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## Planning as Property: Uncovering the Hidden Racial Logic of a Municipal Nuisance By-law

HEATHER DORRIES\*

Dans son important article *La blancheur comme forme de propriété (Whiteness as Property)*, Cheryl Harris a démontré de manière efficace le lien entre l'identité raciale et les revendications relatives à la propriété dans l'histoire du droit. À travers une généalogie du droit commençant par le droit de l'esclavage aux États-Unis, Harris démontre l'évolution de la blancheur, d'une forme d'identité raciale à une forme de propriété reconnue et protégée en droit. Dans le présent article, j'utilise le cadre théorique de Harris pour analyser deux règlements adoptés en 2008 par la ville de Brantford en Ontario, et révéler comment les pouvoirs conférés par la loi aux municipalités ont une logique raciale dissimulée. En analysant ces règlements, ainsi que le litige qui en découle, je démontre comment les pouvoirs de réglementation et d'exécution des processus de planification municipale peuvent autoriser les revendications coloniales liées à la propriété, tout en donnant aux municipalités le pouvoir de criminaliser les revendications autochtones relatives à l'autorité territoriale. Ultimement, je démontre que les pouvoirs de planification des municipalités jouent un rôle important dans l'affirmation des revendications de souveraineté de l'état colonial, tout en réduisant celles des peuples autochtones.

In her landmark essay, *Whiteness as Property*, Cheryl Harris powerfully demonstrates how racial identity and property claims are co-produced in law. Through a genealogy of law starting with American slave law, Harris reveals how whiteness has evolved from a form of racial identity into a legally acknowledged and protected form of property. In this article I apply Harris' framework to an analysis of two by-laws passed by the City of Brantford (Ontario) in 2008, in order to reveal a hidden racial logic within the statutory powers vested in municipalities. By analyzing these by-laws, as well as the litigation which followed, I demonstrate how the regulatory and enforcement powers of municipal planning processes can authorize settler colonial claims to property, while at the same time conferring upon municipalities the power to criminalize Indigenous assertions of territorial authority. Ultimately, the planning powers vested in municipalities are shown to play an important role in affirming the sovereignty claims of the settler state, while diminishing the sovereignty claims of Indigenous peoples.

IN MAY 2008, THE CITY OF BRANTFORD (ONTARIO) passed two nuisance by-laws. By-law 63-2008 concerned access to property, and prohibited "Interference with Development, Construction and Access to Property." By-law 64-2008 concerned the regulation of property use through the application of development charges by entities other than the City of

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Brantford by prohibiting the collection of “Unauthorized Fees, Charges, Levies, Taxes, Requirements and conditions Respecting Development and Construction.” These by-laws were passed in response to the activities of the Haudenosaunee Development Institute (HDI). Established in 2007, the main objective of the HDI is to direct development within Haudenosaunee territories by soliciting fees and requiring permits from developers. In 2007, the HDI began blocking access to construction sites when developers did not comply with the requirements established by the HDI. The nuisance by-laws enabled the City of Brantford to request an injunction against the activities of the HDI; the resulting litigation lasted from 2008 to 2013. These activities were widely perceived as a threat to law and order in Brantford. The *National Post* reported “militant [native] Canadians” put Brantford at risk of “immanent riot.”<sup>1</sup> According to the Mayor of Brantford, the by-laws were simply an attempt to curb the activities of the HDI: “We’re hoping that development will continue, that threats and intimidation will cease, and people will get back to work ... We need to act responsibly to protect the municipal interest, including a significant threat to public safety.”<sup>2</sup>

With roots in tort law, the nuisance by-law is a regulatory mechanism designed to protect the rights of property owners<sup>3</sup> and is organized around property relations. A nuisance is generally defined as an unreasonable infringement on the use and enjoyment of property. Just as property can be understood as privately or publicly held, there are two types of nuisances: a private nuisance is committed against the property or welfare of an individual, whereas a public nuisance is an “unreasonable interference with the public’s interests in questions of health, safety, morality, comfort of convenience.”<sup>4</sup> Both forms of nuisance are viewed as an interference with the rights of property holders. Therefore, to establish the legitimate existence of a nuisance claim, both the existence of a proprietary right and the demonstration of some interference with the use and enjoyment of the property must be demonstrated.

This article is based on an analysis of the City of Brantford’s *First Nations Policy*, by-laws, the affidavits of planners submitted by the City in advancement their claim, and court decisions. Through discursive policy analysis,<sup>5</sup> I argue that the City of Brantford mobilized these nuisance by-laws to establish planning authority as its proprietary right. Relying on the work of critical legal scholar Cheryl Harris, I demonstrate how these simple nuisance by-laws were buttressed by a legal architecture that allows the benefits of property to accrue to non-Indigenous peoples through the vehicle of planning.

Although the negotiation of propertied relations has long been one of the primary tools of planning, many key assumptions about the ownership model of property have gone unchallenged<sup>6</sup> and theories of property are relatively underdeveloped in planning

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<sup>1</sup> Craig Offman, “City seeks Armed Forces intervention fears planning native protest main turn ugly,” *National Post* (29 May 2008).

<sup>2</sup> *Ibid.*

<sup>3</sup> Canadian Encyclopedic Digest (Online) *Nuisance: Ontario* (I2c) at paras 11-12.

<sup>4</sup> *Ibid.*

<sup>5</sup> Discursive policy analysis highlights how policy problems and their solutions are constructed and circulated. See generally: Frank Fisher & John Forester eds, *The Argumentative Turn in Policy Analysis and Planning* (Durham: Duke University Press, 1993).

<sup>6</sup> Nicholas Blomley, “Land Use, Planning, and the ‘Difficult Character of Property’” (2017) 18:3 *Planning Theory and Practice* 351 at 352 ; Mona Fawaz, “Planning and the Making of a Propertied Landscape,” (2017) 18:3 *Planning Theory and Practice* 365 at 366.

scholarship.<sup>7</sup> Instead, property is often treated as a thing, rather than as a bundle of rights delineated through social relations. As a result, planning is often imagined as a technical practice concerning the administration of land use, obscuring the political nature of planning. In this article I demonstrate that while property is the material object at the centre of this state of affairs, there is a larger set of claims being made by both the City of Brantford and the HDI, with each invoking a set of competing historical narratives in order to sustain their legal claims to planning and territorial authority. By invoking the use of the nuisance by-law, the City places property at the center of this dispute, and as a consequence, the larger jurisdictional claims of the HDI become understandable only as damage to property.

Both the City of Brantford and the Haudenosaunee Development Institute claim to have the authority to direct planning and development. The HDI maintains that the Haudenosaunee have never surrendered jurisdiction over their territory, and consequently maintain the right to control development. The City, too, relies on jurisdiction to bolster its claims to the right to plan, but also uses jurisdiction to divorce itself from the claims made by the HDI by arguing that the federal government alone is responsible for Indigenous affairs. The City has sought to end the activities of the HDI through an injunction, claiming that the HDI's activities constitute a nuisance and pose a threat to the City's economy and to the rule of law. In so doing, the City established its position as an agent that restores law and order, while asserting its status as a neutral and impartial actor within a field it had no part in making.

I begin by placing planning within the context of settler colonialism. Relying on the work of Cheryl Harris, and Michael Omi and Howard Winant's concept of "racial formation," I then demonstrate how Canadian laws and policies governing Indigenous<sup>8</sup> peoples accord differential property rights according to race. Next, I provide an overview of the conflict in Brantford, beginning with a brief history of Indigenous occupation and settlement of the area. I then describe the *First Nations Policy* and by-laws passed by the City of Brantford. Finally, I argue that this policy framework limits Indigenous participation in planning processes and upholds a system of privilege that accords significant economic and political gains to non-Indigenous peoples, while criminalizing Indigenous expressions of authority.

## **I. LOCATING THE RACIAL PROPERTIES OF PLANNING**

### **A. SETTLER COLONIALISM AND THE CODIFICATION OF RACIAL STATUS**

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<sup>7</sup> Donald Krueckeberg, "The Difficult Character of Property: To Whom Do Things Belong?" (1995) 61:3 *Journal of the American Planning Association* 301 at 302.

<sup>8</sup> I use the term Indigenous to refer to the various sovereign nations who have inhabited North America for millennia. I use the word Indigenous when not referring to the Haudenosaunee specifically, and this word is capitalized in the same manner that words such as "European" and "American" are capitalized. I use the terms "Aboriginal," "Indian," and "First Nations" when discussing specific legal categorizations, such as Aboriginal, Métis, and Inuit people as recognized under section 35 of the *Constitution Act, 1982*. In this context, I use the terms "Aboriginal" and "Indian" interchangeably when writing about Canadian policies dealing with Aboriginal or Indian peoples, to reflect the changing use of these terms in policy contexts over time.

An analysis of settler colonialism is crucial for situating the historic and evolving relationship between Indigenous peoples and Canada. Patrick Wolfe argues that settler colonialism calculates the acquisition of territory according to a “logic of elimination,”<sup>9</sup> which aims to remove Indigenous peoples from their territories in order to meet requirements for land. This logic of elimination organizes settler colonialism, and results in not only the physical dispossession of Indigenous peoples, but also the denial of Indigenous political authority and the erasure of Indigenous cultural and social life. This proliferation of the logic of elimination across multiple social, economic, and political aspects of settler society means that settler colonialism is best understood as a structure rather than as a singular historic event.<sup>10</sup>

Settler requirements for land and resources explain the violent remaking of property relations that characterize settler colonialism across the globe.<sup>11</sup> Property is also central to planning processes and it is through planning’s role as a manager of property that planning becomes intrinsically linked to settler colonialism. Planning scholar Libby Porter has done important work demonstrating how planning constructs and mobilizes the property regime in ways that facilitate Indigenous dispossession and inform planning’s “colonial culture.”<sup>12</sup> Porter argues that it is in the application of colonial knowledge to planning’s techniques and practices, regulatory methods, and desired outcomes that planning produces fundamentally different “ontological and epistemological philosophies of place.”<sup>13</sup> Similarly, geographer Nicholas Blomley argues that the ownership model of property leads to a situation in which Indigenous models of property are unrecognized by the Courts because they do not conform to western models of property ownership.<sup>14</sup>

While the cultural and discursive practices that produce property provide insight into different cultural and epistemological frames for understanding property, I suggest that cultural differences do not fully account for how differential property rights are entrenched and perpetuated by the planning framework, or the subordinate position of Indigenous peoples in planning processes.<sup>15</sup> Although settler colonialism operates through land and property, it is also justified by the ideology of white supremacy that organizes the world according to a racial hierarchy. With few exceptions, planning scholars have not maintained a sustained engagement with scholars of critical ethnic studies who have faced questions of racism and settler colonialism head on.<sup>16</sup>

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<sup>9</sup> Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” (2006) 8:4 *Journal of Genocide Research* 387 at 387.

<sup>10</sup> *Ibid.*

<sup>11</sup> See generally, Anthony Hall, *Earth into Property: Colonization, Decolonization, and Capitalism* (Montreal: McGill-Queen’s, 2010); Cole Harris, *Making Native Space: Colonialism, Resistance and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

<sup>12</sup> Libby Porter, *Unlearning the Colonial Cultures of Planning* (Surrey and Burlington: Ashgate, 2010) at 40.

<sup>13</sup> *Ibid.* at 17.

<sup>14</sup> Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 112.

<sup>15</sup> Heather Dorries, “Rejecting the “False Choice:” Foregrounding Indigenous Sovereignty in Planning Theory and Practice” (PhD Dissertation, University of Toronto, 2012) [unpublished] at 110.

<sup>16</sup> My purpose here is not to deny the unique sovereign status of Indigenous peoples, but rather to highlight how the logic of white supremacy intersects with the logic of settler colonialism. As Justin Leroy notes, although scholars of Black studies and Indigenous studies have made claims to exceptionalism which may seem to render the political projects in which these fields are rooted irreconcilable, anti-black racism, slavery, and

Thus, the work of Cheryl Harris on the relationship between property and racial subordination is particularly useful for planning scholarship. In *Whiteness as Property*, Harris centres white supremacy<sup>17</sup> in a powerful analysis of how racial identity and property claims are co-produced in law. My understanding of Harris' argument that whiteness functions as a form of property is informed by Michael Omi and Howard Winant's concept of "racial formation" as a socio-historical process through which "racial categories are created, inhabited, transformed, and destroyed."<sup>18</sup> Omi and Winant use this concept to demonstrate how racial formations are institutionalized through social, economic, and political forces in order to constitute racial projects that "*re-organize and redistribute resources along racial lines.*"<sup>19</sup> Examining how such racial formations are created in law and maintained by planning processes draws attention to the dehumanization that enables settler colonialism's logic of elimination, and reveals how planning can be understood as a racial project.

Through a genealogical analysis of American slave law, Harris reveals how whiteness has evolved from a form of racial identity into a legally acknowledged and protected form of "treasured property" associated with a bundle of rights and privileges exclusively available to white people.<sup>20</sup> These rights include: rights of possession, enjoyment, exclusion, as well as the right to determine when and if these rights will be transferred. These privileges also include the ability to determine who can be considered white and as such, access the entitlements of whiteness. She explains how the degraded status of Black people was codified in law, with basic liberties and freedoms denied to Black people and reserved for white people. Slavery treated slaves as property and allowed Black people to become a kind of "'property' human life,"<sup>21</sup> with beliefs about racial inferiority anchoring this subordination. These beliefs were also applied to Native Americans, who were viewed as incapable of engaging in the cultural practices necessary to create and secure property. The same racial subordination that enabled slavery, she argues, also paved the way for the theft of Indigenous land.<sup>22</sup> Thus, Harris demonstrates that "[r]ace and property were thus conflated

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colonial dispossession are co-constituted by and sustained by a logic of white supremacy. Justin Leroy, "Black History in Occupied Territory: On the Entanglements of Slavery and Settler Colonialism" (2016) 19:4 *Theory & Event*. The relationship between white supremacy and settler colonialism has also been examined by Tiffany Lethabo King, Scott Morgensen, Maile Arvin, amongst others.

<sup>17</sup> Cheryl Harris, "Whiteness as Property" (1993) 106:8 *Harv L Rev* 1707 [Harris]. Harris adopts Frances Lee Ansley's definition of white supremacy as: "a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings" (at fn 10).

<sup>18</sup> Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (New York: Routledge, 1994) at 55.

<sup>19</sup> *Ibid* at 56. Emphasis in the original.

<sup>20</sup> *Ibid* at 1713.

<sup>21</sup> *Ibid* at 1720.

<sup>22</sup> *Ibid* at 1721. Harris writes: "Slavery linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property. Similarly, 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 rendered their first possession rights invisible and justified conquest. The racist formulation embedded the fact of white privilege into the very definition of property, marking another stage in the evolution of the property interest in whiteness. Possession—the act necessary to lay the basis for

by establishing a form of property contingent on race ... the conquest, removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of whites in Native American land.”<sup>23</sup>

While Harris’ argument focuses on American law, its applicability to the Canadian context becomes clear when examining the origin and evolution of the *Indian Act*.<sup>24</sup> Throughout its many iterations, the purpose of the *Indian Act* has been to assimilate Indigenous peoples. Its origin as The *Gradual Civilization Act* of 1856 established a racial architecture by creating a distinction between “status” and “non-status” Indians. This distinction not only created a legal category of persons with a specific and limited set of rights and entitlements, it also solidified the authority of the Crown to define the rights of Indians and non-Indians by bringing status Indians under the exclusive jurisdiction of the Crown. Similarly, the *Gradual Enfranchisement Act* of 1869 provided for voluntary enfranchisement by stipulating that Indians of “good character”—exemplified through regular church attendance and the ability to read and write English—could relinquish Indian status and acquire property in fee simple.<sup>25</sup> Thus, the ability to own property for Indigenous peoples was limited to those who had been divested of their Indian status and assimilated into the non-Indigenous population.

Together, these Acts codified racial status and made the right to own property contingent on racial status by limiting property and citizenship to Indigenous peoples who had taken on the characteristics of white Euro-Canadians.<sup>26</sup> The *Indian Act* of 1876 consolidated the two previous Acts. Since its inception, the *Indian Act* has established the settler property regime and associated cultural and political practices as the baseline for the measurement and recognition of political legitimacy, with assimilation serving as the only option for accessing full citizenship rights. In this way, the *Indian Act* validates non-Indigenous possession and occupation of territory while facilitating the elimination of Indigenous territorial claims. At the same time laws defining Indian status were created and expanded, the *British North America Act*, later renamed the *Constitution Act*, created the legal framework for Canada’s system of government, including the division of powers between the provinces and the federal government. This government structure has special implications for Indigenous peoples, as the *Act* assigns jurisdiction for “Indians, and Lands reserved for the Indians”<sup>27</sup> to the federal government and further codifies the status identities created by the *Indian Act*.

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rights in property—was defined to include only the cultural practices of whites. This definition laid the foundation for the idea that whiteness—that which whites alone possess—is valuable and is property” (at 1721).

<sup>23</sup> *Ibid* at 1716.

<sup>24</sup> *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. The first iteration of what is today known as the *Indian Act* appeared in 1850 with the *Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by them From Trespass and Injury*. This Act was replaced in 1856 by the *Gradual Civilization Act*. Following confederation, it appeared as the *Act for the Gradual Enfranchisement and Assimilation of Indian People* in 1868.

<sup>25</sup> Martin Cannon, “Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada” in Jerry White et al, eds, *Aboriginal Policy Research: Moving Forward, Making a Difference* (Toronto: Thompson, 2007).

<sup>26</sup> Enakshi Dua, “‘Race’ and Governmentality: The Racialization of Canadian Citizenship Practices” in Deborah Brock, ed, *Making Normal: Social Regulation in Canada* (Toronto: Nelson, 2003) at 45.

<sup>27</sup> *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11, s 91(24).

The evolution of the *Indian Act* shows the centrality of race in organizing settler colonial governmentality, and makes plain the ways in which racial differences are constructed and used to bolster the state's claims over Indigenous territory. These strategies satisfy settler colonialism's requirement to eliminate Indigenous political authority and facilitate its replacement by the authority of the state. This logic is evident in the ways that the legal categories of "Indian" and the delineation of Indian and non-Indian land that were created during the colonial period continue to be mobilized today for the settler state's governance of Indigenous peoples.<sup>28</sup> These legal distinctions, together with the concept of jurisdiction, are institutionalized in Ontario's planning framework to exclude Indigenous peoples from the planning process.

## B. THE PLANNING CONTEXT

In Canada, jurisdiction for planning matters falls to provincial governments, who in turn delegate responsibility for local land use planning to municipalities. At the same time, jurisdiction for the affairs of Indigenous peoples lies with the federal government. As a result, the provincial government has devoted little attention to the ways that Aboriginal rights interact with planning processes, and Indigenous issues have remained largely absent from the provincial planning framework.<sup>29</sup> Nevertheless, planning decisions often affect the interests of Indigenous peoples, while the absence of provisions in the statutory planning framework for Indigenous interests has often contributed to conflict. Indeed, several of the major flashpoints in Canadian-Indigenous relations have been sparked by municipal planning decisions.

In Ontario, planning is conducted according to a policy-led planning system, in which the *Provincial Policy Statement* provides direction on matters related to land use planning and development across the province, and serves as an expression of broad social and economic policy goals.<sup>30</sup> While the provincial government sets broad policy goals, the task of regulating land use is delegated to municipalities. Municipal governments have considerable power to influence urban land development by creating official plans, which direct land use decision-making at the local level. Local Official Plans represent a statement of intent regarding future decision-making and together provide descriptions of all the types of allowable development within a municipality. These planning instruments control development by identifying permissible land uses, thus placing limits on the use of private property.

John Friedmann notes that in a policy led approach to planning, planners often regard themselves as technicians or technocrats who serve the existing structure of power, and "believe that by using appropriate scientific theories and mathematical techniques, they can, at least in principle, identify and precisely calculate the best solutions."<sup>31</sup> This reasoning

<sup>28</sup> Frances Abele, *Like An Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary Indian Act* (Ottawa: National Centre for First Nations Governance, 2007).

<sup>29</sup> See generally John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 UTLJ 417[Borrows].

<sup>30</sup> Ontario, Ministry of Municipal Affairs and Housing, *Provincial Policy Statement*. (Toronto: Ontario, 2014) [Policy Statement].

<sup>31</sup> John Friedmann, *Planning in the Public Domain: From Knowledge to Action* (Princeton, NJ: Princeton University Press, 1987) at 79.



reinforces the perception that planning activity takes place on neutral ground, and supports the belief that the activities of municipalities are divorced from matters of national political interests.

As a consequence of the ways Indigenous identities have been scripted and managed by the legal framework—originally established to facilitate the dispossession of Indigenous peoples from their traditional territories—the planning framework provides for the very limited inclusion of the interests of Indigenous peoples in the planning process. The planning framework is structured according to the lines of jurisdiction drawn by the *Constitution*. As John Borrows has argued, Indigenous peoples “are caught between the peripheries of competing political jurisdictions.”<sup>32</sup> The planning framework thus serves to preserve the authority of the Crown, rather than facilitating Indigenous participation. For instance, the *Planning Act* defines First Nations as a “public body,” affording First Nations with the same opportunities for notification provided to other public bodies.<sup>33</sup> However, this stakeholder consultation discounts the constitutional position Indigenous peoples occupy in Canada,<sup>34</sup> and minimizes the role which Indigenous peoples can play in planning.<sup>35</sup> Similarly, the *Provincial Policy Statement* encourages planners to create plans that are “mindful” of Aboriginal rights,<sup>36</sup> but does not prescribe the involvement of First Nations in planning processes.

While opportunities for participation in the planning process are limited, the duty to consult is an evolving legal mechanism that has established the obligation of the Crown to consult Indigenous peoples and provide appropriate accommodations when it contemplates actions that may affect Aboriginal or Treaty rights. Aboriginal and Treaty rights are protected by section 35 of the Canadian Constitution. Despite this protection, governments across Canada have frequently undertaken action that may impinge upon those rights. However, the courts have established that the Crown has an obligation to consult with Aboriginal peoples before infringing on those rights. This obligation has become known as the duty to consult, and the nature of this duty has been elaborated by a number of decisions of the Supreme Court of Canada. For instance, the Supreme Court of Canada’s decision in *Haida Nation* identifies two conditions that should trigger Aboriginal consultation. Consultation should occur when: 1) the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right; and 2) it contemplates conduct that might adversely affect this right.<sup>37</sup> Consultation is generally envisioned as a mechanism for protecting Aboriginal rights, but beyond preserving the honour of the Crown, the duty to consult provides a degree of certainty to development processes<sup>38</sup> by minimizing the potential for conflict.

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<sup>32</sup> Borrows, *supra* note 29 at 434.

<sup>33</sup> *Planning Act*, RSO 1990, c P13 at 1.

<sup>34</sup> Chippewas of Nawash, *Under Siege How the People of the Chippewas of Nawash Unceded First Nation Asserted Their Rights and Claims and Dealt with the Backlash. Submission to the Ipperwash Inquiry*, (Toronto: Ipperwash Inquiry, 2005) at 89.

<sup>35</sup> Borrows, *supra* note 27 at 418.

<sup>36</sup> *Policy Statement*, *supra* note 30.

<sup>37</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.

<sup>38</sup> Shin Imai & Ashley Stacey, “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v Salmon Arm (City)*” (2014) 47:1 UBC L Rev 293 at 293.

Although consultation potentially affords some protections for Aboriginal and Treaty rights, recent court decisions have established that municipalities do not owe a duty to consult, and that only procedural aspects of the duty can be delegated to municipalities.<sup>39</sup> Thus, the realm of municipal governance has not been viewed as germane to the negotiation and establishment of relations between First Nations and the Crown. Justice Newbury, writing for the Court in *Neskonlith*, which addressed the municipal duty to consult reasoned that,

the ‘push-down’ of the Crown’s duty to consult, from the Crown to local governments, such that consultation and accommodation would be thrashed out in the context of the mundane decisions regarding licenses, permits, zoning restrictions and local bylaws, would be completely impractical. These decisions, ranging from the issuance of business licences to the designation of parks, from the zoning of urban areas to the regulation of the keeping of animals, require efficiency and certainty. Daily life would be seriously bogged down if consultation – including the required “strength of claim” assessment – became necessary whenever a right or interest of a First Nation “might be” affected.<sup>40</sup>

While the duty to consult represents a significant evolution in attitudes towards Aboriginal rights, and has become a constitutionally mandated moral standard for the Crown’s dealings with Aboriginal peoples, it has several shortcomings. For instance, it is not a vehicle for addressing historical grievances<sup>41</sup> and limits Indigenous claims to those that can be made legible through section 35(1). In this way, the duty to consult fails to subvert the dynamics of colonial relationships.

In fact, the dispute between the City of Brantford and the HDI is an inversion of the conciliatory logic of consultation that seeks to advance dispossession on a contractual basis. Instead, it can be understood as set of refusals. On the one hand, the City refuses to engage Indigenous peoples as legitimate actors in the sphere of planning, instead relying on a series of jurisdictional and property claims to deny the existence of obligations to the Haudenosaunee. This effacement reflects settler colonialism’s drive to eliminate Indigenous peoples and polities. On the other hand, the establishment of the HDI could be interpreted as a refusal to accept ongoing dispossession as managed by the planning process. This logic of refusal has important meaning in the context of settler colonialism. As Audra Simpson argues,

[r]efusal holds on to a truth, structures this truth as stance through time, as its own structure and comingling with the force of presumed and inevitable disappearance and operates as the revenge of consent—the consent to these conditions, to the interpretation that this was fair, and the ongoing sense that this is all over with. When I deploy the term revenge, I am hailing historical consciousness ... Revenge does not mean individuated harm inflicted on a

<sup>39</sup> Janna Promislow, “Irreconcilable?: The Duty to Consult and Administrative Decision Makers” 26:3 Can J Admin L & Prac 251 at 269 [Promislow].

<sup>40</sup> *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at para 72.

<sup>41</sup> Promislow, *supra* note 39 at 261.

perpetrator in a transaction that renders justice. In my usage here, I mean avenging a prior of injustice and pointing to its ongoing life in the present. This refusal to let go, to roll over, to play this game, points to its presumptive falsity of contractual thinking.<sup>42</sup>

Following Simpson, the HDI's refusal to submit to the established planning framework can be understood as a challenge to dominant settler narratives which assume that Indigenous dispossession is a morally unquestionable and historically resolved fact, and that casts Indigenous resistance as criminal activity. Rather, this is a political strategy that begins with a refusal to disappear in the manner required by the eliminatory logic of settler colonialism.

## II. THE COLONIAL CONTEXT

### A. A BRIEF HISTORY OF THE TERRITORY

The land on which Brantford is situated and which is at the heart of this dispute has a long history that cannot be fully captured here. Brantford lies within the traditional territories of the Nishnaabeg and Mississauga peoples, who have used treaties to determine how this territory would be shared. The Dish with One Spoon wampum belt is one way such agreements were codified.<sup>43</sup> The dish represents the shared territory and the resources it offers, while the spoon serves as a reminder that the resources must be shared to ensure common survival, and is representative of relations between the Nishnaabeg, Mississaugas, and Haudenosaunee. The meaning derives from the symbolism of the bowl of food being passed around a circle: each member of the circle must take only what she needs in order to not deplete resources needed for survival. This Treaty was a mechanism for sharing resources, promoting peace, and ensuring the continued sovereignty of these nations.<sup>44</sup>

While the Haudenosaunee occupied a significant territory surrounding the southern portions of Lake Erie and Lake Ontario, in 1784 the Haudenosaunee were compelled to relocate following the end of the American War of Independence.<sup>45</sup> The Haudenosaunee had fought alongside the British, and consequently lost much of their traditional territory. In recognition of this loss, the Governor of Quebec, Sir Frederick Haldimand, offered the Haudenosaunee nearly one million acres of land in the Grand River Valley, which had been purchased by the British from the Mississaugas.<sup>46</sup> The Haldimand Proclamation of 1784

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<sup>42</sup> Audra Simpson, "Consent's Revenge" (2016) 31:3 Cultural Anthropology 326 at 330.

<sup>43</sup> Leanne Simpson, "Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23: 2 Wicazo Sa Review 29.

<sup>44</sup> See also Darlene Johnston, "Connecting People to Place: Great Lakes Aboriginal History in Cultural Context" (2006) Ipperwash Inquiry, commissioned paper, online:

[commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1191&context=fac\\_pubs](http://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1191&context=fac_pubs) [perma.cc/47M5-JKHQ].

<sup>45</sup> For a more expansive history of the Haudenosaunee in the Grand River territory see Susan Hill, *The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River* (Winnipeg: University of Manitoba Press, 2017).

<sup>46</sup> Gary Warrick, "Buried Stories: Archaeology and Aboriginal Peoples of the Grand River, Ontario" (2012) 46:2 Journal of Canadian Studies 153 at 155.

granted the Haudenosaunee all of the land six miles on each side of the Grand River from its mouth to the source:

Whereas His Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians, and of the loss of their settlement which they thereby sustained—that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations, who have either lost their settlements within the Territory of the American States, or wish to retire from them to the British ... I do hereby in His Majesty's name authorize and permit the said Mohawk Nation, and such others of Six Nation Indians as wish to settle in that Quarter to take Possession of, and settle upon the Banks of the River commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river beginning at Lake Erie and extending in that proportion to the head of the said river, which them and their Posterity are to enjoy forever.<sup>47</sup>

As Susan Hill argues, from the perspective of the Haudenosaunee the Haldimand Proclamation symbolized the British commitment to ensuring the economic security of the Haudenosaunee in exchange for their continued support as allies against the French.<sup>48</sup> Thus, the Haldimand Proclamation merely codified the terms of earlier treaties signed between the British and Haudenosaunee, including the 1664 Fort Albany rate, and the 1701 Nanfan Treaty.<sup>49</sup> These Treaties promised that the Crown would protect the hunting grounds of the Haudenosaunee in perpetuity and affirmed the political autonomy of the Haudenosaunee. However, rather than ensuring that Haudenosaunee interest in the land would be protected, successive Canadian governments actively encouraged settlement upon these lands by selling and leasing the lands without Haudenosaunee consent,<sup>50</sup> and by sanctioning the occupation of the lands by squatters and other unauthorized persons.<sup>51</sup> Through these land sales, relations of cooperation were transformed into propertied relations, where property was understood merely in terms of its exchange value rather than as a symbol of a bundle of relationships.

Faced with encroaching settlement, which diminished the land's value as a space for hunting, Haudenosaunee Chief Joseph Brant agreed to sell and lease small land parcels

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<sup>47</sup> Canada, *Indian Treaties and Surrenders From 1680 to 1890 in Two Volumes, Volume 1* (Ottawa: Brown Chamberlin, 1891) at 26.

<sup>48</sup> Susan Hill "'Travelling Down the River of Life Together in Peace and Friendship, Forever': Haudenosaunee Land Ethics and Treaty Agreements as the Basis for Restructuring the Relationship with the British Crown" in Leanne Simpson, ed, *Relighting the Eight Fire* (Winnipeg: ARP, 2008).

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

<sup>50</sup> Susan Hill, "Conducting Haudenosaunee Historical Research from Home In the Shadow of the Six Nations—Caledonia Reclamation" (2009) 33:4 *The American Indian Quarterly* 479.

<sup>51</sup> This continuous encroachment on Haudenosaunee Territory is documented in Six Nations Lands and Resources, "Land Rights a Global Solution for Six Nations of the Grand River" (Ohsweken: Six Nations Lands and Resources, 2015). See also Cecilia Morgan, "Site of Dispossession, Site of Persistence: The Haudenosaunee (Six Nations) at the Grand River Territory in the Nineteenth and Twentieth Centuries" in Alan Lester and Zoe Laidlaw, eds, *Indigenous Communities and Settler Colonialism: Land Holding, Loss and Survival in an Interconnected World* (New York: Palgrave Macmillan, 2015).

within the Haldimand Tract. The confederacy chiefs granted Brant the power to sell the lands; the continuous revenue to be gained from the lease of these lands was viewed as one option for providing for the perpetual care and maintenance of the community. Although there has been considerable debate and criticism among Haudenosaunee historians about the wisdom of Brant's land dealing, Rick Monture argues that the land sales were a genuine attempt to secure the economic future of the community, and were conducted in accordance with the exercise of the sovereign rights of the Haudenosaunee.<sup>52</sup>

## B. THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE

The Haudenosaunee Development Institute (HDI)<sup>53</sup> is one way Haudenosaunee seek to maintain their jurisdiction over the territory. The HDI was established in 2007 by a group called the Haudenosaunee Confederacy Chiefs Council.<sup>54</sup> The Haudenosaunee Confederacy Chiefs Council represents a traditional governing body, and is distinct from the Six Nations Elected Band Council mandated by the *Indian Act*. The HDI asserts the right to approve and direct development in the Grand River area:

The Haudenosaunee Confederacy Council has created a process that would allow developers who want to develop within their territory to be dealt with expeditiously and effectively. The process for exercising Haudenosaunee jurisdiction over their lands in the Haldimand Tract will be known as the Haudenosaunee Development Institute. The HDI will identify, register and regulate development ...<sup>55</sup>

The assertion of the authority to control development within the Haldimand Tract hinges on the belief that the Haudenosaunee continue to exercise jurisdiction over the land, and that the presence of the competing sources of planning authority represented by the provincial or the federal government does not alter the continued sovereignty of the Haudenosaunee. Indeed, as Confederacy Chief Allan MacNaughton told *The Sachem*, “[t]he Confederacy has no issue with how Canada or Ontario in right of the Crown administers its development decisions along the Grand River, as long as it has had prior approval by the Confederacy.”<sup>56</sup> Thus, the HDI acknowledges the authority of these governments to plan and

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<sup>52</sup> Rick Monture, *We Share our Matters: Two Centuries of Writing and Resistance at Six Nations of the Grand River* (Winnipeg: University of Manitoba Press, 2015) at 30.

<sup>53</sup> Within the Six Nations of the Grand River community itself, views of the HDI are varied. Pointing out disagreement and political disunity within Indigenous communities is a common strategy for discrediting Indigenous political processes and denying the political legitimacy of Indigenous governments. My intent in this paper is not to assess the legitimacy of the HDI as a representative body of the Haudenosaunee. As a non-Haudenosaunee person, it would hardly be my place to do so. Instead, my aim is to analyze the strategies used by the City of Brantford in their attempt to criminalize the HDI, in order to better understand the role of planning in ongoing colonial dispossession.

<sup>54</sup> Haudenosaunee Development Institute, “Haudenosaunee Development Protocol” (2007), online: <[www.haudenosauneeconfederacy.com/HDI/devprocess.html](http://www.haudenosauneeconfederacy.com/HDI/devprocess.html)> [perma.cc/9V85-9866].

<sup>55</sup> Haudenosaunee Development Institute, *Terms of Reference* (September 2007), online: <[www.haudenosauneeconfederacy.com/HDI/termsofref.html](http://www.haudenosauneeconfederacy.com/HDI/termsofref.html)> [perma.cc/69UM-3XKT].

<sup>56</sup> Katie Dawson, “Six Nations Responds to Government” *Grand River Sachem* (26 October 2007) 1.

develop land in the traditional territory of the Haudenosaunee, however they claim the right to grant final approval for development.

The HDI's strategy of requesting annual payments in exchange for 40-year leases and development approval recalls Joseph Brant's vision for the survival of the community.<sup>57</sup> Justice Sidney B Linden points out in the final report of the Ipperwash Inquiry, Ontario is one of the strongest economies in the world and yet "economic policies and priorities in the province have neither protected the traditional Aboriginal economies nor enabled First Nations to participate in the industrial economy built on their traditional lands."<sup>58</sup>

Indigenous peoples have tended to suffer as a result, rather than reap the benefits, of resource extraction on their territories<sup>59</sup> and have been systemically prevented from sharing in the economic wealth of Ontario. Attempts to ensure that Indigenous communities are able to benefit from resource extraction and development on traditional Indigenous territories have focused on natural resource development, however there has been little discussion of how Indigenous peoples might benefit from or influence urban land development. Instead, attempts by the Haudenosaunee Development Institute to reap benefits from urban development by soliciting development fees were deemed evidence of a "criminal conspiracy" and of "extortion" by the City of Brantford's lawyer.<sup>60</sup>

### III. PLANNING AS PROPERTY

#### A. THE CITY OF BRANTFORD FIRST NATIONS POLICY

Throughout 2007 and 2008 the HDI began to solicit development fees and demand development applications from developers in the Haldimand Tract. When developers did not comply with the instructions of the HDI, the HDI blocked access to construction sites. According to documents filed in Court by the City of Brantford, by April 2008 development sites were being blocked on an almost daily basis.<sup>61</sup> The City viewed these activities as criminal activities that threatened the economic stability of the City, law and order, and the authority of the City to regulate land use planning. Thus, over a period of a few months in 2008, the City took steps to criminalize the activities of the HDI.

On March 25, 2008, the City of Brantford passed an official position on the activities of the HDI, outlined in its *First Nations Policy*. The policy makes several general statements regarding jurisdiction for First Nations and the authority of First Nations to influence planning in Brantford, but also specifically identifies the activities of the HDI as causing

<sup>57</sup> Tom Keefer, "Declaring the Exception: Direct Action, Six Nations, and the Struggle in Brantford" (2008) 7 *Upping the Anti* 113.

<sup>58</sup> Sidney B Linden, *Report of the Ipperwash Inquiry: Policy Analysis*, Vol 2 (Toronto: Queen's Printer for Ontario, 2007) at 59.

<sup>59</sup> Jean Teillet, "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario," (2006) Ipperwash Inquiry, commissioned paper, online: <[www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Teillet.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Teillet.pdf)> [perma.cc/2GEG-QB3W].

<sup>60</sup> Paul Legall, "HDI Fees 'Extortion': Brantford Applies for Injunction" *The Hamilton Spectator* (31 May 2008) A3.

<sup>61</sup> *Brantford (City) v Montour et al Motion Record*, 2008 ONCA Court File No. CV08334 (Notice of Motion) at para 2 [*Brantford Motion*].

numerous problems within the City. The policy begins with three recitals identifying the problem the City wishes to address, followed by ten sections outlining how the City intends to resolve the problem:

WHEREAS property owners and developers within the city of Brantford have come under increasing attention from certain members of First Nations through protests;

AND WHEREAS these protests cause great disruption to the economic health and vitality of the city of Brantford, and also represent a danger to the safety and security of many groups and individuals;

AND WHEREAS such disruptions will impact city residents,

NOW THEREFORE BE IT RESOLVED:

1. The upper levels of Government should establish a specific timeframe for negotiation processes to be conducted in good faith that shall lead to the payment of appropriate compensation.
2. It is the position of the City of Brantford that the negotiations with the First Nations and the resolution of their claims for compensation are the constitutional jurisdiction of the federal and provincial governments. Although the City of Brantford remains sympathetic to the aspirations of the First Nations to obtain redress for any past wrongs that can be proven, the City of Brantford has no role in the resolution of any such claims.
3. The City agrees with the provincial and federal position that the resolution of claims of First Nations will not be achieved by dispossessing property owners of their lands or other properties, either through expropriation or otherwise.
4. The City agrees with the provincial position that private property owners have valid titles to their properties and that citizens may continue to have reliance on the provincial land titles system as the means to determine the ownership of land.
5. The City agrees with the provincial position that developers are not required to pay licensing fees or taxes to the Haudenosaunee Development Institute.
6. The City agrees with the provincial and federal position that the Crown must comply with its consultation obligations as identified by the Supreme Court of Canada but that these consultation obligations do not give the First Nations a veto power over development or any other government action.
7. The City agrees with the comments from the Prime Minister's Office in which it was stated that incidents aimed at intimidation or coercion of developers are of great concern and the laws of both the Province of Ontario and of Canada must be respected so that economic development may flourish in an atmosphere of law and order. The City particularly agrees with the comment that local police forces and the courts have the responsibility to ensure that the laws of the municipality, the province and Canada are enforced.
8. The City recognizes that pursuant to the Police Services Act, decision-making powers in relation to policing issues are vested in autonomous Police Services Boards, and that operational decisions in respect of policing matters are vested in

the Chief of Police, so that there is no role for the City in the direction of the police in the performance of their duties.

9. The City remains prepared to work with its neighbours and to cooperate with the upper levels of government to solve problems and offer assistance where it can. If requested, the City will appoint a team to accompany First Nations leaders to travel to Toronto and Ottawa in order to meet with responsible ministers.

10. This resolution shall be forwarded to the Prime Minister, the Premier, the Provincial Minister of Municipal Affairs, the Federal Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, the Provincial Minister of Aboriginal Affairs, the Brantford Homebuilders Association, and shall also be distributed to the First Nations in the same manner as notifications are distributed pursuant to the Grand River Notification Agreement. The text of this resolution shall also be placed upon the City's website.<sup>62</sup>

The first two sections concern jurisdiction. The City outlines the extent of its authority, and denies any responsibility for Indigenous affairs by appealing to Canada's constitutional arrangements. According to the Policy, the City has no jurisdiction for First Nations' issues. As a result, it does not see itself as having any direct relation to, or responsibility to consider, First Nations' interests. Rather, it regards these issues as the jurisdiction of higher orders of government. The City does not deny the validity of the First Nations' claims, but states that it has no role in the resolution of such claims.

The third and fourth sections focus on property ownership. The policy affirms the property claims of the citizens of Brantford, and relies on the authority of the provincial property registry to assert the validity of the established property regime. The fifth section affirms the authority of the City and denies the authority of the HDI to collect development fees or otherwise assert authority. The sixth section further limits the authority of the HDI and of First Nations in general, by stating that Canada's consultation obligations do not constitute a veto power. The final three sections state that the HDI poses a disruption to law and order in the City. From the perspective of the City, the HDI poses more than an economic threat, and is viewed as more than a mere nuisance. Rather, from the City's perspective, the HDI calls into question the authority of the City to plan, as well as the authority and legitimacy of the City as an autonomous political entity. The City regards the actions of the HDI as a threat to its authority, and expands the idea of "law and order" from peaceful relations among citizens and respect for criminal law to include the ability of the City to govern its resources and manage property. In other words, laws related to property and planning are held up by the City as central to the notion of law and order.

By focusing on issues related to law and order and the security of private property, the City fails to recognize the ways in which it may have helped to produce the so-called protests by failing to engage First Nations peoples in the planning process in the first place. Moreover, the lawlessness represented by Indigenous "protest" provides a convenient backdrop against which the City can advance an argument regarding the need to preserve law and order as represented by the attainment of planning objectives and the exercise of planning authority.

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<sup>62</sup> City of Brantford, *First Nations Policy* (25 March 2008).



## B. BY-LAWS 63-2008 AND 64-2008

In May 2008, fewer than two months after passing the *First Nations Policy*, the City of Brantford Council unanimously passed two by-laws further aimed at curbing the activities of the HDI. By-law 63-2008<sup>63</sup> had the specific aim of prohibiting “Interference with Development, Construction and Access to Property”<sup>64</sup> and By-law 64-2008<sup>65</sup> was intended to “Prohibit unauthorized Fees, Charges, Levies, Taxes, Requirements and conditions Respecting Development and Construction.”<sup>66</sup>

By-law 63-2008 focuses on the regulation of the uses of public property for the purposes of protecting private property. Specifically, it targets the circulation of persons and vehicles around a number of “affected properties” and “designated streets” listed in the by-law. The properties listed are development sites targeted by the HDI. Thus, the by-law has as its primary feature the prohibition of: “the erection of tents and other structures” that would facilitate HDI protestors by offering shelter in poor weather; “standing and loitering” and other movements that would hinder the flow of traffic, in particularly to and from development sites; and finally, otherwise “hindering and impeding” access to the named properties.<sup>67</sup>

By-law 64-2008 is designated as a nuisance by-law. It prohibits individuals or other corporations from requesting applications for development, or the levying of development charges. Thus “[a]ny request, demand, invitation, coercion, stipulation or requirement that contravenes this by-law is a matter that, in the opinion of Council, is or could become a cause or public nuisance and is hereby prohibited.”<sup>68</sup>

Although both by-laws are framed as nuisance by-laws, they are designed to defend the exclusive right of the City to carry out planning activities by prohibiting other expressions of planning authority. While By-law 63-2008 prohibits the physical enactment of HDI’s authority by prohibiting the physical activities related to HDI’s actions, By-law 64-2008 effectively denies HDI’s authority to collect fees and otherwise direct development, in an attempt to reinforce the authority of the City. Thus, By-law 64-2008 describes the HDI’s activities as an unauthorized system that threatens the authority of the City:

[T]he creation of such a parallel, unauthorized and uncontrolled system undermines and hinders the role of the municipality to develop and implement policies, plans, and zoning by-laws and to regulate and control development and construction under the legally-established system, undermines and puts at risk the ability of the City to impose the conditions it is lawfully entitled to impose, undermines and interferes with the relations between the City and owners of lands on which development and construction has been approved, is causing and may require the City to forego or defer benefits and entitlements to keep or

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<sup>63</sup> City of Brantford, By-law No. 63-2008, *A By-law to Prohibit Interference with Development, Construction, and Access to Property* (12 May 2008), [By-law 63-2008].

<sup>64</sup> *Ibid.*

<sup>65</sup> City of Brantford, By-law No. 64-2008, *A By-law to Prohibit Unauthorized Fees, Charges, Levies, Taxes, Requirements and Conditions Respecting Development and Construction*, (12 May 2008), [By-law 64-2008].

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

<sup>67</sup> By-law 63-2008, *supra* note 63.

<sup>68</sup> By-law 64-2008, *supra* note 65 at para 4.

attract investment in and construction on property within the City, and will cause the City irreparable harm.<sup>69</sup>

Fewer than two weeks after passing the By-laws, the City filed a notice of motion with the Ontario Superior Court to seek an injunction against the activities of the HDI.<sup>70</sup> In this motion, the City sought \$100 million in general damages and \$10 million in specific damages, as well as a declaration that the “Six Nations of the Grand River Band of Indians, The Six Nations Council, the Six Nations Confederacy Council and the Haudenosaunee Development Institute” have no right to “interfere with access to, interfere with or prevent development of or request or require development or other fees;” that “such activities are unlawful and of no force and effect whatsoever;” and that the Haudenosaunee have “no right, title or interest in any lands situate[d] within the City of Brantford.”<sup>71</sup>

The notice of motion also expresses great concern for law and order, and serves as a notification to the Attorney General of Ontario that “the services of the Canadian Forces are required in the aid of the civil power because a disturbance of the peace or riot is occurring or likely to occur.”<sup>72</sup> In other words, the HDI is construed as posing a significant threat, such that the assistance of the military may be required to maintain the rule of law.

In November 2010, the Superior Court of Ontario released its decision and affirmed the City’s position. The Court ruled that the activities of the HDI did indeed have a significant negative impact on the City, and denied the authority of the HDI to control development or collect development fees. Justice Arrell wrote:

In my view, the City will suffer irreparable harm, if that has not already occurred, if this situation is allowed to continue. I find as a fact, on the evidence before me, that the economy of this small city is at risk; the employment of members of the community are likewise at risk; the reputation of the City as a place to live, work and invest is at risk; the tax base is at risk; all as a result of the City being unable to regulate development, provide a conflict-free environment for investment, employment and the raising of families, and the inability of the City to ensure to local residents and the investment community that the rule of law prevails.<sup>73</sup>

The decision of the Superior Court was appealed, and in 2013 the Court of Appeal also found in favour of the City.<sup>74</sup>

At the same time the City of Brantford began proceedings against the HDI, the defendants unsuccessfully sought to have the by-laws quashed. The appellants argued that proper procedures had not been followed when the by-laws were passed. Specifically, they argued that the open meeting requirements had not been followed and that the by-laws

<sup>69</sup> By-law 64-2008, introductory recitals.

<sup>70</sup> *Brantford Motion*, *supra* note 61.

<sup>71</sup> *Ibid* at (Notice of Action) 1d–e.

<sup>72</sup> *Ibid* at b. Here, The City is relying upon the authority bestowed by the *National Defense Act* which states that the Canadian Forces can be called out for service in aid of the civil power in any case in which a riot or disturbance of the peace, beyond the powers of the civil authorities occurs or is likely to occur (*National Defense Act National Defense Act* (RSC, 1985, c N-5 s 275).

<sup>73</sup> *Brantford (City) v Montour*, 2010 ONSC 6253 at para 35 [*Brantford* decision].

<sup>74</sup> *Detlor v Brantford (City)*, 2013 ONCA 538.

breached the *Canadian Charter of Rights and freedoms*. They also argued that the by-laws went beyond the legal powers of the City, because they targeted the Haudenosaunee specifically, and dealt with lands reserved for Indians. These arguments were rejected by the Superior Court, with the Judges agreeing that,

[t]he appellants' position assumes that the Haudenosaunee have a treaty right to ownership of most of the privately held land within Brantford—a right that has never been adjudicated on or indeed that the Haudenosaunee have ever even advanced a claim for in any legal proceeding. The appellants' position is thus untenable.<sup>75</sup>

Moreover, the Court agreed that because the by-laws applied to anyone participating in nuisance activities, they could not be said to affect the “core of Indianness” and thus did not target Haudenosaunee peoples.<sup>76</sup> The appeal was dismissed.

### C. THE PROPERTIES OF PLANNING

The injury emphasized by the City is that caused to the exercise of municipal authority. Municipal by-laws are typically about regulating land uses. However, the by-laws in question concern the right to plan and direct development. They deal with procedural planning issues, rather than with the substance of planning. Thus, these by-laws can be understood as enforcing and regulating a right to plan.

The City relied on property relations to establish that its proprietary right to plan had been disrupted by the HDI and as evidence that the Haudenosaunee have no jurisdiction over the area, and to reiterate the assumption that the Haudenosaunee lost their authority over the land when it was sold. The trial judge accepted this argument and reasoned,

[t]hese have been privately titled lands for almost 150 years and within the city limits of Brantford. The respondents' assertion that the lands are theirs, with nothing more, is far from sufficient for a finding that the by-laws are dealing with “lands reserved for Indians.” The pith and substance of these by-laws are dealing with property and civil rights within the city limits.<sup>77</sup>

This argument equates property ownership with jurisdiction. The Court relies on the testimony presented by an expert witness to confirm the view that much of the land within the Haldimand Tract was sold by the Haudenosaunee. The sale of Haudenosaunee land is viewed as adequate for divesting the Haudenosaunee of jurisdiction over the territory, and, in the eyes of the Court, renders the claims of the HDI illegitimate. However, the private sale of property is not typically understood to have jurisdictional consequences. Only in settler colonial contexts are land sales interpreted in this way, as Russell Barsh and James Henderson point out, “[i]f a citizen of Arizona sells his estate to a citizen of New York, the

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<sup>75</sup> *Detlor v Brantford (City)*, 2013 ONCA 560 at para 94.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Brantford* decision, *supra* note 73 at para 84.

territory of Arizona is not diminished ... We have never, however, overcome the convenient pretense that sales of Indian land imply cessions of sovereignty.”<sup>78</sup>

The fact of settlement and the entrenchment of a colonial property regime were also cited by the Court to dismiss claims by the HDI that the Municipality had not fulfilled its duty to consult. While the issue of consultation was not at the center of this case, it is worth noting that the Court reasoned that consultation was not triggered in this case because the land in question had long been settled. Therefore, further land development did not represent an adverse impact.

Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation ...

The lands in question have long since been altered and acquired by private landholders. The only issue, in reality, is one of possible compensation if the respondents can prove their claim.<sup>79</sup>

According to the arguments provided by the City, the HDI also interfered with the relationship of the City to landowners within the City. In these arguments, planning serves two separate but inter-related functions. On the one hand, the City uses its authority to create by-laws expressly prohibiting and thus criminalizing the activities of the HDI. At the same time, the City advances a tautological argument, in which the assertion of this planning authority also serves as proof of its authority. The validating and authorizing function of municipal and planning law allows these claims to appear coherent and logically consistent.

The arguments advanced by the City and the provincial government focus on the authority of the City to plan, and treat planning as an activity divorced from Indigenous interests. Although planning concerns the management of property rights, in this example the validity of non-Indigenous property rights is simply assumed, thus allowing the City to focus its argument on its jurisdiction in planning matters. At the same time, this regulatory framework affords the property regime a significant degree of protection, and in so doing also legitimates the assumptions embedded within the property regime.

The City also argued that planning policy confers upon it a broader set of rights, including the right to growth and to development. Thus, the ability to plan also has value as a guarantor of economic development. A vision for growth animates planning. Planning, as the rational allocation of resources, guarantees economic development by ensuring that the conditions for development are met. It secures property relations, and the flourishing of a legitimate planning system is provided as evidence that the rule of law flourishes as well. Planning is valued as a means of securing growth, with the acquired right to growth bestowed by planning policy. This right to growth exists as both an economic and political justification for the City’s assertions of authority. In his affidavit, Brantford City Manager

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<sup>78</sup> Russell Barsh & James Youngblood Henderson *The Road: Indian Tribes and Political Liberty* (Los Angeles: University of California Press, 1980) at 77.

<sup>79</sup> *Brantford* decision, *supra* note 73 at para 59-60.

John Brown cites the *Places to Grow Act*,<sup>80</sup> and argues that this planning legislation confers upon Brantford the expectation of economic growth.

It is also worth noting, that pursuant to the *Places to Grow Act*, the province designated Brantford as an urban growth center. This designation is critical to the longterm economic health of the City. Among other things, the activities of the HDI and its agents are significantly undermining the City's and the Province's efforts under the provincial growth plan.<sup>81</sup>

A professional planner called as an expert witness made a similar case regarding the right of the City to benefit from Ontario's growth policies.

It is not just the private sector that may alter investment decisions due to local disputes about land ownership. In the recent *Places to Grow Act*, the Province of Ontario has identified Brantford as an urban growth centre. The Province is suggesting that significant growth in both population and employment should occur in the City of Brantford. One of the major purposes of identifying growth centres was to focus infrastructure investment on these communities. The identification of Brantford as a growth centre is very important to the long-term economic health of the City. Concerns about land claims in the Brantford area may result in delay or lack of infrastructure investment as senior governments seek to avoid conflict. This will have further negative economic impacts on the City of Brantford.<sup>82</sup>

The arguments put forward by the City position the activities of the HDI as threatening the ability of the City and the province in the ways outlined by the *Places to Grow Act*. The arguments present growth and economic development as a proprietary right conferred by planning policy. Moreover, the appeal to planning policy allows the City to insist on this growth imperative, and also allows the City to reinforce its claims regarding the sphere of its jurisdiction. The City not only uses its authority to create by-laws expressly prohibiting alternate systems of development management and thus criminalizes the activities of the HDI, but also uses its authority to plan as proof of the validity of the settler-colonial property regime.

#### **IV. PLANNING AS A RACIAL PROJECT**

The jurisdictional arguments mobilized in this example rely upon a legal framework that codifies racial and status identities. The City's right to plan is established and secured via a jurisdictional framework, including planning policies and the constitutional order, to confer upon the City the ability to regulate land use through planning policies and by-laws. In this

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<sup>80</sup> *Places to Grow Act*, 2005, SO 2005, c13.

<sup>81</sup> Affidavit of John Brown, sworn 20 May 2008, para 37.

<sup>82</sup> Affidavit of Raymond Simpson, sworn 4 May 2008, para 12.

way, planning policy operationalizes settler colonial governmentality by limiting the spaces and positions Indigenous peoples can legitimately inhabit within the sphere of planning.

This example also demonstrates how planning concerns more than the rational management of territory. Although the City draws its authority from the provincial government, through its ability to exercise planning power through the creation of by-laws and other policies, municipal planning renders the municipality knowable and recognizable as an order of government. The authority to plan confers upon the municipality legitimate political agency. At the same time, planning policy and jurisdictional arguments are mobilized to discount the political authority of the Haudenosaunee, and cast the activities of HDI as mere nuisance.

However, the *First Nations Policy* and by-laws enacted by the City are more than a public disavowal of the HDI's assertion of authority. Beyond denying the authority of the HDI, the *First Nations Policy* and the laws it supports criminalize the HDI, allowing the full extent of the state's authority—including the military—to be called into action. However, rather than appearing as violence, the actions of the City are cast as activities which restore the rule of law. Cheryl Harris notes that such assertions of authority are characteristic of colonial dispossession, as the law not only provides a defense of dispossession, it naturalizes a “regime of rights and disabilities, power and disadvantage ... so that no further justifications or rationalizations [are] required.”<sup>83</sup>

In many ways, the HDI was effective in resisting the authority of the City of Brantford to plan. While land use planning is an important technique of governance, and has been deployed in the service of colonial settlement, the actions of the HDI demonstrate that planning can equally be used as a tool to support the assertion of Indigenous political authority. Nevertheless, the City successfully defended its position by relying on a planning framework that presumes and reinforces the legitimacy of the existing property regime. Thus, these by-laws were able to naturalize non-Indigenous property ownership allowing the economic benefits of growth and development to accrue to non-Indigenous peoples, while at the same time criminalizing Indigenous attempts to direct planning activity. Furthermore, the discourse of law and order mobilized by the City to bolster its jurisdictional claims relied on ideas of property ownership in ways that masked state violence and allowed Indigenous authority to be located outside of the legal order of the state.

Finally, this example demonstrates how the rehearsal of Canada's sovereignty claims and the denial of Indigenous claims to authority and political legitimacy are not limited to the national political sphere, but are enacted in local planning practices. Brantford's *First Nations Policy* and attendant by-laws focus on issues of rights and place Indigenous issues outside the realm of municipal jurisdiction. In doing so, these by-laws mobilize racial legal knowledge which accords responsibility for “Indians and lands reserved for Indians” to the federal government, while removing Indigenous interests from the realm of planning. Colonial policies originally designed to assimilate and eliminate Indigenous peoples lend these arguments their legitimacy. Applied within the sphere of planning, this legal arrangement not only limits the ability of Indigenous peoples to participate in governance processes, including planning, but also locates Indigenous interests outside of the law. In turn, it becomes possible for Canada's territorial and legal coherence to be asserted and enables Canada's sovereignty claims to be experienced as a totalizing force.

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<sup>83</sup> Harris, *supra* note 17 at 1723.

## V. CONCLUSION

This article examined the City of Brantford's *First Nations Policy* and the by-laws that accompanied it. I argued that this policy framework was designed to criminalize the attempts of the Haudenosaunee community to re-assert jurisdiction over their historical territory. The article also demonstrated how the statutory planning framework in Ontario works to subvert Indigenous interests by presenting an analysis of the ways that property and growth are mobilized within the planning process to authorize settler claims to property, while at the same time conferring upon municipalities the power to criminalize Indigenous assertions of territorial authority. By demonstrating how race and property are co-produced in law, the article showed how planning constitutes a racial project, which is hidden by the fact that it relies on seemingly race-neutral discourses concerning jurisdiction and the technical management of property relations. Thus, examining race as property is one way to make clearer the elements of systemic racism that exist in planning, and the role of planning as a practice that authorizes Indigenous dispossession. Finally, this article demonstrated that far from representing a technocratic practice, planning plays an important role in affirming the sovereignty claims of the settler state, while at the same time diminishing the sovereignty claims of Indigenous peoples.