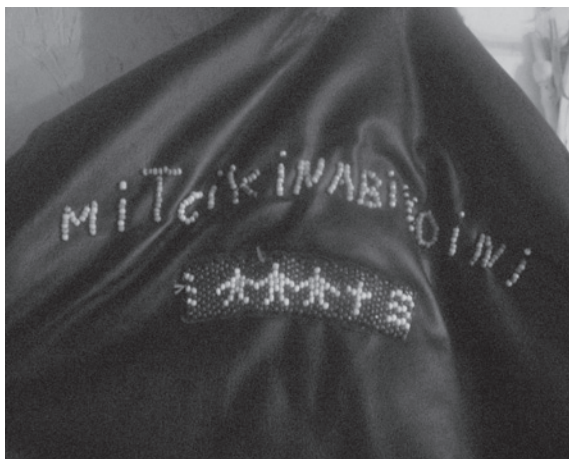
Property in Three Registers by Shiri Pasternak



My work with the Mitchikanibikok Inik, or Algonquins of Barriere Lake First Nation, forms the research base upon which this theorization has been built. For a detailed description of the Algonquin community's land claims struggles with the government to maintain their traditional aboriginal tenure system and customary government, please see "Algonquins Defend the Forest" in *Upping the Anti* 8, 2009 or the support website www.barrierelakesolidarity.blogspot.com. For an overview of active community land claim struggles in Canada, please see www.defendersoftheland.org

This piece focuses on a type of contact between newcomers and Indigenous peoples in Canada. The nature of this contact involves the imposition of a Western property rights system onto Indigenous national territories. In other words, I am describing the techniques of a certain range of strategies of dispossession. I argue that understanding the over-lapping, yet distinct histories of state sovereignty claims, capitalist political economy, and Indigenous governance in relation to property rights, brings into sharp relief the discrepancies between state rhetoric on the inherent rights of Indigenous peoples and the facts on the ground of widespread extinguishment of Aboriginal title.

The project of Indigenous land dispossession is widespread and ongoing in Canada. The imposition of property rights continues to play a significant role in a multiplicity of government policies regarding Indigenous peoples as well as in provoking struggles of resistance against dispossession and displacement across this land. I call this form of contact between Indigenous and non-Indigenous peoples *propertization* to describe the process of transferring the jurisdiction over Indigenous lands from Indigenous nations to the state and private parties. Propertization regimes were stamped and continue to be plotted along settler interests, yet Canadian colonialism has rarely been described in these terms. My research tries to address this gap, asking, What role do property rights play in Canadian colonialism? Or, in Cole Harris' words, "*How* do they dispossess?"[1]

This piece does some of the background work to frame this broader project by looking at three "registers" of property as a lens through which to problematize this question.

Generally, studying property rights is an approach that helps to untangle many of the institutionally complex impositions of power taking place on Indigenous territories. Contrary to dominant understandings, property ownership regimes do not simply describe people's right to things. Through property rights we can see a material realization of how social relations in society are governed. Property gives rights holders access to wealth, resources, and shelter based on their financial capacities. They also reveal something about the nature of governance in general, such as historically contingent distinctions between public and private power, the social nature of law, and the free market ideologies that determine the rights of entitlement. In the context of colonialism, property rights also confer a legitimacy on the state's appropriation of Indigenous lands from both within and without the law. It is precisely by uncovering the social nature of property rights that the denaturalization of these expropriations can be undertaken.

More particularly, property rights comprise a crucial linchpin to colonial deployment in part because they play a significant governing role at *multiple scales* of social organization. Rather than organizing my ideas on property according to scale, however, I want to suggest a heuristic of property "registers" that may each encompass a range of scales. The liability of scale as a framework for organizing this research is twofold: on the one hand, scale too easily implies jurisdiction, which in turn is conflated with sovereignty. Divisions of power between levels of government empower jurisdictions with sovereign operations that only reify the claims of colonial governance. Specifically, there is a danger here of subsuming Indigenous governance under federal, provincial, and municipal governance scales, reinforcing the fragmentation of responsibility by formal divisions of colonial power and conferring a legitimacy to this hierarchy. Further, scale cannot account for contradictions between territorialism and capitalism, where tensions between "an 'endless' accumulation of capital and a comparatively stable organization of political space" recur across any number of spatial configurations.[2] In other words, the circulation of capital cannot be easily confined to territorial boundaries of scale.

In contrast to scale, each of the three property registers that follow describe a set of social relations and political imperatives that capture a kind of practice of power. Of course, these registers do not represent an internally homogenous field of power, but a category of practices defined together through family resemblances. Further, the registers themselves may converge or operate at odds depending on context and history. The three registers are as follows:

1
the Canadian sovereignty claim to all underlying title in Canada as well as provincial and municipal jurisdictional claims;

2
the inter-related, though distinct, logics of capitalism that require, among other property relations, secure title for resource extraction and the transformation of nature and labour into commodities; and lastly,

3
a set of practices that govern peoples' relationship to the land through forms of entitlement based on stewardship for future generations: property as 'taking care.' These three registers of property frame my research:
—property as sovereignty/jurisdiction;
—property as capitalist alienation; and
—property as 'taking care.'

These are over-lapping registers, though each carry distinct histories and operate by different technologies. Their purpose is to help distill the layers and forms of domination operative in a field of colonial power.

In addition to problems of scale, the need for these registers of property is twofold. The first reason is to shake out the distinctions without unravelling the relationships between colonialism and capitalism. My temporary and perhaps crude solution is to conceptualize them as over-lapping registers. While not seeking to discount the insights of such paradigmatic texts that analyze the constitutive nature of colonial and capitalist systems—such as Vladimir Lenin's *Imperialism is the Highest Stage of Capitalism*—there is a slippery-slope from inter-penetration to conflation. The danger of conflating colonialism and capitalism is that while colonialism is constitutive of capitalism, it is not reducible to capitalism. To assert otherwise is to ignore the specific nature of Indigenous claims to land compared to other sorts of reconstructive anti-capitalist visions, and therefore to ignore the particular logics of power exercised on Indigenous lands. Indigenous claims to land tend to be national-territorial claims, are often framed as a sovereignty claim, and include the right to govern commercial enterprise on their lands. Colonialism and capitalism can be distinguished then by differing technologies of control and imperatives of rule. In the first case, the differing technologies of control include, for example, special jurisprudence and legislation that apply just for Indians, such as the Indian Act; international standards of law that apply only to Indigenous lands; systemic racism; and territorial, sovereignty, and self-determination demands affirmed by long histories of treaty-making with the French, British and then Canadian Crowns. In the second case, imperatives of rule arise from tensions between territorial acquisition and capitalist accumulation, critical for different reasons and different moments of state formation.

The second further reason for the registers is to contribute some thought to a need developing out of significant political shifts occurring in the nature of property rights and the legal frameworks governing the property rights regime. On this point specifically, I want to examine what is meant by the "social relations of property" in light of crippling critical attacks (both historic and recent) against the "thingness" and "ownershipness" of Western ideas of property, as I will get to below. While there is insufficient space here to unpack either of these driving imperatives with the appropriate amount of detail, I want to signal their importance here.

In addition to this schematic, I read all of these registers of property as ontological categories. By ontology, I mean descriptions of the nature of relations. I take the position of Bradley Bryan that property is an expression of social relations among individuals and in respect to the natural environment, describing our daily practices; they are also highly nuanced metaphysical expressions of these relationships.[3] Therefore a cross-cultural understanding of how people relate to the world at large is necessary to understand the differences between English and Aboriginal understandings of property. As Bryan points out, method is the most confounding aspect of this inquiry, since the language of "property" is also saddled with the baggage of Western culture and we run the risk of re-describing Aboriginal cultural practices in unfitting comparative terms. Re-descriptions create new webs of meaning and realities, and can eradicate Aboriginal worldviews and ontological grounds.[4]

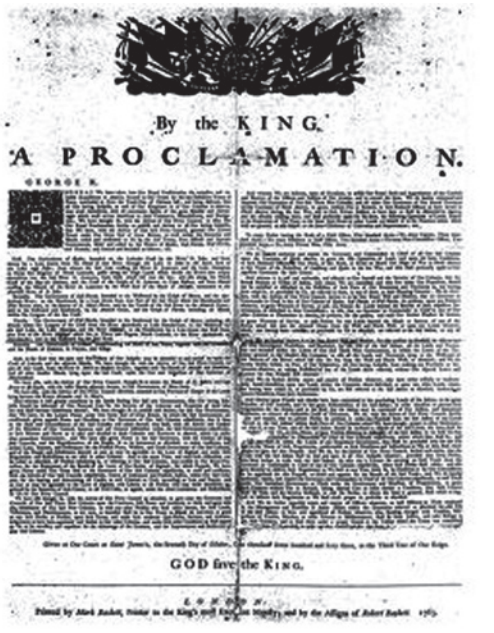
In fact, Bryan asserts that by engaging in this comparison, we are already asking a different question: how have liberal understandings of property determined our own capacity to understand other cultures? English understandings of property tend to exemplify "a rationalistic tendency that is captured by a technological worldview."[5] Rationalization is understood as the harnessing of things in terms of their ability to be turned into something consumable; rationalization forms the root of the ontological structure underlying property. To approach this question with eyes open to these methodological problems, we need to unpack the ontological basis of life which property both expresses and ontologically prescribes from the ground up.

Property in some sense becomes a metonymical device here, standing in for much broader and more complex social phenomenon. Understanding and defining the social relations of property is just one approach to denaturalizing colonial relations. By "social relations" I mean the legal and political institutions that create, protect and enforce property laws, which in reciprocal ways, socialize us to understand and accept the particular distribution of ownership in our society. Put simply, understanding property as a set of "social relations" denaturalizes any notion of property as an ahistorical, depoliticized system that merely protects people's things. Property rights regimes play a central role in the violation and abrogation of treaties and agreements between Indigenous nations and the Canadian state, as well as figuring into the assimilationist imperatives of colonial policies.

Taking property to be a social relation is paradigmatic in the sense that it shatters the illusion that property is about people and their things. Despite this popular view, both the "ownershipness" and the "thingness" of property have long since been discredited in legal and sociological fields as an outmoded way of understanding property rights. The lingering, dominant idea of property as comprised by individualistic and exclusive "ownershipness" has been undermined by the multiplicity of legal tools for subdivision of ownership along temporal, spatial, and collective lines.[6] Moreover, arguing that "the collapse of the idea of property can best be understood as a process internal to the development of capitalism itself," Thomas Grey submits that, "With very few exceptions, all of the private law institutions of mature capitalism can be imagined as arising from the voluntary decompositions and recombination of elements of simple ownership, under a regime in which owners are allowed to divide and transfer their interests as they wish."[7] Whereas capitalism once depended on simple ownership, Grey influentially points out that our political economy now depends on the splintering and invention of property to generate new regimes of accumulation.[8] How and who can own are anything but natural or stable premises, rather, these norms are constructed from vigorously contested economic programs and regimes of power. Meanwhile, the "thingness" of the "thing" owned is called into question by the sheer proliferation of intangible forms of property, including, for example, welfare rights, intellectual property rights, and claims on or entitlement to present or future income streams.[9]

Calling into question the secure thingness and ownershipness of property also brings to light the socially determined nature of *who gets to own what* in our society. These social relations can reveal extreme inequalities in society in terms of both public and private property. Public property, such as parks for example, are regulated by both laws *and* social norms, reflecting power inequalities in society through bylaws prohibiting sleeping on park benches that are aimed at homeless (i.e. propertyless) urban citizens, as are restrictions on access to public parks after dark.[10]

This is all to say that property rights are not simply some re-distribution of ownership, but that they intervene with the very social relations embedded in the ontological constitution of the place: the means by which the community comports itself, in relation to one another, and to the natural world of which they are a part. I want to turn now to the nature of these social relations of property, the thick compounds of historical and political meaning accrued in its uses, and the question of what makes property technically effective in its border-making and political controls.


By the KING.
A PROCLAMATION.
GOD save the KING.

Register 1
Property as Sovereignty

Property as sovereignty describes the imperial-colonial relations of property rights that govern jurisdictional transfers of territory from one nation to another. Sovereignty claims authorize a state's constant assertions of jurisdiction by bureaucratic, biopolitical, and military exercises over land and citizens.

In Morris Cohen's famous 1927 essay, "Property and Sovereignty," he calls out capitalism as a feudal system because the concentration of ownership over means of production in capitalist societies ensures that the propertyless are wage slaves to the owning class. But in the former colonies (as in communities throughout Europe), wage labour did not successfully displace the prior claims to territory of sovereign Indigenous nations, nor were many communities successfully integrated into the wage labour economy.[11] Property as sovereignty can still literally refer to Aboriginal land claims in Canada *in addition* to the current power relations of capitalism, and thus to an enduring conflict within the colonial

settler state.

Canada's sovereign claim to jurisdiction over Canada opposes what anthropologist Michael Asch calls "the Aboriginal fact."[12] This fact states that Aboriginal people held underlying title, jurisdiction, and sovereignty prior to European contact and settlement and that Aboriginal jurisdiction must be assumed to continue today wherever Aboriginal title was not extinguished.[13] Asch asserts that this fact exposes the illegitimacy of Canadian state sovereignty claims of underlying title.[14]

For example, in the case of the Algonquins of Barriere Lake, the Aboriginal fact is evidenced by a series of treaties that Barriere Lake signed with the British Crown that codified nation-to-nation agreements between the Imperial Crown and Indigenous peoples. The *Treaty of Swegatchy* (1760) insured peace, neutrality, protection of land rights, freedom of religion. The *Kahnewake Treaty* (1760) promised peace, alliance, mutual support, free and open trade, anti-trespass, protection of land rights, freedom of religion, and economic assistance.

Perhaps the most significant treaty that the Algonquins of Barriere Lake were party to, however, took place a few years later. In October 1763, King George III issued a Royal Proclamation that set out to protect Indian lands from settler incursions.[15] But the Royal Proclamation committed a double-move: while affirming the protection of Indian lands by decreeing that such lands cannot be sold without the oversight of first being ceded to the Crown, for the first time and against the precedent of Article XL of the *Articles of Capitulation* (1760) signed by the French, it also claimed *possession* and *dominion* over the new territories, ultimately enlarging the Crown's powers. The following year, over 2,000 Chiefs gathered at Niagara to hear the reading of the Royal Proclamation and to ratify its contents in a nation-to-nation treaty. The Treaty of Niagara assured a policy of non-intervention, depicted in the two-row wampum with two lines—one as the Indians in their birch canoes and one as the white settlers in their ship—where neither would try to steer the other's ship.[16]

The *Royal Proclamation* (1763) and the *Treaty of Niagara* (1764) became a formal part of the Covenant Chain Treaty Alliance in the eighteenth century and the documents and belts affirming the Treaty of Niagara have been brought out repeatedly over the years by different nations to affirm their relationship with the Crown. Aboriginal scholar John Borrows believes that this relationship can also be described as a contract between nations and as such deserves to be interpreted in all the richness of its context.[17] But instead of the Treaty of Niagara being recognized as a core constitutional document, affirmation of the Royal Proclamation was included in Section 35 Canada's newly patriated constitution.

However unilateral or stingy the Royal Proclamation appeared compared to the Treaty of Niagara, even this imperfect law of Aboriginal title has failed historically to protect ancestral Indigenous territories from non-Aboriginal excursion and occupation. This failure can be attributed to three main reasons, as constitutional scholar Patrick Macklem explains: **1** as a function of broader social and political feature of colonial expansion; **2** as a result of "judicial devaluation of the legal significance of Aboriginal prior occupancy;" and **3** due to the "acceptance of a legal fiction" that the Crown was the original occupant and sovereign of this land.[18] Underlying title remains the highest material and political expression of sovereignty in Canada, which may be held by the federal or provincial governments in the form of crown lands. The crowns' assertion of title is also effectively a property claim to the entire land base of the country, from coast to coast. Not even the private property rights of citizens can compete with national assertions of underlying ownership since no constitutional protection exists to protect individual property rights in Canada.[19]

We could say then that there are two inter-related aspects of the sovereignty relation that strongly inform Canada's claims to property rights in Canada. The first is based on legislative and jurisprudential claims to authority while the second involves the regulatory practices—the so-called "facts on the ground"—of these policies and precedents. Regarding the latter basis of sovereignty, foremost among these "facts on the ground" that operationalize Canada's claims to underlying title are land-use planning regimes, natural resource and economic development policies, third party commercial and personal interests, the cumulative impacts of municipalization schemes, the economic forces of international investment, and the "death by a thousand wounds" of cultural genocide through, for example, residential schools and Christian missionization. In both senses that I am defining it here, sovereignty acts to extend jurisdictional authority over territory. In this sense, sovereignty is always in some way a claim over space. The question here is: what kind of spatial claim does propertization make?

Perhaps the answer simply requires looking around the landscape with new eyes. In Southern Ontario, for example, early colonial settlement lay the grids and lines across the earth that seem natural today. The system of government in Upper Canada was formally inaugurated in 1792 by Colonel John Graves Simcoe, first Lieutenant Governor of Upper Canada. Simcoe was both conservative and enterprising—he wanted to build up strong agrarian economies with strong British Loyalties, but he also wanted to promote resource exploitation of mining and forestry to raise some wealth. He essentially patriated the land system of England to Canada. About 200 acres of land were given out for free to soldiers with an oath of allegiance, but the certificates were invalidated if settlement and improvement had not begun within a year of rewards. Improvements included a dwelling on the property. According to historian Paterson municipalities were built from these building blocks of property:

> The surveyors were instructed to lay out the townships to be granted as nearly contiguous to each other as the nature of the country permitted, exercising due care in the running of boundary lines. Town plots, with glebes and other reservations for public use, and certain equal portions at the corners, were to be laid out in each. The corner areas were reserved for the future disposal of the Crown. If the township were inland, its dimensions were set at ten miles square. If upon navigable water, it was to be twelve miles in depth with a water frontage of nine miles… The town plots in each township measured one mile square, and usually, if an inland township, were situated in the centre. If a water township, they were in the middle of the waterfront. Each town plot was laid out on a prescribed plan, with town lots of one acre, town parks of twenty-four acres, and squares and streets of stated dimensions. Due provision was made for future public buildings and military defences. The Crown reserves in the corners of the township consisted of eight farm lots.[20]

The improvement criteria for receiving title to land echoes the imperial history of property rights in Canada. An important political context of property rights in Canada is English philosopher John Locke's justification for the enclosure of land, which was based on its improvement through the application of one's labour to the earth. This argument lays a crucial moral foundation for the jurisdictional claims of settlement, but it also renders invisible or insignificant non-European forms of land management and use. Locke privileges agrarian forms of settlement, particularly those agrarian landscapes that employ recognizable forms of labour, such as English tilling technologies, as opposed to Indigenous foraging, slash and burn agriculture, and wildlife management through hunting. A racist, stages-view of history continues to be deeply embedded in notions of entitlement to property today.

Register 2
Property as Capitalist Alienation

Property as capitalist alienation might also be called the register of "dispossession/accumulation," since it describes the unique dynamic of property rights in a liberal capitalist society. While dispossession of lands may be a common feature of imperial and feudal regimes, the specific kinds of dispossession inherent to the methods of accumulation in capitalist societies create their own modes of propertization. Property rights are used to create commodities, such as land and patents on life, and to protect, police, and regulate the commodities produced. We could also say that these forms of propertization are deeply embedded in particular social relations of *transferability* that confer value on a free market-based distribution and exchange of goods.

There are several ways in which the conjoined processes of dispossession and accumulation are internally logical to capitalist propertization. Central to this register of property is a process Marx called "primitive accumulation"—a dual process of dispossession from subsistence economies and forced relocation into wage labour—that Marx described as the origins of capitalism. Dispossession marks a range of alienations from subsistence economies—from peasant lands to file sharing—that enable new commodities and services to replace them—such as store-bought foods and proprietary software.

Far from being a process of simply accumulating the original pot of surplus capital, as Marx asserted, primitive accumulation (or as David Harvey has coined, "Accumulation by Dispossession"), constitutes an ongoing strategy built into the capitalist imperative for constant *expansion* to survive as a viable political economy.[21] Primitive accumulation describes a range of expansionary processes that each involve the creation or instantiation of property rights in different ways, through international trade, imperial relations and natural resource extraction.[22] Non-spatial examples of primitive accumulation also include the exploitation of labour, through a reliance on unwaged women's labour and their reproductive capacity and on racialized, non-capitalist or semi-proletarianized labour, such as non-status migrant labour forces or indigenous labour.[23] Common to all these processes is a violent dispossession from subsistence economies—lands, livelihoods, and way

of life—driven by the quest for new markets to buy from or sell to, or cost-saving armies of cheap labour.

A good example of the relationship between expansionary capitalism and colonialism is the land claims process in Canada. Introduced in 1973 because a Supreme Court precedent forced the government's hand, the policy held enormous promise in a country where the last treaty was negotiated in 1930 before treaty-making was blocked by the state for over 50 years. In 1981, the revised claims policy stated as its objective "to exchange undefined aboriginal rights for concrete rights and benefits" calling for the "extinguishment of all aboriginal rights and title as part of a claim statement." Extinguishment, if not clear enough, meant the end of those so-called "undefined" Indigenous land rights, and another attempt to turn Indigenous lands into isolated ethnic municipalities scattered throughout the country. This clause for extinguishment was met with outrage from Indigenous groups from the start, so in 1985, Indian Affairs appointed a task force that "concluded that the extinguishment policy was unjust and unnecessary. However, when the revised claims policy came out in 1986, it merely tinkered with the policy, suggesting that the government would consider alternatives to the 'blanket' extinguishment of rights in some parts of traditional territories," but this was never to be the case, and instead, the federal government tinkered with the language, but not the policy itself.[24]

One euphemism for extinguishment that has emerged in the context of the British Columbia Treaty Process (PCTP) is "achieving certainty" on Aboriginal rights. This certainty is meant to secure the landscape by removing the condition that interferes with risk-free investment, which according to negotiators and state officials, is Aboriginal land claims.[25] Meanwhile, the endemic risk of uncertainty in market patterns is obscured. Flexible accumulation and post-Fordist restructuring are inherently unstable; given the increasing fluidity of global markets coupled with foreign investment in resource extraction and the intensifying speed-volume of these flows over the past three decades of twentieth century, Aboriginal title has become an economic scapegoat for provinces that depend on mining and forestry taxes for revenue.[26] Rather than resolve the "uncertainty" with fair and just land claims settlements that do not force Indigenous peoples to relinquish all rights to their traditional territories, the provincial and state governments drum up fear in non-native communities of their Indigenous neighbours, blaming them for crises in capitalist accumulation.

Indigenous peoples in Canada have marked the socio-spatial limits of capitalist expansion for centuries and continue to hold their ground to this day. Due to the geography of residual Aboriginal lands, they form a final frontier of capitalist penetration for natural resource extraction, agribusiness, and urban/suburban development. As Deborah Simmons writes in *After Chiapas*: "From this perspective, Aboriginal resistance may be understood as a crucial aspect of the conflict over the process of continental restructuring and the emergence of a new capitalist order."[27] It is the refusal of Indigenous peoples to sign "modern treaties" that force them to extinguish their title and transfer their lands into private property that is posing major barriers for business-as-usual accumulation and exploitation across Turtle Island. To suppress Indigenous peoples' struggles is to eliminate the great obstacle they pose to capitalist accumulation and to maintain the racist assertion that Europeans discovered, paradoxically, a people of *terra nullius* (vacant lands).

This current land claims process, often called the "modern treaties," follow the historic and "numbered treaties" (1870–1930). The numbered treaties themselves, negotiated by the Canadian dominion, blazed a trail for development across the country. The prairie treaties were negotiated to pave the way for agrarian settlement; the treaties in the North West Territories were negotiated immediately upon discovery of oil in the Mackenzie Valley; Treaty 3 opened the door for mineral mining; Treaties 1 through 7 were negotiated to open up land for the railways.[28] While the end-goals here may be similar—economic development for the benefit of state-building and capitalist enterprise—the technology of control here, treaty-making, is a unique form of governance exercised only between the state and Indigenous peoples.

Another example of capitalist-driven propertization lies in market-based distinctions between private/public spheres. As legal scholar Morton Horowitz summarizes, "One of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—tort, contracts, property, and commercial law."[29] The courts still try their best to maintain the distinction between public and private, maintaining the state's legitimate monopoly on violence and restricting the coercive powers of private individuals and corporations. The same activities when engaged by governments can seem coercive when undertaken by corporations, and vice versa, it appears coercive when governments engage in market activity. Thus, the distinctions between public/private, coercive/market, sovereignty/power are the inextricable dualities of liberal capitalist society. Understanding this, we are better equipped to challenge the paradigm of Canadian colonialism, often obscured by the smoke and mirrors of private/public distinctions. These dualities in turn reflect the real tensions between state territorial acquisition and control, crucial to assertions of Crown sovereignty, and more robust mobilities of corporate and private capital, however beneficial to the state, that cannot alone guarantee the security of its exercises of power.

At this juncture the overlap with the register of Property as Sovereignty is apparent. Public/private distinctions muddy the waters of jurisdiction in ways that benefit colonial control over indigenous peoples within the state of Canada. The more complex the rules of transferability around the land—from private ownership to privatized license granting, the more intractable things become for the Indigenous peoples living on the land, and the less directly implicated are the Crowns in what look like the naturalized operations of the market economy.

Register 3
Property as 'Taking Care'

Property as 'taking care' represents a set of practices that govern peoples' relationship to the land through forms of entitlement based on taking care of the land for future generations.

We need to stop here for a moment and look at what is meant comparatively by a Western property system, from the perspective of an indigenous person. Taking the Plains Indians to signify certain universal aspects of indigenous culture, Leroy Little Bear compares their concepts of land embedded in a culture of relationality, with the British property rights system. He outlines three central aspects of Aboriginal culture—philosophy, customs, and values—that ground the belief system of the Plains.[30] Some of these definition provide crucial counter-points to the European tradition from which the British common law system grew: the Plains' philosophy of equality, for example, is based on the implicit belief that all things have a spirit. Compare this equality to English philosopher Hobbes' *equally* jealous and competitive individual, and you begin to see the sharp fissures. Little Bear does not offer a necessarily essentialist view of Aboriginal culture, defining it as a collective agreement between a group of people, but he points to the way the idea of constant flux and renewal are prevalent in all indigenous philosophies. Concepts of time and transformation grow out of the constant recombination of energies and spirits.[31]

In further contrast, the British common law makes no distinction between moveable and immoveable property—because ultimately, property represents a set of rights around *transfer*. All rights can be traced back to the original source of sovereignty: the sovereign or state. But even The Supreme Court of Canada had recognized in Calder and Guerin that Aboriginal title does not derive from the Crown, but rather from occupation of the land from time immemorial.[32] The basic principle of renewal of this ancient ownership is maintained through song, dance, and stories. Thus, Little Bear places the goals of the treaties into the perspective of Aboriginal people who willingly entered them: the newcomers were seen to fit into the web of relations "and become part of the renewal process through the songs, stories, and ceremonies."[33] It is no coincidence that many of these ceremonies disappeared as lands were lost.

The Royal Commission on Aboriginal People (RCAP, 1991) also stresses the difference between Canadian property law and Aboriginal systems of tenure and governance. The report submits that the main difference is that, unlike Aboriginal systems, Canadian property law does not have a concept of stewardship embedded in its meaning. The report maintains that a dense system of social relationships, religious and spiritual beliefs, and values of reciprocity guide Aboriginal understandings of land towards practices that recognize the interdependence of the world.[34] So whereas Canadian common law "fee simple" ownership is defined in reference to rights of *exclusion* with few duties built into holding tenure, Aboriginal concepts of ownership are about *responsibility* to steward the land for future generations. RCAP concludes that Aboriginal understandings of ownership involve a "distinct mix of principles of ownership, responsibility, stewardship and governance."[35] The opposite principles to taking care, the "Canadian" principles, as one might assume, represent a wider Western malaise in terms of our relationship to non-human actors, such as plants, animals, the sun and the moon. Let's call these non-human actors "nature," which one might say in Western cultures, "stand in reserve" for human consumption, representing the ontology of a rationalistic and technologically-determined culture.[36]

In the territory of the Algonquins of Barriere Lake, a hunting community that lives 300 kilometers north of Ottawa, much as people do not own individuated plots of property, aboriginal tenure secures some of the advantages of proprietary regimes without the expense of asocial individualism associated with private property rights regimes. This has worked in two ways. Usually customary or traditional users of the range would have spent many years on that land, therefore they would have built up an extensive fund of knowledge about the area (e.g. local toponymy used for navigation), making them effective hunters and gatherers and giving families historical attachments to the particular areas. These historical attachments then led to some measure of responsibility (*tibenindiziwin*) for the areas, ideally managing their resources for other users and future generations, requiring recurrent (not necessarily continuous) occupancy and use.

These land users, especially through the recruitment of hunting partners, operated through the nexus of kinship and marriage. It is important to convey here that the Algonquins live in a decentralized society spending part of their winters and summers in cabins spread throughout the territory on their family hunting grounds. Family hunting groups have exclusive rights in harvesting territories and are the primordial units of Algonquian social order. These days, the Algonquins spend more time in the reserve, but they still maintain at least one, if not several cabins, throughout their family territories clustering around traplines, sugar bushes, medicine plants, and waterways, all of which they visit seasonally.

Trapping and hunting partners are not only successive through patrilineal lines, but also a bilateral system across kin, giving matrilateral and affinal kin alternative access to land and resources. As anthropologist Sue Roark Calnek, who worked with the community for many years, writes: "Structuring alternative access to areas through the kinship (and friendship) nexus in this way has several advantages, social as well as economic/ecological, over *either* a wholly unpartitioned 'commons' *or* the 'unsociable extreme' of rigidly privatized territories:

- It locates and regulates economic behavior within a moral universe in which adults are supposed to be responsibly interdependent, neither dependent on nor competing with each other. They are thus more willing to share costs as well as benefits;
- (As one Algonquin has repeatedly stressed) it permits local environmental knowledge to be built up from recurrent experience and 'lineally' transmitted, but it also permits pieces of this knowledge to be 'laterally' disseminated throughout the community. This contributes to the community's 'knowledge pool' and therefore its collective survival. This kinship nexus… with its web of lineal and lateral relationships, thus serves both to recruit people to task and occupancy groups and to share environmental knowledge."[37]

The entitlements to land belonging described here embody the register of taking care as an entitlement for jurisdictional claims to govern land. But most of all, these entitlements do not take the form of anthropological arguments. I have spent many hours with traditional knowledge holder Toby Decoursay discussing the distribution of territory amongst the Algonquins and learning about the meaning and codes of the *Onakanagewin*. This constitution not only guides people in how to hunt and trap, and how to allocate the hunting grounds between community members, part of the hunting ethic involves the distribution of meat after the hunt, as well. Decoursay explains:

> That's what they used to call it, *ado'nagen*. It's like, I'm going to eat today, and you're going to have your share. It's the same thing with the moose. *Ado'nagen* means the family, it's the place where you're going to eat, but it also means the family. When you share moose meat, you're just going to have to look at who has the most kids… With the most kids, the share is bigger.

I asked about how the land was actually divided, if there were boundaries or borders between the family territories. Toby answered:

> I don't know if there's a boundary in there, but us, we just know *kamashgono-gamak*, stay there, just hunt there. There's a lot of names on the territory… That's what they say, me I'm going to *kamashgono-gamak* or *gasazibi*, they just say the name of the territory and the Chief is going to take care of that. And they know what direction to go and where is the name of the place. And that's it…

That is the role of the Algonquins' constitution, the *Onakanagewin*, to guide and govern the comportment of the Anishnabe peoples on the land. With the guidance of the Chief and knowledge of the land, the people take care of their "property."

I asked the customary chief, Jean Maurice Matchewan: if you had to explain to someone who didn't understand hunting societies why the community needs so much land and why the families live in separate territories, how would you explain that? He answered,

> Well, first of all, it's hard to concentrate one big group of people in one big area, so I guess, not to over-kill the territory, so they need a bigger land base for that purpose. But also, not all the animals are there in one area, so they follow these animals around if they need to. For instance, if there's one family, if at their trap-line, there's no animals there, pretty much, another family will take them into their area when their animals are growing. So those are the kinds of thing they would do to accommodate other families. 'Cause I remember when I was young my grandfather was a great trapper, he used to go out to somebody else's territories, with permission, and there was no problem that way.

Since animals move around, hunting territories can change over time, or hunting partners, so that everyone

has an opportunity to go out and catch animals to feed their families. Collective benefits of land protection and defense are conceived not only beyond the individual, and the individual family, but beyond human beings so that all benefits of life can be redistributed throughout the land. Story after story told on the territory embodies these meanings and each one is brought out to illustrate this context in different ways.

Final Thoughts

This piece, no doubt, leaves us with more questions than answers. For example, how does the capitalist register also contain aspects of its own internal contradictions and possible dissolution? How can we think of 'taking care' as adaptive to and intertwined with the other two registers? Does 'taking care' in itself annihilate the other two property positions, beyond its conceptual integrity and political challenge? I find myself returning to Proudhon at the end here, even turning to the end of his own treatise, "What is Property?" where he tries to wipe his hands of the whole property debacle. He states, "Property is the suicide of society"—anti-social, scarcity-inducing; a right that was created out of sheer self-interest by the rich and privileged.[38] An asphyxiation of social good. I can't help but wonder: if we kill the first two registers of property, there's no telling what good things would have room again to breathe.

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Notes

1. Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire" *Annals of the Association of American Geographers* 94, no.1 (2004), 165-182.

2. Giovanni Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (London; New York: Verso, 1994), 34.

3. Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership," *Canadian Journal of Law and Jurisprudence* 13, no.1 (2000), 3-31.

4. Bryan, 3-31.

5. Bryan, 1.

6. For a definitive discussion on the practical and philosophical extinction of property "thingness," please see, Thomas C. Grey, "The Disintegration of Property," in *Modern Understandings of Liberty and Property*, ed. Richard A. Epstein (New York: Garland, 2000).

7. Grey, 75.

8. Grey, 75.

9. See William M. Kunstler, for example, "A Real World Perspective on the New Property," *U.S.F.L. Review* 24 (1989-1990), 291; Charles Reich, "The New Property" Yale Law Journal 73, no.5 (1964), 733-787; Keith Aoki, "(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship" *Stanford Law Review* 48 (1996), 1293-1355; Peter Drahos and John Braithwaite, *Information Feudalism* (London: Earthscan Publications Ltd., 2002).

10. See, for example, Gerald Frug, "Property and Power: Hartog on the Legal History of New York City," *American Bar Foundation Research Journal*. 9, no.3 (Summer 1984), 673-691; Damien Collins and Nicholas Blomley, "Private Needs and Public Space: Politics, Poverty and Anti-Panhandling By-Laws in Canadian Cities" in *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003), 40-67; Don Mitchell, "The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States" *Antipode* 29 (1997), 303-335; and Lynn A. Staeeheli and Don Mitchell, *The People's Property? Power, Politics, and the Public* (New York; London: Routledge, 2008).

11. Morris Cohen, "Property and Sovereignty," *Cornell Law Quarterly 13*, no. 8 (1927), 13.

12. Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Ontario: Methuen Publications 1984).

13. Legal scholar Patrick Macklem supports this assertion, stating that, "Canada became a sovereign state against the backdrop of a pre-existing distribution of territory among Aboriginal nations. Constitutional protection of Aboriginal title acknowledges the fact that Canada was and continues to be constituted on Aboriginal territories" Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 104.

14. Asch.

15. As the Royal Proclamation states: "AND WHEREAS, it is just and reasonable, and essential to our interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed *in the Possession of such Parts of Our Dominions, and Territories*, as not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds…." King George III, *Capitulations and extracts of treaties relating to Canada: with His Majesty's Proclamation of 1763* (Quebec: P.E. Desbarats, 1800), 26-27. (*emphasis added*).

16. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 155-172.

17. Borrows, 155-172.

18. Macklem, 104.

19. Richard Bauman, "Property rights in the Canadian Constitutional Context" *South African Journal on Human Rights* 8 (1992), 344-361.

The Charter of Rights and Freedoms (1982) contains no express protection of private property rights. Unlike the American Bill of Rights (Amendments V and XIV) and the European Convention on Human Rights (Article 1 of Protocol No. 1) and also the International Convention on Civil and Political Rights (Article 17-1), Canada chose not carry over the protection of property rights from the 1960 Canadian Bill of Rights (for discussion on why property rights were not included in the patriated constitution, see Roy Romanow, John Whyte, and Howard Leeson, *Canada… Notwithstanding: The Making of the Constitution, 1976-1982* (1984) at 216-62). The Bill of Rights is an ordinary statute, which rose against a background of egregious racial discrimination that denied Chinese, Japanese, and Hutterite communities rights of employment, land and home ownership and it is still in effect, but rife with problems that make the courts reluctant to enforce, and is generally under-used (for discussion on the ongoing relevance of the Bill of Rights, see Philip W. Augustine, "Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms" (1986) 18 *University of Ottawa LR* at 61-6). The Charter does contain two provisions in Section 7- the right to security and right to liberty—that have been interpreted as potentially protecting economic and property rights, but since property is not explicitly mentioned, these rights could be interpreted otherwise, as well, for example, as protecting bodily integrity or privacy.

The federal government's power of expropriation has been found in its residual powers under Section 91: see *Munro v National Capital Commission* [1996] SCR 663. These powers include the rights of owners to object and are usually accompanied by some compensation and significant common law protection. As Bauman writes, "In every Canadian jurisdiction procedural guarantees exist to ensure that the owner receives timely notice and a fair hearing before the expropriation can be carried out." Bauman, 351. He cites the Expropriation Act, RSA, 1980, C-E-16, which reflects the substantial modernization of the law which took place in 1794.

20. Paterson, Gilbert C., *Land Settlement in Upper Canada, 1783-1840*, Sixteenth Report of the Department of Archives, Province of Ontario, (Toronto 1920), 26.

21. See, for example, David Harvey, "The 'New' Imperialism: On Spatio-Temporal Fixes and Accumulation by Dispossession" *The Socialist Register* 40 (2004), 63-87; Rosa Luxemburg, *The Accumulation of Capital* (1913; repr., London; New York: Routledge, 2003), chapters 26-30.

22. see, for example, Luxemburg, 1913; Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1985); Harvey, 2004; Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon Press, 2000); *Neoliberal Environments: False Promises and Unnatural Consequences*, eds. Nick Heynen, J. McCarthy, W.S. Prudham and P. Robbins (London; New York: Routledge, 2007); Neil Smith, *Uneven Development: Nature, Capital, and the Production of Space* (Oxford: Basil Blackwell, 1984).

23. (for example, Federici, Silvia, *Caliban and the Witch—Women, the Body and Primitive Accumulation* (New York: Autonomedia, 2004); Maria Mies, *Patriarchy and Accumulation on a World Scale* (New York: Zed Books, 1998), see in particular, Chapter 2-Social Origins of the Sexual Divisions of Labour; Howard Adams, *Prison of Grass*, (Toronto: General Publishing, 1975); Fanon, Frantz, 1961, *The Wretched of the Earth* (New York: Grove Press, 2004); Jim Glassman, "Primitive Accumulation, accumulation by dispossession, accumulation by 'extra-economic,' means" *Progress in Human Geography* 30, no.5 (2006), 608-625.

24. Paul Rynard, "Welcome In, but Check Your Rights at the Door," *The James bay and Nisga'a Agreements in Canada*, Canadian Journal of Political Science, 33, no.2 (June, 2000), 218.

25. Carole Blackburn, "Searching for Guarantees in the Midst of Uncertainty: Negotiating Aboriginal Rights and Title in British Columbia" *American Anthropologist* 107, no.4 (2005), 586-596.

26. Blackburn, 586-596.

27. Deborah Simmons, "After Chiapas: Aboriginal Land and Resistance in the New North America" *The Canadian Journal of Native Studies* 14, no.1 (1999), 125-126.

28. Norman Zlotkin and Donald R. Colborne, "Internal Canadian Imperialism and the Native People" in *Imperialism, Nationalism, and Canada*, ed. Craig Heron (New Hogtown Press, Toronto, ON; Between the Lines, Kitchener, ON, 1977).

29. Morton J. Horowitz, "The History of the Public/Private Distinction" *University of Pennsylvania Law Review* 130, no.6 (1982), 1424.

30. Leroy Little Bear, "Aboriginal Paradigms, Implications for Relationship to Land and Treaty Making" in *Advancing Aboriginal Claims: Visions/Strategies/Directions*, ed. Kerry Wilkins (Saskatoon: Purich Publishing Ltd., 2004).

31. Little Bear.

32. See *Calder et al. v. Attorney-General of British Columbia*, S.C.R. (1973), 313; and R. v. Guerin 2 S.C.R. (1984), 345. Hereafter, referred to as *Guerin*. This was a British Columbian case involving the Musqueam Band and a tract of their reserve land, alienated to the province, and used against the wishes of the Musqueam band's original agreement. The "trust-like" relationship between the First Nation and provincial Crown was found to be violated by the secrecy of lands use that by virtue of the Royal Proclamation, the Crown still maintained responsibility over. See also Little Bear, 33.

33. Little Bear, 36.

34. RCAP, "Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment," Government of Canada, URL: http://www.ainc-inac.gc.ca/ch/rcap/rpt/index_e.html (1991).

35. RCAP, 14.

36. Bryan, 16. Bryan examines the European history of property rights and how it is exemplified by a rationalistic tendency that is captured by a technological worldview. This rationalization comes to be the way we understand ourselves in the world, which can be explained as the harnessing of things in terms of their ability to be turned into something consumable. Rationalization is revealed to us through language and a particular *enframing* or '*gestell*" that Heidegger calls technological. Technology is what constitutes us, and it demands that nature supply us, that it form a reserve to supply human use. It must be transformed into 'standing reserve' thus ordered or structured - and in this way, reveals the world at large. "With technology, the 'real' is revealed as 'standing reserve'… Technology… makes demands of nature, and that demand is one of supply." This standing reserve is assumed to be a universal reality.

37. Sue Roark Calnek, *Algonquins of Barriere Lake Background Reports—Volume 3: The Social Organization of Barriere Lake Algonquin Land Use*. A Report to the Algonquin Nation Secretariat, Michikanabikok Inik, Algonquins of Barriere Lake. (November 11, 2004), 38.

38. Proudhon, Pierre-Joseph, *What Is Property? or, An Inquiry into the Principle of Right and of Government* (1840).

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