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Status as Property: Identity, Land and the Dispossession of First Nations Women in Canada

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They acknowledge no right for you,
and they do not credit you with a memory.^[1]

In the mid to late nineteenth century, as English and French settlers were in the process of consolidating their colonial Dominion over vast First Nations' territories in the form of a Canadian federal state, the government enacted legislation to create the juridical category of the Indian. Binding together identity with access to land, Indian status and the Indian reserve would come irrevocably to define and regulate the lives of First Nations people in Canada from the mid-nineteenth century until the present. The creation of the "Indian" as a juridical category, along with the Indian reserve as a space of domination, marks a specific historical conjuncture—one in which identity (or indeed, subjectivity itself) and property relations were bound to one another, creating an apparatus^[2] of colonial knowledge and governance that structures the ongoing dispossession of First Nations women. This identity-property nexus in the settler colony of Canada was forged in relation to two distinct economies of land. One was the Indian reserve, the other a market for individual private property ownership that rested upon the fiction of underlying Crown sovereignty. The laws relating to land ownership were evidently informed by Lockean justifications for ownership. In British Columbia, for instance, land that was not visibly populated by agricultural settlements in the English vein was often deemed to be wasteland, open for appropriation by settlers.^[3] Concerns for creating and expanding commercial markets reflected the influence of Smithian political economy on the mentalities of Canada's first legislators. The "self-possessive" and appropriative subject was the ideal archetype of the settler. The idea of the "self-possessive" subject as elaborated by C.B. Macpherson in his enormously influential book *The Political Theory of Possessive Individualism: From Hobbes to Locke*, first published in 1962, has been subjected to sustained critique by a range of scholars. Some argue that Macpherson's theorisation of possessive individualism was reductively economic,^[4] others that he failed to take into account the important influence of natural history and scientific thought on the work of Locke.^[5] Others still have critiqued Macpherson's failure fully to account for the historical conditions, namely colonialism and slavery, in which the ideal-typical possessive individual comes into being. Saidiya Hartman, for instance, has argued that the self-possessive individual in the American context was forged in relation to black bodies as objects of property. Freedom from slavery, which granted former slaves entry into the framework of possessive individualism as free subjects, entailed a cruel contradiction. Self-possession was characterised, for instance, by the taking of a surname, often that of the ex-master, which "conferred ... the paradox of emancipation and the dispossession that acquires the status of a legacy".^[6] Moving from the status of an object to that of a labouring subject was marked by debt peonage and labour conditions so brutal that they could hardly be said to reflect the alienation of one's labour through free choice.^[7] As Hartman writes, the "propertied person remained vulnerable to the dispossession exacted by violation, domination, and exploitation" that existed during slavery.^[8]

Hartman identifies a deeper dynamic of dispossession at work, one that complicates strategies of redress and resistance. If the possessive individual, the archetypal juridical settler subject, has been constituted by a philosophical schema that conceived of the figure of the non-European as a mere

projection of European non-Reason, and constructed and regulated this figure as a being who is somewhat less than fully human, political struggles for recognition as full and equal subjects before the law raise several conundrums. The settler colony is a space where the self-possessive, proprietorial subject emerged in relation to property relations that were thoroughly racial. Unlike with the transatlantic slave trade and plantation slavery, though cases of enslavement did occur, First Nations people in Canada were not the objects of a system of ownership. However, as discussed below, ownership of land was defined along racial and gendered lines.

The concept of Indian status is, in some ways, a logical by-product of Locke's understanding of the proprietorial subject. As I explore below, drawing on the work of Étienne Balibar, modern legal personality rooted in Lockean notions of self-possession is constituted through acts of appropriation that take place in both the interior realm of knowledge and the exterior realm of the world. This philosophical structure of the self-possessed subject was defined in relation to the figures of the Savage, Indian, woman or child conceived as those who lacked the capacity for self-possession. The status Indian was in fact denied the ability to appropriate land in a manner that would satisfy the conceptual criteria of the proper subject of law; as aboriginal people were to be assimilated into the non-aboriginal population, the "Indian" was confined to the economy of the reserve, and the colonial government attempted to control and regulate every aspect of Indian life.

This chapter proceeds in three movements: in the first part, I set out some of the basic legislative history concerning the creation of Indian status and Indian reserve lands. I briefly point to the effects of this legislation for First Nations women who have been denied status. In the second part, I examine the imbrication of identity and property relations through the work of Locke and a few contemporary interlocutors. I argue that Balibar's theory of constituent and constituted property, drawn from Locke, reveals a dual structure of originary dispossession: first in the conceptualisation of the self-possessive subject rooted in a racial ontology, which is then compounded by and realised through the juridical (and patriarchal) structure of Indian status. In the final and concluding section, I consider recent challenges to the most pernicious aspects of *Indian Act* legislation by First Nations women and their advocates, and the political challenges that attend attempts to gain access to a juridical identity mired in colonial capitalist logics.

I. Indian status

Status derives from the Latin term for condition, state, or standing itself derived from the verb *stare*, to stand, and is used to define the rights of individuals vis-à-vis others, to determine the rights of the individual in relation to the state, and to govern populations and territories. The use of status finds its roots in Roman law, where the status of a person was central to determining the rules applicable to disputants. In Roman times, one's legal status was not immutable, as is generally the case with the notion of legal capacity that we have inherited from early modern common law. Status today can be usefully conceptualised in the following way:

Status is the complex set of relationships that defines one's political and social identity within the public and private sphere. Official legal status has been used to define and legislate the very nature of personhood in society. Status determines membership, belonging and may also define the rights and entitlements that a political subject or actor can demand of the state.^[9]

The first federal piece of legislation pertaining to Indian status and Indian lands was *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868, c.42. (31 Vict). This Act was passed shortly after the *British North America Act 30 & 31, Vict. Ch 3*, (also known as the *Constitution Act*), the imperial legislation that united the Canadian provinces into a unified Dominion. This Act provided the constitutional architecture for the division of powers over a range of matters between federal and provincial

governments. Indian lands were to fall under federal jurisdiction, and were initially the responsibility of the Department of the Secretary of the State of Canada. As John Milloy has written, the early legislation regulating the lands and lives of Indians reflected the colonial policy objectives of assimilation.^[10] The earlier imperial policy of “civilizing the natives” was displaced by the objective of assimilating First Nations into the larger white settler population. Indeed, as Milloy notes, the passage in 1869 of the “*Act for the Gradual Enfranchisement of Indians, the Better of Management of Indian Affairs, and to extend the provisions of the Act 31st Victoria*,” rendered bare the colonial “dedication to assimilation”.^[11]

The 1869 Act defined who an “Indian” was “for the purposes of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property” (Section 15). The “Indians” were defined as those who had “Indian blood, and those reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property” (Section 15). The first comprehensive statute that amalgamated the various pieces of legislation that applied to “Indians” was *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, c.18.^[12] Finally, the *Indian Act*, R.S.C. 1886, c.43 provided the following definition of Indian that would remain intact until the late twentieth century:

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such person.

Milloy argues that the concept of status in the *Indian Act* derived from “Victorian cultural assumptions: that property ownership was the foundation of civilized society” which, firmly patriarchal in nature, linked descent and ownership (of status and land) to males.^[13] And certainly, in the definition of “Indian” we see the erasure from the juridical category of Indian of First Nations women as independent subjects; they are categorised either as the child or the wife of a man.

Early legislation governing “Indians” is revealing of the intensely gendered nature of racial difference. The attempt to civilise the native, reflecting a bourgeois, Victorian sensibility, required Indian women to be treated as a property of their husband.^[14] Thus, in 1857, the Dominion Government of Canada passed a piece of legislation entitled *An Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians*, (S. Prov. C. 1857, 20 Vict., as c.26). As Ross MJ recounts—in a judgment that not only vindicates the claims of Sharon McIvor regarding amendments to the *Indian Act* (discussed below) but very thoroughly recounts the history of colonial legislation pertaining to Indian status—this was perhaps the first Act to inflict upon First Nations women and children the involuntary loss of status. If the husband of an Indian woman was “enfranchised” and thus assimilated (at least partially) into the mainstream economy of property ownership, she too would have had her status removed.^[15]

If a First Nations woman married a person who was not registered as an Indian, she (and her children) lost her status. If she married a man who belonged to another band, then her name was automatically transferred to his band.^[16] It is difficult to underestimate the devastating effect that the imposition of this patriarchal system of governing identity and access to land had on First Nations women and First Nations communities. Scores of indigenous feminists have written about the violence of this system and its continuing legacies.^[17] European explorers and settlers who “described Aboriginal women of the plains as slaves and drudges” bequeathed their racist-sexist imagery to colonial administrators and modern day anthropologists, who in their turn saw reserve life as a way of providing Aboriginal women with the potential for respectable domesticity.^[18] The racial and gendered configuration of Indian status led to the dispossession and disenfranchisement of generations of First Nations women. Indian status, for some First Nations women, is not simply the means through which one accesses

reserve land and the social and material benefits appended to residency on the reserve; status has over time come to signify and encapsulate identity itself. The particular forms of psychic, existential and material exile suffered by First Nations women who were stripped of their status by marrying non-aboriginal men, so evident in the testimonies reproduced below by women whose experiences formed part of a research study undertaken by the Aboriginal Women's Action Network, render bare the violence of dispossession inaugurated by the concept of Indian status.^[19]

You weren't nothing. You weren't a Canadian citizen, you weren't White, you weren't Indian. You were nothing. A non-entity, you didn't exist, except for your tax number that's what you were—you're a social insurance number. You had no identity. ~ Interviewee 3^[20]

I went through an identity crisis when I was told I was no longer Native. At the time I looked at myself and I realized I'm not White either, so what am I under now? I look like a Native person but I'm told that I'm not a Native person. So I went through an identity problem for awhile. ~ Interviewee 9^[21]

I am dying, the clock is ticking and I want to die as a dignified whole person. That's what I want my status for. The government just doesn't seem to care. I live off-reserve in [name of place]; I'm not a band member... I have four serious heart problems and cancer which is taking my whole body very quickly and painfully. I don't know who else to turn to get help. ... I am battling for status but I am also battling for my life. ~ Interviewee 15^[22]

Interviewee 3 speaks of being stripped of her identity as a consequence of losing her status, and coming to feel like a mere number, a statistic in a sanitised, bureaucratic registry. Losing status was not simply a matter of finding oneself in a different juridical category: Interviewee 9 expresses an acute existential crisis at the loss of status. Interviewee 15 equates the dignity and importance of status with life itself. Indian status, in some circumstances, became a precondition for access to one's community, one's reservation, one's kinship and social networks, and the benefits and entitlements that attached to both the place of the reservation and the ascription of Indian status.

The requirement that an aboriginal man who belongs to a particular band must have "Indian blood" reflects a biological conception of race that prevailed during the nineteenth century. As Bonita Lawrence has noted, "with the exception of the 1869 legislation... the *Indian Act* has regulated Indianness without reference to *actual* blood quantum".^[23] However, the difference between blood quantum and Indian status has been obscured both by the state and by bands themselves, who have come to equate full Indian status with "full bloodedness".^[24] The notion of Indian "blood" functions persistently, it seems, in a strangely parallel way to the US context in which racial boundaries were policed through explicit legal rules regarding blood quantum. As there is no way to actually measure blood, as Hartman notes, "the tangled lines of genealogy and association ... determine racial identity".^[25]

The First Nations or native woman who was not married to an Indian man nor belonged to a "particular band," was not recognised as an Indian. However, non-aboriginal women who married Indian men found themselves recognised as "Indian." The racial categorisation that subtended the transmissibility of status was thoroughly patrilineal and patriarchal. The prevailing gender ideology was thoroughly racialised—with First Nations women falling outside the bounds of propriety in relation to the gendered criteria of citizenship (and constituted property) on the one hand, and, on the other, cast as immoral, hypersexual, or depraved in relation to white women.^[26]

Bonita Lawrence has argued that the gendered nature of the *Indian Act* legislation reflects the attempts of the colonial state to break the relationships of indigenous peoples to their land. "Removing

women,” writes Lawrence, “was the key to privatizing the land base”.[27] As she argues, the imposition of patriarchal governance structures on reservations, combined with other means of weakening First Nations’ self-governance, severely impeded the ability of First Nations women (particularly in female-led clans) to protect the land base and provide for future generations.

The privatisation of the land base was intimately connected to colonial identity-formation. In the province of British Columbia, an economy of private property ownership was created through the assertion of blanket sovereignty over the territory, followed by the surveying and appropriation of land by settlers. Through cultivating the land according to the conditions set by the colonial government, white (and for the most part male) settlers[28] were afforded the opportunity to become recognised as *bona fide* property owners and citizens of the burgeoning nation state. Contemporaneous with the recognition of the proper settler was the creation of the juridical category “Indian,” whose interest in land was confined to lands reserved for them initially by the provincial government and later held in trust by the Dominion government. The expulsion of First Nations communities from vast areas of their territories and the creation of reserves – access to which depended on the acquisition of the status of Indian – happened in conjunction with the state’s attempt to annihilate First Nations’ ways of life and being. *Juridically* speaking, the way out of the asphyxiating confines of the reserve—and its territorial and economic boundaries—was to shed one’s identity as an *Indian* and assimilate. It is of course imperative to emphasise that in reality, this attempt to impose a Manichean divide between status and non-status Indians was not successful. As Bonita Lawrence reveals, to take one among many examples, there was a long period from the mid-19th century until the early 20th century, where many Algonquin (in both Quebec and Ontario) who had status continued to reside off-reserve and maintain seasonal hunting practices. She examines how the economic and social pressures of colonial settlement forced many Algonquin onto the reserve and into a constrained regime of status as defined by the law.[29]

According to s.85 of the *Indian Act*, 1886, if one desired to be granted the franchise, and thus meaningfully to participate in the growing state as a full citizen, one had to give up one’s Indian status. Indian men and unmarried Indian women who were 21 years of age could apply to be enfranchised. After satisfying certain requirements, they would be granted a “location ticket as a probationary Indian for the land occupied by him or her” or such proportion as the Superintendent General deemed fair and proper. At the end of three years, letters patent would be issued, granting the Indian the land in fee simple. This right to the land in fee simple, however, did not carry with it the power to sell, lease or otherwise alienate the land without the sanction of the Governor in Council. Along with the letters patent would come the recognition of his or her enfranchisement. Laws applying to Indians would no longer apply to the enfranchised man (along with his wife and any minor unmarried children, who would also become enfranchised) or enfranchised woman, except for rights concerning annuities and interest moneys, and rents and councils of the band to which they belonged.[30] This starkly binary juridical structure was resisted in all manner of ways but most particularly, by refusal to participate in it. Very few First Nations individuals pursued enfranchisement since the cost—giving up one’s Indian status—was so high. What is clear, however, is that the intention of colonial authorities was characterised by the desire to eliminate indigenous sovereignty, radically diminish First Nations’ land base, and control nearly every aspect of aboriginal lives.

II. The appropriative subject: Locke and the “Indian” question

Without memory, without an account of how one has come to know a proposition, we are nothing more than children, for whom the mind is heedless of perceptions, and thus incapable of forming ideas, the latter of which are, for Locke, the aggregated, metabolized data of repeated sense impressions.[31]

The economy of the reserve bespeaks a regime of governance over land, labour, mobility, and cultural practices. The entwining of identity with property relations here reflects the dominant *épistème* of a long era, which remains very much with us. Macpherson most famously captured the relationship between market forces and the constitution of modern political subjectivity in his theory of possessive individualism. Analysing theories of ownership as postulated by Locke, Macpherson explores how the emergence in the seventeenth century of a market society inaugurated a concept of the subject defined primarily through his self-possession, his capacity to alienate his labour in the market place, and his ostensible freedom from reliance on others.^[32] Those who could not alienate their labour in this way of course fell outside the bounds of the self-possessed, proper subject. Macpherson's thesis has been challenged on numerous grounds. James Tully, for instance, critiques Macpherson's reading of Locke on the basis that it fails to deal squarely with the questions of political sovereignty, universal rights and duties, and further, on the grounds that Macpherson puts forth an argument about the nature of individual sovereignty that is reductively economic in nature.^[33] In the same volume, Tully argues that Locke's concepts of political society and property "are inappropriate to and misrepresent... the problems of First Nations self-government and ecology".^[34] Tully places the colonial at the forefront of his reading of Locke, making vital connections between Locke's own colonial interests and his interpretation of the natural law foundation for appropriation of land in the Americas. Neal Wood has also challenged Macpherson on the basis of the latter's assumption that seventeenth-century England was a purely market society, and points to what he views as a troubling ahistoricism in Macpherson's work. Arguing that the influence of Baconian philosophy and natural history on Locke's thinking cannot be underestimated, Wood exposes the complex interrelation between the scientific drive for agricultural improvement, the increasing appetite for mercantile imperialism, and the theories of governance that would secure the "peace, toleration and security" necessary for economic development at a particular historical juncture, all of which influenced Lockean theories of ownership. Wood finds Macpherson's reading of Locke lacking due to his failure to account for a number of historical factors that influenced Locke's political philosophy of government.^[35]

While these criticisms of Macpherson's work highlight several significant omissions from Macpherson's reading of Locke, and related weaknesses in his concept of the self-possessive individual, they do not attend to the place of race in the scientific, political and economic dimensions of Locke's thought on property. Both Wood and Tully illuminate (in different ways) the relationship between the ontology of Locke's subject and the social formations that were becoming concretised during the seventeenth and eighteenth centuries. Drawing from the critiques of these scholars and others, I would like to shift direction here and explore the racial dimensions, assumptions and consequences of Locke's theorisation of individual subjectivity and identity. How might we consider the ontological formation of the self-possessive subject, in its relationship to property and commerce, as thoroughly racial?

If the logic of property relations in settler colonies derives from the political-philosophical justifications for ownership engineered by Locke,^[36] how do we account for the identity-property nexus upon which these property logics depend? I want to follow a line of thought on Locke which in my view potentially holds explanatory value for understanding the identity-property nexus that continues to inform modern forms of ownership and dispossession. Balibar's recently translated work, *Identity and Difference: John Locke and the Invention of Consciousness*^[37] begins to bridge the long-standing gap between Locke's theory of consciousness in the *Essay on Human Understanding* and his theory of property, as elaborated in the *Two Treatises of Government*. I would like to draw on Balibar's text to reflect on the place of race and patriarchy in the identity-property nexus, or in the contact point between propriety and property.

Balibar's analysis of the relationship between the *Essay on Human Understanding* and the *Two Treatises* has opened up a path for reconsidering Locke's notion of the self-owning subject.^[38] In drawing out and emphasising the temporal dimension of Locke's concept of self-consciousness, the concept of the self in the *Essay* not only moves closer to the political philosophy of property in the

Two Treatises, but bears traits or qualities that mirror Lockean concepts of property and ownership. There are two in particular that I will focus on here. First, identity and property for Locke are formed through appropriation, which is an inherently temporal concept, and take place through memory, over time. Second, the connection between identity and property ownership is relational, encompassing both an interiority of the self and the exteriority of the world (and social relations) outside it. This relational aspect of the self in Locke's thought mirrors the relational nature of property itself.^[39] In the settler-colonial context, the attributes of this identity-property nexus are harnessed to push forward the civilisational imperative of the colonial authorities. Temporality and duration, two hallmarks of the property form,^[40] characterise the nature of appropriation that defines Lockean self-consciousness. Appropriation takes place through a process of identification, wherein the individual "practically identifies himself with that property which forms his essence ... he recognises his identity in the actual process of appropriation and acquisition" of reflection, or thought.^[41] It is the recognition that one has a memory of past thoughts, which is to say the capacity to observe one's thoughts and reflections *over time*, that constitutes the self.^[42] While this is not as such a new insight, Balibar emphasises that the reflection on memory takes place as, or in the form of, appropriation. This concept of appropriation reveals two things. One is that for self-consciousness, or identity, appropriation is the mode through which the self constitutes (or recognises) itself, and is thus a continuous process rather than a static one. I want to suggest that the ongoing nature of this process of appropriation mirrors the temporality of property ownership found in *Two Treatises*, where Locke provides us with an origin story for private property. In the movement he makes from a divine to secular justification for the accumulation of property, Locke rationalises the removal of common property for individual use. At various stages of this transition, temporality and duration inform his concept of appropriation and ownership itself. Labour (an extension of one's life into the external world) is the initial measure of how much one can legitimately appropriate.^[43] This is quickly bound however, by the amount that one can consume, in relation to the time it takes for goods to spoil.

[I]f gathering the Acorns, or other Fruits of the Earth, &c. makes a right to them, then any one may *ingross* as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also *bound* that Property too. *God has given us all things richly*, 1 Tim. Vi 17. Is the Voice of Reason confirmed by Inspiration. But how far has he given it us? *To enjoy*. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in.^[44]

Locke specifically writes that the "measure of Property, Nature has well set off, by the Extent of Mens *Labour, and the Conveniency of Life*".^[45] Finally, we move into the abstract, limitless and *infinite* accumulation of property facilitated by the introduction of currency.^[46] Even improvement—the motor force of scientific, political and legal innovation in the eighteenth and nineteenth centuries—is conceptualised as being teleological and progressive, growing *in* and *with* time.

Second, Balibar's explanation of appropriation presents a fundamental challenge to an unnecessarily narrow interpretation of Locke's famous dictum, that "every Man has a *Property* in his own *Person*"^[47],^[48] Property here signifies many things that are, or constitute Man: "lives, liberties and estates".^[49] Balibar argues that the list represents "the development of the progress of legitimate appropriation". The *power of appropriation* is the point of origin for the Lockean subject. The "transcendental power of appropriation" is exercised by and on the subject himself, which is called labour and its work. The subject's acts of appropriation in the external world, where labour is the origin of property ownership, are analogous with, and indeed a reflection of, the metaphysical nature of constituent property. Thus it is not merely that "property ownership is the precondition for man's liberty, what he calls property".^[50] Such a reading focuses, too narrowly in Balibar's view, on the "juridical criterion for acquiring political rights or citizenship in a given *polity*" (ibid.). As we know, in the settler colony the juridical criteria for property ownership were thoroughly racial and gendered. In his more expansive reading of Locke, Balibar outlines a theory of *constituent* property: "an

originary property that is not measured” by pre-existing institutions because it is “individuality itself”. With constituent property, “property as such is the exercise of liberty” in the sense that “every free man must always be considered *somehow a proprietor, or an ‘owner’ of something*” which is individuality itself.^[51] Individuality, as noted above, is constituted through the self-recognition of one’s memory of past and present thoughts. The idea that every man has property in himself brings propriety back into contact with property; or, to put it another way, Balibar offers us a theory of a relation between constituted property and constituent property *contra* Radin,^[52] who argues that there need be no relation between these two phenomena. The proper subject is not only he who actually owns property, or is able “freely” to alienate his labour; it is, fundamentally, he who has the capacity to engage in the conscious reflection that marks out or defines the internal stage, “an indefinitely open field in which [self-consciousness] is both actor and spectator.”^[53]

The modern subject captures a “paradoxical unity of opposites”; he is composed of qualities that are both alienable (I alienate my labour in the external world and through this act of alienation, come to own things) and inalienable (as the labour of continually constituting myself through reflection, and exercising my power of appropriation over my own processes of reflection). Here property meets *propriety*; interiority and exteriority are conjoined through my power of appropriation, which has a double valence or movement: it exposes and *spends* an aspect of my self that is alienable within capitalist relations of production, but it also conserves and protects my very capacity for self-constitution. Without these capacities, I am less than a fully individuated human being.

The move from a metaphysics of interiority to colonial governance is not simple or straightforward. We are attempting here to excavate the philosophical structure of dispossession and how it surfaces in the specific space of the Canadian settler colony in the nineteenth century. Locke fashioned a theory of self-consciousness that justified and fit with a non-absolutist form of government. Colonial governance, and juridical representations of subjects of governance frame the constitution of categories of Indian and settler and indeed the *Indian Act* regime. Let’s return for a moment to Balibar’s insight that actual property ownership is not necessarily a precondition for the recognition of one’s identity as a fully-individuated person; that recognition demands instead an interior life which is marked by a movement of self-appropriation that resists the type of alienation that social-economic formations (wage-labour, for instance) demand of actual modern subjects. How, we might ask, are assumptions about racial superiority smuggled into the formation of constituent property and its presuppositions about personhood, subjectivity and self-consciousness?

The primary place of interiority in the conceptualisation of the Lockean subject—one version of Spivak’s “transparent ‘I’”—sets the scene for an analytic of raciality that emerges in the nineteenth century. By locating the sovereign source of the self in Reason, Ferreira da Silva finds “the negation, the declaration of the onto-epistemological inexistence of, exterior things, that is, the affirmation that, as objects of knowledge, phenomena, they constitute but effects of the interior tools of ‘pure reason’”.^[54] Racial subjects—the black slave, the Native, the savage—are located in an exterior realm of Nature by scientific and philosophical discourses that give primacy to the subject of interiority. Ferreira da Silva intervenes in our understanding of how the relationship between interiority and exteriority—as a defining characteristic of the modern subject—is mapped onto the globe and world history, so as to render most inhabitants of the non-European world as mere effects of the powers of Reason, which lie in the sole custody of their European superiors.

Locke’s theory of consciousness and identity as elaborated in the *Essay on Human Understanding*, as discussed above, focuses on the ability of man to appropriate to his self memories or recollections of his own prior thoughts and sensations. As Balibar emphasises, appropriation is central to the self’s constitution, and property metaphors are far from rare throughout the text. In the Introduction, Locke sets the scene of the *Essay* by analogising the quest for knowledge and understanding with the treacherous journey through a *terra incognita* and the unbounded dark space of the unknown:

I suspected we began at the wrong end, and in vain sought for Satisfaction in a Quiet and sure Possession of Truths that most concern'd us, whilst we let loose our Thoughts into the vast ocean of Being; as if all that boundless Extent [emphasis mine, B.B.], were the natural, and undoubted Possession of our Understandings, wherein there was nothing exempt from its Decisions, or that escaped its Comprehension. Thus Men, extending their Enquiries beyond their Capacities, and letting their Thoughts wander into those depths, where they can find no sure Footing [emphasis mine, B.B.]; 'tis no Wonder, that they raise Questions, and multiply Disputes. ...Whereas were the Capacities of our Understandings well considered, the Extent of our Knowledge once discovered, and the Horizon found, which sets the bounds between the enlightend and dark Parts of Things [emphasis mine, B.B.]; between what is, and what is not comprehensible by us, Men would perhaps with less scruple acquiesce in the avow'd ignorance of the one, and employ their Thoughts and Discourse, with more Advantage and Satisfaction in the other.^[55]

One can argue that just as with the attempt to secularise the foundations of property and natural law in the *Two Treatises* there is in the *Essay* a history of the “first beginnings of Humane Knowledge” that incorporates a racialised anthropology of the human. As with the *Two Treatises* and the chapter “Of Property,” there operates in the *Essay* a pre-history of modern law in which Indians nourish themselves in the absence of enclosure.^[56] Locke’s favourite quadrumvirate in the early part of the *Essay*, composed of illiterate people, savages, idiots and children, stands for him as proof that there are no universal principles of knowledge.^[57] General propositions of knowledge are, to the contrary, “the Language and Business of Schools, and academies of learned Nations”. While the chapter titled “Identity and Diversity” distinguishes between brute animals and men in considering capacities for reflection, rather than civilised men and the quadrumvirate previously mentioned, it is arguable that the barbarians of a seventeenth century political imaginary, defined by their godlessness and lack of agricultural science were also, it seems, lacking in the capacity for interior reflection and recollection.

The figure of the savage in Locke’s *Essay* and *Two Treatises* finds its reflection in the juridical category of the Indian. The Indian is a subject without a past.^[58] The settler who has the capacity to pre-empt land fits into the Enlightenment historicism that equated cultivation with a narrative of civilizational progress. The property logic of Indian identity is entirely different from that of the self-possessed, proprietorial subject – its temporality is static, without dynamism or real duration. Indian status flattens time and congeals space into an economy that prohibits appropriation. And while the concept of “recollection” for Locke is not the same as memory of the past, of a historical past, it is quite clear that the *Indian Act* and the imposition of private property relations it embodied were premised on the denial of First Nations’ memory of their relationships to land and place. As Darwish reminds us, writing of another settler colonial context, the refusal to credit the colonised with a memory of place before settlement, before “civilisation”, is intimately connected to the theft of rights. The Indian subject of the *Indian Act* cannot be the individual who engages freely in exchange, nor can she be a private owner of land in *fee simple*. The economy of the reserve was a space where commercial exchange was prohibited in the absence of permission from government officials, and where land was held in trust for Indian Bands by the colonial state. The *Indian Act* created, conceptually speaking, a completely separate juridical space, with the state attempting to regulate nearly all aspects of labour, the use of natural resources, and exchange on the reserve. Here, I discuss the legislative provisions of the *Indian Act* that reflect the juridical construction of the Indian as the inverse of the self-possessed liberal subject. It is imperative to emphasise that my interest is in the legislative provisions governing the reserve economy, and not in the *actual* development of indigenous economies that included waged labour off the reserve, limited agricultural development on reserve lands, and other income generating work, all of which varied remarkably across the country.

In regard to labour on the reserve, section 33 of the *Indian Act* 1886 provided for the forced (or compulsory) labour of Indians on “public roads laid out or used in or through or abutting upon” their reserves. The Indians who were liable were those who were residing upon any reserve and engaging

in agriculture as their principal means of support. The labour was to be performed “under the sole control of the Superintendent General or officer or person aforesaid.” The section provides that this authority “shall have the power to enforce the performance of such labour by imprisonment or otherwise, as may be done by any power or authority under any law, rule or regulation in force in the Province or Territory in which such reserve is situated, for the non-performance of statute labour”. Furthermore, for any labour not performed by any band of Indians on roads, bridges, ditches and fences within its reserve in accordance with instructions by the Superintendent General, the work would be performed at the cost of the band (or relevant individual); funds would come out of the annual allowances of the band or otherwise.^[59]

The regulation of the land and natural resources located on reserves was an integral part of the *Indian Act*. The Act prohibited the development of any kind of independent reserve economy by penalising the sale, barter, exchange or gift of certain crops or natural resources from reserve land. If Indians were to harvest natural resources from their reserve land for commercial sale, they would have to be licensed by the Superintendent General or one of his agents. For instance, section 27 of the Act provided penalties for “every Indian who, without the license in writing of the Superintendent General” or one of his agents, cut down any trees or timber or removed any hay, soil, stone, minerals, metals or other valuables from reserve land. This provision applied to Indians who did not have a licence for the removal of such resources for sale; if it was for the immediate use of the family, it was not penalised.^[60] Any money or securities “of any kind” that were for the support or benefit of Indians in general or any band of Indians in particular, including all money from the sale of Indian lands or timber on Indian lands, were subject to the provisions of s.69 of the *Indian Act*. The money from the sale of land and resources which were “for the benefit” of Indian bands was controlled and managed by the Governor in Council. A Victorian morality permeated the control of money as the Superintendent General could stop the payment of the annuity and interest of any woman who had no children and who “deserted her husband and lived immorally with another man”.^[61]

The *Indian Act* made provision for the colonial control of exchange; as noted above, the Act ensured that legally, the capacities of Indian subjects to exchange and own property *as status Indians on the reserve* were limited or non-existent. (As we will see below, waged labour off the reserve was encouraged as a means of assimilating Indians into the non-aboriginal population). On the reserve, no property purchased with Indian annuities^[62] nor presents given to Indians were to be sold, bartered, exchanged or given by any band of Indians or individual Indian to any person or Indian other than an Indian of such band. Without consent of the Superintendent General or his agent for such exchanges, a person was liable to a fine or imprisonment.^[63] This was yet another provision which aimed at containing and isolating Indians within the confines of the reservation through the contemporaneous curtailment of their capacity to create and sustain a viable economic independence within the reserve territory alone. More significant for our purposes here, the prohibition of the transmission of gifts and currency mirrors the control that the state exerts over the transmissibility of Indian status. Finally, the *Indian Act* 1886 established a regime of governance over land and identity that wreaked havoc on pre-existing social relations and governance structures in native communities.^[64] The *Indian Act* creation of the Indian “band” established the primary mechanism through which colonial rule of native communities was facilitated. The Superintendent General or his agent had the power to determine membership in the band.^[65]

The Indian Advancement Act, R.S.C. 1886, ch.44, provided specifically for the creation of the band council. On such reserves as the Governor in Council deemed fit to be governed by the *Act*, Indian men who were 21 years of age or above, termed electors, would meet in order to elect the members of the council of the reserve, who would in turn elect the chief councillor.^[66] Pre-existing structures of governance were replaced with patriarchal band councils that were given control over several important aspects of social life on the reserve. As I explore in the final section, First Nations women who have challenged the sexist provisions of the *Indian Act* and sought reinstatement in their reserve communities have keenly felt the legacy of this system of colonial control established through male-

dominated band governance.

I am arguing here that the colonial authorities attempted to create an absolute division between the nature of the reserve economy and that of the settler economy. The reality of First Nations economic life, in British Columbia for instance, was not determined entirely by the image arising from the legislation regulating the reserve; that of a stunted, underdeveloped Bantustan-like enclave controlled by the colonial authority. The demands of the fur trade, and subsequently the development of the settler economy depended on aboriginal labour.^[67] Aboriginal workers populated the burgeoning lumber industry, were employed as seasonal farm labourers, and included gold mining as “part of their modified seasonal cycle” of waged labour. As Lutz notes, by 1885 Indian Agents estimated “that of the 28,000 aboriginal people in British Columbia in 1885, over 85 per cent belonged to bands that earned substantial incomes through paid labour”.^[68] After the turn of the twentieth century, the effects of colonial settlement on the aboriginal population (which included increased disease and death) and an increase in migrant labour (Chinese, Indian and European) led to the decline in aboriginal waged labour. But it is clear that the colonial objective of assimilation meant that First Nations men and women were encouraged to become “industrious” and waged labour off the reserve was a means of drawing aboriginal peoples into the dominant economy.

Pre-existing economies such as that of the potlatch—which could be understood not only as a cultural practice but also as integral to a particular economy of social relations and resources—were outlawed and criminalised by the colonial-settler state. Section 114 (infamously) outlawed the potlatch, along with the dance known as the “Tamanawas.” The pertinent context to this is that aboriginal labourers would save their wages in order to contribute to potlatches. Lutz argues that the potlatch ban was driven by the colonial view that the activity “kept aboriginal people poor and mitigated against the accumulation of individual dwellings, land holdings, and private property”.^[69] Elizabeth Furniss notes that in the 1880s in the interior of British Columbia, the Secwepemc bands were prohibited from holding potlatches by the Indian Agent William Meason on the basis that they were a “distraction from ‘work,’ leaving the host poorer through generous provisions for the guests”.^[70]

The intention to assimilate aboriginal peoples into the space of the white settler nation-state required the regulation of life on the reserve so as to prohibit independent, aboriginal ways of holding land and self-governance. Despite the place of the reserve in the colonial apparatus of governance, the effects of being cast out of the reserve were also, as explored above, severe and debilitating for many First Nations women. In the final section, I examine challenges to the sexist provisions of the *Indian Act* and consider recent scholarship that attempts to move beyond its colonialist logic.

III. Feminist challenges to the *Indian Act* regime

Since the 1970s, First Nations women have brought forth successive legal challenges to the discriminatory provisions of the *Indian Act*.^[71] After the Supreme Court of Canada rejected Jeanette Lavalle and Yvonne Bédard’s jointly-heard claim that section 12(1)(b) of the *Indian Act* was invalid because it violated the constitutional provision prohibiting discrimination on the basis of sex,^[72] Sandra Lovelace brought a petition before the Human Rights committee established by the International Covenant on Civil and Political Rights, claiming the same section to be in violation of several articles of the Covenant. The Committee found Canada to be in violation of article 27, which provides for the rights of minorities, “in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.^[73] It would take another four years, after *Lovelace*, before the Canadian government would remedy the sexist provisions of the *Indian Act*. However, the amendments passed in Bill C-31 have reproduced paternalistic and racist categories of identification: the children of women who are reinstated gain reinstatement pursuant to section 6(2) of the *Indian Act*, R.S.C. 1985 c.32, which stipulates that the reinstated child must marry a status Indian in order to maintain his/her status. If they “marry out,” their children will lose Indian status permanently. Pursuant to section 6(1) of the Act, children who are reinstated where both parents can be reinstated as status Indians are not subject to this condition.

There is an implicit and built-in mechanism to phase out Indian status for those who marry non-First Nations people, regardless of how and where they reside and live. Status continues to signify an ethno-racial concept of indigeneity and affects the children of women who were disenfranchised disproportionately to others. As Palmater has discussed at length, status is analogous “to imposing a blood quantum requirement on applicants that measure their degree of descent from a section 6(1) status Indian (i.e. full blood)”.^[74]

These provisions were legally challenged by Sharon McIvor on the grounds that they violate the Constitutional guarantee of freedom from discrimination based on sex.^[75] Despite a resounding victory at trial level, the British Columbia Court of Appeal (BCCA) narrowed the findings of the Trial Judge quite dramatically. The BCCA found that while s.6(1) of the *Indian Act* violates the Charter, the trial judge erred in finding the Charter violation extended to s.6(2).^[76] On 15 December 2010, the *Gender Equity in Indian Registration Act* came into effect. Following the BCCA judgment, the grandchildren of women who had been disenfranchised upon marrying out prior to 1985 were able to register for status. However, their children, if they married non-Indians, would be registered under section 6(2). Thus, the legislative remedy extended enfranchisement to one more generation but kept the underlying structure intact.^[77] The discriminatory provisions relating to the transmission of status that inhere in the legislative attempts to fix the twin problem of disenfranchisement and dispossession thus remain to a great degree unaddressed. The reinstatement of one’s status as Indian has come with its own set of difficulties. Women who had had their status removed due to sexist provisions of the *Indian Act* continue to confront many obstacles, as even after reinstatement they must obtain membership within their band. The objectives of Bill C-31 included remedying the sexist provisions regarding loss of status and also increasing band control over membership.^[78] Giving control over membership to bands was one means of increasing the autonomy of bands, but it has given rise to a host of other difficulties as racial and gender-based bias continues to inform membership criteria.^[79] Thus women who have gained reinstatement of their Indian status under Bill C-31 have faced further obstacles because their bands have not necessarily been willing to grant them membership, which involves sharing and redistributing limited resources.^[80] As Coulthard has argued, “[t]he essentialist defense of certain First Nation’s gender exclusionary practices also cannot be understood outside the context of the eliminatory logic of [the] state’s historical approach to the dealing with its so-called Indian Problem”.^[81] Evidently, the problems that inhere in the Bill C-31 amendments illuminate how the regulation and control of First Nations peoples’ identity, which began during the colonial era, lingers on with little sign of abatement. The *Indian Act* continues to define First Nations peoples as Indian and non-Indian according to an anachronistic and patrilineal notion of racial difference, signified by the transmissibility of status. The state maintains the power to grant recognition of Indian status, and to register this interest in an administrative archive controlled by an officer of the Crown. The recognition by courts that Indian status is purely the creation of a colonial order^[82] points to the troubled history not only of Bill C-31, but significantly, of the entire apparatus of the *Indian Act*. While long-standing efforts to rectify the most egregious and sexist aspects of Bill-C31 remain necessary in order to halt the specific form of dispossession that the regime of status inaugurated in the nineteenth century, this particular mode of colonial governance points to a deeper structure of dispossession: the fusing together of identity and property ownership, as encapsulated in the notion of Indian status.

By way of conclusion, I want to draw on the work of Cheryl Harris, and to consider the ways in which status can itself be understood as a form of property. In “Whiteness as Property,” Harris traces the transmutation of whiteness from status property to a sense of entitlement to the social goods once legally reserved for white people. Prior to de-segregation, the status of whiteness as having economic and social value (in terms of reputational capital) was explicitly recognised in judgments such as *Plessy v Ferguson*, the judgment that upheld the “separate but equal” doctrine. With the celebrated judgment of *Brown v Board of Education*, and the subsequent failures to ameliorate the vast inequalities in educational resources between black students and their white peers, Harris argues that

whiteness becomes a more abstract, intangible form of property that affords its “owners” economic benefits as well as social and cultural forms of capital. “Identities” such as whiteness are formed through relations of ownership and eventually operate within a racial-economic system which, even in the post-slavery era, continues to be based on the twin pillars of a heavily racialised and gendered labour market on the one hand,^[83] and a political structure based on a legal form rooted in private property, on the other.

As such, whiteness still operates as a form of currency, across generations. No longer based in nineteenth-century racial scientific discourses that posit race as a biological concept,^[84] whiteness becomes a sign that represents social, economic and even moral *value*. Can Indian status also be understood as a form of currency? We have seen how status encapsulates both tangible and intangible properties, in the sense of qualities and characteristics that are interdependent with the access to land. Indian status binds together identity with access to land and all of the social, material and cultural benefits appended to the place of the reservation. Status is a form of property that takes a legal form, as well bearing the abstract, intangible properties that attach to physical and actual access to land afforded by Indian status recognition. In this sense, it functions as a sign, much in the same way as money once did.

I say as it “once did” because before money became a pure signifier—its value regulated by uniform types of currency and standardised by universal rates of exchange—debates raged over the origins and status of its value. Did it lie in the value of the precious or semi-precious metals that constituted the coin itself? Or rather, was its value derived from its use as a sign in relations of exchange? In other words, did its value derive from its value as a *signifier* of value or from its *material* content?^[85] Thinking of seventeenth-century debates over currency, in which Locke was an important player, I want to draw an analogy with the concept of Indian status, whose value derives from its abstract function as a sign—an identification and identity as a recognised, *bona fide* subject entitled to reside upon and hold reserve land—and at the same time remains tethered to biological concepts of racial difference. In this way, Indian status both signifies a particular state-controlled category of identity and reifies racial difference as an actual, embodied substance. Like currency, status retains a degree of flexibility and mobility as something that is passed on and transmitted, a sign that has economic, cultural and social value, but at the same time is regulated and controlled by the state.

How can one think identity outside of its relationship to property? Or to put it another way, is it possible to conceive of identity outside of the relations of ownership in which it remains embedded? Indian status remains a relic of an earlier property logic that still determines access to band membership and reserve lands. The various remedies sought by individuals and associations, through both domestic and international legal for a^[86] have focused on the discriminatory aspects of the *Indian Act*, but they do not address the deeper structure of dispossession outlined in this chapter. At the same time, as Bonita Lawrence writes, “having Indian status works to affirm a sense of Native identity in powerful but unacknowledged ways”.^[87] Perhaps the struggles of the disenfranchised to attain status are not necessarily at odds with collective political action that has as its aim self-governance and independence. It is clear that ending the *Indian Act* regime and moving towards self-governance is the only means of escaping the identity-property nexus that remains structured by colonial capitalist logics of ownership and race. The most significant challenge that lies ahead for First Nations and their allies is to consider how indigenous self-governance has the potential to create a space for ways of being that are not bound by possessive individualism.

Notes

1. Mahmoud Darwish, *Journal of an Ordinary Grief*, trans. Ibrahim Muhawi (New York: Archipelago, 2010), 35 [↑]

2. Here, I draw on Foucault’s concept of the *dispositif*, defined as a “certain manipulation of relations

of forces, of a rational and concrete intervention in the relations of forces, either so as to develop them in a particular direction, or to block them, to stabilize them, and to utilise them". (Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon ed. (New York: Pantheon Books, 1980), 194-196). And see Giorgio Agamben, *What is an Apparatus?* (Stanford, CA: Stanford University Press, 2009). Indian status can be described as an apparatus insofar as it incorporates juridical processes, relations of power, and colonial forms of knowledge, in order to assert a hegemonic and strategic form of control over the lives of First Nations people. [↑]

3. John Weaver, "Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English-speaking World," in *Despotic Dominion: Property Rights in British Settler Societies*, John MacLaren, A.R. Buck, Nancy E. Wright eds. (Vancouver: UBC Press, 2004). [↑]
4. James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993). [↑]
5. Neal Wood, *John Locke and Agrarian Capitalism* (California: California University Press, 1984). [↑]
6. Saidiya Hartman, *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth Century America* (Oxford: Oxford University Press, 1997), 155. [↑]
7. Hartman, 135. [↑]
8. Hartman, 134. [↑]
9. Davina Bhandar, "Decolonising the Politics of Status: When the Border Crosses Us" in *Darkmatter Journal*, this volume. [↑]
10. John Milloy, "Indian Act Colonialism: A Century of Dishonour 1869-1969." Research Paper for the National Centre for First Nations Governance.
http://fngovernance.org/ncfng_research/milloy.pdf [↑]
11. Milloy, 2008, 4-6. [↑]
12. Audrey Huntley and Fay Blaney, *Bill C-31: Its Impact, Implications and Recommendations for Change in British Columbia – Final Report* (Vancouver: A Project of Aboriginal Women's Action Network 1999), 7. [↑]
13. Milloy, 2008. [↑]
14. Shelagh Day, "The Charter and Family Law," in E.Sloss ed. *Family in Canada: New Directions*, (Ottawa: Canadian Advisory Council on the Status of Women, 1985), cited in *McIvor v The Registrar, Indian and Northern Affairs Canada* [2007] BCSC 827 at para 12. See also Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press 2014). [↑]
15. *McIvor v The Registrar, Indian and Northern Affairs Canada* [2007] BCSC 827 at para 16. [↑]
16. Huntley and Blaney, 6. [↑]
17. See for instance Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999); Emma La Roque, "The Colonisation of a Native Woman Scholar." In *Women of the First Nations: Power, Wisdom, and Strength*, Christine Miller and Patricia Chuchryk eds. (Winnipeg: University of Manitoba Press, 1996). [↑]

18. Sarah Carter, *Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West* (Montreal & Kingston: McGill-Queen's University Press, 1997) 51-2. [↑]

19. Indeed, as Bonita Lawrence notes, Justice Bora Laskin in his dissenting judgment in *AG v Lavell and Bedard* described the deprivations suffered by women who lost status as "statutory banishment" Bonita Lawrence, "Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood. (Lincoln, NB: University of Nebraska Press, 2004), 55. [↑]

20. Huntley and Blaney 1999, 39. [↑]

21. Huntley and Blaney 1999, 37. [↑]

22. Huntley and Blaney, 1999, 20. [↑]

23. Lawrence, 2004, 73. [↑]

24. Lawrence, 2004, 73. [↑]

25. Hartman, 1997, 195. [↑]

26. Andrea Smith *Conquest: Sexual Violence and the American Indian Genocide* (Boston: South End Press, 2005); Sherene Razack "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George," in *Race, Space and the Law: Unmapping a White Settler Society*, Sherene Razack ed. (Toronto: Between the Lines Press, 2002). [↑]

27. Lawrence, 2004, 47. [↑]

28. By 1908, "the homestead" was one of the key methods of settling the land entrenched in Dominion land legislation. A "homestead" was defined as "land entered for under the provisions of this Act or of any previous Act relating to Dominion lands for which a grant from the Crown may be secured through compliance with conditions in that respect prescribed at the time the land was entered for" (*An Act to consolidate and amend the Acts respecting the Public Lands of the Dominion ("The Dominion Lands Act")*, 1908 Ch.20, 7-8, Section 2). The land that was available for homestead entry or for sale was land that had been surveyed in accordance with the provisions of the *Dominion Lands Surveys Act* (along with other conditions). (*"The Dominion Lands Act"*, 1908, Ch.20, 7-8, Section 7). "Homesteading" was a heavily racialised and gendered phenomenon. A man who was 18 years of age could apply for entry for a homestead. A woman, however, could only make such an application if she was the sole head of a family. If there was any doubt as to whether she was the sole head of a family, this doubt was grounds for refusal of her application (*ibid*, Sections 9(1) and (2)). A woman could only make an application to homestead if she was a single mother; if she was involved in a relationship with a man who was resident in her home, then her right to application could be refused. Legislation passed in 1911 by the province of British Columbia delineated similar conditions under which a white woman could pre-empt land to include a woman who was a widow, a woman over the age of 18 who was self-supporting, a woman deserted by her husband or a woman whose husband had not contributed to her support for two years (*An Act Respecting the land of the Crown*, RSBC, 1911, Vol.II, ch.128, Section 7). The ability of white women to pre-empt land was informed by a Victorian morality that made their ability to own land conditional on their status as abandoned or widowed women. Aboriginal women remained disenfranchised all together. [↑]

29. Bonita Lawrence, *Fractured Homeland: Federal Recognition and Algonquin Identity in Ontario* (Vancouver: University of British Columbia Press, 2012), 40-43, 47. [↑]

30. The *Act for the Gradual Civilization of the Indian Tribes in the Canadas, 1857*, had as its aim the gradual assimilation of First Nations peoples into white society. The stated objectives of this Act were gradually to bestow citizenship upon Indian subjects, and thereby remove all legal distinctions

between “Indians” and other “Canadian Subjects.” Ironically, this Act came into force at the same time that the category of “Indian” was legislated into being, a category of subjects who were defined as non-citizens. Although this Act applied to Upper and Lower Canada, it did have consequences for native communities in the West. (See J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000) 139-140). The new Dominion legislation in 1869, *The Gradual Enfranchisement Act*, set out similar requirements for the enfranchisement of the Indian population. [↑]

31. Jord/ana Rosenberg, *Critical Enthusiasm: Capital Accumulation and the Transformation of Religious Passion* (London: Oxford University Press, 2011) 39. [↑]

32. Macpherson, C.B. *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962) 264. [↑]

33. Tully, 12-15, 82. [↑]

34. Tully, 138. [↑]

35. Wood, 1984. [↑]

36. Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Oxford University Press, 1994); Tully 150. [↑]

37. Étienne Balibar, *Identity and Difference: John Locke and the Invention of Consciousness*, trans. Warren Montag (London: Verso, 2013). [↑]

38. An extremely abbreviated version of the argument relating to Balibar and Locke appears in Bhandar and Toscano, “Race, Real Estate and Real Abstraction” in *Radical Philosophy* Vol. 194, Nov/Dec 2015, 8-17. [↑]

39. The idea that property is relational is a standard way of understanding ownership. As Kevin Gray and Susan Frances Gray write in their widely consulted textbook, *Elements of Land Law*, “property law [is] a network of jural relationships between individuals in respect of valued resources” (Kevin Gray and Susan Gray, *Elements of Land Law*. Oxford: Oxford University Press, 2005), 5. The idea of absolute ownership, where the owner has exclusive power over the object of ownership, derives from the Roman law concept of *dominium* and has little relevance to the contemporary operation of the British common law of property. [↑]

40. Gray and Gray, 69-72 and 426. [↑]

41. Étienne Balibar, “The Reversal of Possessive Individualism: From Locke to Derrida,” in *Constellations* (2002) 9(3): 299–317 at 303. [↑]

42. Balibar 2013, 41; Rosenberg, 38-9. [↑]

43. John Locke, *The Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), 330, par. 28. [↑]

44. Locke, 1960, 332, par. 31, emphasis in original. [↑]

45. Locke, 1960, 334, par. 36. [↑]

46. Locke, 1960, 341, par. 45. [↑]

47. A fairly common interpretation of the Lockean subject is that it is abstract, bounded and non-relational. For instance, Margaret Davies discusses Macpherson’s theory of the possessive individual

and asserts that the “self has been defined through the idea of property: in this sense, we are said to be self-owning individuals, bounded, autonomous and distinct.” (Margaret Davies, *Property: Meanings, Histories, Theories*. (London: Routledge, 2007) 26). Margaret Radin notes that self-consciousness for Locke is characterised by memory, but argues that a “pure Lockean conception of personhood does not necessarily imply that object-relations ... are essential to the constitution of persons, because that conception is disembodied enough not to stress our differentiation from one another.” For Radin, Locke’s concept of the person has “no inherent connection to the material world.” M.J. Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) 42. [↑]

48. Balibar, 2002, 303. [↑]

49. Locke, 1960, par. 123. [↑]

50. Balibar, 2002, 302-303. [↑]

51. Balibar, 2002, 302. [↑]

52. Radin, 1993. [↑]

53. Balibar 2013, 41. [↑]

54. Denise Ferreira da Silva, *Towards a Global History of Race* (Minneapolis: University of Minnesota Press, 2007) 60-61. [↑]

55. John Locke, *An Essay Concerning Human Understanding*, Peter H. Nidditch ed. (Oxford: Oxford University Press, 1998), 4. [↑]

56. Locke, 1960, 328-331. [↑]

57. Locke, 1998. [↑]

58. We could contrast this with the temporality of recognition evident in First Nations’ rights claims. Anne McClintock’s term “anachronistic space” comes to mind here, where First Nations’ cultural practices and relationships to land have been cast into the pre-history of modern law and sovereignty in the context of section 35 jurisprudence. A potentially promising deviation from this course can be seen in the recent Supreme Court of Canada judgment, *Tsilhqot’in v British Columbia* [2014] 2 SCR 257, which goes further than any previous judgment in incorporating aboriginal perspectives on land use and ownership into the criteria utilised to establish aboriginal title. [↑]

59. *Indian Act*, 1886, s.34. [↑]

60. Sections 30 through 32 provide penalties for the sale of “any grain or root crops or other produce” from reserves in the Province of Manitoba, the North-West Territories or the District of Keewatin. People who bought such crops or other produce contrary to the regulations were also liable to a monetary penalty or a short period of incarceration (*ibid*, s.30[2]). The colonial government strictly controlled the harvesting and sale of timber, a very valuable natural resource. The Superintendent General had the power to grant licences (to anyone) to cut trees on reserves and ungranted Indian lands (*ibid*, s.54). The licensee was granted the right to “take and keep exclusive possession of the land so described subject to such regulations as are made” (*ibid*, s.56). [↑]

61. *Indian Act*, 1886, s.73. [↑]

62. Status Indians living on reserve were given an annuity (an annual payment) by the federal government in an amount determined by the government. [↑]

63. *Indian Act*, 1886, s.81. [↑]

64. *Royal Commission on Aboriginal Peoples*, Vol.1, (Ottawa: Minister of Supply and Services, 1996) 279-286. [↑]
65. *Indian Act*, R.S.C. 1886, s. 9-13. [↑]
66. *The Indian Advancement Act*, R.S.C. 1886, ch.44, s. 5 and [↑]
67. John Lutz, "After the Fur Trade: The Aboriginal Labouring Class of British Columbia 1849-1890," *Journal of the Canadian Historical Association* 3.1(1992): 69-93; James K. Burrows, "A Much-Needed Class of Labour: The Economy and Income of the Southern Interior Plateau Indians, 1897-1910," *B.C. Studies* 71 (1986): 27-46. [↑]
68. Lutz, 1992, 77-81. [↑]
69. Lutz, 1992, 91. [↑]
70. Elizabeth Furniss, *The Burden of History: Colonialism and the Frontier Myth in a Rural Canadian Community* (Vancouver: University of British Columbia Press, 1999) 42. [↑]
71. Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Minneapolis: University of Minnesota Press, 2008) 85-88. [↑]
72. *The Attorney General of Canada v Jeanette Lavalle, Richard Isaac et al v Ivonne Bedard* (1974) S.C.R. 1349. [↑]
73. *Sandra Lovelace v Canada*, *Communication No. R.6/24*, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), Para 132. [↑]
74. Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011), 105. [↑]
75. McIvor was successful at trial, but on appeal, the scope of the trial judgment's vindication of her rights was narrowed dramatically. Her leave to appeal to the Supreme Court of Canada was denied. [↑]
76. *McIvor v Canada*, BCCA, 306 DLR (4th) 193, par. 152-161. [↑]
77. See the Legislative Summary of Bill C-3: Gender Equity in Indian Registration http://www.parl.gc.ca/content/lop/legislative_summaries/40/3/40-3-c3-e.pdf accessed June 17, 2014. [↑]
78. Huntley and Blaney 1999, 9; James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous People", United Nations Human Rights Council, 27th Session, 7 May 2014, 16. [↑]
79. For an exemplary instance of the racially discriminatory nature of band membership rules see *Jacobs v. Mohawk Council of Kahnawake* (1998), Canadian Human Rights Tribunal. Peter Jacobs' biological parents were black and Jewish, but he was adopted by two Mohawk Indians as a baby. He was raised in the Mohawk community and was schooled in Mohawk laws, traditions and customs. When he was 21, however, he was denied band membership on the basis that he was not "racially" or "ethnically" Mohawk. See also Jodi Byrd, *Transit of Empire: Indigenous Critiques of Colonialism*, (Minneapolis: University of Minnesota Press, 2011) [↑]
80. Palmater, 2011. [↑]
81. Coulthard, 2014, 95. Coulthard's work, along with interventions by Bonita Lawrence, 2004 and

Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States*, (Durham, NC: Duke University Press, 2014), complicates a framework that has largely pitted individual First Nations women's rights against the collective sovereign rights of First Nations. [↑]

82. See *McIvor v The Registrar, Indian and Northern Affairs Canada* [2007] BCSC 827, and (2009) BCCA 153 [↑]

83. David Roediger and Elizabeth Esch, *The Production of Difference: Race and the Management of Labor in US History*, (New York: Oxford University Press) 2012. [↑]

84. Nadia Abu El-Haj, *The Genealogical Science: Genetics, the Origins of the Jews, and the Politics of Epistemology*, (Chicago: The University of Chicago Press, 2012). [↑]

85. George Caffentzis, *Clipped Coins, Abused Words & Civil Government: John Locke's Philosophy of Money* (New York: Autonomedia 1989); Foucault, *The Order of Things: An Archaeology of the Human Sciences*, (New York: Vintage Books, 1994). [↑]

86. In addition to the legal cases discussed above, Palmater notes that the Native Women's Association of Canada for instance, has called outright for the repeal of s.6(2)'s second generation cut-off. Palmater 2011, 128. [↑]

87. Palmater, 2004, 220. [↑]

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