Executive Summary

Land Back: A Yellowhead Institute Red Paper

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One of the loudest and most frequent demands of Indigenous people in the relationship with settlers is for the return of the land.

THERE ARE MOUNTAINS OF evidence that describe the theft of Indigenous territories, and even more mountains that testify to the harms that followed and the need for restoration.

Despite this, in the supposed era of reconciliation there can appear to be progress: legal "victories," proliferating negotiation tables, land codes development, impact benefit agreements, and so on. For some, these may be enough. But for others, particularly those asserting rights and jurisdiction outside of reserve or settlement boundaries, they do not go far enough.

That is because there is a stubborn insistence by Canada, the provinces and territories, that they own the land. For many Indigenous communities, this is a deep violation of their consent to determine what happens on unsurrendered lands, but also a violation of the broader assertion that they have jurisdiction over those lands.

This is the focus of Yellowhead Institute's first Red Paper. We consider in very specific detail, the existing land and resource strategies of federal and provincial governments, with reference to their interface of Indigenous law and Aboriginal rights and title. We ask a number of broad questions:

- **WHAT REGIMES** of consent have been practiced by Canada, if any, and what does land restitution look like for First Nations in the context of these regimes?
- **HOW DO THE** Crown and industry dispossess Indigenous peoples of land and waters today?
- **WHY ARE THE CROWN'S** current consent regimes failing to protect Indigenous interests in the land?
- **HOW CAN INDIGENOUS PEOPLE** re-assert jurisdiction to lands and waters outside of reserve boundaries?
- **WHAT MODELS** of Indigenous governance centre community-based decisions on land/water use and cultural resurgence?

This analysis finds that there are three approaches to consent being practiced in Canada toward Indigenous jurisdiction and they fall along a spectrum of denial, recognition, and reclamation. Each of these approaches, described in greater depth below, provide the framework of this report:

PART ONE: SPECTRUM OF CONSENT
A framework to understand how Indigenous consent is ignored, coerced, negotiated, or enforced.

PART TWO: DENIAL
The strategies deployed to dispossess Indigenous people of the land.

PART THREE: RECOGNITION
The limited land management rights offered to Indigenous peoples by the Crown and industry.

PART FOUR: RECLAMATION
Community-based strategies of consent-based jurisdiction.

CONCLUSION: THE CONTINUATION OF LIFE
An argument for why Indigenous jurisdiction matters in the midst of an ongoing climate crisis.

Ultimately, we assert that land restitution for First Nations requires political and economic transformation.

Land theft is currently driven by an unsustainable, undemocratic, and fatal rush toward mass extinction through extraction, development, and capitalist imperatives. It is further enabled by a racist erasure of Indigenous law and jurisdiction. As Yellowhead Research Fellow Sákéj Henderson has noted, this fatal rush functions as a kind of malware released into our ecological system. Indigenous legal orders embody critical knowledge that can relink society to a healthy balance within the natural world. This change must begin on the ground: Canada ceding real jurisdiction to Indigenous peoples for this transformation to happen. With or without Canadians, Indigenous people will continue to exercise it because responsibility demands it.

Part I: The Spectrum of Consent

AN UNDERLYING QUESTION driving our work revolves around consent: how is Indigenous consent ignored, coerced, negotiated, or enforced? A consensus on the practice of consent in relation to decisions about land and water use has yet to be realized in any regional or national context. Instead, there seem to be competing conceptions of consent along a spectrum of denial, recognition, and then reclamation. This section offers a contextual overview of each of these broad trends.

On the spectrum of consent, we analyze how the land tenure regime in Canada is structured upon the denial of Indigenous jurisdiction through the creation and enforcement of legal fictions. This is followed by limited recognition, which includes an evolving notion of the Duty to Consent and corresponding government and industry responses. Today while states are encouraged to adopt the principle of Free Prior Informed Consent (FPIC) at the international level, in the Canadian context, since 2007 when the UN's *Declaration on the Rights of Indigenous Peoples* was first presented, there has been state opposition to a fulsome implementation of free, prior, and informed consent. More than that, Canada has attempted to convince the international community, and Indigenous peoples, that consultation is effectively consent. Canada's submission to the Expert Mechanism on the Rights of Indigenous Peoples asserts, "Canada already has significant experience with implementation of the principle of free, prior and informed consent as found in the Declaration."

Finally, Indigenous conceptualizations of consent are articulated in theory but also in practice through the recent actions of a range of Indigenous communities across Canada. These conceptualizations flow from the ongoing re-constitution of Indigenous law and governance, and in some cases is a manifestation of them. This generalized version of Indigenous consent has four distinct elements, building on the existing notion of free, prior, and informed consent:

- **RESTORATIVE**: Promotes the active and intentional centering of Indigenous models of governance and law and moving away from Western frameworks and definitions. This does not necessarily exclude band councils or tribal councils but promotes the revitalization of authentic governance practices and institutions.
- **EPISTEMIC**: Accepts Indigenous knowledge frameworks and languages for understanding relationships to the land. This may include Indigenous science, land management customs, obligations to the land and waters, or recognizing the land as having agency. This knowledge can be embedded in Indigenous law and governance.
- **RECIPROCAL**: Ensures that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent. This is an active and enduring condition whereby consent may be revoked or the terms changed depending on the ability of outsiders to abide by the terms in good faith. This is less a process of governments obtaining consent, but an active maintenance of Indigenous authority.
- **LEGITIMATE**: While community politics can be fraught, decisions about granting or withholding consent generally require representatives perceived as legitimate by the community, and with a stake in the decision (whether band council, hereditary council, youth, elders, all genders, and urban populations) to participate or be accommodated. A decision should not be made until the legitimate authorities consent.

While these constitute an evolving and generalized form of consent (many nations often have their own models and principles), we see this conceptualization emerging from Indigenous-led consent-based practices that de-centre state authority, revitalize Indigenous knowledge, law and custom, and promote inclusion within and even across communities.

Part II: Denial

THIS SECTION OF THE REPORT focuses on a particular kind of dispossession called alienation. Here we set out to understand how common alienation practices of provincial and federal authorization for extraction and development on Indigenous territories take place without Indigenous consent.

In Canada, 89 percent of lands have been roughly divided between the federal and provincial governments.[1] These so-called "Crown Lands" are an artefact of the "doctrine of discovery" and enable a machinery of government authorization to alienate lands to third-parties. We look at how the courts and government policy uphold this power of discovery and permit no recourse to Indigenous jurisdiction without significant caveat.

Land alienation is linked to the broader political economy of Canada that relies to a significant extent on its natural resource sector to secure jobs and investment. Thus, land alienation is a major economic driver of the Canadian economy.

When First Nations contest the authority of the province or the regulatory processes, like environmental assessment, that fail to acknowledge their lack of consent, companies take advantage of a legal system built to protect the interests of property. After reviewing over almost 100 cases of injunctions, our team of researchers found that this legal tool reinforces the impossibility of choices First Nations must make when they appear before Canadian courts.The sad final tally was that 76 percent of injunctions filed against First Nations by corporations were granted, while 81 percent of injunctions filed against corporations by First Nations were denied. Perhaps most tellingly, 82 percent of injunctions filed by First Nations against the government were denied.

However, alienation is not simply a process of straight theft because it often requires the compliance of First Nation governments. Colonization has transformed internal social relationships and governance systems through the cumulative impacts of assimilation. This report looks at literal and figurative types of cumulative impact, including the ways environmental destruction compounds the traumatic loss of life through colonization. We also consider how, without proper measures and consideration for the cumulative impacts of extraction, Indigenous peoples cannot consent to third-party land use of their territories.

Land and water alienation must also be understood through gender dynamics, which are instrumental to how land loss and dispossession unfold and impact people's lives. Gender is also critical to the ways in which the right to consent is denied to Indigenous peoples. Women, transgender, queer, and Two-Spirit people were never the intended beneficiaries of new distributions of power introduced through colonization. Rather, they were targeted and disempowered with the intention of removing them from leadership and minimizing any confrontation or challenge they posed to the patriarchy of Western systems of governance. This patriarchal system was internalized by many Indigenous communities and has been reproduced through misogyny in First Nation governments. We look at the impacts of patriarchy to decision-making authority around land and water, as well as the gendered impacts of resource extraction.

Part III: Recognition

IN RESPONSE TO THE RESURGENCE of Indigenous political and legal orders and the ongoing protection of land, waters, and peoples that has persisted through centuries of land alienation and dispossession, the state and industry have developed strategies to address the demands Indigenous peoples: consultation processes have been crafted, revenue sharing policies have been introduced, and ownership stakes offered.

But how do these measures meet Indigenous demands? What are the limits to their recognition? In what ways are Indigenous people willing to compromise or negotiate social values and jurisdiction? For many Indigenous people, the recognition of Aboriginal rights in Canada has meant the continuation of colonization through new means. That is because the terms of recognition have tended to reinforce the state's monopoly on power.

Further, is the goal simply that Indigenous people make decisions about how to participate in Western social, economic, and political systems? Or must this mean a challenge to these very systems, which have threatened Indigenous existence as nations and as people who live in relation to their own laws?

1 V.P. Neimanis, "Crown Land," The Canadian Encyclopedia, December 16, 2013, thecanadianencyclopedia.ca. [https://www.thecanadianencyclopedia.ca/en/article/crown-land]

While there is potential reduction of harm for First Nation communities through government policy and industry concessions—such as gaining expanded access to capital and some avenues of sanctioned disruption through duty to consult, contracts with companies, resource revenue sharing from provinces, and participation in regulatory processes—we see much of this unfolding through a weak recognition of Indigenous jurisdiction.

The report begins here with an overview of changes to the landscape of Aboriginal rights over time and the legal precedents that came to define their constitutional rights.

But these changes also ushered in the introduction of new strategies to manage Aboriginal rights. One way that governments have sought to manage the assertion of Aboriginal rights has been to download their responsibilities—especially the duty to consult—to the private sector. A primary vehicle for this is through the encouragement of bilateral commercial contracts with resource companies. Impact and Benefit Agreements (IBAs) are private commercial contracts that are increasingly being negotiated between Indigenous peoples and industry in the consultation phase of a project. Further, IBAs raise significant legal questions about the proper rights and title holders in communities undertaking the negotiating process. On the matter of fairness, we examine how the shares of these profits are calculated and redistributed.

IBAs and private agreements like them are considered "downstream" projects because they involve the run-off from agreements already brokered with governments. Given the experience First Nations have had with governments, negotiating directly with companies can offer greater autonomy, opportunity, and strength. Ownership stakes, or "upstream" opportunities also implicitly recognize the authority of First Nations to negotiate and derive direct benefits from economic activity on their territories. They are also, critically, a way to raise cash to cover essential services and infrastructure on reserves, and even generate surplus for financial and community security.

There are several concerns here, regarding the large-scale extractive projects support cultural revitalization. While certainly not embracing a frozen-rights approach to Indigenous culture, recognizing the importance of First Nation participation in the market economy, and trying to avoid any form of essentialism, we press the question: can capitalism coexist with decolonization? We strike a cautionary note on nonrenewable resources when this investment is a choice and not a necessity. As Winona LaDuke argues, "across the continent, corporations and governments are trying to pawn off bad projects on Native people."[2] Even renewable energy projects like hydroelectricity and transmission lines can negatively impact First Nations and their land and waters through poorly scoped projects and the cumulative impacts of damming.

This section also considers Government Resource Revenue Sharing (GRRS) schemes, surveying different jurisdictions across the country. GRRS is exclusively limited to mining, forestry, and oil and gas across all jurisdictions so far. Decoding the fine print of how these figures are calculated across jurisdictions, we ask whether these schemes uphold Crown obligations.

In this section, we also examine how alienation can advance through regulatory processes, specifically in the way "harm" and cumulative impact are defined and measured, as well by examining barriers to Indigenous participation in these regulatory processes.

Part IV: Reclamation

THE FINAL SUBSTANTIVE SECTION of this report chronicles examples of First Nation efforts at land and water reclamation. By reclamation, we mean an assertion of jurisdiction beyond reserve boundaries and corresponding efforts to enforce that assertion. In some cases enforcement fails, in others it leads to negotiation, and yet in some cases, reclamation results in the tangible exercise of Indigenous jurisdiction on Indigenous territories. It is through these efforts that we have gleaned the characteristics of Indigenous models of consent-based jurisdiction.

They are organized in this report by "type" of consent-based jurisdictional practice. The first of these, corresponding to the earliest stage of development, are environmental assessment processes. The Tsleil Waututh, Mi'gwawei Mawiomi Secretariat, and Secwepemc cases, which involve assessing oil pipeline and transport projects and mining, are the best examples of delaying of even stopping an unwanted development and asserting rigorous and evidence-based claims for their decisions. In other words, in these instances Indigenous groups refused consent and backed their refusal with evidence that policy-makers and investors could understand. A variation of environmental assessment occurs post-development or post-disaster, as in the case of the Heiltsuk and the Nathan E. Stewart spill.

2 Winona LaDuke, "Reconciliation Pipeline: How to Shackle Native People," APTN National News, July 13, 2019, aptnnews.ca. [https://aptnnews.ca/2019/07/13/reconciliation-pipeline-how-to-shackle-native-people/]

A second type of consent-based jurisdiction consists of formal protocols for providing consent, and then by extension a formal permitting system once consent has been provided. It often occurs during or immediately following development proposals. Neskantaga First Nation, Saugeen Ojibway Nation, and Sagkeeng have all developed a consent process for proponents of development in their territories. It is not surprising that each of these communities are, at the time of writing, facing large scale and potentially transformative projects. A variation of this type of jurisdiction comes from the Tsilhqot'in in a simple but effective local permitting system established for mushroom picking in their territory that applies to all harvesters.

A third, and perhaps more provocative type of assertion revolves around physical reclamation or occupation of lands and waters. While the examples discussed so far emerge from community-based "official" leadership (at least geographically), there are a number of cases of community members, in some cases working across national boundaries, attempting to extend jurisdiction by simply occupying and using the land. And while they may disrupt Canadian jurisdiction, each also provides a service to the community. The Tiny House Warriors offer low-impact housing solutions, the Uni'stot'en Healing Centre provides mental health and substance abuse treatment and Nimkii Aazhibikong offers land-based education. A final example does not exactly follow this trend. The efforts of Sylvia and Curtis McAdam Saysewahum to prevent logging in their family's territory in Treaty 6 clashed with the interests of other Indigenous economic objectives. This is not an uncommon case.

While there is much to celebrate in the examples gathered in this section, they also demonstrate there are some important considerations. First, it should be noted that many of the communities featured here are, by and large, also communities with very strong title claims and as such levels of government and industry are more likely to negotiate. Second, in assembling these examples, we are not making a structural argument that reclamation efforts must be separate and distinct from Canadian legal, political, and economic frameworks and discourses. Nor are we making a case for stopping all development, though there are important debates on these issues on a community-by-community basis. Finally, the case studies in this section are not an exhaustive list. Perhaps these examples can be thought of as "promising practices" in consent-based jurisdiction across each of these three areas described here.

Part V: The Continuation of Life

THE STAKES OF THIS STRUGGLE are immense. Of course, while Indigenous land and life are the focus here, the life of our species and of the planet are at risk from the type of economic philosophy and practices perpetuated by capitalism and settler colonialism. So much so that in May 2019, the UN's *Global Assessment Report on Biodiversity and Ecosystem Services* found that human activities are rapidly stripping the planet of biodiversity, contributing to the ecological devastation wrought by climate change. One million species are at risk of extinction.

While an apocalyptic future certainly awaits without transformational change, the report—the largest of its kind ever produced—finds some hope in the land management practices of Indigenous peoples globally.

So the matter of land back is not merely a matter of justice, rights or "reconciliation"; like the United Nations, we believe that Indigenous jurisdiction can indeed help mitigate the loss of biodiversity and climate crisis. In the Canadian context, the practices and philosophies profiled here as case studies contain answers to global questions. Canada - and states generally must listen.

In fact, the UN report includes recommendations for state governments to strengthen Indigenous management. These include: advancing knowledge co-production including recognizing different types of knowledge that enhances the legitimacy and effectiveness of environmental policies; promoting and strengthening community-based management and governance, including customary institutions and management systems; and co-management regimes involving Indigenous peoples and local communities. States can also recognize Indigenous land tenure, access, and resource rights regimes in accordance with national legislation; and the application of free, prior, and informed consent.

These are helpful suggestions that we truly hope are heeded. And yet given the denial of the climate crisis and ongoing erasure of Indigenous jurisdiction by states, and especially settler states, we also have to acknowledge that solutions might have to be realized outside of state processes. In fact, they may be more conducive to asserting alternative futures for life on this planet.