the province, rather than the federal government and land allocated to reserves was extremely limited (Harris, 2002, 2004). Second, Treaty 8, signed in 1899, applies to territory in Northeastern BC.

With exception to these two areas, BC resisted negotiations until the 1990s and it was the last province to acknowledge Aboriginal title (Tennant, 1990). Treaty 8 and the Douglas Treaties were the only formal agreements between First Nations and the Crown concerning land ownership in the province until the Nisga'a Agreement (BCTC Annual Report, 1994, 5). The Nisga'a Agreement was not settled through the BCTP, but it was the first modern treaty signed in BC. Following this, the TFNFA, the Maa-nulth First Nation Final Agreement (2011) and the Tla'amin

[9] Although these agreements, formed during 1850-1854, have been recognized by the courts as treaties, they can be more accurately understood as agreements of land purchase, rather than nation-to-nation treaty relationships (Tennant, 1990). However, as Christopher McKee (2000) writes, regardless of this distinction, the Douglas Treaties show that colonizing authorities were acting through a recognition of First Nations' land rights (13).

Final Agreement (2016) were all signed through the BCTP. Notwithstanding the Douglas Treaties and Treaty 8, as well as these four modern treaties, the province remains unceded. The lack of cession is in contravention of founding documents, such as the Royal Proclamation.

When the federal government initiated the CLC in the 1970s, BC did not begin negotiations right away. The Social Credit Party, in power from 1976-1991, actively opposed land negotiations (Tennant, 1990). Opposition continued until 1989, when increasing Indigenous resistance to land dispossession and encroachment by the state led to the establishment of the Premier's Council on Native Affairs. The following year, the council advised the BC government to undertake a provincial policy shift away from the denial of Aboriginal land title to negotiating land claims (BCTC Annual Report, 1994, 6). This same year, BC joined negotiations with the Nisga'a and federal government in what would later become the first modern treaty signed in the province.

The BC Social Credit Party finally committed to treaty negotiations in 1990, pressured by the federal government and the public (Rynard, 2000). They initiated the formation of the British Columbia Claims Task Force (hereafter, BC Task Force) a body charged to make recommendations for the negotiating process. The party did not stay in power long enough to actually engage negotiations, as they were voted out of office the following year. Over that year, the task force conducted research on the historical background of settlement in BC and gained insight into possibilities for new relationships between Canada and First Nations. In 1991, it released its report recommending the BCTP, advocating for a "positive and lasting change in the political, social and economic structures of British Columbia" built on a negotiation process that is "open, fair and voluntary" (Mathias, et. al., 1991, 1). The report determined the scope of negotiations conducted through the BCTP, as well as the way the process should be organized. It

included the formation of the BCTC and a 6-stage process to conduct negotiations. In addition, the report made 17 other recommendations, all of which were adopted.

That same year, the provincial New Democratic Party (hereafter, NDP) was elected. The party ran on a platform promising to negotiate with First Nations claimants, emphasizing social equality and public participation. The party platform pushed for increased public involvement in land management. Upon election, the NDP began a number of initiatives aimed at this goal (Jackson & Curry, 2004). One of these initiatives was the formation of the BCTP, recommended by the BC Task Force. The new government adopted a multifaceted project aimed at increasing public participation over what they considered Crown land and resources (Jackson & Curry, 2004,). This resulted in a shift in provincial policies, from a century and a half of denial of title to active land claim negotiation participation.

The switch in political attitudes was also driven by changing economic demands. The provincial economy began with reliance on the fur trade. This shifted to the gold rush and has continued to the present, with the centrality of timber harvest, mining, and fishing (Ratner, Carroll & Woolford, 2003), as well as the construction of oil and liquefied natural gas pipelines. Displacement and dispossession of Indigenous peoples has central in the formation of this type of economy. The shift from the fur trade to a resource-based economy meant that Indigenous peoples were no longer necessary for their labour and colonial officials pursued settlement through the removal of them from their lands, confining people to small areas of reserve land (Altamirano-Jimenez, 2013). Continued reliance on resource extraction has meant that these trends continue and that the state has maintained colonial policies of land accumulation by achieving certainty over land ownership during negotiations. Canada pursues certainty through the BCTP because resource development on unceded and disputed land can be halted or disrupted by use of the courts where

certainty is not established. Many have noted how a lack of certainty greatly hinders foreign direct investment in development and resource extraction because of the insecurity it poses for returns on investment (Corntassel, 2012; Nadasdy, 2002; Woolford, 2005; Baird, 2005). The BCTP offers a means through which the state can pursue the stability necessary for foreign investment, as agreements establish legal certainty over land and rights.

As already explained, certainty can mean the resolution of conflict between Crown and Aboriginal title (Wooldford, 2005). In land claims, certainty also refers to a legal requirement to define the rights and responsibilities within treaty agreements (Stevenson, 2000). Certainty in the context of the BCTP also demands the clear definition of the rights of the First Nation involved in the treaty negotiation as well as the territory on which those rights apply (Blackburn, 2005). Clearly defined rights and land ownership are often cited as attractive goals by all parties. Existing Aboriginal rights under section 35 are ill-defined and the federal government often violates or fails to uphold its fiduciary duties to First Nations. There is a need for legal definition in order for clarity and effectiveness in enforcement of these rights.

Tsawwassen Chief at the time of negotiations, Kim Baird, noted divergent interests throughout the TFNFA negotiations, as the state sought certainty over land and resources and the Tsawwassen worked to establish certainty over self-governance (Baird, 2005). Veracini argues that if sovereignty is understood as "the relationship between people, power, and space over time", settler sovereignty in settler colonial contexts involves one exclusive understanding of these relationships (Veracini, 2010, 54-55). This has been a major critique of the BCTP. State policies within negotiations pursue the extinguishment of Aboriginal title, through the vision of reconciliation as an act of finality (Tully, 2001). This vision differs from understandings of reconciliation as an ongoing process, the view of many Indigenous groups (Tully 2001). As

negotiations involve asymmetrical relations of power, these conflicting goals and visions of purpose do not receive the same weight and the state's pursuit of title extinguishment is the exclusive organizing mode of negotiations (Tully, 2001; Borrows 2001; Egan 2012).

3.6. Chapter Conclusion

This chapter undertook historical analysis of how the land claims policy came about in Canada. Recognition of Aboriginal title has not been part of state policies in a uniform or consistent manner and at different times and in different areas, recognition of title was ignored or outright denied. Refusal to recognize title led to settlement without land cession in many areas, including the majority of BC. These actions were in contravention to the Royal Proclamation and were illegal even by standards of Canadian law. In 1973, the SCC's ruling in Calder determined title existed regardless of state recognition of it, prompting a shift in state engagement and formation of the official policy. Calder, the CLC process, and the first treaty settled through it, the JBA, set the stage for this shift. The process set the parameters and possibilities for further negotiations, including the TFNFA. Most significantly, it set up policies of extinguishment, where land claims are used to extinguish Aboriginal title and section 35 rights in exchange for new treaty rights. The start of the CLC process preceded the constitutional crises that took place throughout the 1980s and into the 1990s and offered the Chrétien government a viable option through which to address ambiguity surrounding Aboriginal rights at a time when the public had made it clear it was tired of continued Constitutional amendment attempts.

Despite a history of denying Aboriginal title in the province, and a very late engagement with the CLC process, BC was engaging with negotiations prior to the 1995 policy shift. The Nisga'a Final Agreement was already in formation and several other modern treaties, including the TFNFA, were being negotiated through the BCTP. In order to meet legal obligations to First

Nations, and respond to constitutional ambiguity surrounding section 35 rights, the BCTP establishes certainty over land and Aboriginal rights. Negotiations focus on ways land is to be ceded to the Crown in exchange for financial payments from the federal government to the First Nation ceding ownership of territory (Jackson & Curry, 2004). In addition, they solidify a form of Aboriginal rights that emphasizes market participation and minimal self-government, separated from land.

Policies of extinguishment continue to organize negotiations. In the case of the TFNFA, both Tsawwassen and state negotiators sought to establish certainty over Tsawwassen rights. The Tsawwassen First Nation cited their concern over ambiguous rights and their exclusion from wealth generated by resource development on Tsawwassen territories as reasons for land claim engagement. They sought to gain a municipal style status of government through which to interact with other governments. A desire on the part of many First Nations, including the Tsawwassen, to establish certainty over their rights has been met by a provincial and federal desire to establish certainty over land and resource ownership. These goals are, in many ways, irreconcilable, as practicing rights and self-government often demands a significant land base. Obvious state goals of land accumulation make this a zero-sum outcome. The more land the state gains ownership of through land claims, the less land the First Nations has available on which to practice self-governance. In order to manage this contradiction, negotiations separate self-government from land through an emphasis on market participation. This was evidenced through the TFNFA. The following chapter will outline specific exchanges that took place through the agreement. These exchanges continue settler colonial imperatives towards further accumulation of territory and assertions of sovereignty.

Chapter 4: The Tsawwassen First Nation Final Agreement

4.1. Introduction

The Tsawwassen First Nation has resided on their territories since time immemorial. Carbon dating has traced Tsawwassen occupancy to at least as early as 2260 BC (Tsawwassen First Nation website). It is one of many Coast Salish Nations whose ancestral homelands cover territories surrounding the West Coast of what is largely known as BC. When BC became an official British colony in 1858, the Crown pre-empted large amounts of Tsawwassen land and gave it to settler families without Tsawwassen consent. In 1871, the Tsawwassen reserve, a 490-acre area, was established as part of a colonial land management strategy to isolate Aboriginal peoples, and by 1890, settlers had developed about 40,000 acres of land surrounding it (Tsawwassen First Nation website). Now, the Tsawwassen First Nation consists of about 400 members, half of whom live within the Tsawwassen land base (Curry, Donker & Krehbiel, 2014). In addition to the damage land theft and colonial management inflicted on Tsawwassen territories and the nation's ability to harvest, the Tsawwassen were also excluded from benefiting from the wealth accumulated.

On February 23, 1994, the Tsawwassen First Nation met with the BCTC to discuss their formal entrance into the BCTP (BCTC Annual Report, 1994, 19). Reasons for entry into negotiations included poor economic and housing conditions on the reserve and high rates of unemployment among members (Baird, 2005). Tsawwassen Chief at the time and driving force in negotiations, Kim Baird, explained that she pursued the treaty in order to escape Indian Act control which had historically prevented the Tsawwassen's economic success (Baird, 2005). Baird (2011) writes that she and others in Tsawwassen leadership pursued the TFNFA because they saw it as the most effective means available for the Tsawwassen to benefit from wealth generated from the territory.

The Tsawwassen First Nation entered into the BCTP in 1993 and ratified the agreement in 1997 with a 70% vote in favour. The agreement came into effect on April 3, 2009 (Curry, Donker & Krehbiel, 2014). Curry, Donker, and Krehbiel (2014) conducted interviews with members of the Tsawwassen First Nation and found that participants most commonly cited a desire to break away from Indian Act governance and to gain control over future decisions as reasons for participation in the BCTP. In 2009, after over 15 years of negotiations between the Tsawwassen First Nation, the province, and the federal government, the TFNFA was signed. As the first land claim and only urban one formed in BC, it followed nearly two centuries of colonial land theft and state intrusion. Key aspects of the agreement include the establishment of self-government, a transfer of 434 hectares of provincial Crown land and 290 hectares of what was previously Tsawwassen reserve lands to the Tsawwassen First Nation, and cash transfers (Curry, Donker & Krehbiel, 2014). Analysis of the exchanges must account for impact of the Vancouver Port Authority's (hereafter, VPA) construction and operation of a ferry terminal and coal port on Tsawwassen reserve lands. These impacts on Tsawwassen lands, the exclusion of the Tsawwassen from the wealth the projects generated, and the interests of the provincial government in maintaining benefits from industry in this area created the economic and political context within which the TFNFA was formed. This context is important to understanding key provisions concerning self-government, land and financial transfers in the TFNFA and what the state has gained from each.

4.2. Construction of the BC Ferry Terminal (1958) and Roberts Bank Coal Port (1969)

The Tsawwassen Nation was once rich in resources. However, the urbanization of Tsawwassen territory, which gave rise to the cities Delta, Richmond, and Surrey, did not spread wealth to Tsawwassen members. Moreover, this urbanization has significantly impacted Tsawwassen hunting and fishing practices (Baird, 2011). The Nation's traditional harvest included

salmon and sturgeon, crab, waterfowl, seals and sea lions, elk, deer, black bear, beaver and western red and yellow cedars (Baird, 2007). This harvest has been dramatically and negatively impacted by colonial imposition, including development, industrialization, and urbanization of traditional Tsawwassen territories. In addition, environmental damage and numerous highways in the area impacted lands claimed by the Tsawwassen. These projects did monumental damage to Tsawwassen beaches, impacting not only harvest, but also the Tsawwassen's ability to practice spiritual and cultural activities (Baird, 2011). Two development projects were particularly damaging to Tsawwassen lands and ways of living. They continue to generate high revenues, which the Tsawwassen only benefited from after forming agreement over land ownership. These projects are the Tsawwassen BC Ferries Terminal and the Roberts Bank Coal Port.

The construction of the BC Ferries Terminal began in 1958. Construction cut directly through the Tsawwassen reserve, dividing it in two. The construction of the long causeway, extending out through the ocean to the busy ferry terminal disrupted beach access significantly. Expansions in 1973, 1976, and 1991 further exacerbated impact to Tsawwassen reserve lands and people (Rhodes, 2009). The Tsawwassen ferry terminal is the largest and busiest of two terminals on the Lower Mainland, transporting people to and from Vancouver Island, numerous smaller Gulf Islands, and the Sunshine Coast. In addition, BC ferries service trips between Northern BC and Haida Gwaii. Altogether, BC Ferries has 47 terminals throughout the province, generating $899 million in revenue between March 2017 and March 2018 (British Columbia Ferry Services Inc., 2018, 25). Beyond the direct revenue, the ferries have enabled settlement and urbanization of the islands surrounding the Lower Mainland and movement of people and goods between these areas, allowing BC's economy to grow in unmeasurable ways. Since the finalization of the TFNFA, the Tsawwassen First Nation has accessed some of the wealth generated from the ferry terminal

through the newly constructed Tsawwassen Mills Shopping Center, built on Tsawwassen lands by Ivanhoé Cambridge, a global real estate corporation. The shopping center opened in 2015 and was widely approved by the Tsawwassen First Nation due to the creation of jobs and revenues (Bennett, 2016). The TFNFA enabled the Tsawwassen to benefit from this project by enabling the nation to act as economic agents. The project facilitates global movement of capital and enabled the extinguishment of federal financial obligation to the Tsawwassen First Nation. Taxes obtained through the Tsawwassen revenues and income generated by jobs stemming from the mall go directly to the Tsawwassen First Nation government, taking the place of federal government funding.

Shortly after the Tsawwassen ferry terminal was built, construction on the Roberts Bank Coal Port began in 1968. The coal port is a 113-hectare island connected to the mainland by a causeway through which trains carry coal for export 24 hours a day (Rhodes, 2009). The coal port is a Superport and is a major point of Canadian coal export. From June 2017 to June 2018, Westshore Terminals Investment Corporation, the company operating out of the Roberts Bank Coal Port, made over $354 million (Westshore Terminals Investment Corporation, 2018, 3), demonstrating the enormous wealth generated by the project annually. Construction of the port, like the ferry terminal, was environmentally devastating to Tsawwassen beaches and lands and continues to impact the Tsawwassen people as noise and pollution are constant.

The Tsawwassen were never consulted on either the ferry or coal port project (Rhodes, 2009), and ended up suing the VPA for this failure to consult with them. The suit demanded compensation for the incredible destruction these projects did to Tsawwassen lands, beaches and harvest capabilities. In 2004, during land claim negotiations but prior to reaching finalization of the TFNFA, a settlement worth $47 million was reached with the VPA (Simpson, 2004). The

settlement, a Memorandum of Agreement between the Tsawwassen First Nation and the VPA, included $2 million in compensation for past environmental destruction, $2.5 million to compensate for expected future environmental damage, and $2.5 million to fund projects aimed at mitigating the adverse effects of this damage (Simpson, 2004). The rest was made up of benefits from contracts operating out of the Roberts Bank Coal Port, employment for members, future rental costs paid to the Nation for use of land, and a transfer of water lots from the province to the Tsawwassen First Nation (Simpson, 2004).

The agreement was not really a punitive measure against the VPA for past destruction of Tsawwassen lands and ways of living. The majority of the settlement was not paid directly to the Tsawwassen First Nation. Funds were instead dependent on the success of the Roberts Bank Coal Port. In effect, the settlement made the Tsawwassen stakeholders in the project. The agreement occurred outside of the TFNFA negotiations, but the goal of being involved in economic development of their lands was not isolated to this agreement and was instead a key feature throughout the formation of the TFNFA. Then Chief, Kim Baird explained the ability to act as a stakeholder in economic development was a major goal in the Tsawwassen's participation in the BCTP, and a victory in resisting the historic exclusion of the Tsawwassen from the economic benefits of development in the province (Baird, 2005).

The settlement with the VPA disallows future resistance to the project through the courts. It created the conditions necessary for unimpeded expansion of the terminal and of coal exports (Simpson, 2004). This expansion is still underway, as the Roberts Bank Terminal 2 Project is set to add 2.4 million twenty-foot equivalent units in container capacity to the coal port (Patterson,

2018).[10] The 2004 settlement included provisions that the Tsawwassen First Nation commit in writing that both the VPA, and Canada, had fulfilled duties to consult with the Nation surrounding development of the Roberts Bank Terminal 2 project. In exchange for the settlement amount, the Tsawwassen are no longer permitted to impede the VPA in the construction or operation of the Roberts Bay Coal Port and can no longer sue the VPA for past or future infringement of Tsawwassen interests (Roberts Bank Development Memorandum of Agreement, 2004, 8).

Clearly, even in just its daily operations, the coal port infringes on Tsawwassen abilities to practice traditional harvest and ceremonial activities. A study in 1985 showed early impacts of the Coal Port had significant impacts on salmon because it modified or destroyed their habitats and the areas necessary for the survival of young (Levings, 1985, 248). Furthermore, measurement of coal particles in sediment near the Roberts Bank terminal show levels have increased from concentration of 1.8% in 1977 to 3.6% in 1999 (Johnson and Bustin, 2006, 57). Though current data is unavailable, it is likely that these concentration levels have only increased further, as the Roberts Bank Coal Port added a second terminal in 1997 and has been expanded continuously since. In cases of accidents and spills this impact can be, and has been, even more devastating. A major example of this occurred on December 7, 2012, when a bulk coal carrier, the Cape Apricot, crashed into the Roberts Bank Coal Port causeway. The crash caused an estimated 30 tonnes of coal to be spilled into the ocean water (Hamilton, 2012).

Despite the danger of potential further spills and even just pollution from normal operations, the Tsawwassen First Nation has found it preferable to be a part of the Roberts Bank Coal Port, and to benefit from the BC Ferries Terminal through the Tsawwassen Mills Shopping

[10] The expansion was, as of March, 2018, halted due to an assessment warning of its impact on the western sandpiper population (Pynn, 2018). The future of the project is now unknown. However, should expansion be stopped, it will likely not be because of Tsawwassen resistance.

Centre, than to remain excluded from the project revenues. The majority of Tsawwassen lands, as determined by the TFNFA, sits between the coal port and ferry terminal. It makes sense that the Tsawwassen want to have input on their operations and to derive economic benefit from them, especially considering the nation takes on the majority of the risk of each project regardless of whether or not they benefit from them. The important point here is that, because of this, the Tsawwassen no longer pose an obstacle to either project, their expansions, or further development projects in the area. Moreover, the Tsawwassen gain revenue and taxation from the projects, through personal income from jobs, as well as from revenue agreements with corporations such as Westshore Terminals and Ivanhoé Cambridge, relieving the federal government of its financial obligations to the Nation, and positioning people as neoliberal entrepreneurial subjects within the Canadian state.

4.3. Negotiations and the Formation of the TFNFA (Post-1993)

The historical restriction of the Tsawwassen to the small Tsawwassen reserve, the impacts of the ferry and coal port, the exclusion of the Tsawwassen from wealth generated from the nation's territories, and the buildup of the Lower Mainland, all created the conditions within which the Tsawwassen First Nation began land claim negotiations. As the first, and so far, only modern urban agreement in BC, one of the challenges to negotiations was the concentrated urban settlement of the Lower Mainland; a considerable amount of BC's population resides on Tsawwassen lands. Therefore, a lot of stakeholders were involved in negotiations (Baird, 2005). There was settler resistance to development on Tsawwassen lands for environmental reasons, a point of contention because, as Baird explains, development is necessary if Tsawwassen standards of living are to increase and the Tsawwassen were no longer to be excluded from the benefits of previous development and wealth generation from the territory (2005).

In 1995, The Tsawwassen First Nation moved into the second stage of the BCTP, indicating their readiness to begin negotiations with Canada and the province (BCTC Annual Report, 1995, 13). By 1996, the Tsawwassen First Nation had entered into stage three of the BCTP, negotiating a framework for an agreement (BCTC Annual Report, 1996, 11). Baird explains how since the finalization of the treaty, the Tsawwassen have been able to practice self-governance without restrictions of the Indian Act (2011, 171). Escaping Indian Act regulation has been cited by proponents of the FNPOI as well. Land modernization attempts have historically incorporated similar discourse whereby poverty alleviation and inclusion have been used to pursue commodification of land. This ignores different and often conflicting interests in the land between Indigenous people, the state, and corporations (Pasternak, 2015).

One of Baird's goals was to build relationships with Canada and the province. She explains the TFNFA is an important step towards reconciliation because the agreement replaced state controls with a Tsawwassen legislature and constitution (Baird, 2011). This legislature has authority over Tsawwassen cultural practices, passing budgets and laws, and making resolutions on matters such as community safety (Baird, 2011). The Tsawwassen now have a "municipalities plus-type status" in negotiating with the provincial government (Baird, 2011, 172). While this position has garnered criticism from those both inside and outside the Tsawwassen Nation, Baird contends it is the most effective status possible to interact with the province and industry in ways the nation can be heard and from which to participate (Baird, 2005). For example, this position enables the Tsawwassen to participate in Associated Entities of the Greater Vancouver Regional District (hereafter, GVRD), such as the Greater Vancouver Water District Board (Tsawwassen Final Agreement, 2007, 165). With this position also comes the duty to pay annual fees to the GVRD for service provision (Tsawwassen Final Agreement, 2007, 166). It has also allowed, as

discussed above, the Tsawwassen to enter into economic agreements with development and economic projects such as the Tsawwassen Mills Shopping Centre.

Baird sought to raise socio-economic standings of Tsawwassen members through treaty negotiations. She clarifies this goal as one of integration, not assimilation, and explains the TFNFA as the most effective way to raise living standards among Tsawwassen membership, which is necessary for Tsawwassen nation-building (Baird, 2011). Baird explained that the agreement needed to give enough land and cash to allow the nation to rebuild its original traditional wealth. However, the high value of urban land made it difficult to gain enough land and cash to meet these goals (Baird, 2005). Land values are one of the main issues in treaty negotiations, and a point of continued concern in many negotiations. The Tsawwassen territory has been heavily urbanized and land values are extremely high. Because of this, the size of land transferred to Tsawwassen ownership and jurisdiction was small. This has limited possibilities for land use for the Tsawwassen and has also generated pressures surrounding Tsawwassen land management (Baird, 2005).

4.4. Analysis of the Tsawwassen First Nation Final Agreement

As explained, the TFNFA is a comprehensive land claim agreement between the Tsawwassen First Nation, BC, and Canada and was the first modern land agreement signed through the BCTP. It outlines the exchanges of land, rights, and money between the three parties. The agreement transferred the vast majority of land to the Canadian state and changed the land the Tsawwassen First Nation did receive from collective territory to fee-simple property, owned by the nation. In exchange, the Tsawwassen gained financial transfers and the means to access some of the wealth generated from the land through a municipal-plus style status. This allows the nation to engage with development and municipal decision making.

The TFNFA consists of 25 chapters. Many of these chapters are concerned with administrative organization, such as transition, capital transfer and negotiation loan repayment, fiscal relations, taxation, eligibility and enrollment, dispute resolution, amendment, ratification of the final agreement, and implementation. Other areas of the document organize territory, rights, and governance and are of the most interest to this work. These chapters focus on lands, land title, land management, access, forest resources, fisheries, wildlife, migratory birds, national parks and national marine conservation areas, provincial parks and gathering, culture and heritage, environmental management, governance, and intergovernmental relations and services.

Building on the previous historical analysis of the evolution of the land claims policy, analysis of the TFNFA is also conducted through the theoretical lens of political economy. This examination makes sense of the material exchanges that took place through the document by contextualizing them within two state goals. These are, continuing Canada's access to land and assertion of sovereignty, and inserting Indigenous peoples into the market through the transformation of land into property, dispossession, and the marketization of citizenship. Discussion focuses on the exchange of rights, land and financial transfers, to demonstrate that the state created the conditions by which the Tsawwassen's way of life has been damaged, largely through their confinement on a small reserve and the development of Tsawwassen traditional territories without their consent or involvement. These conditions prompted the Tsawwassen to engage with the state through the land claim process in order to gain some degree of control over some parts of their land and economic future. The land claim has enabled them to do so, but only within settler colonial and neoliberal parameters where Tsawwassen self-government and ownership of lands has not impeded on Canadian sovereignty, land development or investment in resources. Rather, the agreement has benefited the state by finalizing Crown ownership of the vast

majority of the Tsawwassen's traditional territory and bringing the nation into further development projects. In exchange for the majority of the land, the state exchanged rights and money, all oriented towards market participation and the global movement of capital.

4.4.1. Rights

A primary exchange that took place through the TFNFA was the "full and final settlement" of Aboriginal rights and title of the Tsawwassen First Nation, in exchange for newly defined, exhaustive section 35 rights, as well as a capital transfer (Tsawwassen First Nation Final Agreement, 2008, 22). The TFNFA explains that these rights take three forms. First, there are rights and title to Tsawwassen lands as modified by the agreement. These modified rights extend from those that pre-existed the agreement. The Crown is obligated to uphold these rights in their new, modified form (Tsawwassen First Nation Final Agreement, 2008, 23). Second, there are rights based on the Tsawwassen's governmental authority. And third, the document outlines "Other" section 35 rights that remain undefined (Tsawwassen First Nation Final Agreement, 2008, 22). Janine Brodie (2010) argues neoliberalism involves privatization and individualization through governing practices that emphasize the market and position people as "entrepreneurial subjects" (5). The following description of the types of rights the Tsawwassen gained through the agreement shows how these rights primarily focus on harvest, resources, and taxation. Rather than position the Tsawwassen First Nation as a nation in relationship with Canada, these rights, which were desired by the Tsawwassen membership and do benefit the nation, also integrate the Tsawwassen into the state because they hold powers similar to those held by municipalities and are only really able to be expressed through the market.

The Tsawwassen government gained some law-making authority through the agreement, specifically over the areas of subsurface resources (43), land management (63-64), access to Tsawwassen lands (67), forest resources management (73), the harvest of aquatic plants and fish

under the Tsawwassen fishing right, as well as the distribution and transport of that harvest off Tsawwassen lands (82), wildlife management on Tsawwassen lands (98), the harvest, distribution and transport of harvest of wildlife (97-98) and birds (107) under the Tsawwassen right to harvest, the designation of which members may harvest fish, aquatic plants, wildlife, and birds under the Tsawwassen right to harvest (112), trade and barter within membership of that harvest (120), the preservation and promotion of Tsawwassen culture and the Hun'qum'i'num language (125), pollution and waste management (including protection of air quality although standards must meet the bylaws set by the Greater Vancouver Regional District) (131), the formation of Tsawwassen public institutions and corporations (143), and the direct taxation of Tsawwassen members on Tsawwassen lands (Tsawwassen First Nation Final Agreement, 2009, 183). However, in all of these areas federal or provincial law prevails if there is a conflict and Tsawwassen laws must be consistent with the TFNFA (Tsawwassen First Nation Final Agreement, 2008). In addition to these restrictions, the Tsawwassen First Nation does not have law-making authority over criminal law, criminal procedure, intellectual property, official languages of Canada, aeronautics, navigation, shipping, labour laws, or working conditions (Tsawwassen First Nation Final Agreement, 2008, 24-25).

The designation of Tsawwassen law-making authority over only these areas falls flat because the federal/provincial division of powers should, as Abele and Prince (2003) argue, operate alongside a division of powers between the Crown and First Nations in a system of treaty federalism (140). Kiera Ladner (2003) explains treaty federalism as "the joining of two political orders: the treaty order and the federal/Canadian constitutional order" (175), which are at times consistent with one another, and at others, not. Founding documents have entrenched principles of both federalism and treaty relationships in Canadian law and governance (Abele and Prince 2003).

Treaties were integral to the formation of the Canadian state and their significance was entrenched in numerous founding documents, including the Royal Proclamation. The TFNFA fails to operate through principles of treaty federalism because the Tsawwassen First Nation gained law-making authority primarily over areas concerned with Tsawwassen culture, membership, and the Tsawwassen right to harvest. Tsawwassen laws or regulations cannot conflict with Canadian sovereignty or economic interests. This is evidence of how neoliberal policies of recognition seek to celebrate culture in service of furthering economic agendas. Charles Hale (2002) writes that recognition applies to minimal cultural rights and a rejection of others to the benefit of those in power, deploying neoliberal policies (487). Ladner calls for a rejection of this and a rejection of positioning Indigenous peoples in Canada as either simply Canadian citizens or as "citizens plus" when they are instead, sovereign nations with connections to the Crown through varied nation-to-nation relationships (Ladner, 2003, 170).

The subordination of Tsawwassen law to federal and provincial laws and the stipulation that Tsawwassen laws must remain consistent with the TFNFA are significant restrictions on Tsawwassen sovereignty. Furthermore, the agreement designates the Tsawwassen First Nation as a "First Nation member in the Greater Vancouver Regional District", meaning it can participate in Associated Entities as a member of the GVRD, including having a voice in the Greater Vancouver Water District Board (165). The agreement determined the GVRD is the provider of core mandatory regional services to the Tsawwassen First Nation in exchange for annual fees charged the Tsawwassen First Nation (166). The designation of the Tsawwassen First Nation as a member of the GVRD enables the Tsawwassen to have a voice in municipal level politics and policy, a power the Nation did not have prior to the agreement. As evidenced by the exclusion of the Tsawwassen First Nation from decision making processes during the construction of the ferry

terminal and Roberts Bank Coal Port, involvement in decision making over matters that impact the Tsawwassen territory is extremely important. However, designation of the Tsawwassen First Nation as a member to a municipal plus style status benefits both the province and the federal governments. Projects are able to move forward with the addition of the Tsawwassen as stakeholders.

The Tsawwassen First Nation now holds powers similar to a municipality and this does not challenge Canadian sovereignty. Rather it situates the Tsawwassen First Nation alongside Canadian municipalities and rejects any organization through a nation-to-nation relationship, advocated for by RCAP and many Indigenous leaders (Burnett, 2002, 230). Ladner (2003) critiques the land claims policy for failing to incorporate RCAP recommendations and build nation-to-nation relationships, and instead pursuing policies of integration of Indigenous peoples through a citizens-plus framework. The integration of the Tsawwassen First Nation as similar to a municipality follows the same strategy, allowing the state to appropriate land through inclusion rather than exclusion. Second, it prevents the Tsawwassen First Nation from pursuing lawsuits following future development projects. As discussed above, the Tsawwassen First Nation successfully gained compensation for the destruction levied by the Roberts Bank Coal Port construction and operation. Despite the caveats and restrictions that came attached to that compensation, the Tsawwassen's success in holding the VPA accountable, even minimally, for damage done to Tsawwassen lands and ways of living is an example of effective legal resistance against development of unceded territory. Resistance discourages foreign investors from investing in resource development in BC. The involvement of the nation in decision-making can be read as a move to prevent instability in development later on. Third, the Tsawwassen First Nation now pays annual fees to the GVRD for service provision. The TFNFA changed the Tsawwassen lands

from reserve lands and other contested territory into fee-simple property, some of which the Tsawwassen now own. The Tsawwassen government holds powers over taxation, and taxes paid by Tsawwassen members are made to the Tsawwassen government and not the federal government. These taxation powers also benefit Canada because taxation funds have replaced the state's funding responsibilities.

The majority of Tsawwassen members wanted to obtain certainty over their rights, exercise those rights, and reduce poverty. The TFNFA enables them to do these things. However, economic participation has demanded participation in the very markets that destroyed their homelands to begin with. The state set up certain parameters of the land claim which disallowed alternative paths forward. Poverty rational was used, as it has been through the FNPOI, as a means through which the state was able to change land into property, a necessary condition for market activities and an economic solution to a largely political situation.

4.4.2. Land

In addition to the extinguishment of previously held Aboriginal rights and title for these three types of newly defined Tsawwassen rights, the TFNFA organized the transformation and exchange of land. The Tsawwassen First Nation relinquished claim to the vast majority of contested territory in exchange for ownership over small land parcels, all of which were changed into fee-simple property (Tsawwassen First Nation Final Agreement, 2009, 39). The Tsawwassen claimed 10,000 square kilometers of territory and obtained ownership over 7.24 square kilometers (plus a right of first refusal over another 2.78 square kilometers should they choose to buy it from the Crown). This means the state accumulated more than 99% of the Tsawwassen traditional territory.[11] The agreement entrenches Tsawwassen ownership over some land; however, this land

[11] Parts of this area are also claimed by other First Nations, and while the land claims process does not consider overlapping claims, those lands still remain unceded by those claimants. I was unable to find data on this. However,

is considered to be owned by the Tsawwassen in fee-simple, rather than as collective territory (Tsawwassen First Nation Final Agreement, 2009, 39). In addition, much of this land was previously held by the Tsawwassen as reserve land.

Tsawwassen land now includes designated Tsawwassen land, "Other Tsawwassen Lands" including the Boundary Bay and Fraser River land parcels and land the Tsawwassen First Nation acquires in the future as fee-simple purchases (42). These "Other" lands are not under the jurisdiction of the Tsawwassen government, and these three different types of land are important to understand. Tsawwassen lands are lands over which the Tsawwassen First Nation has ownership of and jurisdiction (42). These are the lands which sit between and are cut across by the BC ferry terminal and Roberts Bank terminals. "Other" lands are not connected to Tsawwassen lands, and encompass a section of land to the East, part of which sits on Boundary Bay. Finally, there are lands over which the Tsawwassen have a right of first refusal, meaning the Crown must offer to sell the land to the Tsawwassen before any other buyer, should it seek to sell it.

As discussed in Chapter 2, Mirowski (2013) and Harvey (2016) each argue that neoliberal privatization of land allows for colonial appropriation of it and the repression of alternative forms of production and consumption. The land claim transfered the majority of contested land to the state and created the conditions through which the Tsawwassen now participate in neoliberal relationships of production and consumption. Participation through involvement in the Tsawwassen Mills Shopping Center, Roberts Bank Coal Port, and the GVRD have decreased poverty among Tsawwassen membership by positioning people as individualized entrepreneurial subjects, boosting the economy, preventing resistance to development, and relieving the state of

in terms of the Tsawwassen land claim, Canada was able to extinguish Tsawwassen title to nearly the entirety of their 10,000 square kilometers of traditional territory.

its obligations to the nation. The transformation of Tsawwassen land from territory to fee-simple property has made ownership clear to all participants, producing certainty over ownership on all sides. It allows the Tsawwassen to do certain things and prohibits others. This is similar to the FNPOI, which offers the means to change reserve land into fee-simple property in order for owners to access mortgage credit (Pasternak, 2015). Changing Tsawwassen land from reserve land and disputed territory has changed the way rights can be thought of and practiced, undermining the self-determination of the Tsawwassen First Nation.

The transformation also enables the movement of capital in a number of ways. As Shiri Pasternak and Tia Dafnos (2017) write,

> [...] Indigenous peoples interrupt commodity flows by asserting jurisdiction and sovereignty over their lands and resources in places that form choke points to the circulation of capital. Thus, the securitization of ‘‘critical infrastructure’’—essentially supply chains of capital, such as private pipelines and public transport routes—has become a priority in mitigating the potential threat of Indigenous jurisdiction (741).

In other words, in order to mitigate risks to economic development and the movement of capital, the state seeks to secure land so that contestations of ownership or jurisdiction cannot impede development. By conceding small areas of land to the Tsawwassen the state was able to gain ownership of the majority of land under claim. Moreover, in changing the Tsawwassen land from collective territory to fee-simple property, negotiations have constrained the Tsawwassen's capabilities to practice self-governance in ways that would challenge development or investment.

In addition to the limited size of the Tsawwassen land base, and the change in land to fee-simple property, the type of land the Tsawwassen reclaimed has also restricted activities and self-government. Tsawwassen traditional territories have now been heavily urbanized. This is important to consider for two reasons. First, it meant that the market value for lands claimed was

very high and impacted the amount of land state governments were willing to concede. The Tsawwassen land base of 7.24 square kilometers is dramatically smaller than the 2,019 square kilometers attained by the Nisga'a First Nation through the Nisga'a Final Agreement (Nisga'a First Nation website, Understanding the Treaty), which was concerned with land far north in BC away from urban centers. Rynard (2000) argues that in the Nisga'a agreement the Crown did not make adequate progress towards meeting RCAP recommendations concerning land and resource rights. The limited land base of the Tsawwassen shows this failure continued and was in this case even more constraining. The impact of urban land values is also visible when one looks at the TFNFA in comparison to the Tla'amin Final Agreement. The Tsawwassen gained less land compared to the Tla'amin as well, whose land base consists of 83.22 square kilometers (Tla'amin Final Agreement, 2016, 41). The Tla'amin Nation's land is also away from urban centers, consisting of land on the mainland coast, Texada and Lasqueti Islands, and part of Eastern Vancouver Island (Tla'amin Final Agreement, 2016, 48).

Pasternak (2015) makes sense of these discrepancies in land size. As noted, she writes that poverty alleviation is often used in the neoliberal repression of alternative economic organization, such as the organization of land. An example of this in the way in which certainty over land ownership for the purposes of economic development often relies on the justification that it is necessary to poverty alleviation **(**Pasternak 2015). This was visible in the Tsawwassen First Nation land claim. Pasternak writes that using poverty alleviation as a rationale for land modernization means that the value of the land is attributed to it from outside sources, rather than held intrinsically, and location determines property value. Thus, a transition in land rights from collective reserve to fee-simple property impacts diverse nations very differently (Pasternak, 2015). In the case of the TFNFA, land was valued very highly given its proximity to Vancouver,

Richmond, Surrey, and Delta. In other cases, where land is more rural, property values (attributed by outside sources such as real estate markets) can be considered much less valuable, unless they contain sought after resources.

Second, it means that the lands themselves have been damaged. The Tsawwassen land base now is wedged in between highways, the ferry terminal, and the Roberts Bank Coal Port, each aspect contributing to high rates of pollution to the land and water. Because of urbanization, the majority of animals have moved off the territory. The Tsawwassen also have no forestry resources, so acquiring firewood for ceremonies is difficult. In addition, there is limited access to unpopulated nature for ceremonies (Baird, 2005). Each of these issues dramatically impacts the practice of the Tsawwassen people's traditional ways of living and governing. Resources from the land are limited. Fish are now the most significant harvest to the Tsawwassen and are a key aspect of the TFNFA (Baird, 2005). Fish harvests form the longest chapter on resources, demonstrating their importance to the Tsawwassen's economy.

The Tsawwassen government also has powers over land management and development. I've included these powers in this section on land, rather than in the previous section on rights, because they show how the transformation of land into property enables market participation and enables for state goals towards the insertion of First Nations into the market and promotes development of land and resources. The Tsawwassen First Nation has power over the management of lands. This includes management over zoning development and planning, as well as approving development proposals on lands owned by them (Tsawwassen First Nation Final Agreement, 2009, 63-64). For any proposed development on Tsawwassen lands, the Tsawwassen First Nation may also participate in development, benefit from federal or provincial benefit-sharing programs, and

form financial agreements with third parties for economic projects (Tsawwassen First Nation Final Agreement, 2009, 66).

The Tsawwassen First Nation gained very little land through the TFNFA in comparison to the state. The agreement provided certainty over Tsawwassen ownership of some lands previously under dispute, in exchange for certainty of state ownership over the vast majority. In addition, newly designated Tsawwassen lands are partly made up of previous Tsawwassen reserve lands. Thus, the agreement effectively changed those reserve lands into fee-simple property owned by the Tsawwassen. Tsawwassen powers over land management have made them stakeholders in development and regulators of the Tsawwassen right to harvest. Both outcomes are important to Tsawwassen self-determination and allow for some self-government on Tsawwassen lands. However, these powers, like Tsawwassen rights and law-making authority, fall short of positioning the Tsawwassen in nation-to-nation relationship with the state. Instead, the Tsawwassen First Nation is positioned in legal and physical ways as an entity *within* the state, in ways similar to a municipality.

4.4.3. Financial Transfers

A third major component of the TFNFA was a $13.9 million capital transfer from the federal government to the Tsawwassen First Nation. This transfer was not simply a cash payment, but rather, was made through the establishment of funds meant to increase the Tsawwassen's economic growth. These funds included an Economic Development Capital Fund, a Forest Resources Fund, a Commercial Fish Fund, a Commercial Crab Fund, a Wildlife Fund, and a Reconciliation Fund (Tsawwassen First Nation Final Agreement, 2009, 169). They were established through separate agreements following the finalization of the TFNFA. As one example, the Tsawwassen First Nation Harvest Agreement set up guidelines whereby Canada transferred

$1,155,000 to a Commercial Fish Fund and $450,000 to a Commercial Crab Fund aimed at increasing the Tsawwassen's capacity for commercial fishing (92). This agreement, formed in 2010, sets the provisions for the Tsawwassen fishing right (Tsawwassen First Nation Harvest Agreement, 2010, 7). In addition, Canada transferred $50,000 to establish a Wildlife Fund as compensation for the Tsawwassen's loss of harvest due to development and, more importantly, as a one-time payment meant to address future loss of harvest opportunity (Tsawwassen First Nation Final Agreement, 2009, 96). These funds are explicitly aimed at market participation.

The capital transfer also needs to be considered alongside the Tsawwassen's debt for negotiation loans. In order to pay the cost of 14 years of land claim negotiations, the Tsawwassen First Nation had to borrow money from Canada. The TFNFA sets up parameters over which that debt has to be repaid. This involved 10 annual payments totalling $5.6 million (Tsawwassen First Nation Final Agreement Implementation Report, 2013, 33). It is not accurate to think the Tsawwassen gained $13.9 million from the agreement, as loan repayments decreased this amount by 40%. Also, the payments were aimed at increasing the Tsawwassen's economic capacities. Again, this goal was desired by the Tsawwassen and benefits the nation as well.

4.5. Chapter Conclusion

The TFNFA produced outcomes that were desirable to the Tsawwassen First Nation, particularly, a way out of Indian Act regulation, the ability to interact with the state and industry as stakeholders, funds to build economic capacity, certainty over land ownership, and control of some laws and regulations within the nation. These are all important turns away from past policies of exclusion. Such policies separated the Tsawwassen from their land through confinement to the Tsawwassen reserve and their exclusion from participation in the development of their territories, development that took place without Tsawwassen consent. However, despite, and possibly

because of, the state's turn to policies of inclusion, the TFNFA allowed Canada to achieve goals it has always pursued, namely the accumulation of territory and assertion of sovereignty.

Chapter 5: Conclusion

5.1. Discussion

Canadian policies towards Aboriginal title were historically varied and inconsistent across different places. In some areas, treaties were formed, and oftentimes broken by the state. In others, title was denied outright. Canada used physical violence, removal, confinement, the denial of property ownership rights, exclusion from legal recourse, and policies of assimilation in a variety of ways to try to erase Indigenous people as original owners of land. These policies were guided by a logic of abstraction, which reconciled conflicting ideas of land as both commodified property and, at the same time, as not owned by anyone (Bhandar, 2015). In addition, these policies were shaped by racialized exclusion, whereby the definition of property became rooted in white privilege. Not only were Indigenous people separated from their land, they were also precluded from ownership of property. In this way, property was conflated with whiteness and has justified conquest.

These policies have caused a lot of harm. They have also been met with many First Nations' resistance and resilience and because of this, the state has been forced to abandon explicitly exclusionary attempts at dispossession and assimilation, though of course violence and exclusion continue. Driven by legal and economic pressures to engage with land claims, the state has shifted to a policy of negotiations. The land claims policy, like the FNPOI and other land modernization attempts, now uses language of inclusion and recognition instead. It is celebrated by policy makers who claim it offers Indigenous people a way to escape Indian Act regulation and poor economic circumstances, as well as practice self-governance on clearly defined land they can own in fee-simple. In reality, it is a contemporary settler colonial policy that transforms land into property, separates Indigenous people from the vast majority of their land, and transfers that land to the state. Differing from historical policies of dispossession, the land claims policy is neoliberal because it

masks the political reasons for higher rates of poverty among Indigenous people, attempting to fix the problem with economic solutions. Its primary motivation is to facilitate the free movement of global capital by creating the investment stability necessary to attract foreign direct investment in land development and resource extraction.

In order to understand how this is happening, this thesis conducted historical analysis of the federal and British Columbian engagement with land claims, as well as document analysis of the TFNFA. It did so through a political economic theoretical lens that examined how economic and political processes in Canada have intersected to produce the conditions through which land claims are negotiated today. This framework and analysis showed that the TFNFA is the outcome of over a century of settler colonial violence in the province. Confinement to small reserve lands, environmental destruction from development projects, exclusion from wealth generated by the projects, and urban settlement without land cession created the conditions through which the Tsawwassen First Nation sought to negotiate through the BCTP. The agreement transferred over 99% of the land claimed to the state and enabled the Tsawwassen First Nation to become an economic participant in projects impacting their land. It created new Tsawwassen rights that promote a specific form of marketized citizenship and self-governance where law-making authority is concentrated on market participation, restricting possibilities for self-governance.

In order to mitigate the risks lack of cession poses to investment, the state has pursued land claims as a means through which to conduct real estate style land transactions, whereby the state pays for land (Rynard, 2000). These transactions involve privatization of land, changing both the land and ways it is possible to live on it. This privatization then enables market participation and the marketization of rights aimed at economic integration. In addition to the integration of Indigenous peoples into the market economy, this accumulation of land as property provides

certainty over land ownership, a necessary precursor to stable foreign direct investment in development and resource extraction.

5.2. Implications

There are many reasons to critique the land claims policy and the BCTP. As explained in this work, many First Nations who have entered the BCTP with hope of achieving a land claim agreement have since paused or ended their participation in the process. Their frustrations are cited as factors including inflexible federal and provincial negotiators' mandates, the failure to account for overlapping claims, policies of extinguishment of prior Aboriginal rights, and divergent views of what a desirable outcome looks like. Woolford (2005) contends the largest problem is a tension between justice and certainty at the heart of land claims negotiations. Rynard (2000) argues the state's preoccupation with limited Aboriginal title is the biggest obstacle for negotiations as self-government is encumbered by small land bases. Reform of the BCTP should address these issues, but it cannot do so without addressing their root cause, which is the unequal relations of power between First Nations and state governments, which allows the state to use the land claims policy as a settler colonial policy of land acquisition and only offers First Nations one path forward through market participation.

As in the case with the Tsawwassen, many First Nations in Canada experience higher rates of poverty compared with Canada's non-Indigenous population, have experienced dispossession from their lands, and confinement in small reserves for decades. This, coupled with asymmetrical relations of power between First Nations and the Canadian state in land claims, enables the state to largely dictate parameters of what is discussed, or even possible, in them. The land claims policy is an economic solution for a political problem. It represses alternative relationships of production and consumption, relationships to land, and conceptions of land and citizenship. So long as these imbalances of power remain, and the state maintains a preoccupation with accumulating land and

pursuing policies of resource extraction with the neoliberal focus on international markets and movement of capital, the state cannot pursue negotiations ethically, or disrupt the ways in which the land claims policy is acting as a continuation of policies of dispossession, extending from colonization into the present.

Despite these problems, there are redeeming qualities to the land claims process and these are points around which the state could reform its engagement with it. Many First Nations do desire certainty over rights and land ownership (Blackburn, 2005). The tension between justice and certainty, and between addressing past wrongdoings and solely looking to the future, could be mitigated if the state pursued certainty on all sides, rather than treated land claims as a zero-sum relationship. Canadians should hold policy makers and provincial and federal negotiators accountable for land claims outcomes which fail to produce relationships based in treaty federalism and continue to further settler colonial violence. The first step towards this, is recognizing that Canada is using the land claims policy to buy land in exchange for market-oriented rights. It is doing so in order to assert its own sovereignty and establish certainty over land for the purposes of land and resource development, and to eliminate its financial obligations to First Nations.

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