

Gendered dispossession and settler colonialism:  
A feminist carceral analysis of the privatization of Indigenous land

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## Abstract

This theoretically based thesis employs a critical feminist analysis to examine the gendered aspects inherent in the implementation of private property on Indigenous reserve land in Canada. Although Indigenous peoples in Canada have previously rejected privatization of their reserve lands for fear of assimilation of their traditional lands to market-based commodification and rationalities, as well as fragmentation and reduction of their traditional land base, versions of privatization policies continue to be advocated by some government officials, think tanks, scholars, and a small but significant number of Indigenous peoples themselves. With the Canadian governmental shifts to neoliberal socioeconomic policies converging, in some ways, with Indigenous demands for more self-determination, it is foreseeable that both the anxiety and appeal of privatization of Indigenous reserve lands will resurface. Recent advocates of privatization of reserve lands present it as necessary for unlocking the market value of dead capital in land leading to investment certainty thereby unleashing an entrepreneurial “spirit” leading to prosperity. The neoliberal ideological linkage of private property to purportedly emancipatory entrepreneurialism is depoliticized from historical and ongoing gendered and racial colonialism. Settler colonial dispossession of Indigenous women from their traditional relationships to land and labour, coupled with current growing expectations of women as participants in entrepreneurialism, has inspired the main question of the thesis as: How does the contemporary rationalization of private property for First Nations reserve land operate as a gendered tool of dispossession for Indigenous women? To answer this question, this thesis uses an interdisciplinary socio-political lens to interrogate the *First Nations Private Property Ownership Act* (FNPOA) as a contemporary example of Indigenous land privatization policy. It is argued that the logic underlying the policy, including entrepreneurialism as dependent on private property, along with gender-blind historical revisionism, operates to erase and obscure not only the historical colonial dispossession of Indigenous women but also the current carceral mechanisms in capitalism that work to maintain the heteropatriarchal settler state status quo. The thesis employs an interdisciplinary framework drawing on Indigenous feminist theory and carceral geography, historicizing historical and anthropological research to elucidate how past dispossession is still operational in the contemporary state. This critical feminist analysis unsettles the common sense of private property and contributes to feminist engagement with settler colonial studies.

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## Dedication

I dedicate this to my beloved Dr. Blake E. Hayes who continues to inspire me, to challenge me, and to push me to love life. Only because of her unwavering belief in me, her dedicated support, her expert advice, exceptional intellect, and nuanced insight have I been able to complete this project. She is one of the exceptional people I know that is willing to make personal sacrifices for the greater good and her principled belief in, and passion for, gender justice is commendable. I am grateful mostly, though, for her generosity in casting her light in my direction which has enabled me to experience the greater part of my life in high-definition.

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## Conventions used in thesis

Unless otherwise indicated, citations for the works of John Locke adhere to the following conventions:

All italics, capitalization, and spelling in quotes are in the original text.

TT= Two Treatises of Government

§37=paragraph37

TI= First Treatise of Government

All intext reference of, or citation to, the *Indian Act* should be assumed to relevant to the present version of the legislation unless a previous version of the *Act* has been cited.

## Abbreviations

AFN	Assembly of First Nations
AWBEN	Aboriginal Women's Business Entrepreneurship Network
CEDAW	Convention on the Elimination of Discrimination against Women
DIAND	Department of Indian Affairs and Northern Development
FNLMA	The First Nations Land Management Act
FNPOA	First Nations Property Ownership Act
FNPOI	First Nations Property Ownership Initiative
ICCPR	International Covenant on Civil and Political Rights
NWAC	Native Women's Association of Canada
RCAP	Royal Commission on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police
UN	United Nations
UND RIP	United Nations Declaration on the Rights of Indigenous Peoples
UNHRC	United Nations Human Rights Committee

## Thesis Introduction

### ***Topic***

In 2013, Darlene Necan, a member of the Ojibway Nation of Saugeen, began building a small cabin on her family's traditional trap line that they had occupied for generations.<sup>1</sup> She had a dream to grow food on her family's land to become more self-sufficient. The land she claims is located off-reserve<sup>2</sup> on unceded Saugeen territory in Savant Lake, in northern Ontario. It had been passed down through her family for several generations, recognized in oral legal history by the local Ojibwe Nation. She started building her one-room cabin in part because she had been chronically homeless, not having been able to acquire housing on her small reserve. The Ministry of Natural Resources and Forestry (MNRF) initially charged Ms. Necan for being in breach of the *Public Lands Act*, charging her with illegally building a structure on Crown land. If found guilty she would have been fined thousands of dollars. Necan was instructed by the government to apply for permits and offered her the opportunity to buy the land ("Ministry told Darlene Necan," 2014) but she had been chronically homeless so lacked the funds. More importantly though, as a First Nations woman Necan did not see the need to apply for a permit to live on her own family's traditional land under Anishinaabe treaty (Porter, 2014). Therefore, she decided to enter into a political battle with the MNRF (Porter, 2013). Almost a year and a half after filing charges, early in 2015, the provincial government dropped the legal suit citing that it was "not in the public interest to proceed with these charges.... In this case the public expense of a lengthy trial does not appear to be justified when weighed against the gravity of the offence" (Crown Counsel Scott Dunsmuir quoted in "Ontario withdraws charges," 2015, para 4). The Crown counsel avoided any mention of Necan's *sui generis*<sup>3</sup> rights as a First Nations person or the colonial legacy of dispossession that at

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<sup>1</sup> Several news articles and interviews with Necan outline the basics of her case. See, for example, "Ministry told Darlene Necan," 2014; O'Callaghan, 2017; "Ontario withdraws charges," 2015; Porter, 2013, 2014).

<sup>2</sup> The Saugeen reserve was created in 1990. It is located about 400 kilometres northwest of Thunder Bay in Treaty 3 area. Fewer than 100 members live on the reserve. There are about 30 privately owned homes on reserve. (Statistics Canada, 2011a).

<sup>3</sup>The inherent collective right to the use of and jurisdiction over ancestral territories as envisioned by Indigenous legal scholars such as John Borrows (1997, 2002). The Canadian supreme courts have recognized this right in: *Calder et al. v. Attorney General of British Columbia*, 1973; *Guerin v. The Queen*, 1984; and the 2014 Supreme Court of Canada decision to confirm aboriginal title to the Tsilhqot'in First Nation.

the very least contributed to her chronic poverty and disenfranchisement as an Indigenous woman. In framing the case as an individual matter the Crown was able to avoid a “lengthy” and highly politicized trial.

The purpose of beginning this thesis with Ms Necan’s story is as a point of real-life departure with which to consider some of the key issues pertinent to this thesis: the dispossession of Indigenous women from their traditional socio-political status, communities, and homelands; settler state pressures to integrate Indigenous peoples into the capitalist free market economy through privatization and commodification of Indigenous reserve land; and neoliberal market-based solutions to colonial dispossession, demanding individual self-sufficiency. Indeed, Ms Necan did want to become more self-sufficient by growing her own food; however, as shall be discussed in this thesis, subsistence farming by Indigenous peoples has been viewed as primitive and uncivilized by settler colonial authorities, and not worthy of land ownership, especially when done by women. The logic in contemporary rationales for privatization of reserve land is evidenced in the individual development of the emancipated entrepreneur—unleashed through the acquisition of private property and justified through active participation in the alleged security and abundance of the liberal market.

The Necan case challenges the state-led depoliticized privatization policies and illustrates the complexity of access to traditional homelands for many Indigenous people, specifically women, due to the legacy and ongoing settler state control enforced through the *Indian Act*. In creating colonial boundaries around Indigenous identity (Lawrence, 2003) and land, the *Indian Act* has demarcated and shaped huge Indigenous traditional territories into small bordered spaces resulting in identity conceptions and material realities based in a colonial construct of “on- and off-reserve” for many First Nation peoples (Thom, 2009, 2014). Necan’s indication that First Nation’s leadership has been unable to help her as “many other off-reserve members [needs] aren’t being met by the First Nation leadership” (Porter, 2013, para 3) is symptomatic of the fragmented and confined spaces that colonial policies designated as reserve land.

This colonial dispossession from traditional lands and community, as well as government underfunding on often economically marginalized and geographically isolated reserves, has resulted in higher rates of poverty and homelessness for many Indigenous peoples than the general

population (Klodawsky, 2009; MacDonald & Wilson, 2013). Chronic housing shortages, overcrowding and inadequate living conditions, unsafe drinking water (Morrison, Bradford & Bharadwaj, 2015), and a lack of other basic services on many reserves are compounded by high unemployment. Poverty as depoliticized and severed from settler colonialism, becomes “subsumed by expectations of individual self-sufficiency that forego Canada’s own colonial haunting” (O’Callaghan, 2017, para 3). Indigenous poverty in Canada, rooted in an ongoing legacy of gendered and racialized dispossession, is tied tightly to land, and Indigenous claims to it. Necan’s claim to her traditional land is based in her rhetorical question, “Aren’t we under treaty?” (quoted in Porter, 2014, para 15). For many Western-liberal settlers, fee simple<sup>4</sup> rights to private property ownership is the answer (Flanagan, et al., 2010; Quesnel, 2013).

This thesis examines privatization of Indigenous reserve land utilizing the most recent policy articulation in Canada, the *First Nations Property Ownership Act* (FNPOA), as an example. The FNPOA is an opt-in policy that proposes fee simple private property ownership on reserve land providing First Nations with the ability to own the underlying title to their reserve lands with the added benefit of being able to freely alienate it. Although the FNPOA was not passed into legislation there is still active support for privatization of reserve land from a variety of sectors, and it is most likely that this type of policy will resurface in the near future as neoliberal hegemony continues to push free market participation in Aboriginal governance (MacDonald, 2011), perpetuating the pressures of capital accumulation through contemporary colonial dispossession (see, for example, Bhandar, 2016a, 2016b; Choudry, 2010; Collard, Dempsey, & Sundberg, 2015; Coulthard, 2014; Rose, 2017). The thesis, therefore, takes a “*historicized*, rather than historical” (Bonds & Inwood, 2015, p. 1) approach to situating settler colonial accumulations through contemporary private property rationalizations in the “right here, right now” (Morgensen, 2011, p. 52). The focus in the thesis is on the gendered implications of the FNPOA. I am particularly interested in how private property in settler Canada has been and continues to be a gendered and racialized mechanism of Indigenous dispossession.

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<sup>4</sup> It is a form of freehold ownership of land. It is the most robust and powerful form of ownership that can be held in real property. Most Canadians own their property in this type of tenure. There are different levels of fee simple, for example, some conditions may be attached to a deed but most estates are absolute, meaning without special conditions attached.

## ***Questions***

Questions involving social justice for Indigenous women require an analysis of not only the intersection of race and gender but also the ongoing legacy of colonial dispossession. Thus, the idea of private property on Indigenous reserve land, especially as it would impact women, raises complex questions. How is private property configured as a tool of the colonialist settler government in which Indigenous women continue to experience sustained discrimination through sexism and racism? Beyond the goals of government and business development, what effects would private property hold for First Nations women? Are individual rights, the underpinning of liberalism, useful for Indigenous women? How are Indigenous concepts and traditional relationships to land different to liberal notions and practices, and how do these differences potentially impact Indigenous women? In what way does the state proposal of private property reveal its masculinist and racialized structure, which enables its white settler supremacy? Is the FNPOA reflective of a shift in property logics? Given these considerations, the main question driving the thesis is:

How does the contemporary rationalization of private property for First Nations reserve land operate as a gendered tool of dispossession for Indigenous women?

## ***Relevant debates and thesis argument***

In order to answer the main thesis question, the oft intersecting arguments advocating privatization of Indigenous reserve lands based in economics, rights, and public benefit need to be considered. It is believed by advocates of private property that ownership is a key factor necessary to ameliorate the “economic underperformance” of Aboriginal communities (Akee, 2009; Alcantara, 2007, 2012; Cornell & Kalt, 1992; Quesnel, 2013). There is also support among some First Nations for adopting private property (LeBourdais, 2013) It is thought a system of private property clarifies ownership boundaries and title creating legal security, which in turn increases investment and development. It is argued that untitled land, or land that is outside of the formal economy and not used for commercial trade or financial leverage—what is referred to as *dead capital*, should be *unlocked* and made accessible on the open market (de Soto, 2000; Flanagan et al., 2010). If this is accomplished, the logic goes, poverty would be reduced through increasing income and general well-being of reserve communities and the surrounding areas (Aragón, 2015). The emphasis in

these economic arguments is to formalize and standardize land tenure through “government-sanctioned, designed and imposed land title systems that leverage the coercive power of the state” (Baxter & Trebilock, 2009, p. 56). Individual ownership of property is argued to be more productive than lands controlled by federal governments or collectively by Indigenous nations (Alcantara, 2007; Anderson, 1995; Flanagan et al., 2010).

Another set of arguments enlist neoliberal economic rationalizations for private property on Indigenous reserve land linking ownership as central and necessary to entrepreneurialism. These arguments are forcefully articulated in the logic behind the FNPOA. They contend that private property is crucial to unlock people’s entrepreneurial spirit to enable them to be in control of their economic selves. It is believed the lack of private property ownership is the fundamental cause of poverty and entrepreneurialism is promoted as an individual solution to lack of employment and reducing household poverty. As entrepreneurialism is generally seen as barrier-free, and “level[ing] the playing field” (Szeman, 2015, p. 477), women have been increasingly targeted as participants as it is believed to enable women to bypass employment discrimination and be more self-sufficient, thereby increasing gender equality (Sarfaraz, Faghih, & Majd, 2014). Government policies directed at gender equality are based in liberal arguments extending and ensuring individual rights to women.

Prominent arguments refer to the concept of individuals rights, pointing out that Indigenous peoples should have the same rights to access private property ownership and free market exchange as non-Indigenous Canadian citizens. These arguments are based in liberal ideas of property ownership as a fundamental right that allows citizens to flourish as equal citizens. Liberal feminists (see, for example, Lister, 1997; Pateman, 1988), feminist scholars in development theory and practice, and some international organizations also promote individual rights including access to property ownership, inheritance, and management for women especially in the global south, as being key to gender equality (see, for example, Agarwal, 1994a, 1994b; Deere, 2001). In the liberal settler context, these arguments are often limited in their lack of attention to the ongoing effects of colonialism, specifically the racialization and gendered dispossession of Indigenous women and peoples through white heteropatriarchal colonial policy that threatens Indigenous peoples to the point of elimination. The individual rights paradigm, while useful to protect individual rights is not adequately valued to deal with collective rights, nor have collective rights effectively dealt

with individual rights. However, the push for individual rights in a liberal settler context cannot fully account for or rectify colonial dispossession.

Adjacent to these arguments are ones promoting integration of Indigenous peoples into the dominant Canadian multicultural polity. Rights-based historical revisionism is also used to claim the naturalness and universal practice of private property ownership, working to diffuse the unique cultural, political, and social standing of Aboriginal peoples (Bains, 2015; Cairns, 2000; Flanagan, 2000/2008; Widdowson & Howard, 2008). The multicultural settler state is willing to integrate Indigenous peoples as a distinct cultural group; however, state resistance to Indigenous self-determination and claims to traditional territory and resources remains fierce. These arguments often link integration to civic responsibility and the greater societal good, citing public benefit through the active participation of all citizens in the economic development and social harmony of the settler nation. Conservative Canadian think tanks such as the Fraser Institute, for example, argue that revenues from Indigenous mining and development could have a positive impact on society as a whole (Sterritt, 2014). Pressure on First Nations to accept pipelines through their traditional territories also appeal to the greater public good arguments. These arguments are more recently linking privatization of reserve lands to individual entrepreneurialism. In this way, First Nations communities and individuals can supposedly become more self-sufficient and less of a financial burden on the rest of Canadians.

Integration of Aboriginal peoples and their lands into the fabric and economy of Canadian society is also argued as a way to reduce Aboriginal dependency and impoverishment (Cairns 2000; Flanagan, 2000/2008). These arguments view that government support should be ended along with any special status awarded to Aboriginal peoples. A strain of these writers views the “idealistic and unsystematic ‘conceptions of history’ of aboriginal peoples” as perpetuating poverty among Indigenous peoples (Widdowson, 2003, p. 2; see also Widdowson & Howard, 2008). On this view, Aboriginal cultures should have changed centuries ago in order to integrate into the emerging agricultural and industrial economy of Canada and because they did not this has caused widespread Indigenous dependency and marginalization. This view, highly criticized as being discriminatory and racist (see, for example, Alfred, 2009; Decoste & Friedland, 2009; Lefebvre, 2017; Simpson, 2010) has some resonance with public sentiment as indicated in a 2016

public opinion survey<sup>5</sup> on Aboriginal peoples in Canada (Environics Institute, 2016) in which respondents were split in their attitudes between the policies of the government and Aboriginal people themselves as to what was the biggest obstacle to achieving economic and social equality for Aboriginal peoples (p. 22). Respondents also cited issues related to the lack of acceptance of and failure to integrate into the Canadian social fabric as important challenges facing Aboriginal peoples (p. 19). These arguments are gaining more ground as neoliberalism pushes communities of people into taking more responsibility for their own well-being.

The problem with many of the arguments for privatization of Indigenous reserve land, this thesis argues, is that not only are these arguments depoliticized and market-based, but most arguments, either for or against, do not utilize a critical gender analysis. This lack of gendered analysis is striking given the historical focus of dispossession directly targeting Indigenous women. Thus, the thesis aims to address that analytical gap by using a feminist gender lens to analyze the FNPOA. The neoliberal logic of individual private property ownership as practiced and understood in a liberal settler state such as Canada, is thinly veiled in colonial legacies of gendered and racialized tenets. These arguments work to minimize alternative land tenure systems circumventing, for example, Aboriginal claims to traditional land tenure practices that conflict with Western-liberal practices and ideologies of private property. The potential for the unequal distribution of resources is underanalyzed (Altamirano-Jiménez, 2013; Graben, 2014). As privatization increases capital accumulation (Hall, 2015, p. 25), it is argued in this thesis that it will most likely do so at the increased dispossession of women. When land comes to be seen as having a market value women are commonly disadvantaged especially in market land transactions (Altamirano-Jiménez, 2013).

From a classical economic viewpoint and for holders of a strong neoliberal view, the intersection of gender or race as mitigating factors to market equity is often considered to be simply a lag in the market and mostly irrelevant, or else blamed on political dysfunction and corruption, rather than due to the market mechanisms themselves (Cudd & Holmstrom, 2011). The market is believed to eventually regulate itself, though when this will occur is an unaddressed question. Neoliberalism, based in classical economics, is utilized as a rationale for more self-determination

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<sup>5</sup> Environics Research is a Canadian polling and market research firm. The Canadian Public Opinion on Aboriginal Peoples 2016 survey was conducted between Jan. 15 and Feb. 8, 2016 using a representative sample of 2,001 adults who did not identify as Aboriginal. More information can be found at <http://environicsresearch.com>.

over development of Indigenous communities and, by extension, women would thus eventually benefit as they are part of the community. The subjugated position of women and gender-based discrimination means that social justice for women is assumed to trickle down, although it often leaves women marginalized and overlooked.

## Methodology

In order to answer the main question the thesis employs a critical feminist analysis, drawing on the body of relevant Indigenous feminist theories, Indigenous thought, and secondary empirical research. I have brought various discourses together in order to pursue a rich multidisciplinary approach to my research question using sources from a wide range of disciplines including feminism, settler colonial studies, political philosophy, feminist political economy, the law, anthropological history, criminology, and geography. I have chosen to take this interdisciplinary approach because, working together, these areas of studies can bring the historical settler colonialism into engagement with the present, “tracing the presence of the past in our claims about the present” (Schein, 2011, p. 7). This socio-political approach has also given me the theoretical tools to be able to bring important aspects of traditional Indigenous women’s historical status, labour, and matrilineal social organization into the fore, and (re)politicize it unsettling the liberal and neoliberal notions of the neutrality of private property and the settler colonial state.

With this rich array of perspectives, I have been able to set, for example, the 17<sup>th</sup> century political theory of John Locke into conversation with studies in feminist political economy and carceral geography, thus, being able to historicize settler colonialism, current neoliberal ideas of the self, and colonial capitalist relations, in order to challenge the “common sense” positioning of private property and entrepreneurial subjectivity. A discussion of the property theory of Locke not only brings a historical understanding of the underlying precepts and values of private property, but also of the dispossession of Indigenous lands, colonial gender and racialized relations, and women’s status.

In order to examine the idea of private property under the *First Nations Property Ownership Act* (FNPOA), I use the book *Beyond the Indian Act*, published in 2010 by the authors Tom Flanagan, Christopher Alcantara and André Le Dressay (herein referred to as “the authors” unless otherwise clarified) as it is the foremost descriptor of the FNPOA, outlining very clearly the main characteristics and ideas behind the legislation in stating unequivocally that the federal government

should adopt the legislation as the authors describe it. The authors, being ideological advocates of privatization of reserve land, were highly involved in the conception of the FNPOA, and can therefore be considered among its architects, along with members of the First Nations Tax Commission (FNTC). The thesis does not only engage in a policy analysis of the FNPOA but more importantly uses the FNPOA as a dynamic and illustrative example of the modern neoliberal rationale driving privatization of reserve land. Because the FNPOA would be applicable to First Nation reserves that are presently under the jurisdiction of the *Indian Act*, the focus of this thesis is on First Nations and not on similar pressures being waged upon the Inuit and Métis peoples in Canada.

Although empirical research may have enhanced this thesis project, I decided not to conduct empirical research for both practical and ethical reasons. Conducting Indigenous research, and especially using empirical methods, involves following an evolving set of protocols to ensure that ethical misconduct does not occur (Battiste & Youngblood, 2000; Castellano, 2014; Wilson, 2003). Several excellent books and papers written about Indigenous research methods (see Denzin, Lincoln & Smith, 2008; Kovach, 2010; Smith, 2013; Teays, Gordon & Renteln, 2014; Walter & Andersen, 2016; Wilson, 2008) have illuminated the unethical research practices that Indigenous peoples and their communities have endured at the hands of some non-Indigenous researchers' centuries of invasive research often resulting in the appropriation of Indigenous knowledge with very little if any benefit returning to their communities involved (Kovach, 2010), as well as recreating colonial power relations (Davis, 2004). Also, due to the extremely critical and urgent nature of much of the work that Indigenous women's organizations do despite the chronic underfunding (Meinhard & Foster, 2003), and especially the pressures of neoliberal governmental "erosion and delegitimization" of women's organizations (Knight & Rodgers, 2012), I decided to rely on previous research rather than put an extra burden on Indigenous individuals and communities. Thus, with these considerations, I deemed it most responsible to pursue a desk-based approach to this research project. I found that there is ample quality empirical research, with a growing amount produced by Indigenous researchers, that I could draw from to achieve my stated goal and contribute meaningfully.

## Theoretical framework

In answering the main question, the thesis argues that the neoliberal logic in the FNPOA draws heavily from the precepts in Lockean property theory, possessive individualism, and that it especially makes use of Locke's entrepreneurial subjectivity. Indeed, the contemporary rationalization of private property for First Nations reserve land operates in ways that obscure the gendered mechanisms in the market and uses entrepreneurialism to rationalize and facilitate market access to Indigenous reserve lands. Furthermore, in neoliberal rationale women's equality is increasingly tied to economic independence and accessibility through entrepreneurialism. Although obscured in neoliberal rhetoric and rationalizations, gender justice for women continues to be thwarted by contemporary colonial dispossession. In order to make these arguments several theoretical frameworks are used.

### *Indigenous feminism*

Indigenous feminist theory is rich and diverse and is “broadly concerned with achieving gender justice” (Suzack, 2015, p. 262). Despite the diversity in naming<sup>6</sup> and in critical perspectives especially in terms of its relationship to Indigenous self-determination (Kuokkanen, 2012), Indigenous feminisms come together as a radical “analytical tool” (Snyder, 2014) in order to illuminate and eradicate the “intersections between colonialism and patriarchy examin[ing] how race and gender systems overlap to create conditions in which Indigenous women are subjected to forms of social disempowerment that arise out of historical and contemporary practices of colonialism, racism, sexism, and patriarchy” (Suzack, 2015, p. 262), as “colonialism has always operated *through* gender” (Razack, Thobani & Smith, 2010, p. 1). Maile Arvin, Eve Tuck, and Angie Morrell (2013) define Native feminist theories as “theories which make substantial advances in understandings of the connections between settler colonialism and both heteropatriarchy and heteropaternalism, problematizing and theorizing the intersections” (p. 11). They further identify two central and intertwined themes present in much of Native feminist theory: that Canada is a

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<sup>6</sup> There are various namings that are used including Aboriginal feminisms (see, for example, Moreton-Robinson, 2000; Green, 2007a, 2007b; Native feminisms (see, for example, Arvin, Tuck & Morill, 2013; Smith, 2005b; Smith & Kauanui, 2008; Ramirez, 2007, 2008; Goeman & Denetdale, 2009). Although initially thought of as a “European invention” or a “colonial imposition” (Goeman & Denetdale, 2009, p.10), Indigenous or Native feminisms are now widely and robustly theorized.

settler colonial nation; and that “settler colonialism has been and continues to be ‘a gendered process’” (2013, p. 9). Challenging the colonial capitalist status quo means, for instance, understanding how the state plays a role in “perpetrating both race-based and gender-based violence” (Smith, 2005a, p. 3). In these ways, Indigenous feminist theory is equipped to disrupt a hegemonic socio-political economic system such as private property as it focuses on challenging the capitalist settler state status quo as a way to gain gender justice, unlike more recent liberal and so called third wave feminisms (Kinser, 2004) that have been accused of abandoning a challenge to the neoliberal state in pursuit of identity/cultural politics (see, for example, Federici, 2004; Fraser, 2013; Jackson, 2001; Mies, 2014; Varn, 2013), as well as the “issues of white women’s racial privilege and complicity in the colonialist project remain[ing] unaddressed” (Grande, 2004, p. 138).

Indigenous feminism draws on the critical work by postcolonial<sup>7</sup> feminists, especially in the area of the intersectionality of race, ethnicity and gender (Cho, Crenshaw & McCall, 2013; Collins, 1998; Crenshaw, 1989). Important contributions have been made by Black feminists and postcolonial feminists, for example, in illuminating the diversity of women’s lived experience as in the works of Audre Lorde (1984/2007, 2003), as well as in the limitations of homogenizing the varied oppressions faced by women as in the works of Chandra Talpade Mohanty (1984, 2003). These theoretical concepts have laid some of the important groundwork for Indigenous feminism. Intersectionality is utilized as a critical analytical tool in understanding how intersections of discrimination such as race, gender, class, sexuality, and ethnicity are interconnected in a web of oppressive power relations and are “mutually constitutive” (Bannerji, 2011, p. 51). Intersectionality for Indigenous feminists is extended to issues of dispossession from homeland, community, social position, and culture, tied to the right to self-determination and sovereignty as it is bound up with homeland. Indigenous women are situated within a larger collective of dispossessed peoples, whose lives are woven together in a shared heritage and grounded in specific homelands. Thus, gender equality is strongly tied in with the survival of the community and therefore is tied to Indigenous men as articulated by Celeste Liddle, an Arrernte woman living in Australia, when she writes, “I feel personally that the issue of race keeps me focussed on community rather than individual advancement, and therefore my feminism reflects this” (Liddle,

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<sup>7</sup> The concept of being ‘post’ colonial is highly contested, especially in the settler context.

2014, para 3). This is similar to many women of colour as they are targets of racism and violence along with the men in their communities (Gilmore, 2009; Maynard, 2017; Weissinger, Mack, & Watson, 2017). Thus, feminisms that have not addressed intersecting issues such as class, sexuality, and especially race, have undergone much critique from postcolonial feminists (see, for example, Lewis & Mills, 2003). In this same critical vein, Indigenous feminists' critique what can be referred to as mainstream or "whitestream" feminism (Grande, 2003, 2004) for generally giving too little attention to Aboriginal women's issues (Moreton-Robinson, 2000; Smith 2005b) and more specifically for the lack of analysis of settler colonialism (Arvin, Tuck & Morill, 2013) and "questions of indigenism" (Jaimes Guerrero, 1997, p. 101).

Race often remains a category for only non-whites, much like how gender has been until recently only a category for only women. "White" is now used as a "marker for objectifying difference in the social construction of race" (Moreton-Robinson, 2000, p. xvi). Relations between non-Indigenous women and Indigenous women "challenge white women...and raise complex issues about complicity, collusion and the privileged status of white women and an unfinished colonial project" (Pettman, 1995, p. 72). White women as beneficiaries in the colonial state structure through the Othering of Indigenous women and other women of colour, has led to feminist analysis that fails to adequately focus on the state as an ongoing colonial settler project. The deep-rooted and divisive complexity of power and privilege in settler colonial relations is further evidenced by some Indigenous feminists who also critique people of colour as being complicit in or at least benefitting from the settler colonial regime (Amadahy & Lawrence, 2009; Lawrence & Dua, 2005). However, it is the whitestream feminist movement's "reluctance to grapple with questions of indigenism...land rights, sovereignty, and the state's erasure of the cultural practices of native peoples" that is "limited in vision and exclusionary in practice" (Jaimes Guerrero, 1997, p. 101).

The theoretical framework also employs the concept of structural patriarchy in order to interrogate gender, race and capitalist relations. Reference to the concept of patriarchy is frequent in much of Indigenous feminism, especially in terms of the impact of Euro-Western forms of patriarchy on Indigenous women and men (St. Denis, 2007; see also Green, 2007a, 2017). Patricia Monture-Angus (1995) cautions that an analysis of patriarchy must incorporate an understanding of how colonization works otherwise it is a "meaningless endeavour from the perspective of Aboriginal people" (p. 175). So how does patriarchy function in settler colonial society? Monture-

Angus continues, “The Canadian state is the invisible male perpetrator who unlike Aboriginal men does not have a victim face” (p. 175).

### ***Carceral geography***

In order to theorize about the relationship between historical colonial policies of dispossession of Indigenous women, current forms of hyperincarceration, and the socio-economic emancipatory discourse of neoliberal privatization of reserve land, research and theory in carcerality studies will be useful. Carceral geography, a subset of criminology, understands sites of incarceration as more than prisons and includes other spatial aspects of confinement that are not typically associated with incarceration (Moran, 2015), for example other types of detention areas such as refugee holding centres or child social services. The carceral is understood as more than a physical space but also “a social and psychological construction of relevance both within and outside of carceral spaces” (Moran, 2015, p. 87). Carcerality is also theorized to work in circuits among people, things, and places (Gill, Conlon, Moran & Burridge, 2018) and this can help us understand how, for example, colonial legislation continues to work to confine and incarcerate Indigenous peoples and how private property works to further this disciplinary dynamic. Carceral geography offers some important ways to understand reserve land as a carceral space. It also helps us understand how private property works as a disciplinary mechanism through colonialism and capitalism. Private property as networked into the capitalist market system operates to maintain a settler state based on racial and gendered foundations. Capitalist relations of carcerality illuminate the ways in which the neoliberal push to develop the entrepreneurial self-sufficient subjectivity has historical roots in the political theory of possessive individualism and Indigenous dispossession.

### ***Terminology***

Terminology regarding Aboriginal people is complex, dynamic, and regional; much of it in usage has been generated by the federal government. Thus, I follow terms used by Indigenous peoples themselves whenever possible, reverting to historical or government terms, such as Indian or band, when appropriate or necessary. Terms related to Indigenous identity are particularly challenging as they have different interpretations depending on the region and positionality, and most are actively contested. The term Aboriginal is a government term adopted in Art. 35 of the *Canadian Charter* and specifically refers to the combined category of all First peoples in Canada—Inuit

Métis, and First Nations. Both terms Aboriginal and Indigenous are employed by Indigenous authors and are also used throughout the thesis, in some cases similarly when referring to the descendants of the peoples who originally occupied the territorial land now referred to as Canada. As the *Indian Act* only applies to status First Nations peoples, I use the term First Nation(s) when referring specifically to the *Indian Act*, as well as discussions of the FNPOA. I have made effort to follow the usage by authors in the literature within different discussions, capitalizing the terms Indigenous and Aboriginal out of respect unless in direct quotes. It is my ethical intention to be as accurate as possible to the conventions I have chosen to utilize.

The concept of enfranchisement needs to be clarified as it was practiced in colonial policy. Enfranchisement is typically positively associated with the idea that disenfranchised, or marginalized groups of peoples, for example, women or people of colour, are brought into the dominant polity and given the rights of citizenship and especially the rights to vote in elections. However, enfranchisement was used by the colonial government to target Indigenous men, and by association the women and children, for assimilation into the dominant polity. In this way, enfranchisement was used as a way to sever Indigenous peoples from their communities in order to pursue policies of cultural elimination and Indigenous land accumulation.

Through enfranchisement, Indigenous reserve land could then be turned into fee simple and become accessible to the open market. Fee simple tenure is a form of freehold ownership of land. It is the most robust and powerful form of ownership that can be held in real property. Most Canadians own their property in this type of tenure. There are different levels of fee simple, for example, some conditions may be attached to a deed but most estates are absolute, meaning without special conditions attached.

The thesis argues that the FNPOA is a gender-blind policy rather than being gender neutral. By erasing the status of Indigenous women in the historical narrative in the FNPOA, the policy fails to recognize, or purposefully denies, the influencing factor of gender in how the policy would impact women versus men. In this way the policy is gender-blind. The FNPOA assumes that women and men interact in the marketplace in the same way, and that women have the same responsibilities, access, and capabilities as men, despite ample scholarship documenting the disadvantages experienced by women (see, for example, Brindley, 2005; Heidrick & Nicol, 2002). The policy assumes that the marketplace is neutral and is not impacted by issues of race or gender, or colonial goals of accumulation of land and elimination of peoples.

Referring to differences within theory and theoretical concepts is challenging and I have attempted to avoid over-generalizations in discussing feminist theories, property theories, and Indigenous ontologies. For example, the term “whitestream” feminism is argued to accurately describe what is often referred to as “mainstream” or “Western-liberal” feminism. Sandy Grande (2003, 2004) has defined the term as “a feminist discourse that is not only dominated by white women but also principally structured on the basis of white, middle-class experience; a discourse that serves their ethno-political interests and capital investments” (2003, p. 330). Using this term also brings to fore the concept of white supremacy and how that plays into settler politics.

I also must note that although this thesis focuses on the dispossession of Indigenous women, I recognize that all Indigenous peoples and their Nations continue to be targets of colonial dispossession resulting in poverty, dependency, cultural destruction, and violence.<sup>8</sup> While the thesis examines First Nations women that would be affected by an adoption of reserve privatization through the FNPOA, the adoption of private property is an issue for all Indigenous peoples in this era of neoliberal globalization.

### ***Researcher standpoint***

I want to acknowledge the moral and intellectual sensitivities that should be taken in this research topic. I am not a member of an Indigenous peoples or community. I grew up in a small town north of Toronto, an area with several First Nations communities and reserves nearby. Not uncommon to Canadian families, mine also has unanswered questions around heritage and lineage peeking my initial interest in this research topic. My driving interest, though, is in understanding Canada as a settler country, and why Indigenous peoples continue to be marginalized and why the horrors of settler colonialism continue to be ignored. How to understand the continued violence and dispossession of Indigenous peoples, specifically women, in a country that promotes itself as multicultural and progressive, is my central concern.

My experience of having lived as an ethnic minority in Asia for most of my adult life, has allowed me some “life lessons” in exclusion that I would not have experienced had I remained in Canada. Due to these experiences, some of the ways in which white supremacy and the “commonsense” mechanisms that act to maintain it as the status quo in Canada, have become

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<sup>8</sup> Poverty, dependency, cultural destruction, and violence through colonial dispossession has been, and continues to be experienced differently, and to different degrees, depending on the particular Nation and or region.

apparent. My interest in this project is to challenge the commonsense nature of private property as it is utilized as a form of Indigenous dispossession, as well as a tool to maintain the white settler state structures and status quo and to understand how gender and racialized discrimination work through colonial relations of power. Canada is in a state of crisis in terms of violence against Indigenous peoples, especially women. Thus, settler peoples, especially those from white European descent and/or cultural practice, need to understand how, when, and why sexism and racism work together under current forms of settler colonialism to perpetuate the ongoing dispossession of and violence against Indigenous women, and Indigenous peoples in general.

It is challenging to understand the worldview of Indigenous peoples for those educated and raised in the values and logics of a Western liberal worldview. As an outsider, understanding of Indigenous cosmologies starts from reading some of the seminal works of Indigenous philosophers, though this understanding may, at times, be relatively superficial, of deeply complex concepts, some of which can be best understood through lived experience.

Numerous intersections shape my existence including gender, class, race, and sexuality, sometimes enlightening, sometimes constricting my path through this world. Because of historical brutalities and the continued colonial settler apparatus, it is critical that non-Indigenous people also understand the legacy of colonial dispossession in Canada that is still very much current. In making genuine efforts to understand our past and present relationships with Indigenous peoples in Canada we may be able to reconcile and repair the ongoing issues between our peoples and envision a “new relationship” (Royal Commission on Aboriginal Peoples [RCAP], 1996a, p. 39).

A goal of this thesis is to challenge liberal feminism and feminists who do not incorporate a critical race analysis, as well as an analysis of the historical and ongoing structures of settler colonialism, in their scholarship and activism in gender justice.<sup>9</sup> It is not my purpose or place to suggest that private property is or is not suitable for any particular First Nations as each community must make that decision for themselves based on many factors. However, I am arguing that policies such as the FNPOA do promote the maintenance of white settler heteropatriarchal status quo.

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<sup>9</sup> See, for example, the following scholars who draw attention to these tensions and inadequacies in much of whitestream feminist thought: Arvin, Tuck & Morill, 2013; Fredericks, 2010; Grande, 2003; Moreton-Robinson, 2000.

## Significance and contribution of the study

The Necan case raises the question of whether private property in the settler society is able to benefit the worst off and marginalized Indigenous peoples, specifically women. Joyce Green (2001) refers to First Nations women who were excluded from Indigenous citizenship by the *Indian Act* as the “canaries in the mines of citizenship.” Green’s use of this metaphor is instructive in understanding the vulnerable, precarious, and unique position based on gender that many Indigenous women experience in Canada. Traditionally, many Indigenous women were seen as the strength of the community, participating in political and social decision-making. Their history must inform and drive political understandings in order to unsettle the prevailing liberal approach to poverty, violence, and dispossession in the relationship between First Nations and Canada.

Thus, this study is significant in that it uses a critical gendered approach to policy analysis. However, in a settler country like Canada, with a long and formative colonial legacy, it is not enough to make policy gender-neutral, attempting to “‘even up’ measurable ‘differences’ between men and women” (Eveline & Bacchi, 2010, p. 88). European models such as in the Netherlands appear to have more effective gender analysis as they pay “explicit attention to inequitable power relations between women and men [aiming to also] challenge the ‘male norm’ and the ‘masculine ideal’” (p. 103). However, in the settler context it is also necessary to factor in settler colonialism as a gendered process in the policy analysis. Taking this approach has been one of the significant contributions of this thesis. A gender analysis of the FNPOA problematizes settler colonialism as a “gendered process” (Arvin, Tuck & Morrill, 2013, p. 9), exposing the deeply embedded heteropatriarchal colonial roots of private property and how they have been, and continue to be, used as a strategy of assimilation and exclusion for Indigenous peoples, especially women.

The theoretical framework brings together anthropology, history, political theory, carceral geography, and feminist political economy creating a unique lens to interrogate how private property is gendered and racialized in the present. There is a growing use of carceral geography in theorizing about Indigenous issues (A. Barker, 2016; Cole Harris, 2011; Woolford, & Gacek, 2016) and gender (LeBaron & Roberts, 2010). My study adds to that scholarship and again brings to fore a focus on gender. This study extends the idea of the “circuitry of carcerality” (Gill, Conlon, Moran & Burridge, 2018) and connects these circuits from the historical to the present, which work to further confine and dispossess women through poverty and violence. These historical carceral

networks fuel the disciplinary mechanisms found in capitalist relations and reveal how private property works to limit challenges against the settler state.

Furthermore, the thesis builds on the recent scholarship regarding privatization of land on First Nation reserves. While some scholarship has examined privatization of First Nation reserve lands (see, for example, Dempsey, Gould & Sundberg, 2011; Egan, 2013; Fabris, 2017; Hall, 2015; Palmater, 2010b; Schmidt, 2018;) few have done so using a gender lens (see Altamirano-Jiménez, 2013). Others have focused on a critique of the FNPOA in some cases mentioning gender (Egan & Place, 2013; Fabris, 2017; Hall, 2015; Palmater, 2010b; Pasternak, 2014; Schmidt, 2018); however, there has been no extensive gendered analysis of the FNPOA to my knowledge. To that end my study builds on scholarship critical of neoliberal privatization schemes on reserve land, and the FNPOA in specific. The study pushes this scholarship by making the theoretical and analytical connections between Indigenous women's dispossession and the assimilative and confining aspects of private property. This study challenges the critiques of privatization, which forget that those amongst the most vulnerable to the effects of neoliberal policies and logic are women.

Property theory continues to be developed by scholars as relational rather than strictly as a legal relationship (Blomley, 2005, 2013, 2014, 2015), in order to understand how it is affected by race, gender, class, and other intersections, trying to push beyond the "bundle of rights" approach to understand what the idea of property and possession actually means. Several scholars have been critically examining property through a gendered lens (for example, see Bhandar, 2014; 2015, 2016b; Brace, 1998, 2004; Davies, 1999, 2007; Cheryl Harris, 1993; Phillips, 2013; Radin, 1993; Rose, 1992; Underkuffler, 2003) and property/land rights regarding Indigenous peoples (see, for example, Blomley, 2015; Bryan, 2000; Egan, 2013; Thom, 2009, 2014). Fewer writers are looking at property using a gender lens as it applies in the Indigenous context (for example, see Altamirano-Jiménez, 2013; Bhandar, 2014; 2015; 2016b; Hamilton, 2002). In my framework I employ a gender lens referring to some of the important work done by Indigenous feminists to look at Indigenous land/property rights, arguing gender and race cannot be separated out from a critical examination of property, especially in a settler colonial context. Using Indigenous feminism to study property has been useful to unsettle the "common sense" (Cockburn, 2016) of private property.

Along with other feminists who use settler colonialism in their analysis (Bhandar, 2016a; 2016b; Dhamoon, 2015; Glenn 2015; Grey, 2005; Morgensen 2011; Pasternak, 2014), this research also adds to the growing research area of settler colonial studies using a feminist theoretical lens. In the field of settler colonial studies, much emphasis is put on theorizing countries such as Canada as settler countries operating in the present and continuing the project of dispossession of Indigenous lands, and not just viewing it as a (past) historic event (Wolfe, 2006). State sovereignty is argued to be a fallacy that only maintains the colonial state. Using an Indigenous approach, this study challenges the settler colonial assumption that enables the concept of private property to be “taken for granted” (Blomley, 2005, p. 125), to be understood as “common sense” (Cockburn, 2016; Harvey, 2007), and to be “gender neutral,” and in that way this thesis further contributes to the scholarship of settler colonial studies.

This research also contributes to the growing body of feminist analysis in development theory that recognizes the extreme limitations in the utility of the redistribution of private property ownership, especially its impact on women (see, for example, Agarwal, 1994a, 1994b; Deer & León, 2001, 2003; Meinzen-Dick & Mwangi, 2007; Meinzen-Dick, Brown, Feldstein & Quisumbing, 1997). It challenges the neoliberal subjectivity that women will easily benefit from liberation into the free market. As Indigenous women are increasingly encouraged to participate in the market place as entrepreneurs, which leads to capital financing (borrowing), this is also another way to encourage the need for private property ownership since land can be used as leverage. There is presently a lacuna of critical scholarship on how this particularly neoliberal shift might be connected to, for example, further Indigenous land dispossession. Indeed, the FNPOA advocates an entrepreneurial subjectivity as one of the critical justifications for the transition to private property ownership. The critical analysis in this thesis of neoliberal subjectivity regarding Indigenous women in the context of private property under the FNPOA adds to and extends the feminist scholarship critical of neoliberal subjectivity.

A final significance is that this study is based on the inevitability that private property policies will continue to be proposed since neoliberal policies are continually putting pressure on Indigenous communities to accept versions of privatization despite widespread Indigenous rejection. Already there have been at least three communities that have opted for fee simple private ownership. Chronic state induced poverty is a keen motivator for the adoption of private property on reserve land. A blasé attitude to private property and taking it for granted, means that the process

and logic of elimination of Indigenous peoples, with all its gendered and racialized outcomes, may, in the end, triumph.

## Structure of the thesis

Chapter 1 sets up the descriptive and theoretical property framework for understanding the contested Indigenous/non-Indigenous relations in Canada. The first part of the chapter outlines the theoretical framework of the thesis, establishing how Canada currently acts as a settler state. The chapter then lays the groundwork for an understanding of the *Indian Act*. Possession of property on reserve land differs from ownership of property outside of reserve land. How, why, and in what ways the colonial government set up the differentiated land regimes creating Indigenous dependency will prepare the reader for the next chapter that interrogates the recent initiative to transform reserve land into private property.

Chapter 2 outlines the technical aspects of the *First Nations Property Ownership Act* (FNPOA), discussing some of the key rationales outlined by its advocates in the book *Beyond the Indian Act*, as well as some of the key debates and criticisms surrounding its proposed adoption. The key argument of this chapter draws attention to the political implications of the gender- and racial-blind logic in the FNPOA. The chapter argues that the gender-blind logic of the FNPOA serves two purposes: first it serves to erase the targeted dispossession of Indigenous women by colonial policies and legislation that aimed to sever their traditional ties to land. This depoliticization then acts to reaffirm whiteness and patriarchal forms of socio-political and economic organization reflected in contemporary neoliberal logics of accumulation. Second, it serves to shield the market-based solution to Indigenous colonial dispossession through individualized entrepreneurialism from criticism and present it as a common sense solution.

Chapter 3 and 4 continue developing the main arguments of the thesis by looking more closely at the claim by the advocates of the FNPOA that First Nations always had a system of private property ownership. To interrogate this claim, Chapter 3 draws on Indigenous philosophers and scholars in order to gain an understanding of Indigenous relationships to land, including interconnectedness, non-binary thinking, and stewardship, that are not found in Western-liberal concepts of property. In the second part of Chapter 3, I analyze John Locke's 17<sup>th</sup> century theories of private property in order to elucidate the concepts of white male property-owning subjectivity, possessive individualism, independence, and rationality, as key ideological components that

continue to contribute to the colonial appropriation of Indigenous lands. The chapter argues that the Western-liberal ontological foundations of private property found in these early writings contravene Indigenous ontological understandings of the human, non-human relationship to land. The chapter further argues that the gendered and racialized subjectivity in relation to property engineered by Lockean ontological concepts of rationalism, possessive individualism, gender hierarchy, racialization, and binary categorization are crucial factors that create and exacerbate inequalities for women. Indigenous ontological precepts, on the other hand, are potentially constitutive of more egalitarian gender relations.

With an understanding of the gendered and racialized differences in ontologies, I am then able, in Chapter 4, to analyze the relevance of the more egalitarian power dynamics between some Nations of Indigenous women and men during early- and pre-European contact. The chapter illuminates and gives significance to matrilineal social organization using anthropological evidence in conjunction with Indigenous feminist scholarship to argue that there was a subsequent decline in First Nations women's status and power due to European heteropatriarchal colonization. The chapter argues that pre-contact egalitarian social relations were not a primitive phase of modernization. Rather, women's relative position of power directly threatened the European gender hierarchy, integrating a masculinized, racialized entitlement to the enclosure and appropriation of Indigenous lands in conjunction with women's dispossession, which were necessary strategies to settler state expansion.

Chapter 5 then uses carceral geography theory to analyze the gendered and racialized colonial legislation and policies. Reserve lands are essential to the continued well-being and very existence of Indigenous peoples. However, this chapter argues that the spaces created, and the tactics used by the settler colonial governments, should be understood as carceral because the motive was to confine and eliminate Indigenous peoples. Understood in this way, it becomes clearer how historical trauma of dispossession is linked to current forms of violence, discrimination, and incarceration faced by First Nations and Aboriginal women. This chapter prepares the reader for the discussion in Chapter 7 regarding the expected entrepreneurial participation in the market economy by Indigenous peoples and the disciplinary mechanisms faced that are embedded in the system of private property and the capitalism system.

As private property is based in the notion of individual rights, Chapter 6 examines Indigenous women's human rights and discusses the effects of one of the gendered laws in the *Indian Act*, the

so-called “marrying out” clause, section 12(1)(b). The chapter interrogates the interactions between Indigenous women and the state, the state and First Nations, and reinstated women and their First Nations communities. The purpose of this chapter is to explore the tensions and inequities caused and exacerbated by colonial legislation between some First Nations bands and reinstated First Nations women, as well as the continued complications that state-generated legislation continues to cause even when it tries to be gender-neutral and corrective. The chapter draws on four legal cases that deal with Indigenous women claiming rights to reinstatement in their First Nations communities as a result of gender dispossession in the *Indian Act*. The cases point to the disruptive and destructive effects of centuries of imposed colonial heteropatriarchal ideology on Indigenous societal and gender relations, resulting in sometimes painful and deep-seated divisions within First Nations communities. The chapter argues that while several non-Indigenous feminists have cautioned about the destructive role that culture can play between individual rights of women and collective cultural rights, the continued effects of settler colonialism are critical to understanding the specificities that complicate Indigenous women’s claims to individual and collective equality and justice. The chapter concludes that as the FNPOA is built on the premise of individual rights to private property ownership as being essential for First Nations communities, and as it does not include a gender perspective in its design, it is foreseeable that Indigenous women, in the event of having to make claims to individual property rights, will most likely be faced with the effects of male privilege and possessive individualism that is associated with Western-liberal practices of private property.

As the final chapter of the thesis, Chapter 7 examines the gendered nature of the disciplinary functions of neoliberal property relations in the context of Indigenous land ownership. The chapter critically evaluates the potential for private property ownership to benefit Indigenous women living on reserve focusing on how debt, the complex site of the household, as well as the concept of private property itself operate as disciplinary mechanisms within ‘carceral’ capitalism. The chapter challenges the claim by advocates of the FNPOA that private property on reserve land is necessary and beneficial for the successful economic development through entrepreneurialism of First Nations. As the FNPOA promotes the unencumbered individual ownership of private property as a way to foster successful entrepreneurial economic development, the chapter examines Indigenous women’s participation in entrepreneurship. The chapter illuminates how capitalism effects disciplinary and carceral mechanisms for Indigenous women. As neoliberal

policy and ideology in Canada puts more pressure on Indigenous communities to be more self-sufficient, neoliberal policies that align with increased self-determination and self-development have resulted in Indigenous women being encouraged and expected to become more independent and one increasing solution proposed is entrepreneurship. As the neoliberal capitalist market does not work evenly especially along gender, race, and class lines, this chapter uses carcerality theory in order to understand how the market may constrain the opportunities and life choices of Indigenous women within the “carceral relations of capitalism” (LeBaron & Roberts, 2010). The chapter argues that the barriers that many First Nations women face in entering the exchange market are compounded and bounded in the carcerality of continued settler colonialism.

## CHAPTER 1: Settler property regimes

### Introduction

This chapter sets up a descriptive and theoretical framework for understanding property regimes as set up by the colonial authorities in the region known as Canada. This provides an important theoretical understanding of how settler colonialism operates in the present and not just as an event in the past (Wolfe, 2006), as well as how racism and heteropatriarchy continue to underpin settler colonialism. Possession of property on Indigenous reserve land through the *Indian Act* differs greatly from ownership of private property outside of reserve land. Understanding why the colonial government set up the differentiated land regimes in the way they did and what some of the regime features are will prepare the reader for the analysis of the recent policy initiatives to transform reserve land into private property, such as that outlined in the *First Nations Property Ownership Act* (FNPOA).

The chapter has two main sections. The first section lays the groundwork for theorizing what it means to characterize Canada as a settler state underpinned by heteropatriarchy, heteropaternalism, and white supremacy. The section starts with a discussion of how settler colonialism is constituted in the present and not relegated to a past era. How gender, race, and other intersections play a constitutive role in the settler colonial state and their potential threat to the status quo will be explicated. The next section then follows with a description of settler colonial policy in the *Indian Act*. This will prepare the reader for later chapters that delve into more depth and detail regarding the gendering of the *Indian Act*. The next section discusses property regimes. Not all settler countries have reserve land and the policies and laws that have evolved are specific to Canada, sometimes taking on different characteristics in different regions of the country. Finally, the chapter turns to attempts to end the *Indian Act* and some thoughts on a departure from it.

## A modern recognition of settler colonialism

### *Settler colonialism*

Settler colonialism is often understood as an historical event (Arvin, Tuck, & Morrill, 2013; Morgensen, 2011)—for settlers that is. For Indigenous peoples in countries like Canada, Aotearoa New Zealand, Australia, and the United States, settler colonialism is a daily experience based in dispossession. For non-Indigenous the benefits of settler colonialism are barely acknowledged or even understood. Settler colonialism is theorized to be distinct from colonialism. Whereas colonialism is understood to be defined by “exogenous domination” (Veracini, 2011, p. 1), settler colonialism is distinguished as an ongoing process in which “settler colonizers come to stay: invasion is a structure not an event” (Wolfe, 2006, p. 388), and land appropriation itself is the primary goal. In its goal of permanency, settler colonialism creates a new colonial system and society, which often results in taking what is useful from the original inhabitants or nations, but ultimately renaming, reinventing, and claiming what is taken. Thus, it is fundamentally characterized by “a logic of elimination” (p. 387) of the original inhabitants and their ways of life through using strategies such as assimilation, neglect, marginalization, and physical, cultural, and psychic violence, in an attempt to force conformity into the dominant societal structure. Wolfe maintains that the “primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.), but access to territory” (p. 388). The settler colonial present operates in specific ongoing structures including “notions of possession that negate claims of prior owners, that sustain Indigenous isolation, and that prevent the social reproduction of Indigenous communities” (Veracini, 2016, p. 178). The expansion of territories that has occurred or land that continues to be developed through the hard work and sacrifice of settlers who were willing to develop the unused land becomes a narrative that is imagined and that gets lodged in the origin stories of the new settler society until the successful “disavowal of conquest, genocide, slavery, and the exploitation of peoples of colour” Razack, 2002, p. 3). Eve Tuck and K. Wayne Yang (2012) refer to this process as the settler construction of “colonization stories” as opposed to the authentic “creation stories” believed by Indigenous peoples (p. 6).

Through the expansion of property, sovereignty of the colonial state takes hold and evolves to gain a position of unquestioned power. The dynamics of settler colonialism become “mundane” and are “continually reconstituted and experienced as the horizon of everyday potentiality” (Rifkin,

2013, p. 323). In the sovereign settler state, then, property ownership becomes understood as a settled concept that is taken for granted as inevitable (Blomley, 2005). Indigenous sovereignty becomes seen as “peculiar” (Rifkin, 2009, p. 89) to the normative imaginings of state sovereignty and, in that way, tends to reinforce its hold. Thus, the state sets the parameters and language of the relationship. The only challenge to state sovereignty, though, is from Indigenous Nations as immigrant populations are solicited and managed to build settler sovereignty. Western-liberal private property regimes become a key and powerful structure to further the dominant political and economic settler state (Egan & Place, 2013). However, Indigenous resistance to ongoing state colonization and claims to self-determination and sovereignty means that the state constantly must push back against this challenge in order to maintain its control. This can be seen in instances where Aboriginal protests over unanswered claims to traditional territories have been violently squashed by government law enforcement, such as in: the Oka Resistance<sup>10</sup> just outside Montreal in the 1990s, which resulted in violent conflict between the Mohawk peoples of Kanehsatà:ke and the government; the Burnt Church Crisis<sup>11</sup> which lead to conflict between the Royal Canadian Mounted Police (RCMP) and the Burnt Church First Nations Mi’kmaq community; as well as the more recent First Nations demonstrations and blockades against shale gas company SWN Resources feared use of fracking and further development<sup>12</sup> on tribal lands in the region of New Brunswick (Hennessy, 2013).

Legitimization can also be found in the United Nations (UN) validation of each member state’s sovereignty, and UN conventions and declarations are issued with that understanding. For example, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) outlines a universal framework for basic rights as they apply specifically to Indigenous peoples, including collective rights, self-determination, and claims to traditional lands and resources (United Nations [UN], 2008). Although 144 states voted in favour of the UNDRIP in September 2007, settler states including Canada, Australia, New Zealand and the United States initially did not. These settler states, built on white European settler colonialism, were primarily concerned with the UNDRIP

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<sup>10</sup> The town of Oka planned to expand an already contested golf course to eighteen holes and to construct 60 condominiums on Indigenous disputed lands.

<sup>11</sup> The Burnt Church First Nations interpreted the Treaty of 1752 and the Treaty of 1760-1761 as agreements to allow fishing out of season for them. Non-Aboriginal fisher peoples disputed this.

<sup>12</sup> Although the Supreme Court has upheld that First Nations people have to be consulted if development is on or affects their traditional territories, the government often has a different idea of what consultation must entail.

phrase “free, prior and informed consent”<sup>13</sup> (UN, 2008). This phrase was thought to be problematic because of its potential influence regarding, for example, the development of pipelines, the Alberta oil sands, and the Site C hydroelectric dam, which are all megaprojects<sup>14</sup> contested by Indigenous communities (Wilt, 2017), as well as by environmentalists. Although the UNDRIP was later signed by Canada in May 2016, it is still highly contested regarding its interpretation and implementation (Wilt, 2017). The UNDRIP is non-binding and non-enforceable international law and enforcement occurs only through state mechanisms and international pressure. Legal mechanisms are examined in more detail in the discussion on individual and collective rights in Chapter 6.

As state sovereignty is protected in international laws and agreements, settler states are then empowered and emboldened to create their own mechanisms to achieve and maintain sovereignty through either control or assimilation, usually both, of Indigenous populations. These mechanisms involve a range of carceral forms and strategies using incarceration within “unique institutions, segregation from the settler population and surveillance and regulation through an expanding bureaucracy” (Finnane & McGuire, 2001, p. 279). These unique institutions then become normalized and depoliticized within the settler state, not as spaces of confinement, but as sometimes protective and sometimes punitive spaces, either one justified for the greater good. For instance, reserves were set up in Canada with the original Imperial rationale that they were necessary spaces to protect Indigenous peoples from marauding settlers. After centuries of colonial policy, boundaries of the reserve have then come to represent “the borders of traditional territories” (Barker, 2015, p. 103) in the settler psyche. Other more apparent mechanisms and spaces of confinement, such as the prison, also have become normalized in the “age of mass incarceration” (Wacquant, 2002). Indeed state manipulations and evasions of Indigenous land claims rely on strategies of racialized and gendered confinement and control, resulting in the hyperincarceration of Indigenous people, especially women, in settler countries like Canada (Reynolds, 2008; Walsh, MacDonald, Rutherford, Moore, & Krieg, 2011), Australia (Baldry & Cunneen, 2014; Stubbs, 2011), the United States (Hall, 2008), and New Zealand (Burt, 2011; Taylor, 2008).

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<sup>13</sup> This phrase occurs in several places in the document, Article 10, 19, 28, 32.

<sup>14</sup> The disputed Kinder Morgan pipeline project has been halted by the Canadian federal court of appeal despite the federal government’s approval of the project. The court’s decision included the fact that the government failed to adequately consider the concerns of First Nations communities (Kassam, 2018). The building of numerous pipelines from the Alberta oil sands that would carry crude oil across Canada and into the United States are contested; and the Site C hydroelectric dam is being halted pending legal decisions on whether it violates constitutionally-protected treaty rights (Hayward, 2018).

### *Organizing principles of race and gender in settler colonialism*

White European settler societies like Canada, New Zealand, and Australia were modeled on the British system of a white liberal democratic ideal and these regions were given a degree of political autonomy in the hope that they “might develop within a shared framework of civilization and moral and material standards” (Stasiulis & Jhappan, 1995, p. 97). This construct of a white European polity in a foreign land inhabited by “non-white” Indigenous peoples means that settler colonialism utilizes the “organizing grammar of race” (Wolfe, 2006, p. 387), as well as gender, to fulfill its goals. These two grammatical tools are used to transmit and disseminate the new colonial social construct intimately reaching into the hearts and psyche of both settlers and Indigenous peoples. As Patrick Wolfe argues, different racial regimes are used in settler colonialism to create and maintain unequal relationships. For example, the ability to enslave and own Black people in the US meant that blood quantum and the “one drop rule” designated who was Black. The “one drop rule” meant that extended families could be owned and the increased numbers benefited the slave owners. However, with Indigenous peoples, blood quantum has been used to reduce populations and this is beneficial to settlers as more Indigenous people “obstructed setters’ access to land, so their increase was counterproductive” (p. 388). In both cases the system benefitted the ruling elites and the status quo. In this constructed void the white settler is able to move in place of the Indigenous peoples. Aileen Moreton-Robinson (2015) argues, “patriarchal white sovereignty as a regime of power, operates ideologically, materially and discursively to reproduce and maintain its investment in the nation as a white possession” (p. xxiii). She further argues, “possessive investment in patriarchal white sovereignty is enhanced through private property ownership. This security produces an affect that is encapsulated in a sense of home and place, mobilizing an affirmation of a white national identity” (p. 146). Ownership in property then takes on the power of belonging in the settler community that in turn symbolizes the power of whiteness.

While settler societies are fundamentally based on the dispossession and elimination of the Indigenous population they continue to evolve and expand in ethnic diversity creating and adopting multicultural policies and national identities. Despite the image of the inclusive and celebratory nature of multiculturalism the building of settler states, as in the case of Canada and Australia, through immigrant labour and population is fraught with racist and exclusionary policies. For example, in the early 20<sup>th</sup> century Canada welcomed its largest number of immigrants, but they were restricted to white Anglo-Saxon protestants in attempts to preserve the white British heritage

of the nation (Roy, 2011). The more well-known instances of immigration exclusion are: the Chinese head tax;<sup>15</sup> the refusal to allow the 375 Indian people to disembark the 1914 Komagata Maru ship in the port of Vancouver; Japanese internment during WW II; and the exclusion of Jewish immigrants during the lead up to World War II (Abella & Troper, 2012). In the early 20<sup>th</sup> century the rise of cultural pluralism, especially on the West coast, “generated profound, irrational racial fears” (Ward, 2002, p. 92).

However, exclusion has not been the only method used to maintain a white settler population. Enakshi Dua (2007) writes about how in the late 19<sup>th</sup> and early 20<sup>th</sup> century in Canada it was debated whether or not to allow single female immigrants from China, Japan, and India. Dua notes that both for and against arguments were articulated in a way to ensure the maintenance of a white settler society. On the one hand, it was thought that keeping Asian women out of Canada might ensure “male migrants from Asia would be rendered as temporary residents;” on the other hand, allowing women to enter the country was argued to reduce the probability of “inter-racial sexuality” (p. 445). Dua points out that inclusion is also used as a “strategy to figure Canada as a white settler society” (p. 446). More recent migration policies in Canada have been critiqued as: putting greater emphasis on “immigrant ‘self-sufficiency’ and ‘integration’ into the Canadian society” (Abu-Laban, 1998, p. 190); expanding “temporary and precarious forms of migration” (Bhuyan, Jeyapal, Ku, Sakamoto, & Chou, 2017, p. 47); and promoting “‘ideologically deracialized’ nation-building … serv[ing] to re-envision Canada’s White [immigration] policy within a neoliberal context” (p. 60) resulting in a “perfected system of control, containment, and expulsion” (Walia & Tagore, 2012, p. 88).

Furthermore, ideologies of gender underpin the structure and authenticate a gendered settler state superiority and control. Dominant concepts of gender norms and values become key to mobilizing not only the new settler society but also reforming and assimilating the Indigenous population into the fold. “Othering” of Indigenous populations means not only that race, but also gender, is utilized to create the settler hierarchy. In the formative era of settler colonialism in North America the effects of dispossession on Indigenous women, as well as the imposition of European

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<sup>15</sup> Each Chinese person had to pay a head tax upon entering Canada under the *Chinese Immigration Act of 1885*. This was hoped to dissuade more Chinese people from immigrating to Canada after the Canadian Pacific Railway was finished (CPR) (Cho, 2002). The CPR was constructed in large part with indentured Chinese labour (Naylor, 2014).

heteropatriarchal, gendered norms in which heterosexuality and patriarchy were believed to be normal and natural, were key to the success of colonial hegemony.

Heteropaternal social relations, where the head of the nuclear family was the father, were extended to the state and to its relations to Indigenous peoples. This was especially devastating to precontact societies that were based on relatively egalitarian gender relations. In the colonial state Indigenous women found themselves locked out of traditional labour practices associated with agricultural production, separated from their relationship to land, driven into monogamous heterosexual relationships, and forcibly severed from their matrilineal lines of decent and their existing power base. The ideal women in the formative era of settler colonialism in Canada were white European women who were virtuous homemakers and dependent, supportive wives and the ideal men were white property-owning settlers. Racialized Others did not fit into this binary of social relations. As the key driver in settler colonialism was the occupation of land, “masculine whiteness thus became central to settler identity, a status closely tied to ownership of property and political sovereignty” (Glenn, 2015, p. 58). In this way, settler colonialism becomes “an example of institutionalised or normalised (and therefore mostly invisible) ideology of national identity” (Lovell, 2007, p. 3) in which whiteness and masculinity (at least certain kinds) maintain the invisible power structure.

The white European settler society as an imagined construct is a hegemonic myth that is both gendered and racialized (Stasiulis & Yuval-Davis, 1995), and erases Indigenous history. Daiva Stasiulis and Nira Yuval-Davis argue that these concepts have “continued relevance” and have been “absorbed within the political and legal-juridical institutions, ‘myths of origin’ and national metaphors,” allowing multinational corporations to “profit immeasurably from the appropriation of Indigenous lands and from the cheap and divided labour of racially, ethnically and gender-segregated labour markets” (p. 8). In their examination of what it means to have a settler identity, Emma Battell Lowman and Adam Barker (2015) discuss how Indigenous and settler identities are non-binary, meaning that there are different ways that someone may come to settle in a country such as Canada. For instance, if someone enters Canada as a refugee or as an indentured worker, this does not make them a settler in the colonial sense. Newcomer immigrants do come to settle, but they are settling on unceded Indigenous territories only because the occupying state promoted a “bracketed out” (Dempsey, Gould & Sundberg, 2011) version of history that does not include Indigenous dispossession, but rather heroic settler possession against all odds and dangers.

Immigrants are being invited in to be a part of this so called “glorious and free” project.<sup>16</sup> From an Indigenous perspective all non-Indigenous are settlers, albeit not the same, as their histories, identities, traditions and very beings are not grounded in the land they will come to call home (Jafri, 2012; Lawrence & Dua, 2005).

What does it mean, though, to characterize a developed multicultural country like Canada as a present-day settler colonial state, or as a paternalistic, heteropatriarchal, settler state? This next section describes what might be seen as the parallel universes of settler/Indigenous experience in Canada.

### ***O Canada: Our home on Native land<sup>17</sup>***

Over the past few years Canada has consistently ranked in the top 10 countries to live (out of approximately 200 countries), according to the United Nations Human Development Index (HDI), based on HDI measurements of health and life expectancy, access to education, and standard of living. Canada is also ranked relatively high, 30<sup>th</sup> out of 144 countries in 2017, on the Global Gender Gap Index, which measures “economic opportunity and participation, educational attainment, health and survival, and political empowerment between women and men” (World Economic Forum [WEF], 2017).

The Canadian government promotes its image of having an extremely diverse population, being a “proud immigration country,” and having one of the most “elaborate” multiculturalism policies (Ambrose & Mudde, 2015, p. 213) that have been referred to in Australia as “Canada’s gift to the world” (Albrechtsen, 2008, para 2). This model of multiculturalism that Canada has constructed is based on selecting highly-skilled immigrants and offering policies to help integrate immigrants into the labour market and social fabric who will “contribute to Canada’s economic, social and cultural development” (Biles, Carroll, Pavlova, & Sokol, 2012, p. 93). Also, the popular support of immigration in Canada, as opposed to the United States, can perhaps be attributed to a popular understanding that “immigration represents a positive opportunity to build the economy and develop the country” (Reitz, 2012, p. 518) as the state is seen as “amenable to resolving ethnic and cultural divisions...a perception shared by many immigrants” (Thobani, 2007, p. 144). This

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<sup>16</sup> Phrase from the Canadian national anthem. Full lyrics can be found at <https://www.lyricsondemand.com>.

<sup>17</sup> In reference to several Native writers such as Judith Sayers (2016) who have drawn attention to the irony and challenged the legitimacy of the second line of the lyrics of the English version of the Canadian national anthem.

could be why “many immigrant Canadians on their own tend to naturally adopt ‘traditional’ Canadian attitudes and mores” (Hussain, 2013, para 17), as well as why there is very little far right wing pushback, in contrast to many other countries in Europe, or in the United States (Ambrose & Mudde, 2015). Despite these accolades multicultural policies not only “manag[e] internal differences” (Mackey, 2005, p. 50) but also “constitute the difference” (Bannerji, 2000) and thus “reconfigure[e]” and “crystalliz[e]” race as political identity although the “core of the nation” remains white European (Thobani, 2007, p. 145).

If liberalized immigration policies continue to satisfy a need for increased labour rather than an ethical response to human mobility (Thobani, 2007), then it is little wonder that during integration into dominant social norms many immigrants and newcomers pick up “negative stereotypes [of Aboriginal people] after immigrating to Canada” (Jetelina, 2015, para 16) as evidenced in surveys commissioned by the Canadian Race Relations Foundation (Canadian Race Relations Foundation, 2016). This points to the negative colonial era stereotypes of Aboriginal peoples that are still current in the psychic fabric of the country. The seemingly positive attitude towards immigration and immigrant peoples, while very important, at the same time represents the building blocks of settler colonialism and the sovereignty of the settler state since the focus is on building Canada while the Aboriginal population remains under virtual siege.

As such, multiculturalism as an official policy has created a narrative that “the nation [has] made a successful transition from a white settler colony to a multiracial, multi-ethnic, liberal-democratic society” (Thobani, 2007, p. 144). While the sovereign nation of Canada prospers with a relatively high standard of living, and is generally viewed positively in the world’s eye, the actual ongoing situation of many Aboriginal peoples living on Turtle Island<sup>18</sup> is extremely different. In particular, the statistics on Indigenous peoples, particularly Indigenous women, clarify what needs to be understood. The media is ever present with stories and statistics of poverty, homelessness, scarcity of housing on reserve land, missing and murdered women, displacement from traditional lands, restricted access to reserve land as well as territorial lands, all of which are issues for almost all Aboriginal peoples; however, for Aboriginal women, the situation is often much worse compared to non-Aboriginal women and Aboriginal and non-Aboriginal men, and this is complicated by the fact that information is hard to find, since surveys and statistics are often not

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<sup>18</sup> Many Aboriginal people traditionally referred to the territory that is now known as Canada as Turtle Island.

well disaggregated regarding Indigeneity and the intersection of Indigeneity and gender. Poverty rates for Aboriginal Canadians are much higher at 31.2% compared to the average at 12.9% (Jackson, 2010, cited in Raphael, 2011, p. 68), with poverty among Aboriginal women higher than for non-Aboriginal women,<sup>19</sup> and also higher when compared to Aboriginal men, let alone non-Aboriginal men. Homelessness for both Aboriginal women and girls is disproportionately high compared to Aboriginal men and boys and also compared to the non-Indigenous population (Baskin, 2007; Taefi & Czapska, 2007). Women and girls who live in precarious housing situations are often vulnerable to violence. This violence can lead to women migrating to more urban areas. However, without support of family and community they can become vulnerable to further violence in urban areas. Research has found that Indigenous women are “12 times more likely” to be victims of violence than non-Indigenous women and “16 times more likely than Caucasian women” (National Inquiry into Missing and Murdered Indigenous Women and Girls [NIMMIG], 2017, p. 8), and 16% of all murdered women between 1980 and 2012 were Aboriginal (Government of Canada, 2015a). Considering Aboriginal people are only around five percent of the population (Statistics Canada, 2017b), this is clearly a much higher rate of violence experienced by Aboriginal women. Indigenous women are “disposable in settler colonialism” through sexualized violence (Razack, 2016, p. 299; see also Razack, 2015).

These extreme conditions on and off reserve have gained some attention in recent years, especially due to the Idle No More<sup>20</sup> movement founded in 2012. The movement was, to an extent, inspired by the leader of Attawapiskat, Chief Theresa Spence’s liquid hunger strike in which she protested against the crisis conditions of her isolated community—including overcrowded housing, and extreme physical, sexual, and drug abuse. Many First Nations across Canada have had chronic unsafe drinking water for decades. First Nations quality of on-reserve drinking water is much lower than the national average and there is a much lower rate of First Nations communities with access to clean, safe, running water (Morrison, Bradford & Bharadwaj, 2015). However, the government is very slow to react, and when it does take action it is often ineffective in its solutions.

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<sup>19</sup> “Based on before-tax incomes, more than 36% of Aboriginal women, compared to 17% of non-Aboriginal women were living in poverty” (Statistics Canada, 2006, sec. 6.4, para. 1).

<sup>20</sup>Idle No More is a grassroots social movement demanding that the government respect Indigenous sovereignty, treaties, and Indigenous rights. The movement addresses the high suicide rates, lack of potable water, poor housing, and other social problems, such as those listed above, that are found on reserve land.

Unemployment rates are much higher for First Nations peoples both on and off reserve. For example, in 2006 the unemployment rate was 25% for First Nations peoples living on-reserve, which was almost 3 times the rate for non-Aboriginal peoples (Assembly of First Nations, 2011). Among all First Nations women, the unemployment rate was 15.9% and it was almost double for First Nations women without registered Indian status<sup>21</sup> (Arriagada, 2016). High unemployment rates have been linked to incarceration rates. According to the Annual Report of the Office of the Correctional Investigator 2016-2017 (Zinger, 2017), incarceration rates of both Aboriginal men and women were much higher than the national average. About a quarter of inmates across the country are Aboriginal and in the middle Prairie provinces it is almost 50%. They tend to receive higher security classifications, are released later in their sentence, and have their paroles revoked more often. Aboriginal women are the fastest growing population in incarceration, growing by 60% in the last ten years; they represent 37% of all women incarcerated and are 50% of the maximum-security population (Zinger, 2017). While there are some who might falsely argue that First Nations are responsible for their own criminality, the argument taken in this thesis is that it is directly related to and maintained by settler colonial dispossession.

The histories and current realities of Indigenous peoples are neither well understood nor present in the mainstream consciousness of many Canadians. According to the 2003 findings in an attitude survey towards Aboriginal peoples conducted by the Centre for Research and Information on Canada (CRIC, 2004), 49% of Canadians believed that the land claims by Aboriginals were illegitimate, and 42% supported abolishing Aboriginal rights entirely, while 51% thought Aboriginal people were ‘better off’ than other Canadians. However, at the same time, 48% indicated that they thought it was not possible for Aboriginal people to be able to have much power over the poverty they experienced (CRIC, 2004).

Colonial constructions of Aboriginal cultures and societies as foundations of poverty and as impediments to progress in themselves are problematic (Findlay & Wuttnee, 2007), and while many Canadians are sympathetic to poverty in general, the results of the survey seem to indicate that there are negative attitudes toward Aboriginal agency. Robert Harding (2005) found that negative stereotypes were being perpetuated in the media, which “casts doubt into the ability of

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<sup>21</sup> “Registered or Treaty Indian status refers to whether or not a person is a Registered or Treaty Indian. Registered Indians are persons who are registered under the Indian Act of Canada. Treaty Indians are persons who belong to a First Nation or Indian band that signed a treaty with the Crown” (Statistics Canada, 2017d).

Aboriginal people to successfully manage their own affairs” (p. 312). While Aboriginal peoples are statistically “more likely to be recipients of social welfare, to be unemployed, to be incarcerated, to live in poverty, to face health risks and to commit suicide than other Canadians” (Indigenous and Northern Affairs Canada [INAC], 2003, p. 2), the colonial roots are constantly being either left out or reinterpreted in public debate, thereby unfairly casting blame on the marginalized dispossessed.

Canada is a nation not only built, but also maintained, by settler colonialism (Battell Lowman & Barker, 2015). Most simply understood, Canada remains a modern settler state by virtue of the sustained legislation of the *Indian Act* that continues to govern First Nations people separately from the rest of Canadian citizens. The *Indian Act* denies First Nations their *sui generis* rights and makes claims to comprehensive sovereignty—cultural, political, and economic (Borrows, 2002). The following section briefly outlines the main aspects of the *Indian Act*, including the reserve system. This has proven challenging as the main state legislation governing First Nations, the *Indian Act*, has its current application in colonial roots. Thus, the following section transverses both the historical and more current application of First Nations policy. This is critical to understanding how Canada still functions as a settler state and how private property through the FNPOA is situated in the context of settler/First Nations relations and the government fiduciary and treaty responsibilities. Outlining the evolution of the policies is necessary in creating an understanding of the current context in which the FNPOA has been drawn up. This will aid in comprehending the legacy of colonialism that continues to inhabit the present as well as explicating the current gendered nature of the push to privatize reserve lands.

### ***We are all treaties peoples***

All peoples living in Canada are treaties peoples. In light of the belief that Canada has sovereignty over all the lands, this may seem like a provocative statement to some non-Indigenous people. However, treaties are nation-to-nation political agreements that happened between various First Nations long before Europeans arrived. Treaties ensured a diplomatic understanding of how to utilize and share lands and resources. With the advent of European migration, several First Nations entered into treaties with them as well. After Britain won the Seven Years war, in 1763 the British set the groundwork for establishing treaties in the *Royal Proclamation of King George III*, thought of by many First Nations peoples as the initial recognition of Aboriginal title to traditional

territories and it “continue(s) to have relevance for the relations between Aboriginal and non-Aboriginal people” (RCAP, 1996a, p. 99; Borrows, 2011). Because the British Imperial Crown recognized Aboriginal peoples as Nations and that treaty agreements were necessary before any traditional lands could be ceded, in the early relations between Indigenous peoples and Europeans there was a sense of mutual benefit despite the unparalleled circumstance of increasing numbers of newcomers arriving and staying on Turtle Island.

From about 1763-1923 a series of treaties were signed between First Nations and the colonial governments negotiating “reserve lands, hunting, fishing, trapping rights, annuities,” and other types of payments to treaty First Nations (INAC, 2003, para 1). From a First Nations point of view, these treaties allowed settlers to share the use of their traditional lands (RCAP, 1996b). However, as treaties between Indigenous peoples were traditionally recorded in oral histories, and both sides were coming from very different ontological understandings of land, there were considerable and devastating misunderstandings, as well as deceptions on the part of the Europeans (RCAP, 1996b). From the perspective of the colonial authorities, these treaties gave the government the authority to open up Western and Northern areas of Canada to further settlement through agricultural and resource development. In all of the 11 treaties there is a clause put in by the government basically stating that First Nations have—surrendered, ceded, released, and yielded their lands (Vowel, 2016, p. 254). This is not the understanding of First Nations, though. In Section 25 of the *Canadian Charter of Rights and Freedoms*, the *Royal Proclamation of 1763* is still included, protecting early Indigenous peoples’ agreements of shared land usage. Importantly, the Proclamation instituted a framework for fiduciary responsibility to the British Crown for the wellbeing of the First Nations peoples.

With this legal authority the Canadian government also carried on the fiduciary responsibility laid out in the Royal Proclamation. This has been described as a responsibility “which places the Crown between the Aboriginal group and third parties to prevent exploitation” (Hurley, 2002, p. 3). Thus, the government would not only have legal jurisdiction over Indigenous lands, but it also became responsible for working in the best interests, welfare, and safety of First Nations. Thus, it became the responsibility of the federal government to provide basic services to First Nations that normally the provinces or municipalities provide to non-Indigenous communities. The government also would be responsible to make annual annuity payments to registered First Nations people through bands that have signed historic treaties with the Crown (INAC, 2008b). However, more

and more First Nations have become responsible for governing some of these basic services for their own communities (Rich & Hume, 2011).

### ***Indian Act***

In order to understand how the property regimes work in Canada some knowledge of how the *Indian Act* has impacted First Nations peoples will help orient the reader, though a more detailed analysis will be undertaken in Chapter 5. While the Canadian government has designated the three distinct groups of Indigenous peoples—Inuit, Métis, and First Nations—as Aboriginal, the *Indian Act* only applies to First Nations peoples. The legislation consists of a complex network of laws that regulate almost every aspect of First Nations lives and their environments. In 1876, several colonial policies, most notably the *Gradual Civilization Act 1857* and the *Gradual Enfranchisement Act of 1869* that had governed Indian peoples, were consolidated into the *Indian Act*. These policies were aimed at civilizing and later at assimilating First Nations peoples into EuroCanadian society. Under the *Indian Act*, First Nations men were targeted for enfranchisement to become British subjects. This was considered to be a privilege by the colonial government, one that would also result in a reduced number of status Indians, which meant fewer fiduciary responsibilities for the government. Enfranchisement meant that the person would lose their status rights, have to use a Christian name, as well as lose all connections to their Indigenous heritage and communities. The ability to own private property was used as an enticement or reward to entice men to volunteer to be enfranchised; however, the property (50 acres) was taken from their home reserve, resulting in a smaller collective land base. Women were not direct targets for enfranchisement but would be through their husbands. Under the *Indian Act* First Nations women were “dually disadvantaged” (Isaac & Maloughney, 1991) in two very critical ways: first, the burgeoning settler colonial state deprived all First Nations people of their rights as part of its creation of a “new social order”; and second, as “women who were deemed inferior both to Indian and mainstream men” (Voyageur, 2011, p. 68).

A major legislative turning point in the *Indian Act* was to define the jurisdictional category of “Indian.” The government decided who was to qualify to be a registered or status Indian, delineating who would be eligible for fiduciary benefits from the government and who would have the ability to live on reserve land. In this definition, the government disqualified Indian women who married any man that was not registered as a status Indian. Consequently, thousands of Indian

women along with their descendants lost their Indian status including their rights to live on and possess reserve land. These sexist criterion continue to have devastating effects on generations of Indigenous women and their descendants, the results of which will be examined in more detail in Chapter 6.

As a consequence of these laws related to identity and status, there are several terms that are used by the government. Although the identity Treaty Indians/First Nations and Status or Registered are often used interchangeably, more specifically, Treaty Indian means someone who belongs to a band that was under one of the 11 numbered treaties. The colonial government also created the category of band. Under the *Indian Act*, a First Nation is a band if it has a reserve and has a trust fund held by the government. If it has no reserve land the Governor General can declare it to be a band (*Indian Act*, 1985). The government created this administrative category in spite of traditional kinship groupings, which were often disrupted through this categorization (Vowel, 2016, p. 32). A band may have more than one reserve and some bands do not have any reserve land. Not all status people have membership in a band and since 1985, bands can choose whether to adopt their own membership codes<sup>22</sup> or to follow those as laid out in the *Indian Act*. In the *Indian Act* there is no reference to citizenship and after the 1947 *Canadian Citizenship Act*, all people born in Canada are considered Canadian citizens, including all Aboriginal peoples.<sup>23</sup> Some First Nations have developed citizenship codes such as the Nisga'a First Nation, Key First Nation, and Tsawwassen First Nation. This means that First Nations people can now have dual citizenship, although some people only acknowledge their First Nations citizenship.<sup>24</sup>

Along with the category of bands the colonial government imposed a European-style governance system on First Nations. The colonial government viewed Indigenous political systems as undemocratic and inefficient and so imposed a three-year, later reduced to a two-year, election system.<sup>25</sup> Women were not allowed to participate in either band councils or in treaty negotiations with the colonial authorities, even though for many Indigenous cultures women were traditionally active in political decision-making. This gendered exclusion has had devastating effects on the

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<sup>22</sup> Bands can also decide then who can live on reserve and who can receive band monies.

<sup>23</sup> Anyone born in Canada after 1977 is considered a Canadian citizen (for further discussion see Sákéj and Henderson, 2002).

<sup>24</sup> The Six Nation Haudenosaunee has issued a passport that is recognized in many countries in the Americas with Indigenous populations (Hill, 2015).

<sup>25</sup> Bands can now opt to use customary elections, which allows them to follow traditional forms of leadership including hereditary chiefs.

status of women and their participation in Aboriginal governance, although women continue to resist.<sup>26</sup>

Most of the administration of the band would remain in the control of the Department of Indian Affairs<sup>27</sup> under an Indian agent,<sup>28</sup> except for things like health care, infrastructure maintenance, or building repairs (Tobias, 1983). In order to exert more control over daily life, the “Pass and Permit System” meant that First Nations peoples living on reserve had to ask for permission from the local Indian agent in order to leave the reserve or conduct business off reserve. Many permits were denied. Although many of these policies have been stopped, the legacy of their negative effects, trauma, and violence are still being experienced by many First Nations communities. Although there are no longer Indian agents, some services such as housing, education, and infrastructure are managed by band councils but ultimately still regulated by Indigenous and Northern Affairs Canada (INAC). These legislative statutes, especially how they applied specifically to Indigenous women, will be discussed in more depth in Chapter 5.

## **Property regimes in Canada**

In this section, the difference in property rights on reserve lands and the rest of Canada will be discussed.

### ***Settler property regime in Canada***

Property law in Canada is based in English common law, except for the province of Quebec, which is based in French civil law. In general, though, property rights are experienced similarly across Canada. The majority of land in Canada is Crown land, or public lands, which are owned by either the provincial, federal, or municipal government<sup>29</sup> and are typically used for parks and recreation

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<sup>26</sup> Like most women globally, Indigenous women overwhelmingly are dominant in local social service organizations and grassroots organizing; the Idle No More movement is such an example. A recent surge in leadership by First Nations women has resulted nationally in about 20% of First Nations being headed by women chiefs (Welch, 2016). For more information on First Nations women’s leadership see Voyageur, C. (2008).

<sup>27</sup> It is now called “Indigenous and Northern Affairs Canada” (INAC). The present Liberal government will soon split into two administrative offices.

<sup>28</sup> Indian Agents served as the official spokesmen (there were no female Indian agents) of the Department of Indian and Northern Affairs within First Nations communities until about 1968 in some communities. After the abolishment of the system of on-the-ground Indian Agents, First Nations chiefs and their councils took on the various responsibilities (Chartered Accountants of Canada, 2008).

<sup>29</sup> Crown lands are still nominally owned by the Queen of England.

sites and other common uses. Only 9.7% of the land is owned privately (Cahill & Copley, 2006). Individuals can own property in fee simple, which is the highest (least restricted) form of ownership possible in Canada. Although home ownership rates have declined among the poorest of Canadians, the national average is at about 68% (Statistics Canada, 2017c). Owners can freely sell their property to whomever they like, pass down the property to heirs, exclude others from it, and in some cases the property can be further sub-divided. These rights are limited by government ability to taxation, eminent domain, escheatment, as well as other legal restrictions. Fee simple also does not mean one has the rights to all subsurface materials. If the government needs to expropriate privately owned land (restricted by legal protection) they must compensate the owner fairly. Because the land is legally secure, it is possible to use the property as collateral for a loan. There are other types of land ownership such as trusts, but fee simple is the standard form of land ownership for Canadians, and home property is overwhelmingly on this form of land ownership.

### ***Indigenous property regime in Canada***

There are over 600<sup>30</sup> First Nations across Canada that are in possession of approximately 3,100 reserve areas in Canada (Statistics Canada, 2011b). Several bands have more than one reserve, some being in close proximity to each other and some not. The total landmass for reserves is about 0.28 percent of Canada (Vowel, 2016). Reserves are designated areas by the government and set aside for the use of a band although not all are inhabited. Some First Nations were relocated during the colonial era to non-traditional areas (Indigenous Corporate Training [ICT], 2015a). Some reserves near settler populations are relatively prosperous. However, about half of the reserves are located in rural areas and usually have difficulties as they are geographically isolated. With the introduction of small plots of land designated on reserves the government location tickets attempted to get Indigenous people to conform to EuroCanadian understandings and practices of bounded property. Although reserve land cannot be individually owned by First Nations members, there are lesser forms of tenure being practiced including primary usage and occupancy rights (Alcantara, 2007). The three main ways that individuals can gain possession of land on reserve are through Certificates of Possession (CP), leases, and customary rights. CPs are formal property rights recognized by the *Indian Act* whereby the holder has “lawful possession” to, for

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<sup>30</sup> This number is increasing.

instance, erect a building such as a house. CPs cannot be sold but they can be passed on through inheritance or leased out to a third party. It is almost impossible to use CPs as collateral against a loan as they are protected from seizure upon default. Long term and short-term leases operate similarly to those off-reserve, although any leases to a non-member must be approved by the band council and Indigenous and Northern Affairs (INAC, 2008a). Customary rights are thought of legally as “informal holdings” as they are not formally recognized by the courts or the *Indian Act*. These are allotments of land used by particular families or individuals sometimes spanning generations. Customary rights are thought to be indicative of a “residual category by policy-makers and researchers for tenure regimes not administered by or negotiated with the federal government” (Baxter & Trebilcock, 2009, p. 75). Different from reserves, traditional Indigenous lands are the much wider territorial areas that include sacred sites and that in many areas continue to be used in other traditional ways such as fishing, hunting, and gathering of foods.

### ***First Nations Land Management Act***<sup>31</sup>

Due to pressure from First Nations leadership to have more self-determination and control over their lands and resources, the Government of Canada agreed to the *First Nations Land Management Act* (FNLMA), which came into force in 1999 and allowed the initial 14 First Nations to opt out of certain provisions in the *Indian Act*, allowing them to establish their own land management regimes and thus to move further toward some level of self-government. The land still remains held by the federal government and cannot be mortgaged. In March 2002, the FNLMA was made available to other First Nations and as of 2012, 56 First Nations were participating (Lands Advisory Board Brief, 2012). It gives participating First Nations greater control and authority over land use planning and administration on Indian reserve land. The FNLMA has been criticized to have “carried forward and even exasperated” (Isaac, 2005, p. 1048) the ambiguities in the *Indian Act* as it still does not ameliorate the problems associated with the uncertainty, especially for third party investors.

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<sup>31</sup> Parts of the following sections of the chapter include work from a previously published paper by the author: Hicks, S.K. (2015). Land, Property and Assimilation of Culture; First Nations Property Ownership Initiative. *Journal of Policy Science, College of Policy Science, Ritsumeikan University*, 23(1), 17-31.

Ambiguity and uncertainty generated by the *Indian Act* among third parties, or non-First Nations peoples, such as utility companies (telephone, electric, pipeline) highway departments, and private developers, is believed to have severely hindered the development of Indian reserve land (Isaac, 2005). This uncertainty, from a legal standpoint, regarding ownership of First Nations land is mainly sourced to two sections of the *Indian Act* (Graben, 2014): section 29 which states, “Reserve lands are not subject to seizure under legal process” (Indian Act, 1985, c I-5, s 29) and section 81(1) which lists 17 principles that do not allow band councils to act inconsistently with the *Indian Act* such that the “council of a band may make by-laws not inconsistent with this *Act* or with any regulation made by the Governor in Council or the Minister” (Indian Act, 1985, c I-5, s 81[1]).

These protective measures ensure that land will not be alienated to non-Indigenous peoples, which in a very paternalistic way, protects the integrity of communal lands. However, these measures also result in limiting the ability of individual band members and band governments to leverage land for economic or other purposes. Reserve land can in fact be leveraged via customary rights, CPs, and leaseholds, albeit with complications due to bureaucracy and restrictions of the *Indian Act*. However, outside lenders are often reluctant to take a risk, as they may not be able to recover lost assets. The band and the Superintendent General of Indian Affairs can dissolve any claim against a property, which also lowers the security.

### ***Land claims***

Aboriginal title is now recognized as a *sui generis* right. In 1973 *Calder et al. v. Attorney-General British Columbia* found that the Nisga'a title to land had existed contrary to the claims of the government that they had not made claims, as there was no historic treaty. The 1984 *R v. Guerin* case established the *sui generis* rights of Aboriginal peoples as well as the Crown's responsibility to uphold its fiduciary duty to protect Aboriginal peoples. Finally, in 1997, *Delgamuukw v. BC* upheld that Aboriginal nations have jurisdictional authority over how land is used and acknowledged collective ownership of land and a cultural relationship to land. Furthermore, the courts in Canada have distinguished Aboriginal title from fee simple in three distinct ways, as being:

- (1) a collective right and communally occupied;
- (2) being necessary to the group's historical attachment to the land; and
- (3) can only be surrendered to the Crown (Hurley, 1998).

However, modern day treaties are taking a slightly different approach. Three modern treaties have been agreed upon: Nisga'a, Tsawwassen, and Maa-nulth, all located in British Columbia. The BC treaty process gives some idea as to the government's approach to modern treaty making. If a First Nation signs a treaty agreement under this process they would presumably be agreeing to a smaller area of land than originally claimed, to not pursue any future land claims, and to the lands being transferred to fee simple. This is not surprising considering that "the main objective [of the government] is to clarify property rights in dispute, not to reduce inequality in land redistribution" (Aragón 2015, p. 44). The recent Supreme Court decision to grant the Tsilhqot'in First Nation land title rights to more than 1,700 square kilometres of territory raises pressure on the Crown government to consult more sincerely on development projects. The B.C. government may have problems using Crown land freely as more and more First Nations are utilizing the Tsilhqot'in precedent to further their own land claims (Bergner & Jones, 2015; Sinclair, 2014).

### **"Open the doors of opportunity": White Paper**

Indigenous peoples have been resisting being controlled by the *Indian Act*, sometimes quietly and sometimes less so. As discussed above in this chapter, earlier versions of privatization for land subdivisions have been proposed by the Canadian state since the 1840s and have been rejected by Indigenous peoples (Pasternak, 2014). In 1963, the federal government commissioned anthropologist Harry B. Hawthorn to investigate the social conditions of Aboriginal peoples across Canada. In his report, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* (Hawthorn, 1963), Hawthorn concluded that Aboriginal peoples were the most disadvantaged and marginalized population in the country. Hawthorn also used the phrase "Citizens Plus" referring to the special rights that Indians had in addition to those of other Canadians. In response to this report, the then Prime Minister Pierre Elliott Trudeau and his Minister of Indian Affairs, Jean Chrétien, proposed the *Statement of the Government of Canada on Indian Policy*, a 1969 policy White Paper (Chrétien, 1969), with the goal of achieving equality among all Canadians by eliminating '*Indian*' as a distinct legal status and by regarding Aboriginal

peoples as citizens with the same rights, opportunities, and responsibilities as other Canadians. Under this White paper, the Department of Indian Affairs would be dismantled, and the welfare of the First Nations and their communities would be handed over to the provinces; the federal government would not be further involved in any affairs of First Nations. The aim was assimilation of all First Nations peoples in one broad policy stroke into the mainstream Canadian citizenry, and the eradication of any special status in order to improve equality:

This Government believes in equality...open the doors of opportunity to all Canadians, to remove the barriers which impede the development of people. (Chrétien, 1969, p. 5)

As John Leslie (2002) writes, “In many ways, the 1969 white paper went right back to the 19<sup>th</sup> century. It was straight assimilation.” He goes on to write that the paper “left a bitter legacy” (p. 27). Not only did the 1969 White paper elucidate the economic benefits that were believed to follow from individual ownership of land, but it also outlined the obligations that would also follow:

The Government believes that full ownership implies many things. It carries with it the free choice of use, of retention or of disposition. In our society it also carries with it an obligation to pay for certain services. (Chrétien, 1969, p. 21)

The message was clear that with individual underlying title ownership would come taxation. Ownership was conceptualized in the Western-liberal sense of property in which First Nations peoples would ideally have access to individual ownership. First Nations leaders ultimately rejected the White paper, partially as they believed the policy would jeopardize treaty and other rights and they wanted to retain a legal distinction as Indian peoples. First Nations leaders accused the government of not including them in the design process of the policy and without the support of the First Nations governments and others the White Paper was withdrawn in 1971 by the Canadian government. It is still widely referred to and criticized as being a policy tool of assimilation and enfranchisement of Aboriginal peoples.

While the language of assimilation is no longer socially acceptable, neoliberal rhetoric can have similar effects. First Nations can opt out of the *Indian Act*, for example, in the FNPOA or

other treaty negotiations, ostensibly by choice versus by being legislated by the terms of the White paper.

### ***Between a rock and a hard place***

I am often asked whether it would be better to change the existing Indian Act or to eliminate it entirely. Will we still need the Indian Act once our right to self-government is recognized and our treaties are implemented? I believe we will need some federal legislation to make clear the obligations the federal government bears towards First Nations peoples. This is radically different from an Indian Act that continues to allow a minister and some bureaucrats to tell people who they are, what they can do, or how they must live. That arrangement is a colonial relic. We would all like to see it disappear. But we would like to see the government fulfil its responsibilities to us, not shirk them by repealing the Indian Act and pretending that is the end of their obligations to First Peoples. (Mercredi & Turpel, 1993, p. 95)

In Canada, many First Nations peoples believe they should define themselves outside of the *Indian Act*, although many at the same time recognize there is merit in maintaining some version of it, and there should continue to be a right to retain, at least some aspects in order to hold the government responsible to its fiduciary responsibilities. The continuing condition of settler state sovereignty means that possibilities are limited by colonial ideological premises, as the *Indian Act* has not changed in essence since its inception (Leslie, 2002). Douglas Sanderson (2014) has proposed the federal government and First Nations work “within the framework” of the Indian Act (p. 513) working towards an “overlapping consensus,” proposing, for example, that income tax paid by First Nations members be assigned to their communities. Pamela Palmater (2011) reminds us that “abolishing the *Indian Act* and giving Indians individual interests in reserve lands...are the original keys to Canada’s assimilation policy” (p. 120). Thus, she cautions, “Getting rid of the Indian Act might clear the path for more formal recognition of First Nation jurisdiction or it could be used to do away with all special recognition and federal responsibility” (p. 120). To be sure, the *Indian Act* does not allow self-determination and it inhibits economic development; however, it does provide a framework, albeit weak and hard to enforce, to hold the government responsible to its duties to First Nations peoples as well as for providing protection from land fragmentation due to market exchange. In the quote above, Ovide Mercredi states new legislation is needed to ensure

the government's fiduciary responsibilities are met. Improving settler/First Nations relations and achieving justice and sustainability through decolonization is going to take more than abolishing the *Indian Act* legislation or creating new legislation, as we shall discuss in the coming chapters.

## Conclusion

This chapter outlined how and why First Nations peoples' lives and lands continue to be regulated under settler colonialism in Canada. This is critical to an understanding of the relevance of policy proposals for the privatization of land, such as the FNPOA, not only to First Nations, but also to the settler state and society. The chapter outlined the evolution of earlier policies into the *Indian Act* all of which had the ultimate purpose of land acquisition through the logic of elimination using heteropatriarchal and paternalistic policy measures. Through policies based in civilization, assimilation, and integration, the colonial government has created and maintains a unique property regime in Canada that has disrupted First Nations sovereign social, political, and economic organization. This historical context is key to understanding the nuances of neoliberal logic contained in the FNPOA since the policy is presented in a way that obscures its gendered and racialized heritage.

As land holdings on First Nations reserve lands such as CPs and customary holdings are considered to be uncertain for market purposes in that they cannot be alienated or used effectively for collateral, they have been criticized for preventing First Nations from developing economically. However, while a transition to privatization of reserve lands may indeed make lands more secure for the purpose of market exchange, the impact on First Nations cultural, social, and political character would be substantial; the FNPOA, consistent with the neoliberal impulse, reduces land to a commodity, stripping it of its inherent autonomy.<sup>32</sup> Similar to the introduction of the White Paper 1969 (Chrétien, 1969), privatization policies in the liberal settler state do not take into account the colonial history of dispossession linked to colonial state building but tend to reframe dispossession in terms of human rights and equality. This is facilitated in the package of demands by the state in land claims settlements including exiting the *Indian Act*, cash settlement, and

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<sup>32</sup> For example, the Te Urewera area (near the east coast of the North Island in New Zealand) is now legally protected as a life form unto itself. Under the Te Urewera Act 2014 the area is "a legal entity, and has all the rights, powers, duties, and liabilities of a legal person" (Te Urewera Act, 2014).

transfer of land into fee simple. In this way, collective political claims to sovereignty are reduced to individual concerns and assimilated into the dominant economic system.

After understanding the basic First Nations/settler property regime, we are now ready to engage with the most recent formulation and logic of privatization of reserve land as outlined in the FNPOA. The next chapter draws attention to the gender-blind stance of the FNPOA calling attention to how it aims to depoliticize the colonial dispossession of Indigenous women, heralding the neutrality and emancipatory nature of the marketplace.

## CHAPTER 2: FNPOA

### Introduction

This chapter examines the *First Nations Property Ownership Act* (FNPOA) and explores its underpinning neoliberal and settler colonial logic as an example of current thought and discourse regarding privatization of First Nations reserve land. Since the era of colonialism, privatization of Indigenous land by colonial authorities and governments has emerged in cycles using various strategies. The most current version of reserve privatization policy is comprehensively described in the 2010 book *Beyond the Indian Act* written by key FNPOA advocates Tom Flanagan, Christopher Alcantara and André Le Dressay. These three men, especially Flanagan and Alcantara, have been actively working even before the advent of the FNPOA to promote privatization of reserve lands.

The first part of the chapter discusses the evolution and the technical aspects of the FNPOA followed by a brief analysis of how the neoliberal logic behind the FNPOA supports settler colonial logic. Building on previous cautions and critiques of private property implementation on reserve land and the FNPOA in specific (Dempsey, Gould & Sundberg, 2011; Fabris, 2017; Palmater, 2012; Pasternak, 2014; Schmidt, 2018), the chapter argues that the neoliberal rhetoric aims to obscure the assimilative aspects of the policy through using specific narrations of colonial and Indigenous history that bracket out (Dempsey, Gould & Sundberg, 2011) critical aspects, portraying an unencumbered version of private property that is not tempered by either colonial, heteropatriarchal, or racialized dispossession. The chapter argues the economic assumptions are indicative of a push to make property and Indigeneity readable and serviceable to the settler state. The chapter concludes that the race-, ethnicity-, and gender-blind approach to the policy design allows the advocates of private property to create this unencumbered vision of private property.

In order to accomplish my argument that land privatization conceptions are steeped in colonialism's heteropatriarchal legacy, I first need to elucidate the background to the FNPOA and its distinct features. I then analyze the key FNPOA arguments; first interrogating the authors' claim that land privatization is the ideal land system. I next examine the authors' use of an entrepreneurial subjectivity as a way to link economic prosperity through the

individual, sidestepping the collective. Finally, the authors' claim that a return to private ownership of land is a restoration of traditional Indigenous practices is challenged.

### **Setting the settler table<sup>33</sup> for the FNPOA**

In order to understand the resurfacing of privatization of First Nations reserve land in the form of the FNPOA a degree of background information is elucidated in this section. After the landmark publication by the Royal Commission on Aboriginal Peoples (RCAP) in 1996, the debate regarding First Nations self-government was again fueled. The RCAP's roaring condemnation and call for the abandonment of the colonial policies of assimilation, an increase in self-government, and the creation of a new relationship between Aboriginal peoples and the Canadian government (RCAP, 1996a), was welcomed by Aboriginal peoples and their supporters.

As a result of this momentum and energy that came from the RCAP report calling First Nations peoples to "exercise the power to make choices outside the boundaries erected by colonialism" (Christie, 2002), there was also a conservative reaction that countered this supposed "wrong direction" (Flanagan, 2000/2008, p. 3). Two books<sup>34</sup> first published in 2000, in reaction to the stance of the RCAP, advocated, albeit differently, the need for the integration of Aboriginal peoples into the Canadian polity rather than autonomy through self-government as advocated by the RCAP. One of the books, Thomas Flanagan's *First Nations? Second Thoughts*, was in direct response to what he referred to as the "Aboriginal orthodoxy" (Flanagan, 2000/2008, p. 4) found in the RCAP report. Flanagan, a conservative political activist who was an advisor to Canadian Prime Minister Stephen Harper until 2004, has focused much of his research on challenging the rights of First Nations and Métis peoples, along with his colleague Christopher Alcantara. They have written academic and policy papers (see Flanagan & Alcantara, 2002, 2004, 2005), as well as newspaper and online articles promoting the benefits of private property on First Nations reserve land. A

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<sup>33</sup> In Canadian parliamentary procedure to "table" means to begin consideration (or reconsideration) of a proposal. In the US it can mean the opposite, to postpone or suspend consideration of a pending motion (see Parliament of Canada website at [https://www.ourcommons.ca/About/Compendium/TypicalSittingDay/c\\_d\\_tablingdocuments-e.htm](https://www.ourcommons.ca/About/Compendium/TypicalSittingDay/c_d_tablingdocuments-e.htm)).

<sup>34</sup> Cairns, A. (2000). *Citizens plus: Aboriginal peoples and the Canadian state*. UBC press; Flanagan, T. (2008). *First Nations? Second thoughts* (2nd ed.) McGill-Queen's Press-MQUP.

fundamental stance of the authors is revealed in their statement, “collective property is the path to poverty, and private property is the path to prosperity” (Flanagan & Alcantara, 2002, p. 16).

### ***The development and evolution of the FNPOA***

The development of the FNPOA came about through the efforts of the federally funded First Nations Tax Commission (FNTC). According to their website, the FNTC is a shared governance<sup>35</sup> institution that started in 2007 and is “concerned with reducing the barriers to economic development on First Nations lands, increasing investor certainty, and enabling First Nations to be part of their regional economies” (FNTC, 2017, para 1). Under the leadership of Chief Commissioner of the FNTC, Manny Jules, former chief of the Kamloops Indian Band, the FNTC created the *First Nations Property Ownership Initiative* (FNPOI), which is the project that advocates and promotes the FNPOA legislation. The FNPOA was introduced twice in the House of Commons by Commissioner Jules, first in a pre-budget presentation to the Standing Committee on Finance on 15 September 2009, and again in August 2011 (FNTC, 2012a).

Support for the FNPOA came quickly within the Conservative government as well as with the conservative press. Prime Minister Stephen Harper quickly and aggressively supported the FNPOA promoting it in the Conservative government’s federal budget *Economic Action Plan 2012*, announcing the government’s “intent to explore with interested First Nations the option of moving forward with legislation that would allow private property ownership within current reserve boundaries” (Flaherty, 2012, p. 171). The budget report stated that there were 18 new entrants into the *First Nations Land Management Act* (FNLMA) resulting in a total of 56 First Nations that were operating or interested in developing their own land codes outside of the Indian Act. However, the Harper government was keen to go beyond the FNLMA, mentioning the FNPOA as a priority in their 2015

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<sup>35</sup> At least one commissioner is appointed by the Native Law Centre of Canada at the University of Saskatchewan and the Governor-in-Council appoints the other nine. This ensures that at least one appointee is appointed by the Native Law Centre; the number of Indigenous Peoples is dependent on the decisions of those in charge from these two bodies. Mission statement: “Help First Nation governments build and maintain fair and efficient property tax regimes and to ensure those First Nation communities, and their taxpayers alike, receive the maximum benefit from those systems” (FNTC, 2017).

Conservative election platform (Conservative Party of Canada, 2015). In their platform document, the Conservative government included an endorsement from the Whispering Pines/Clinton Indian Band, thereby assuring the nation that “this legislation is First Nations-led” (p. 149). The Conservative government promised, if re-elected, to “enact legislation that allows this specific band [Whispering Pines/Clinton Indian band] to move forward” and “proceed with similar legislation” for other First Nations that choose to pursue this option (p. 149); however, they were not able to table the legislation as they lost the election to the Liberal government under Justin Trudeau in 2015.

However, it was the book *Beyond the Indian Act* by Tom Flanagan, Christopher Alcantara & André Le Dressay published in 2010, and its “meteoric rise to prominence” that quickly launched the FNPOA from public policy to government policy—normally a “rare” and “extraordinary” occurrence (Gutstein, 2014, p. 106). The book outlines the FNPOA in detail and is in many ways a promotional manuscript for the policy that “forges an alliance between neo-liberal networks and a group of Canadian First Nation leaders” (p. 107). In the rest of this chapter the use of the phrase “the authors” will refer to Flanagan, Alcantara & Le Dressay’s ideas presented in *Beyond the Indian Act* unless otherwise indicated.

The FNPOA was preceded by other reserve land privatization agreements.<sup>36</sup> The FNPOA was inspired in part by the settlement of the long-standing land claims by the Nisga'a Nation, which was the first Indigenous Nation in British Columbia to sign a modern treaty with the provincial government. The Nisga'a, located along the West Coast in British Columbia, have been struggling to get the rights to their traditional lands since the late 1800s. In the *Nisga'a Final Agreement* (NFA) (1998a), the Nisga'a First Nation won reversionary title to about eight percent of what they claim as their traditional territory (Altamirano-Jiménez, 2013), resulting in approximately 2,000 square kilometers of land in fee simple (Nisga'a Lisims Government, 1998b). In 2008, Nisga'a citizens began paying taxes, and in 2009, the Nisga'a Lisims<sup>37</sup> government passed the *Nisga'a Landholding Transition Act*. The Nisga'a treaty does not require fee simple ownership for individual band members (Flanagan & Alcantara, 2002). This extended to members of the community the opportunity to own their residential

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<sup>36</sup> Tsawwassen First Nation Final Agreement, 2007; Tlicho First Nation Agreement, 2003.

<sup>37</sup> The name of their government, versus the nation.

lots in fee simple,<sup>38</sup> each plot not larger than .2 of a hectare,<sup>39</sup> enabling the owner to sell, lease, mortgage, encumber their land, and transfer their lot to anyone without restriction (Nisga'a Lisims Government, n.d.a). Manny Jules and the authors then wanted to develop federal legislation that would enable any First Nations band who wanted to be able to own their land in fee simple. This brings up the question of whether the FNPOA is different from previous policy initiatives. I now turn to the specific features of the FNPOA that distinguishes it from previous policies of privatization, according to the authors.

### ***Distinct features of the FNPOA***

The FNPOA proposes fee simple<sup>40</sup> private property ownership for First Nations reserve lands. Although private property on reserve land is not a new policy, as was discussed in the previous chapter, the authors characterize the FNPOA as being distinct from previous policy versions in important ways. First, the FNPOA “recognizes and protects the inalienable reversionary right to First Nations title” (Flanagan et al., 2010, p. 177), which means that underlying title to land would be transferred from the Crown to participating First Nations. This transfer of underlying title would give those First Nations legal authority to:

- manage their lands and make development laws independently of the federal government;
- enable the use of land as collateral through potentially accessing mortgages;
- and provide options to alienate (i.e. sell) their property freely, including to non-status members or non-Aboriginal people.

The FNPOA would ensure underlying title remains with the First Nations even in the case of “reversion or appropriation” (Flanagan et al., 2010, p. 169-170).

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<sup>38</sup> Thirteen more bands in Canada are showing interest in this property system.

<sup>39</sup> .2 of a hectare is about 2,000 square metres.

<sup>40</sup> As described in Chapter 1, fee simple is a form of freehold ownership. It is the highest level of ownership that can be held in real property in Canada. Fee simple allows people to own the land and make changes to the property (within bylaws) without having to get the consent of neighbouring property owners. This is the most common form of land ownership that most Canadians are under and is the type of land ownership that underpins most families’ homes. The Crown, meaning either the provincial or federal government, owns all underlying title to land in Canada. 41% federally owned Crown land; 48% is provincially owned Crown land; only 9.7% of land is privately owned (Cahill & Copley, 2006).

To this point, the authors go to great lengths to distinguish the FNPOA from the 1887 *General Allotment Act* in the United States, more commonly known as the Dawes Act. They reassure the reader that the reversionary title rights ensured in the FNPOA means the legislation has little in common with the US Dawes Act, highly criticized for its assimilationist goals, devastating land loss, and cultural destruction. The Dawes Act divided certain American Indian tribal lands deemed suitable for individual allotments, giving each family (male) head 160 acres. Land was subdivided in the process of inheritance to the next generations resulting in tiny plots that could not be utilized effectively. US citizenship was granted to Indian peoples who accepted these individual titles to land, effectively legislating assimilation. However, as not many Indian peoples decided to opt in to the Dawes Act, the government made allotment mandatory in many instances. The land was held in trust by the government for 25 years and then was converted to fee simple ownership. By the time the Dawes Act was reversed in 1934, the Indian land base had “shrunk from approximately 150 million acres...to only about 48 million” (Holford, 1975, p.18 as cited in Campbell, 2007, p. 223). In so far as the FNPOA ensures underlying title to First Nations, it is accurate to characterize the policy as different from the Dawes Act. However, the possibility of a resultant land fragmentation, such as that which occurred because of the Dawes Act, is something that the authors do not address. Regardless of whether a First Nations band owns underlying title to property, if property is open to purchase by anyone on the open market the First Nations community could become fragmented due to a dispersed influx of non-Indigenous peoples purchasing property. It is here that the authors’ underlying understanding of property becomes evident as primarily a commodity to be traded that can unlock wealth. For the authors, the sensible reason why there is poverty in property for First Nations is that they have not been able to use land as a commodity—not that they do not want to use it as a commodity.

A second distinct feature of the FNPOA, as identified by the authors, is that, unlike previous policies or legislation both in Canada or, for example, the Dawes Act in the US, the FNPOA is an opt-in land titling legislation that allows individual First Nations to make the choice whether to agree to participate in the FNPOA, to remain under the *Indian Act* legislation, or choose another option like the FNMLA. Also, First Nations would be able to make a choice as to how much land they want to transform into individual private ownership

(Alcantara, 2012). In this way, the neoliberal ideas of individual choice and individual responsibility for both good and bad decisions comes into play. If a First Nations community decides to enter into the FNPOA but then runs into financial problems because of it, there is no recourse as they had chosen to enter into the scheme. While it is up to all First Nations to make those decisions and to be able to succeed or fail on their own, the authors do not include any safety measures or recognition of likely problems compounded, for example, by colonial dispossession and dependency.

In order for the FNPOA, or any First Nations land title system that is outside of the *Indian Act* to be effective, the authors stipulate three further objectives that must be enacted. First, legislation must facilitate linkages to other statutes “so the First Nations can quickly catch up to the modern Canadian property-rights framework” (Flanagan, Alcantara & Le Dressay, 2010, p. 170). Second, all individual property rights should be registered in a Torrens system<sup>41</sup>—the “best system in the world,” which would put an end to the uncertainty of the status of the land and “ensure that … lands will be worth as much as any other lands in Canada” (p. xi). The authors believe that the Torrens system provides the best level of certainty and assurance and do not mention, for example, its colonial roots in the dispossession of Aboriginal lands in Australia (Bhandar, 2016a). In order to achieve the desired integration into the wider national and international market, which is dependent on legal certainty and conformity, a Torrens land registry is necessary, according to the authors. Finally, the authors argue that the FNPOA system must be done through federal legislation rather than provincial in order to be accessible for all. These objectives are geared towards integrating land title on reserve land fully into the existing federal system so that “property markets [can] work on First Nations lands as they do everywhere else in Canada” (Flanagan et al., 2010, p. 170). As the authors’ objectives above indicate, they believe it is crucial that the legislation link to other statutes in Canada as the goal is to create a titling system that is legally consistent with provincial and federal laws.

The adoption of the FNPOA affects a First Nations’ relationship with the *Indian Act*. If a First Nation wanted to adopt the FNPOA they would be necessarily severing their ties with

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<sup>41</sup> Torrens system registers property and is the most widely used worldwide. It is considered to be an efficient way to register land that is compatible with other systems. This system is used in some Canadian provinces: Alberta, Saskatchewan, Manitoba, British Columbia, New Brunswick, Nova Scotia, and some parts of Ontario.

*Indian Act* in terms of a property regime, or as the authors write, the First Nations would be “emancipated from the Indian Act” (Flanagan et al., 2010, p. 5). The Nisga’a, mentioned above, are no longer under the auspices of the *Indian Act*. Instead the treaty gives the Nisga’a ownership of 2,019 square kilometers of former reserve and Crown land in the Nass Valley, along with a cash settlement of almost \$200 million (Nisga’a Lisims Government, 1998b). Owning the underlying title to the land would mean the reserve status would no longer be in effect. Rather, the community would become a quasi-municipality able to govern itself. The legislation would also allow First Nations to decide which type of property tenure to follow. For example, as well as ownership in fee simple, they could also allow temporary ownership in leasehold tenure, or shared ownership as in strata title.

Although the Conservative government and the media were quick to support the FNPOA, it has been criticized by Indigenous leaders, writers, and activists (Fabris, 2017; Knotts, 2012; Palmater, 2012; Vowel, 2016). The grounds for criticism were numerous and will be elucidated and analyzed in this next section.

### **Analysis of key arguments of the FNPOA**

This next section examines some of the key arguments and logic that the authors use to promote the FNPOA. I aim to elucidate the neoliberal logic within the FNPOA that is fundamentally consistent with much of settler colonial logic, thereby challenging the underlying assumptions of land privatization policy proposals. The authors are keen to present private property as the most efficient system of ownership, which will work to attract investment and lead to economic prosperity for First Nations. In order to make this argument seem less like cultural assimilation, they propose that private property was a traditional practice of Indigenous peoples. They buttress their argument with an articulation of respect for traditional culture and practices, thereby disparaging any other form of land tenure by positing communal lands as having been a colonial imposition on Indigenous peoples.

#### ***Private property as the “best” system***

For the authors, private property is presented as the most efficient and natural system of land tenure, since other systems available to First Nations are “all seriously deficient for economic purposes” (p. 5). The authors believe these reserve lands,

are handicapped by an inadequate framework of property rights. Investors are deterred by uncertainty; legal work and litigation multiply; projects take longer than they should, and many potentially profitable developments never happen because all these factors raise the cost structure. (p. 4).

For private property advocates, even though customary land rights are “valued...because these rights give [First Nations] direct connection to their pre-contact cultural heritage” (p. 86), they are seen as having important and, in many ways, insurmountable limitations, especially with the focus on economic utility that underpins private property in the current capitalist market. For the authors, customary land rights are: inconsistent and unenforceable in Canadian courts; could be vulnerable to nepotism within First Nations governance; and the lack of security “discourages individual band members from pursuing on-reserve development” (p. 87). The authors conclude, “customary property rights on Indian reserves are probably the least economically efficient property rights system available to aboriginal peoples in Canada” (p. 90).

Other land holdings, such as Certificates of Possession (CP) and leases, are also thought of as problematic in terms, for example, of their high transaction costs and slow transaction enactment under federal bureaucracy. The First Nations Land Management Act (FNMLA) is also deemed to be inferior to the FNPOA since it is limited by its lack of legal title. The FNPOA is promoted as a “modern turn-key legal framework” (First Nations Tax Commission, 2012b); however, the turn-key framework means a participating First Nations would be required to opt out of several other possible types of land tenure because the FNPOA stipulates that all lands would be converted into fee simple private property. The adoption of fee simple tenure is similar to treaties under the BC Treaty process, as discussed in Chapter 1. Thus, with a “stroke of a pen” the FNPOA could “bring First Nations governments into the federation [of Canada]” (Flanagan et al., 2010, p. 161), but on what terms is left as an open question. The delineation of propertied boundaries in colonial history is nothing new and “was largely done with the intent to claim land and make it readable as property” (Goeman, 2008, p. 25-26).

The authors create a singular, prescriptive solution to First Nations land tenure issues, as they assure that the FNPOA can enable First Nations to have fee simple ownership “without jeopardizing the integrity of the First Nations land base” (p. 5). In this way, regulatory certainty becomes the vehicle to recognize and attain First Nations collective territorial claims. Underlying title becomes the key to securing not only land rights but also market participation. Shiri Pasternak (2014) warns:

The FNPOA legislation is discursively framed to acknowledge Indigenous land rights while the bill simultaneously introduces contentious measures to individualize and municipalize the quasi-communal land holding of reserves. This cultural recognition of Indigenous difference is meant to disarm resistance while it circumscribes the proprietary aspect of Indigenous sovereignty. (p. 2)

Thus, can be seen the emergence of what Fiona MacDonald (2011) calls “neoliberal Aboriginal governance,” referring to “specific state-crafted responses to Indigenous demands that are part of a broader governmental strategy of neoliberalism” (p. 257). MacDonald argues that the effects of privatization policies are often counter to significant autonomy for Indigenous peoples. The certainty of land tenure fits the needs of the state mechanism to open up Indigenous lands to investment. Thus, the ability of First Nations governments to be able to maintain policies that protect their members may be compromised. Sari Graben (2014) predicts that “rather than support differential local reforms that reflects the authority of Indigenous governments, investors are likely to call for the widespread adoption of laws with which they are familiar” (p. 439). In this way, the economic prosperity of all members may not be equally secured. Chapter 5 on legislation will examine in detail the colonial legacy of land tenure with its inherent dispossession.

### ***Economic prosperity (especially for individuals)***

The FNPOA takes a market approach to solving First Nations problems of poverty through private property ownership. The authors argue this will inevitably lead to investment certainty, access to financial resources through credit, and general economic improvement. According to the authors, the cause of socioeconomic and governance problems of First

Nations is due to the lack of a “legal, governmental, and fiscal framework,” (p. 125) which is not accessible to First Nations because of the *Indian Act*. The authors argue that despite being at the bottom of the Canadian socioeconomic ladder, First Nations have the ability to become “potentially wealthy landlords” (Flanagan et al., 2010, p. 3), referring to First Nations possession of approximately 6.5 million acres in reserve lands (Campbell, 2007, p. 220). In contrast, the authors claim fee simple property rights could help “unlock the tremendous economic potential of First Nations lands, to become part of the productive contribution to the Canadian economy, and to provide a mechanism that will allow them to create the level of prosperity that other Canadians take for granted” (Flanagan et al., 2010, p. 171-172). These arguments are very much in line with the Peruvian economist Hernando de Soto<sup>42</sup> (2000), whom the authors draw inspiration from:

Our approach follows in the footsteps of Peruvian economist Hernando de Soto, who has argued in two bestselling books that defective property rights make life miserable for the poor in the Third World...The problems of First Nations in Canada, though not identical in detail to what de Soto describes, are similar in principle. (p. 7)

In his influential book *The Mystery of Capital* (2000), de Soto hypothesizes that if the world’s poor were able to obtain legal title, in other words documented ownership to the land that they otherwise live on, they could raise themselves out of poverty. De Soto argues that in fact most poor people in developing countries “already possess the assets they need to make a success of capitalism” (p. 6). The problem, according to de Soto, is that the assets are simply not being utilized properly as the poor are operating outside of the formal economy and “without formal property, no matter how many assets they accumulate or how hard they work, most people will not be able to prosper in a capitalist society” (p. 167). In de Soto’s logic these assets need to be “unlocked” through legal title to the land so that the owners can utilize the land assets on the market. Land that cannot be legally alienated or is not legally registered is “dead capital” in de Soto’s logic. In this logic, land is a resource that needs to be leveraged otherwise it is useless and keeps people trapped in poverty. After de Soto’s publication of

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<sup>42</sup> de Soto went to Vancouver to give a keynote speech; De Soto also wrote an endorsement on the back cover of *Beyond the Indian Act*.

*The Mystery of Capital*, the Canadian media linked chronically high levels of poverty among First Nations communities to their lack of alienable property rights (Helin, 2011; Hopper, 2013). The logic of de Soto's land titling was clearly not designed for First Nations reserve lands, although it was believed to be applicable, as simply put, a lack of formal, legal private property rights means unused capital will ultimately result in poverty (Anderson & Parker, 2009; Flanagan & Alcantara, 2002). However, as discussed in Chapter 1, First Nations have several kinds of property rights already, for example, in CPs and customary rights and these rights can be leveraged.

The authors suggest that people holding CPs, customary rights, or leases would be able to convert these uncertain rights into a more "valuable and tradable tenure" (p. 173). These owners would then be able to use their property to build equity, which could be used to finance new businesses.<sup>43</sup> After all, as the authors write, "market economies are built on the exchange of property rights" (p. 171). However, the authors do not address the gendered or racialized underpinnings of colonial private property but rather present it as a neutral mechanism that can be accessed presumably by everyone equally. As shall be discussed throughout this thesis, the *Indian Act* has been highly gendered to the extent that it has led to the greater dispossession of land from Indigenous women and it is still having a cumulative effect on generations of First Nations peoples. The colonial government created a situation that the present federal government is unable or unwilling to deal with effectively and justly.

The authors of *Beyond the Indian Act* present the idea of private property as being without any problems and with an unquestionable level of certainty for success, making the claim that formal title inevitably leads to collateral and credit that would benefit Indigenous peoples. One of the benefits these authors see is that Indigenous people can get out of the cycle of dependence and reduce welfare and social services. The authors pull back from any kind of welfare or social fabric that women rely on. They insist that private property is the only way to unlock dead capital, and unlocking dead capital is deemed essential. Research has found, though, that the argument that de Soto (2000) and Flanagan et al. (2010) promote is faulty. In writing about the problems with de Soto's arguments, Timothy Mitchell (2007) draws attention to research that shows, for example, in the largest land titling experiment in

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<sup>43</sup> A much more thorough discussion of the relationship between property and entrepreneurship will be undertaken in Chapter 7.

Peru, there is no evidence that land titling increases business credit and that “commercial banks and informal lenders are unaffected by residential ownership status” (p. 260). Mitchell also found in Egypt that “creation of formal legal title and property registration becomes a machinery for transferring property from small owners and concentrating it into larger and larger hands” (p. 259). Mitchell writes, “there appears to be no evidence” (p. 261) supporting the argument that property titling will lead to capitalist development, but rather “a strong case can be made that for the majority of the population it will make things worse” (p. 261). Furthermore, in developing countries entrepreneurship has not consistently resulted in women getting out of poverty (Grasmuck & Espinal, 2000). Others have also found that titling of land does not necessarily result in business credit (Gilbert, 2002) or the emergence of a housing market (Payne, Durand-Lasserve, & Rakodi, 2009).

The FNPOA authors also fail to mention the associated issue of debt and its inherent risks to security, perhaps because debt is seen as the new normal (Graeber, 2011; Roberts & Soederberg, 2014). The debt associated with real estate in Canada is increasing, as homeowners are increasingly using their homes as collateral to pay for other expenses, especially in light of recent low interest rates (Castaldo, 2017). As Mahony and Browne (2011) caution:

...[FNPOA] shares many of the same challenges as Treaty negotiations and implementing aboriginal title. It is a long-term prospect with difficult-to-predict outcomes. In our view, there are many factors that trap First Nations in a cycle of poverty including lack of land, lack of land in or near urban centres, lack of capacity, lack of infrastructure, etc. A rapid transition to fee simple ownership is more likely to create opportunities for a few non-First Nation developers than to create widespread wealth for First Nations and their members. (p. 4)

The authors of *Beyond the Indian Act* contend that private property ownership would lead to increased employment and wealth generation resulting in First Nations becoming less dependent on government social welfare assistance in the form of education, health, and housing. If the FNPOA is adopted, all federal payouts would end and thus the First Nations government would be responsible for any social assistance it decided to provide to its

members. As people would have more equity in their homes through certainty of ownership title, the government would not have to guarantee loans and provide maintenance costs for homes. Incentives for investment would also be increased through enhanced certainty resulting in fewer disputes, whether they are based in inheritance claims or matrimonial division of property. According to the authors, in these ways governments would benefit through lower fiscal costs. Additionally, First Nations would be able to increase revenues through taxes from property, property transfers, and sales. In this way, according to the authors, First Nations would become more self-sufficient. The neoliberal logic in the FNPOA is consistent with David Harvey's (2005) characterization of neoliberalism as an ideology of political economy that "proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade" (p. 2).

### ***FNPOA and the entrepreneurial self: Gender and race***

However, it is really the individual, who, the authors argue, will benefit the most from private property ownership in the FNPOA, promising that private property's "greatest benefits will fall upon ordinary First Nations people, especially through the improvement of housing on reserves" (Flanagan et al., 2010, p. 6). With the adoption of the FNPOA, housing security and improvement is then argued to lead to a blossoming of entrepreneurialism:

With the stroke of a pen, First Nations land values could rise to those prevailing in the rest of Canada. It would recognize underlying First Nations title, and thus formally bring First Nations governments into the federation. It could increase home equity for owners on First Nations lands so they can be more entrepreneurial, plan for their retirement and bequeathing their wealth just like other Canadians. ... It would provide market incentives for improved financial management and for completing self-government and land-claim negotiations" (Flanagan et al., 2010, p. 161).

The entrepreneurial subjectivity that the authors create is consistent with much of the literature as someone who, with the right attitude and character traits, can surpass any constraints that might otherwise be encountered. According to the FNPOA logic, fee simple

property rights and the development of the entrepreneurial self will result in a reduction in Indigenous dependency on the state. This is consistent with neoliberal entrepreneurial subjectivity in which the “passive citizen of the welfare state becomes the active citizen with rights, duties, obligations, and expectations—becoming the citizen as active entrepreneur of the self” (Walkerdine & Bansel, 2010, p. 494). Individuals are expected to “increase her [sic] value” (Türken et al., 2016, p. 34) as entrepreneurialism is elevated to the position of a “moral space” that is tied in with “socially approved behaviour” (Anderson & Smith, 2007, p. 495), resulting in social benefits that were previously the responsibility of, and distributed by, the state, to be shifted onto the individual. Neoliberal ethics then “reorient[s] notions of public good by representing individual good as a civic responsibility” (Pollack & Rossiter, 2010, p. 156).

For First Nations, this shift of responsibility from the state to the individual is crucial as the federal government has fiduciary responsibilities as outlined in the Royal Proclamation dating back to 1763 as partial compensation for centuries of colonial dispossession of Indigenous lands and peoples. Thus, the authors have equated and conflated settler colonial rhetoric of *Aboriginal dependency* with neoliberal rhetoric of dependency of regular poor citizens as a financial and political drain on the state. This is a nefarious attempt at severing centuries of colonial carceral legislation and contemporary capitalist relations of carcerality in an attempt at depoliticizing the privatization of property, such as that outlined in the FNPOA. In a way around acknowledging Indigenous-state relations and colonial history, the neoliberal focus on the individual is exploited.

The literature constructs the entrepreneurial subject as “creating an enterprise and creating a self [as] *the same thing*” (Szeman, 2015, p. 482), and as “a neoliberal vision of people owning themselves as though they were a business” (Gershon, 2011, p. 539). Following this logic, the FNPOA not only promotes the commodification of Indigenous lands as private property, but also promotes the neoliberal commodification and “economization of subjectivity” itself (Scharff, 2016, p. 111). This is despite Indigenous scholars describing Indigenous subjectivity as being “relational” and rejecting unfettered commodification of all life forms, as shall be discussed in Chapter 3, and furthermore linking private property ownership with entrepreneurial subjectivity at the individual level. Individuals are supposedly destined to benefit from investment created by the FNPOA, which will support

“entrepreneurial initiatives by people” (Flanagan et al., 2010, p. 139). This, too, is despite the well documented risk of failure involved in entrepreneurialism in general (McGrath, 1999), as well as the added factors of chronic poverty on many First Nation reserves. The FNPOA is in sync with the general neoliberal idea that “embrac[ing] and even seek[ing] out failure [is] an important, even *essential*, dimension of [the entrepreneur] activity” (Szeman, 2015, p. 483), as it is the entrepreneur’s goal to “creat[e] value out of nothing” (p. 474). This entrepreneurial subjectivity is presented as being without ties or needs in the material world, in as much as value is created from the characteristics within oneself, rather than real productive value.

The FNPOA, on the other hand, deviates from this neoliberal characterization of the self-contained entrepreneurial subject to a subjectivity that conflates entrepreneurialism and private property, indeed making entrepreneurialism dependent on private property ownership. In the FNPOA rationale, Indigenous individuals need private property to acquire the “spirit” (Flanagan et al., 2010, p. 10) of a seemingly emancipatory entrepreneurialism. The authors of *Beyond the Indian Act* present the First Nations entrepreneur much like how Imre Szeman (2015) quips that “enterprising citizens [are] free to take up and solve and challenge outside the constraints of race, gender, sexuality, class, and history” (p. 478). Indeed, the prospect of being a small business entrepreneur, as an Indigenous woman living on a reserve, would seem to be far more based in a reality that had to deal with intersecting constraints, rather than the idealized subjectivity presented by the FNPOA.

Indeed, while the literature on entrepreneurialism is articulated as a “benign...meritocratic accessible field of economic opportunity” (Ahl & Marlow 2012, p. 544), it is critically recognized by some to be racialized, gendered, and classed (Chatterji & Seamans 2012; A. M. Harvey, 2005; Knight, 2006, 2016; Smith-Hunter & Boyd 2004; Wingfield & Taylor, 2016). Notably, the dominant subjectivity of the entrepreneur exemplifies stereotypical masculine attributes such as risk-taking, autonomous decision-making, confidence, and creativity (Ahl, 2006) resulting in the entrepreneur as being “historically located in the symbolic universe of the male” (Lewis, 2013, p. 253) and at the same time “making the masculinity invisible and sustaining a model of economic rationality alleged to be universal and agendered” (Bruni, Gherardi, Poggio, 2004, p. 407; see also Ahl, 2006; Gupta, Turban, Wasti, & Sikdar, 2009; Morris, Miyasaki, Watters, & Coombes, 2006).

The “masculine discourse...is taken as normative” (Ahl & Marlow, 2012, p. 544), as heroic (Bruni, et al., 2004) and “assumptions regarding feminine weakness are embedded in normative beliefs” (Ahl & Marlowe, 2012, p. 545). This is compounded by the liberal strain of feminism that because of having a foundational belief in women as subjects of equal rights has “empowered [women] as autonomous, sovereign subjects—in effect,... embody[ing] the unencumbered subjectivity of the neoliberal vision of market society...appealing to women as entrepreneurial subjects...[however, has also] taken for granted social reproduction and care as women’s natural, and by extension invisible, responsibility” (Goodale & Postero, 2013, p. 213).

The intersection of race is also a critical factor in entrepreneurialism and entrepreneurial subjectivity that is often ignored in the literature and specifically in the FNPOA rationale. Critical race theory argues that white supremacy and racial oppression impacts the economic opportunities of racialized peoples (Crenshaw, 1989; Bell, 1998). Andrea Smith-Hunter & Robert Boyd (2004) write that most literature suggests that women of colour are more disadvantaged than white women in “entrepreneurial options (e.g. occupational choices)” and “entrepreneurial capital (e.g. sources of capital)” (p. 19). While most entrepreneurial subjectivities are envisioned and articulated as having stereotypical masculine traits, Mélanie Knight (2006) argues that the alternative discourse that does articulate a “female entrepreneurial subject,” tends to be based on the experiences of white middle-class women whereas women of colour are often excluded as “active subjects” (p. 152). Knight uses the example of how women are essentialized as nurturers and caregivers, thereby potentially hindering their entrepreneurial endeavours. However, when nurturing is reframed as a special attribute, such as women being “good, compassionate caregivers” (p. 157), this can result in a positive function in some business situations. However, Knight reminds the reader that this applies more readily to white middle-class women since for women of colour the stereotypes, even related to nurturing are less affirmative. For example, Black women are typically seen as “the matriarchal superwoman who is aggressive, loud, and dominant” (p. 157). For Aboriginal woman the stereotypes do not fit into the “good, compassionate caregivers” model either. Aboriginal women have been long stereotyped as sexually promiscuous and having a propensity for prostitution, neither of which a desirable form of entrepreneurialism

in the white settler state. For women of colour, then, the dominant model of the entrepreneur is constrained by gendered and racialized mechanisms.

Certainly, for some Indigenous women entrepreneurialism does open up possibilities to empowerment and financial security. Indeed, these kinds of success stories are lauded in the media (Adam, 2018; Morin, 2017). Despite success for some individual women, there are gendered and racialized constraints that are in place that even successful entrepreneurs face (Robertson, 2017). To be sure, for many Indigenous women the entrepreneurial subjectivity presented in the FNPOA is not the unencumbered reality that they would face. In Chapter 7, I explore in more detail the gendered and racialized constraints and barriers faced by Indigenous women in entrepreneurship as discussed above including difficulties obtaining financing, care responsibilities, lack of experience, as well as business networks and relevant education. The chapter also discusses the spatial constraints, particularly on reserve, such as isolation and segregation, and analyzes disciplinary mechanisms that occur in capitalist relations of carcerality. The discussion ties in the limiting and confining factors that debt, the household, and private property itself exact on Indigenous women. The push for individualism in the FNPOA subjectivity ends up being one of the very destructive forces which strips women of collective power that is lost in gendered and racialized neoliberal market utopian promises.

### ***Restoration of traditional practices***

The authors spend a lot of space in *Beyond the Indian Act* showing that precontact Indigenous peoples followed private property ownership just like “all other human beings” unless they are “prevented by the *force majeure* of government” (p. 41). The full title of the book, *Beyond the Indian Act: Restoring Aboriginal property rights* reflects the discursive adaptation<sup>44</sup> in the rationalization of the FNPOA in a way that uses neoliberal rhetoric to accommodate First Nations desire for self-determination while at the same time facilitating the settler colonial goal of assimilation. Rather than the FNPOA as a cultural imposition of Western-style private property practice, it is presented as a saviour of First Nations traditional ways, and as an

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<sup>44</sup> The term discursive ‘shift’ is also used (Mohanty, 2013) to describe neoliberal logic. The term adaptation illustrates the characteristic of neoliberal capitalism to be able to absorb and adapt, rather than as a shift in understanding per se.

emancipator from *force majeure* of the *Indian Act*. In his foreword, Manny Jules writes that, for Indigenous peoples, “Market economies were not foreign to us. We created them ourselves” (2010, p. ix). Manny fails to distinguish between private property ownership and personal property ownership stating, “We had individual property rights. Our clothes and shoes were not made to fit everyone. Our homes belonged to certain families” (p. ix). These examples are not convincing as indicators of following the Western/individualistic concept of exclusive ownership. This is an attempt by the authors to characterize First Nations as normal humans, supposedly like the rest of white settler Canadians. In Chapter 3, a discussion of Indigenous ontological scholarship disputes this providing a nuanced understanding of the difference between possession versus ownership.

As private property practice has now been validated in their book by Manny Jules, Chief Commissioner of the FNTC, and former chief of the Kamloops Indian Band, Flanagan et al. (2010) are then able to denigrate any depictions of communal ownership as being “both ironic and tragic,” stating that this “originally European conception of Indians as natural communists has now been accepted by many aboriginal leaders and thinkers and become a barrier to Native participation in the modern economy” (p. 31). The ethics involved in cooperation and community are replaced by a “speculative subjectivity” that “entails a specific dynamic oriented around reinforcing the survival and flourishing of the self in opposition to others” (Gilligan & Vishmidt, 2015, p. 612). The ethics of community or social cohesion then tends to be supplanted by a narrowing of the circle of focus to building the strength of individualism (Türken, Nafstad, Blakar & Roen, 2016), to the point of “manifest[ing] an intensified individualism” (Scharff, 2016, p. 109) and a type of “irrational exuberance” that refuses to attribute, for example, chronic poverty or violence to “the greed of ‘human nature’” (Layton, 2010, p. 303). This “fundamental assumption of strong individualism … [does not] allow[s] for collectively, citizenship, or group identity” (Türken, Nafstad, Blakar, & Roen, 2015, p. 43). Poverty and dependency are severed from political and colonial roots since entrepreneurialism offers redemption to those poor who are just “waiting for a spark of opportunity to transform their lives” (Katz, 2012, p. 101). In this way, Flanagan et al. reinforce their push for the release of an individual property-owning subjectivity that they argue has been suppressed by (mis)conceptions of Indigenous peoples as “natural collectivists, indeed proto-communists” by either early Europeans or by

“Aboriginal advocates” (p. 30), citing prominent Indigenous philosophers Vine Deloria Jr. and Ward Churchill, as examples. However, as we shall discuss in the following chapters, Indigenous philosophical understandings and relations with the world are more complex and diverse and do not conform to either Western-liberal (mis)conceptions of collective ownership or exclusive ownership, but rather are relational. Chapter 4 discusses how matrilineal social organization in many Indigenous Nations resulted in women’s critical and instrumental participation in the stewardship of lands, and was key in creating lateral power sharing and egalitarian practices in socio-political and civic relations.

In trying to establish the universality of individualistic property relations, the authors go to great lengths to establish that Indigenous peoples were like civilized Europeans after all. This “polite racism” (Leacock, 1977, p. 10) attempts to portray the authors of the FNPOA as “good” (Srivastava, 2005) and sensitive to the realities of traditional Indigenous culture, and not as characterizing the FNPOA in the Darwinian, modernist way that previous ‘racist’ versions of privatization polices have been. This type of racialized framing “combines elements of liberalism with culturally-based antiminority views to justify the contemporary racial order” (Bonilla-Silva, 2003, p. 275). The authors, then, are helping to revitalize and restore a lost Indigenous way of life that just happens to be based in Western-liberal values and practices. The authors bestow agency and normalcy on primitive Indigenous peoples, bringing them to the level of all other human beings and attempt to deflate the criticism that the FNPOA, and private property in general, is a modern assimilationist policy, writing,

In short, the historical evidence shows that the aboriginal peoples of North America are like all other human beings. They claim territories as collectives but have no particular aversion to private property in the hands of families and individuals. Unless they are prevented by the *force majeure* of government, they change with the times and are willing to adopt whatever institutions of property are most economically efficient for the world in which they live. Say goodbye to the primitive communist of Marxist fantasy and hello to the worker, owner, and investor of the modern global economy! (Flanagan, Alcantara & Le Dressay, 2010, p. 41)

In the above quote, the authors criticize communal ownership as being primitive and a Marxist fantasy. For the authors, “Individual ownership tends to put property to its highest economic use because it unites knowledge and motive to creative incentive” (p. 19) basically because individuals are not burdened by having to negotiate with others and they know their own self-interests best. The authors write that communal, or community ownership, is only best when it is cost efficient, or during certain times that have been a natural part of the evolution of social history.

This is a clever sleight of hand in terms of simultaneously disarming the accusation that private property on Indigenous land is a form of cultural assimilation and at the same time interpreting communal ownership and sharing resources in common as being something created by colonists presumably to label early Indigenous peoples as primitive. Jessica Dempsey, Kevin Gould and Juanita Sundberg (2011) note that in maligning any other type of land tenure, while at the same time offering inclusion into the mainstream market, First Nations are invited to “become equal” as “property-owning entrepreneurial individuals” arguing that these boundaries of appropriateness of both land management and Indigeneity are “entwined with ongoing colonial processes of whitening” (p. 235). Combined with the selective portrayal of the primary root of First Nations poverty as First Nations being locked out of being able to use dead capital in their lands, and to participate in the market economy, the rest of the colonial history, legislation, violence, and land appropriation is bracketed out (Dempsey et al., 2011), thus over simplifying the root causes of Indigenous problems (Palmater, 2010b), as well as the use of reserves as mechanisms to dispossess First Nations of their lands and confine their very existence (Cole Harris, 2004).

In an earlier publication Flanagan and Alcantara (2002) write very bluntly “in the long run, collective property is the path of poverty, and private property is the path of prosperity” (p. 15-16). For these authors, there is little consideration of cultural or ontological differences in property ownership that warrant consideration or that might lead to more appropriate solutions. Indeed, there is a strong momentum of Indigenous development and participation in the capitalist market in Canada. This ontological difference is discussed in more detail in Chapter 3 where I examine differing land ontologies, as well as how land is gendered and Indigenous women’s dispossession, both of which are covered in Chapter 4 on women’s early relationships to land.

Further to their argument that Indigenous peoples do not have unique ways to view property, the authors quote John Locke's passage "No Body could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst" (TT§33, p. 291). They use this passage to underscore their belief that everyone will "assert ownership over scarce resources" (Flanagan et al., 2010, p. 22) rather than seek more communally beneficial values. On the other hand, the authors write that they do not follow the Lockean theory of property being based in natural rights but believe that property rights are not linked to arbitrary ideas of what is correct human nature but rather "the practical criterion of whether they contribute to human welfare in a specific social context" (p. 16). Instead, in creating their "simple story about the evolution of property rights" (p. 23) they follow Harold Demsetz's (1967) *Toward a Theory of Property Rights*. In using Demsetz they are trying to justify the natural economic evolution of property rights and reduce complex Indigenous land and sustainable resource management to a natural evolutionary process.

## Conclusion

This chapter outlined many of the distinct features and logic used to rationalize the FNPOA as described in the book *Beyond the Indian Act*. The FNPOA is based on de Soto's logic that reasons that undocumented individual title to land and property in the global south, if formalized under a legally recognized federal property system, would lead to increased economic prosperity and independence for the poor who normally operate in the informal sector. Not only was this development strategy not designed for the context of First Nations reserve land in Canada, but also prosperity due to land titling has been shown in other contexts to not be as successful in terms of attracting business credit and financial security as was promised. Titling has also been found to make land vulnerable to take overs by larger land owners.

This development logic is used in the underlying design of the FNPOA. In the context of First Nations reserve land in Canada, the policy calls for the privatization of reserve land into fee simple ownership and the dissolution of the *Indian Act*. Indeed, these stipulations are being demanded by the Crown government in many of the recent First Nations land claims that are being settled. The FNPOA, though, would be a federally accessible policy to First

Nations across the country, and specifically intended for reserve land. Unlike many small undocumented Indigenous and non-Indigenous land owners in the global south, First Nations reserve land in Canada is recognized as part of the traditional territories of Indigenous peoples, although still owned by the Crown. The colonial history and legacy of violent dispossession of Indigenous lands means that the contention and complication in dissolving the *Indian Act* and ending the fiduciary responsibilities of the Crown, as discussed in Chapter 1, are exacerbated by the depoliticized nature of the design of the FNPOA and its emphasis on using neoliberal market-based solutions to a legacy of colonial social, economic, and political dispossession. These market-based solutions draw heavily on the supposed neutrality and rationality of the liberal free market, while insisting on a transformation of citizen subjectivity tying a colonial mechanism of cultural, economic, and political assimilation—private property—to a neoliberal mechanism of promised autonomy—entrepreneurialism. In the coming chapters the denial in *Beyond the Indian Act* of ontological differences between Indigenous and non-Indigenous peoples framing of privatization as a restoration of Indigenous traditional practice, as well as the erasure of the significant matrilineal social organization and women's elevated status of many of the precontact Indigenous clans, will be challenged. Analyzing the depoliticized logic and rationale presented in *Beyond the Indian Act* will illuminate how heteropatriarchy continues to function to uphold the white settler state status quo and the contemporary rationalizations of market-based Indigenous dispossession. The following chapter challenges the framing of privatization as a restoration of Indigenous cultural practice through looking at differences in land ontologies between Lockean property theory and some examples of Indigenous precepts, illuminating some of the implications for Indigenous women in the privatization of land.

## CHAPTER 3: Ontologies of property

### Introduction

The purpose of this chapter is to unsettle and de-naturalize the “common sense” (Cockburn, 2016) approach to and endorsement of the dominant liberal concept of private property as it is widely understood in settler Canada. There is a rich and diverse understanding of property in Western philosophical tradition debating ideas and tensions around common usage versus private ownership. For example, the Diggers and Levellers in 17<sup>th</sup> century challenged the enclosure movement and believed that commons were a “common treasury belonging to the poor as part of their birthright” (Brace, 1998, p. 77). The Franciscan notions of use challenged ideas of inheritance laws and explored the possibilities that property was “neither owned nor inherited but only used” (Frank, 2008, p. 256). The concept of ownership itself has also been questioned. Property has been thought of as a “bundle of rights” (Penner, 1995) versus exclusive ownership as ascribed by 17<sup>th</sup> century English jurist William Blackstone.<sup>45</sup> Although property is now rarely understood as embodying exclusive rights among legal and property scholars, Sarah Hamill (2012) argues that the dominant theory of property is still “more a definition of ownership than an explanation of property” (p. 379). Furthermore, Thomas Merrill (1998), though, argues that the right to exclude is the “*sin qua non*” constituent of the concept of property:

Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property. (p. 730)

Other debates interrogate property as an individual human right (Demsetz, 1967), as a means to protect one’s labour (Rose, 1994) or to promote human flourishing (Radin, 1993). Although property theories based in Western philosophical thought are diverse, as Blomley (2005) argues, the “dominant model” works to obscure the other modes of property and treat them with “suspicion,

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<sup>45</sup> Although Carol Rose (1998) has questioned whether Blackstone was quite as absolutist as many have made him out to be.

derision, or indifference. The most striking case is that of indigenous claims to land” (p. 127). The dominant model practiced in liberal societies, as Blomley describes, is based in Lockean notions of self-interest, ownership, exclusion, individualism, enclosure and, I must add, concepts of gendered and racialized subjectivities. The language and concepts that are used to understand property as a self-interested state of individual ownership, especially in this age of neoliberal economics and governance, leads to “property becom[ing] depoliticized” and resultant power relations between owners and non-owners become normalized thereby “produc[ing] systemic inequality” (Blomley, 2005, p. 126). Regardless of the volume of critiques of neoliberal economics and governance, advocates are adamant that “human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills...characterized by strong private property rights, free markets, and free trade” (D. Harvey, 2005, p. 2). The FNPOA adheres to this logic. How can this dominant model of property be unsettled, especially given the momentum of neoliberal privatization in most aspects of Canadian society and First Nations/state relations?<sup>46</sup>

The diversity of Indigenous concepts and relationships to land can be used to de-naturalize and call to question the notion of private property as a “common sense” system (Cockburn, 2016; D. Harvey, 2005). Understanding some important precepts from Indigenous ontological thought is critical to unsettling the hegemonic dominant concept of private property, and shaking loose its gendered and racialized foundations, especially as it is depoliticized under the cloak of culturally neutral economic development. Relational subjectivity found in much of Indigenous ontology is in stark contrast to the Lockean ontological concepts of rationalism, possessive individualism, and hierarchical, binary categorizations.

This chapter outlines the major precepts of the liberal system of private property that buttress capitalism as developed in the 17<sup>th</sup> century primarily by John Locke. Locke’s theory of property, although a product of his time and context in the Carolinas, is instructive of not only historical but also the current understandings and manifestations of property relations in the settler state of Canada. Locke’s property theory is linked to settler colonialism (Arneil, 1996; Tully, 1994a, 1994b), liberal thought (Armitage, 2004), possessive individualism (Macpherson, 1962), capitalist development in North America (Townshend, 2000), and early forms of entrepreneurial capitalism as in the “formation of a colony based on slave labor” (Richards, 2011, p. 101; see also Huyler,

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<sup>46</sup> See for example Altamirano-Jiménez, 2013; Benzason, 2018; MacDonald, 2011; Pasternak, 2014.

1995; Glaußer, 1990), Understanding the historical roots of the dominant model of private property that is based in 17<sup>th</sup> century concepts of individualism, exclusive ownership, rationality, and commercial commodification is important in being able to understand these concepts as based in cultural values rather than as common sense, natural or inevitable. Essential to a critical analysis of private property is an understanding of Indigenous ontology to give power and clarity to understanding private property as a specific cultural practice based in a Western-liberal ideology and to unsettle its assumed hegemony. It is hoped that examining some of the ontological differences will elucidate areas in which gendered and racialized discriminations are hidden within the system and practice of private property. Importantly, what are the ideological underpinnings that give power to women's continued dispossession? In examining worldviews, notions of independence, dependence, and interdependence emerge as guiding principles in the divergent approaches to land between Western-liberal thought and much Indigenous thought. Not only does the chapter aim to unsettle the naturalness of private property, it also begins to challenge the arguments made by Flanagan et al. (2010) that pre-contact Indigenous peoples had private property practices and ownership the same "as all other human beings" (p. 41). This will be further interrogated in the following chapter especially as it relates to women.

The chapter begins with a discussion of the challenges of bringing different ontologies/worldviews into conversation, as well as the importance and relevance to this thesis. The chapter then discusses John Locke's (1632-1704) theories on property in Chapter V of his *Two Treatises of Government*. Locke's concept of property as rational and legitimated through labour is based in a possessive individualism that helps to explain a historicized account of accumulation and dispossession of Indigenous lands illuminating how the FNPOA can be seen to share logics with Lockean concepts of possessive individualism. The chapter then turns to a discussion of Indigenous precepts from particular Indigenous cultural thought as described by Indigenous scholars including: Leroy Little Bear, a member of the Blackfoot Confederacy; Vine Deloria Jr. of the Lakota of the Standing Rock Sioux; Vanessa Watts, Anishnaabe and Haudenosaunee; Diné philosopher Marilyn Notah Verney; and Gregory Cajete of the Tewa from Santa Clara Pueblo, New Mexico. The writings of these Indigenous scholars are based in oral traditions and stories passed down through generations amongst their peoples. These Indigenous scholars shed some light on the worldview of some Indigenous peoples during early contact, ontologies that have survived to the present through oral traditions and practice. These concepts

challenge the supposed commonsense nature of private property by envisioning a counter-narrative and understanding of the commodification of property through a spiritual relationship to land, human and non-human relations, and non-binary categorization. I argue, along with many Indigenous feminists, that these precepts enable the potential for less hierarchical and patriarchal gender relations (see, for example, J. Green, 2007a, 2007b, 2017; Suzack, Huhndorf, Perreault & Barman, 2010).

### **Conversational and conceptual challenges**

Worldviews are hard to talk about. You have to substantially escape your own to even begin to hear what is being said about another. (Ross, 2014, p. 2)

It is difficult to discuss notions of Indigenous property due to the diversity of conceptions, but there are relevant questions that I would like to consider. For example, are there Indigenous ontological beliefs that promote more equality of women? As discussed in the first chapter, one of the major critiques of proposing private property ownership on First Nations reserve land is that it is incongruous with traditional Aboriginal ways of being and understanding—that it is a policy of cultural appropriation (see, for example, Campbell, 2007; Hall, 2015). Western-liberal and Indigenous relations to land are generally understood as oppositional binary categories of individual ownership versus communal stewardship, rational versus spiritual, and definable space versus metaphysical space. However, the differences are more nuanced and complex than usually portrayed. These ontological differences have deep roots in the fundamental understandings of the human position in the world, and the relationship between all things human and non-human. However, there are several related challenges in trying to bring these two worldviews together. Despite these difficulties, Bradley Bryan (2000) argues that it is important to understand the “ontologically specific grounds that inform institutionalized socio-cultural practices like property” (p. 3). Bryan views this as “not simply a comparison of ways of owning and possessing, but a cross-cultural comparison of ways of relating to the world at large for what are ostensibly economic purposes” (p. 3).

A discussion of some of the particular precepts may shed light on some different ways to view relationships to land and conceptions of property. First, several Indigenous scholars have emphasized the importance of examining specific philosophical dimensions of particular First

Nations as there are diverse cultures and it is impossible to identify one defining Indigenous ontology. Leroy Little Bear (2011) writes, “there is enough similarity among North American Indian philosophies to apply the concepts generally, even though there may be individual differences or differing emphasis” (p. 77), however it is critical not to essentialize Indigenous thought and particular cultural beliefs can be powerful destabilisers to hegemonic practices. Next, there are several challenges to ascertain what an Indigenous conception of “property” might mean. The English language words that are used to describe and understand property—ownership, rights, private—are also very much value-laden to the point that the language itself can drive and bind the explanation and understanding of concepts across other cultures and languages, distorting alternative concepts. Using a foreign language, in this case English, is limited by its own vocabulary and concepts that makes understandings of other ontologies limited and necessitates caution when making assumptions and conclusions. Third, much of Indigenous knowledge is passed down in oral rather than written accounts. Indigenous oral accounts have usually not been considered credible in the Western scientific canon that has rather insisted on a “denial of historicity to ‘Indian’ in white colonial mythology” where they have been “rendered...as mere relics of an earlier stage of human development” (Brownlie, 2009, p. 21-22). For example, a recent archeological discovery in the Prince Rupert area of British Columbia has finally confirmed through DNA evidence that the oral histories told by the Metlakatla First Nation peoples as having been in the region for thousands of years are in fact accurate (Lindo et al., 2016). In other words, Western-based scientists have finally discovered what the Metlakatla Nation has known for centuries. Claims based on oral histories have been typically given little weight in many settler legal and philosophical debates especially in the United States (Babcock, 2013), as opposed to comparatively more recognition in Canada,<sup>47</sup> but this recent archeological finding validates an oral history that continued for thousands of years and points to the scientific veracity of the myriad of Indigenous oral records. Forth, the ideas of spirituality in many Indigenous worldviews are often rejected or marginalized in political philosophical analysis, whereas Christian views tend to be normalized in the Western canon. As shall be discussed in this chapter, 17<sup>th</sup> century writers like John Locke based much of their political theories in Christian theological understandings with references to Christian precepts and the use of the word God underpinning their writings. Finally,

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<sup>47</sup> For a discussion of how Indigenous land claims are handled in the Canadian court system see, for example, John Borrows, 1997, 2002, 2005.

the penchant to romanticize and simplify versions of Indigenous worldviews, as idealized pastoral societies who lived in perfect harmony is deceptive and dysfunctional (Gerald Alfred, 1998, personal interview, as cited in Bryan 2000, p. 17, FN 75) and often reinforces the hegemonic view of Euro-liberal thought as modern and Indigenous as primitive. With these challenges in mind, the chapter attempts to interrogate ontologies of property.

### A theory of property fit for colonialism

This section of the chapter outlines conceptions of private property according to the theories of 17<sup>th</sup> century English theorist John Locke. It is most suitable to refer to his property theory as it has been criticized from the point of view of his limited knowledge in, understanding of and connection to the dispossession of Indigenous peoples (Arneil, 1996; Tully, 1994a, 1994b), as well as his concept of the social contract as being racialized (C. W. Mills, 1997) and gendered (Pateman, 1988; Pateman & Mills, 2007). Furthermore, Locke and his writings have been argued to promote unrestricted capitalist accumulation through “possessive individualism” (Macpherson, 1962), or at least to legitimate capitalism (Townshend, 2000). Examining Locke’s appropriation-based justification of property rights brings to fore the contested relationship between ownership and equality and the ways in which settler colonialism had foundations as a gendered and racialized project. How Locke interpreted the values and lifestyles of Indigenous peoples during his time in the Americas is evident in his writings (Arneil, 1996). Thus, viewed from an ontological perspective, Locke’s 17<sup>th</sup> century English theory of property provides a rich foundation for understanding modern private property relations as well as manifestations of neoliberal capitalist relations (Mansfield, 2007). In the 17<sup>th</sup> century, Europeans brought a different worldview to the Americas, one based in religious teachings of (European) hierarchical male dominion of all creation, and of economic principles of ownership in land. Characteristics of Lockean property theory, although being highly influenced by the socio-political and economic situation in Britain and Europe, took on unique characteristics in the Americas. Locke’s construction of a narrative of Indigenous peoples, as well as the colonial constructed gendered and race relations, were used to legitimize and empower the supremacy of colonial settler values. As the British Empire was in need of natural resources in order to reinvigorate its economy, the Americas provided ample, and seemingly endless resources that could be exploited. To the Europeans, the lands they encountered were vast and unused by the local Indigenous peoples.

### ***John Locke's theory of property***

Locke developed an enduring labour theory of property ownership basing his theory on the idea that property was a natural result of one's labour, writing, "he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*" (TT§27, p. 288). Labour then became the key to justifying private property ownership in Locke's theory. The following quote from Locke's *Two Treatise of Government*, Chapter V famously states the main ideas of his theory on property:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state nature placed it, it hath by his *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others. (TT§27, p. 287-288)

In Locke's conception of the natural state, all things were given by God to "Men in common" (TT§26, p. 286). Locke, therefore, needed to construct a theory to get from his idea that all humans held the world's abundant resources in common to a theory that would morally justify the right to own property individually. Locke's notion of self-ownership, or "every Man has a *Property* in his own *Person*," enabled Locke to theoretically transition from common dominion of property, to private ownership. For Locke, a person's individual labour is the key element that adds value to a thing in nature and thus in turn establishes and justifies possession and ownership by that particular person as it "is by the *Labour* that removes it out of that common state Nature left it in, *made his Property* who takes that pains about it" (TT§30, p. 289-290). Locke focused on the individual and exclusive rights of one's labour; individuals, even in the state of nature, were not tied to groups or clans. For Locke, appropriating land was serving the public good as "he who appropriates land to himself by his Labor, does not lessen but increase the common stock of mankind" (TT§ 37, p. 294).

Thus, it was “Industrious and Rational” to want to labour and improve land through cultivation and in doing so one not only self-developed but also benefited others.

### ***The Lockean entrepreneur***

Locke was very definite in his creating a moral enlightenment that industriousness and rationality could only be achieved through the acquisition of private property. These early entrepreneurs, if industrious and rational, would be entitled to the accumulation of property. Moral qualities of hard-work, rationality, and market participation were the cornerstones of Lockean entrepreneurial subjectivity and self-development through accumulation. In this way, Locke “glorifies the emerging economic entrepreneur” (Nelson, 2015, p. 205). Locke laid the groundwork for framing the development of entrepreneurial subject as someone who is productive and uses their labour to add value to something in nature. In Locke’s theory, land was only made valuable through labour and for Locke labour included the act of appropriating the land itself. Thus, as Karen Vaughn (1978) writes, Locke’s “very general definition of labour...had important implications for [his] view of economic value” (p. 313). In Vaughn’s view, Locke’s notion of labour included the very act of accumulation. For Locke, what makes private ownership of common land for all humanity legitimate is individual labour.

### ***Appropriation of Indigenous land***

Property, and all that it symbolized and entailed, was the mechanism that enabled settlement and the colonization of the Americas. The majority of the land in America was seen by the colonists as being unused and the drive to settle and cultivate was the means to establish the new nation. In his chapter on property, Locke uses Indigenous peoples as examples of natural man living in “the late stage”<sup>48</sup> of the state of nature. For Locke, before the Europeans arrived “in the beginning all the World was America” (TT§49, p. 301). James Tully (1994b) notes that in Locke’s state of nature, there are no political organizations or systems, rather there is a natural system of individuals’ selves. In this way, Tully argues First Nations “traditional territory is denied” by the colonialists (p. 178). Barbara Arneil (1996) notes, “Half of the references to America or its aboriginal inhabitants in the

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<sup>48</sup> James Tully writes that Locke was aware that Amerindians had forms of government; however, Locke just did not recognize them as “full ‘political societies’” (1994b, p. 178).

second treaties” are contained in Locke’s chapter on property (p. 133). Thus, she concludes, “chapter five is the meeting-point in Locke’s argument between property defined as land, and natural man defined as the Amerindian” (p. 133). For Locke, the Amerindian was an effective opposite to the hard-working and rational Englishmen who engaged in agricultural labour.

Enclosure and cultivation are two criterion that go hand in hand in order to establish appropriation of property. Locke argued that agricultural production of land was much more efficient and effective when enclosed, writing, “one acre of inclosed and cultivated land, are (to speak much within compasse) ten times more, than those, which are yielded by an acre of Land, of an equal richnesse, lyeing in wast in common” (TT§37, p. 294). The idea of enclosure and labour through cultivation are both critical in Locke’s theory as together they make clear what constitutes the existence of property (Arneil, 1996). Locke implied in his writings that the Amerindians wasted vast tracts of land by not cultivating them in the way that Europeans did, writing, “in the wild woods and uncultivated wast of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?” (TT§37, p. 294). Enclosure was necessary for property to be productive but also to effectively delineate who it belonged to. As Amerindians did not enclose their lands with fences or walls or other such structures, the land was free to be appropriated appropriately. William Uzgalis (2002) takes issue with the idea that lack of physical enclosure meant Amerindians could be dispossessed, arguing that Locke’s “He by his labour does, as it were, inclose it from the common” meant one’s labour could act as enclosure. However, as Indigenous peoples did not practice agriculture in the ways that Europeans did, even enclosure was not enough to justify ownership for Indigenous peoples (Brace, 1998) as the “fruits of the earth” could still spoil. Furthermore, Laura Brace writes, “Rather than regarding enclosure as creating a new form of ownership which was a prerequisite for improvement, Locke regarded appropriative and improving labour as creating the new property. In doing so, he brought together improvement and enclosure, labour and property, to create a coherent theory which went beyond the tentative and often elliptical statements of the improvers” (p. 162).

Arneil (1996) notes that Locke established in several ways that Amerindians were idle, and wasteful of lands and the “Englishman [was] more industrious than the Indian” (p. 148), while distinguishing in several other places that the industrial and rational were, in his vision, English

men. Arneil clarifies that it was not that Locke was excluding Indigenous peoples from being industrious and rational but it was only “when the Amerindian adopt[ed] an agrarian form of labour, a sedentary lifestyle, and private appropriation, while recognizing the Christian God and developing English forms of education and culture, [would] he qualify under both criteria and enjoy the right to share equally in God’s gift” (p. 150). Until the Amerindian was able to do that they would not meet the requirements as set out in this appropriation theory. Locke does recognize, though, that Indigenous people still had rights to “The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure” (TT§26, p. 287). Even though Indigenous peoples laboured in other ways, there were not entitled to claim property in the way that Locke set out.

While Locke did promote accumulation of Indigenous lands he also theorised two provisos that were intended to put limits on wasted accumulation. The first proviso relates to not wasting or spoiling resources. Locke writes, “nothing was made by God for man to spoil or destroy” (TT§31, p. 290). It was permissible to Locke to take as much land as one could cultivate as long as there was no spoilage incurred. A second proviso indicates that one should leave something for others “at least where there is enough, and as good left in common for others” (TT§27, p. 288). Locke establishes, though, that the consent of everyone in common is not necessary or reasonable. For Locke, if someone appropriates fruits of the earth through their labour that person “is nourished by the Acorns he pickt up under an Oak...he certainly appropriated them to himself” (TT§28, p. 288). However, again Locke returns to this and clarifies “...this *appropriation* of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use” (TT§33, p. 291). In other words, as long as land is improved upon others do not have the right to criticize. Locke’s theory of property, notwithstanding these provisos, has been criticized for justifying the appropriation of Indigenous land (Arneil, 1996; Glausser, 1990; Lebovics, 1986; Tully, 1994a, 1994b).

### Social contract

The theory of social contract developed by Locke<sup>49</sup> not only linked property rights to one’s labour but also rationalized government as the protectors of property rights. For Locke, property was pre-

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<sup>49</sup> The social contract is also theorised in different ways by others including Thomas Hobbes, Jean-Jacques Rousseau, Immanuel Kant.

political, emerging naturally before the existence of the state (Blomley, 2005). Locke squarely laid the function, and evaluation, of government on its ability to protect private property rights of men. For Locke, “The Reason why Men enter into Society, is the preservation of their Property” (TT§222, p. 412), and governments were primarily established to give security to men’s natural right to property. Locke understood rules and laws as “Guards and Fences,” to “limit the Power, and moderate the Dominion of every Part and Member of the Society” (TT§222, p. 412). In Lockean theory, the social contract between the government and civil society would ensure the stable enjoyment of the three natural entitlements, being: life, liberty and estate (property). Locke believed that natural law forbade people to violate others’ self-evident, pre-legal or moral natural rights. This relationship between property owning men and their government is the social contract. Within the social contract as theorised by Locke full citizens are gendered and racialized despite ideas of equality for all. In order to interrogate this further we shall depart temporarily from Locke’s property theory to discuss how women fit into the concept of the social contract. Related to the discussion on Locke’s writings on women’s limited power within the private and public spheres are the colonial policies which reordered Indigenous gender relations reducing women’s status to that of European heteropatriarchal rules of engagement.

### ***Social contract for “all men”***

Locke’s social contract has been challenged by feminists and critical race scholars. What forms of exclusion are written into the social contract? Who is allowed to count as a member of civil society? Who is entitled to be a property owner? These questions are relevant in understanding how Indigenous women have been legislated out of ownership rights and out of the conception of ownership of land in general. Locke’s description of the family as heteropatriarchal, his gendered distinction of the public/private, and his exclusion of women from the political community, although intended for white European women, had major effects on Indigenous women. In colonial legislation Aboriginal women were expected to, and in many cases forced to, follow gender norms of European society. These social reorderings, based on colonial British women’s subjugated place in society, has resulted in a legacy of gendered dispossession of Aboriginal women. The ways in which the gendered dispossession was executed is discussed in detail in the following chapters.

In order to interrogate gender in Lockean theories the writings of Carole Pateman (Pateman, 1988; Pateman, 1996; Pateman & Mills, 2007) are a foundational and useful starting point.

However, a gendered reading alone is not sufficient as it cannot be isolated theoretically from other intersections including race and colonialism. Charles Mills (1997) and David Theo Goldberg (2002) are useful for understanding how race evolves in the colonial architecture. Locke was dedicated in his writings to the concept of equality and in some ways challenged the patriarchal writings of Sir Robert Filmer<sup>50</sup>; however, when Locke wrote about equality, it was for the most part about the equality of all white European property-owing men. Recognizing there are differences among individuals, for Locke equality was not possible for everyone (Butler, 1978).

Although Locke challenged many of the viewpoints of Filmer's "classic patriarchalism," for example, that "kings were fathers and fathers were kings" (Pateman, 1988, p. 24), Locke's writings were still heavily grounded in biblical references and beliefs (Waldron, 2002) resulting in his social contract sustaining the natural authority of husbands over wives. Melissa Butler (1978) argues that for Locke the "subjection of women carried no political import" thus even though Locke did challenge Filmer's patriarchalism, "Locke largely accepted the empirical fact of women's inferiority and saw it grounded in nature as ordered by God" (p. 142). The Christian belief in God's creation of human life—first man (Adam) and then from man emerges woman (Eve)—the origin story, led to a paradigm of creation as being through men. Filmer managed to advocate the divinely natural rule of men over women without mentioning much about women directly whereas Locke wrote more on women enhancing their status within the household; however, he did not advocate the inclusion of women in civil society (Schocet, 1998). Locke was limited by his belief in God as the supreme patriarch (Waldron, 2002), and the mortal system of patriarchal social relations was difficult for him to challenge. Thus, according to Pateman (1988), Locke simply shifted and shared the domination of women from husbands to brothers. Rather than equalizing the power relations, Locke ended up promoting a lateral shift in male power creating a "modern patriarchy" (p. 19). Locke mocked patriarchal authority and made challenging claims for equality, but his challenges were more directed at the political authority of the monarch and its absolutist claims to the divine right of kings. When Locke does refer to women, it is invariably in the context of private life issues, specifically marriage and motherhood.

Pateman's identification of the public/private divide in Locke's two kinds of power relations is important in understanding how women were marginalized in Locke's understanding of the

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<sup>50</sup> Sir Robert Filmer (c. 1588 – 1653) was an English political theorist who believed in the divine subjugation of women.

social contract. As Arneil (2001) notes, for Locke there are two kinds of power: conjugal and political. Political power is based on the ownership of property and Locke is unambiguous about wives having no independent rights to own “goods and lands”<sup>51</sup> writing, “Conjugal power, not Political, the Power that every Husband hath to order the things of private Concernment in his Family, as Proprietor of the Goods and Land there, and to have his Will take place before that of his wife in all things of their common Concernment” (TI§48, p. 174). In Locke’s view, it was in the private realm where women resided that all things reproductive, family, and domestic occurred. The public then becomes the political arena of the unencumbered male who can operate without the confines of the gendered duties designated to women. As Geraint Parry (1964) notes, paternalism which is the domain of both parents (although fathers also have access to the political, property owning domain) is actually “anti-political” in character as it involves “protection” and “tutelage” of children rather than “choice,” “liberty,” and “industry” (p. 174). Parry notes that “to extend paternalist rule into the age of discretion<sup>52</sup> is therefore to maintain individuals in the backward condition of children” (p. 173). For Butler (1978), these non-political relationships are instructive of Locke’s understanding or positioning of women in the power structure. Even though Locke was willing to accept the supposed naturalness of women’s subordination, he did believe that everyone had the ability to overcome their situation. This is further evidence of his belief in the liberating power of individualism (Butler, 1978, p. 143).

Power relations fell in large favour of men in Locke’s theories on equality. For example, in terms of paternal care giving of children Locke writes, “For no body can deny but that the Woman hath an equal share, if not the greater, as nourishing the Child a long time in her own Body out of her own Substance” (TI§55, p. 180). However, his view of hierarchical power relations fluctuates greatly in his writings. In his vacillation, Locke often refers to describing parental authority as

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<sup>51</sup> It is also important to note that under English common law in the colonies in the 17<sup>th</sup> and 18<sup>th</sup> centuries, when a woman married, all her property was transferred to her husband, and her realty came under his control (Shammas, 1994). Laws progressed during the 19<sup>th</sup> century to giving slightly less control to the husband to be able to will away the wife’s realty property; however, a husband could still control the decision-making during the marriage (see Backhouse, 1988). These laws were primarily available to wealthy colonial women since slaves, servants, and racialized women were not considered subjects of property (Snyder, 2015). The implications for indigenous women will be discussed in greater detail in Chapter 4. As property is currently recognized as the social relations between peoples, these very gendered beginnings in English law set a very strong distinction between how women and men relate not only to each other but also to the land or property itself.

<sup>52</sup> This refers to the age that a child no longer needs paternal care and guidance but can join the property-owning class in the political arena (TT§59, Chap. VI, p. 307).

paternal authority<sup>53</sup> clearly prioritizing the ultimate authority with the paternal father. As feminists have argued, Locke was not challenging what had been considered women's natural place and his writing would have been consistent with the low status of women at that time (Okin & Pateman, 1990).

Although Locke's view of the status of women within the family is more progressive than most of his era, he ultimately grants strict authority to the husband writing when "different wills" collide it is necessary that the rule should be placed somewhere and thus "it naturally falls to the Man's share, as the abler and the stronger" (TT§82, p. 321). This authority is based not on rationality but on Locke's belief in the nature of men and women. Arneil (2001) notes, "wives, in relation to their husbands, become an exception to demolishing Filmer's patriarchal natural authority" continuing "the place of wives of citizens in civil society is so inconsistent with Locke's overall political theory that he eventually writes as if they do not exist at all" (p. 33). If Locke was willing to clearly support the husband's ultimate authority in the home then it is hard to argue that Locke intended women to have equal voice and participation in civil society. Despite Jeremy Waldron's (2002) defensive position that Locke had no objections to women having political power, Waldron does concede "Locke's position on the natural subjection of wives *is* an embarrassment for his general theory of equality" (p. 40).

The emphasis placed on the social contract switched the understanding of how society was constituted from the kinship unit to a focus on the autonomous individual that enters into agreement in order to constitute society (Pateman, 1988). As will be discussed in the following chapter, kinship, especially when it was matrilineal in organization, benefited women in terms of status and relative power, often resulting in more egalitarian social relations among Indigenous clans. Pateman (1988) reads the autonomous individual, which Locke referred to in his use of, for example, "all Men by Nature are equal" (TT§54, p. 304) to be referring in fact only to males.<sup>54</sup> Locke does not suggest anywhere in his writing that women have a status equal to men in political terms (Dunn, 1982). Furthermore, Locke suggests that women have a lack of control over property and he denies many property and inheritance rights to women that he awards to men (Hirschmann

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<sup>53</sup> This appears in the Second Treatise in Chapter VI, section 52 to 76, pp. 303 to 318.

<sup>54</sup> Locke firmly established the private/public divide between women and men and in doing so established a conceptual and moral framework for understanding equality in terms of extreme contradictions. Throughout this thesis, I argue that these gendered versions of equality have not only contributed to the stagnation of the practice of equality for women and Native peoples, but also enabled the acceptance of inequalities within liberal settler states.

& McClure, 2010). Pateman writes that for Locke, “Women are excluded from the status of ‘individual’ in the natural condition. Locke assumes that marriage and family exist in the natural state...and that the attributes of individuals are sexually differentiated; only men naturally have the characteristics of free and equal beings. Women are naturally subordinate to men and the order of nature is reflected in the structure of conjugal relations” (Pateman, 1988, p. 52). It is the distinction between the public and private realm that starts to emerge here. Couched in the language of equality Locke might not have been primarily concerned with the status of women (Grant, 2003). However, Locke’s limited challenge to patriarchal structure and power relations in the family structure, his adherence to the exclusive centrality of men in political and economic relations, and the minimizing and marginalizing of the sphere of influence of women on social relations have led to a Western-liberal version of heteropatriarchal family structure that is hard and fast.

Virginia Held (1993) suggests an alternative to using the paradigm of the “rational economic man” (p. 71) that enters into contracts as our fundamental understanding of societal relations. Held asks what would happen if we replace it with the paradigm of mother and child as the primary social relation and view human relations as being “*like [sic]* relations between mothers and children” (p. 195). Whereas these types of relationships are based on nurturing and dependency, the economic man paradigm is based on the unencumbered labouring male, one who is free to enter civil society and negotiate a contract for the protection of his property. If we extend Held’s idea of the mother/child relationship to its mature stage when both mother and child are adults, the relationship becomes more interdependent and often results in a reversal of dependency and nurturing—the adult child nurturing the aging mother. The relationship is cyclical and symmetrical, following a predictable pattern—from life to death and life again in the next generations. Along with Indigenous ontology, Held has repositioned the female as a central, agentic figure in the structure of social relations; however, she does not envision non-human lifeforms in this new paradigm. In Lockean theory the individual becomes separated from others in society, becomes self-interested in order to flourish.

Locke’s description of the family is heteropatriarchal. He writes about the normalized practices of maternal single-parenting in America (TT§65, p. 310), which was most probably referring to Indigenous family structures (Carver, 2004). In this way Locke shows awareness that Indigenous family relations differed from 17<sup>th</sup> century English ones. Locke’s insistence on the

naturalness of heterosexual two-parent households and the final authority of the father implies that other types of family arrangements are unnatural or primitive. Indeed, colonial policies became increasingly prescriptive in terms of gender and family relations that were imposed on Indigenous peoples, as we shall discuss in more detail in Chapter 4.

Pateman's (1991) theory that modern patriarchy is conjugal and not paternal led her to focus on women primarily as "wives" in Lockean theory and thus led to criticism by other feminists. Laura Brace (2007) calls attention to the dangers of pinning the reasons for women's exclusion from the social contract as solely tied with reproduction capabilities and the public/private divide of unpaid carework. According to Brace, this invariably obscures other reasons for women's exclusion such as low paid work or other forms of informal or gendered work. As we shall discuss in the following chapter, Indigenous women's domestic work, or the essential yet unpaid work Indigenous women did in the fur trade (Van Kirk, 1984, p. 11), for example, occurred on the margins of the social contract and market economy. Arneil (2001) argues that Locke does more than merely establish "a public sphere of male citizens and a private sphere of [their] wives," as he also describes "a private world of non-citizens populated by not only wives and children, but also by male *and* female slaves and servants" (p. 30). This next section deals directly with a colonial reading of Locke.

### ***Social contract and the racial state formation***

Locke believed that people had a right to individual autonomy and self-ownership, as long as it did not interfere with another person's liberty. The consent of individuals is key to Locke's ideal of just political societies; however, if active consent is not possible (which it is not in many cases), for example, in the case of women or racialized peoples, then tacit consent is enough, for cultivating land is rational behaviour that benefits everyone. Inspired by Pateman's gendered critique of the social contract, Charles W. Mills (1997) argued that non-whites were also excluded from Locke's social contract and that a "racial contract" underpinned the social contract. He argued the social contract was between white men who deemed themselves as fully human and thus able to exert power in civil society. Race became the instrument to determine who were fully persons and who were "subpersons" (Mills, 1997), resulting in the category of race being used through the social contract to maintain the ideal of white European supremacy.

Locke's anti-essentialism (Conn, 2012) held that humans were basically the same biologically, but Locke based differences in the various cultural practices (Uzgalis, 2002). For example, Locke writes in *Essay 1* that depending on which culture or geographic region one is born into even the "*improved English-man*" might be "bounded within the Ways, Modes and Notions of his own Country" (Essay, 1, 4, 12 cited in Uzgalis 2002, p. 87). William Uzgalis (2002) argues that this means that Locke was not racist in the "strong sense interpreted biologically" (p. 87). Uzgalis continues that Locke did not see Black Africans as "less than human" and did not see Native Americans as "animals" (p. 87), concluding that Locke was therefore not a racist (p. 98). It may be that Locke did not subscribe to racist biological determinism ideas of the time; however, Locke's belief in historical development to show the superiority of Europeans over primitive Others (Goldberg, 2002) would give power to dispossession of non-whites and the legitimacy of white European superiority. Locke's usage of culture as a metric for difference foreshadows the New Racism theory that refers to the relatively "new" modification from a racism based in biology to a racism based in culture (Goldberg, 2002). Arneil (1996) argues that Locke viewed Indigenous peoples as being less rational than Europeans and hence they remained in the state of nature.

Arneil (1996) also challenges Locke's concept of property as excluding Indigenous peoples and other non-Europeans because it is so based in mutually exclusive dichotomies such as the state of nature and civil society, primitive and political society, idleness and labour, and mythology and rationality. Unlike Mills, others argue that Locke was of the assumption that Indigenous peoples were not stuck in the state of nature but that if they applied themselves they had the capacity to develop rationality (Armitage, 2012; Arneil, 1996; Goldberg, 2002; Miura, 2013; Tully, 1994b). Locke attributed rationality to adult Englishmen, not to children or animals, nor did he mention women. However, the difference between children and animals was that children had the capacity to gain rationality with age and experience. Thus, Indigenous peoples, categorized as equal to children, also had the capacity to develop rationality.

For Locke, those possessing full rationality are very specific—women and non-Europeans fall outside of those parameters. Their rationality is differentiated by their dependence, much like that of children. Locke held that unlike property holding European men, the labouring class, European women, and non-Europeans lack some of the desires that are indicative of rationality (Macpherson, 1962). To be included in the category of full human or personhood is more than simply a biological category, one had to possess politically determined criteria. For Locke, it is through a desire, or

lack thereof, for property ownership and improvement that rationality was evidenced. Indigenous peoples did not show a desire to accumulate, and women were naturally subjugated. True desire and rationality are tied to the male gender and white race, and that tie grows stronger as colonial laws emerge to protect and promote those differences. Thus, political rights and freedoms in the social contract were dependent on rationality—the individual pursuit of the accumulation of property and wealth (Macpherson, 1962).

Locke might not have subscribed to the idea of biological racism; however, white Europeans took on a kind of identity, power, and property value. Both race and gender are part of the structure of self-consciousness and of self-image. Civil society was possible for white Europeans; however, Amerindians remained in a state of nature until they laboured the land in the way that Europeans did. This was an important time in which the colour white took on not only the power of identity but also the power of “property” (Cheryl Harris, 1993). Cheryl Harris argues that it is no coincidence that at the same era that Europeans and Americans were enslaving African peoples and defining them as property to be owned, white Europeans legislated their own liberty through ownership of landed property. Harris makes the point that the strong rationality of whiteness and property ownership which were supported by law causes whiteness to become a form of property unto itself:

... the racial line between white and Black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification,... White identity and whiteness were sources of privilege and protection; their absence meant being the object of property. (Cheryl Harris, 1993, pp.1720–1721)

Andrea Smith (2006/2016) identifies three pillars of white supremacy that operate to oppress all peoples of colour that are “constituted by separate and distinct, but still interrelated, logics” (p. 67). The first pillar Smith identifies is the “logic of slavery” which “renders Black people as inherently slaveable—as nothing more than property” (p. 67). This is consistent with Harris’ thesis, although Smith clarifies that policies of “forced assimilation” and “forced whiteness on American Indians” (p. 71) means Indigenous peoples experience white supremacy differently than Black Americans. Smith draws on Marx’s theory of capitalist relations in which “one’s own person becomes a commodity” (p. 67). The logic of slavery “applies a racial hierarchy to this system”

leading to the system of incarceration as “criminalization of Blackness as a logical extension of Blackness as property” (p. 67). According to Smith this pillar is the “anchor” of capitalism (p. 67). The second pillar Smith identifies is the logic of genocide of Indigenous peoples, what Wolfe (2006) referred to as the logic of elimination. In order to establish and maintain state sovereignty over land, Indigenous peoples must disappear either through assimilation or genocide. This pillar is the “anchor” of colonialism. The third pillar is the “logic of Orientalism” that “marks certain peoples or nations as inferior and as posing a constant threat to the well-being of empire” (p. 68), which is now played out in anti-immigration sentiments.

White supremacy can be seen in the early colonial policies that would segregate Indigenous peoples into reserves and deny them the right to own property, except if they gave up their culture, lifestyle, and the essence of what made them Indigenous. Locke, of course, knew that it was not possible for even every white man to own his own property, even in the vast lands of America. For Locke, then, white masculine identity was firmly fixed in the property ontology to the desire for individual ownership. The actual ability to own property becomes secondary to the perceived desire to own:

...even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their lesser share, by an unspoken but no less certain property right in their “whiteness.” (Derek Bell, 1998, p. 139)

### **Possessive individualism and white settler identity**

This section explores the relationship between accumulation of land and formation of white settler identity. As has been discussed above, accumulation of property has been constructed along male lines of entitlement. Men became property owners if they were thought to display the intention to improve land through settlement and agriculture. Using money in the market exchange gave rise to the ability not only to make surplus, and thus circumvent Locke’s worry about spoilage, but to make endless profits from the surplus. Indigenous peoples were thought to only be interested in subsistence living (Tully, 1994b), which was a key point in the rationale of Indigenous territory appropriation.

Locke's<sup>55</sup> defense of arguably unrestricted capitalist accumulation has been called to task most prominently by Canadian philosopher C.B. Macpherson (1962). Macpherson argued that the political theory developed in the 16<sup>th</sup> and 17<sup>th</sup> centuries by Hobbes and Locke created a conception of property that was "constitutive of individuality, freedom, and equality" (Carens, 1993, p. 2). Locke's explicit and repetitive linkage of rationality and self-ownership through the improvement of nature contributed to Macpherson's critique of Locke as promoting capitalism through possessive individualism. Macpherson argued quite convincingly that the possessive quality found in modern liberal-democratic theory is in "its conception of the individual as essentially the proprietor of his [sic] own person or capacities, owing nothing to society for them" (p. 3) and when independent of "the wills of others" (p. 263) the individual is most free and thereby most human. In this way, ownership of property was "read back into the nature of the individual" (p. 3). Human essence was thought of as "freedom from dependence on the wills of others, and...[as] a function of possession" (p. 3). For Macpherson, that is the basis of Locke's possessive individualism. It holds that the essence of humanness is rationality and the ability to use one's rationality to improve nature through enclosure and labour. For Locke, self-improvement emerges in the process of appropriation and conversely the actual process of appropriation is conceptualized as self-improvement. This very symbiotic relationship between ownership of property, self-development, and self-ownership becomes a strong underpinning of Western-liberal understandings of private property, becoming one and the same, intricately intertwined, deeply connected in identity and entitlement.

Although Locke included some restrictions on accumulation, he clearly recognized that even in the state of nature, "the Turfs my Servant has cut" (TT§28, p. 289) can become one's property, indicating that he believed that people could alienate their labour. Macpherson took issue with the strong links between individual self-ownership and freedom through the ability to individually own and possess. The unfettered desire for the accumulation of possessions and the entitlement was not tempered by social responsibilities or obligations in Locke's writing. The obligation was to self-develop through improvement and in turn through accumulation. The theory of possessive individualism ascribes much of the basis of humanity as rationality and the ability to transcend nature.

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<sup>55</sup> Macpherson also wrote about Thomas Hobbes as promoting possessive individualism.

While Locke made limitations to outright, unfettered appropriation, Macpherson argued that Locke rationalized his way out of his provisos. Waldron (1979) also argued that the sufficiency argument did not restrict appropriation (p. 322). If we take Locke at his written word, the “sufficiency limitation” should be interpreted as a very important limitation on property rights and understood to mean that even though goods are not scarce the appropriator is required to either compensate the non-landowners or at least to obtain consent from them (Sreenivasen, 1995, p. 40).

Several scholars took issue with Macpherson’s claim that individuals had no obligations to give back to society because Locke advocated charity. For Locke, receiving charity is applicable only where men are unable to labour as Locke blamed poverty on idleness (Townshend, 2000). However, Locke’s overriding belief that poverty was the result of idleness made charity a weak antidote to unfettered accumulation in an emerging capitalist system when the goal was increased production. Rather than put restraints on possessive individualism, the concept of charity works for it. Charity works as a pressure valve to the potential immorality of unfettered accumulation. This can be seen in the accolades given to billionaire philanthropists such as Bill Gates and Warren Buffet when they make financial donations. Jules Townsend (2000) notes there is “nothing inherently anti-capitalist about charity” as it does not address the “structural causes of neediness” (p. 69). Charity presupposes that possession is justified rationalizing that labour (for Locke) entitles some people, although not others. The power of redistribution is at the discretion of the appropriator as charity is an “unenforceable obligation” (p. 69).

With the advent of money, it became seen as rational to appropriate more land than one could use as it could be used as capital (Macpherson, 1962). Locke wrote that before money it was “dishonest to hoard up more than one could make use of” (TT§46, p. 300). As Macpherson notes, “Locke does not ask why men took to unlimited appropriation after the introduction of money; he simply explains why they would not be bothered to do it before then” (p. 235). Thus, it is money that makes unlimited accumulation not only rational but also moral. Locke held that an individual’s participation in a market society, and more specifically a property-owning man’s use of money in relations of exchange, constitutes tacit consent to the economic inequality which results from some accumulating more than others in the market (Macpherson 1962). Macpherson argues that in Locke’s theory, “fully rational behaviour to be accumulative behaviour” (p. 236), meaning that the more one accumulates is not only desirable but also logical and rational. According to Macpherson, Locke believes that “full rationality is possible only for those who can so accumulate” (p. 232).

Macpherson clarified that 17<sup>th</sup> century concepts of “freedom, rights, obligations, and justice” were not “entirely derived from … possession” but they were “powerfully shaped by it” (p. 3). Important for our discussion, Macpherson argues that possessive assumptions “have not been abandoned yet, nor can they be while market relations prevail” (p. 4).

John Locke provided the foundational logic in the enclosure of land for individual use, envisioning a system of government for the purpose of protecting those property rights and “constructing a moral economy of liberal society based on those *individuals* who work [the land that is] … resonating strongly with neoliberalism” (McCarthy & Prudham, 2004, p. 277).

### A shift in property logics? From Locke to the FNPOA

Lockean notions of individual ownership and Macpherson’s notion of the possessive individual can be read in the logic of the FNPOA. The Lockean basis for land appropriation in the 17<sup>th</sup> century settler colony was based in the idea that one’s labour has the power to legitimate private property, which in turn could exclude others from having any claim to what was once a common resource. However, it is the moral elevation that Locke associated with property ownership that is most enduring in tying value to labour. For Locke, the land itself was not of much value. It only became valuable when labour was enacted upon it for useful production and exchange in the market place. In Locke’s view, despite their subsistence economy and labour, Indigenous people added little value to land as they did not produce surplus to exchange in the market (Tully, 1994b). The FNPOA echos this logic, although the causality is reversed. In the FNPOA description, private property is the catalyst that unlocks and supports entrepreneurialism. In Locke’s theory, it is entrepreneurial labour that unlocks and adds value to land. This is a subtle but important shift. In this contemporary rationalization of privatization of Indigenous land.

Macpherson’s theory of possessive individualism brings to the fore the implications of Locke’s moral connections between self-realization, self-development, and owning property. Locke’s rationality was based in the merits of individuality, independence, and accumulation. What Macpherson saw in Locke’s theory was the reading into one’s very nature the unbridled commodification of one’s own person or capacities, independent of others. Full human rationalization was through unfettered accumulation and by extension the ability to participate in the market. Self-ownership is “an invitation to social and economic mobility…especially for the talented and industrious” (Macpherson, 1962, p. 323).

The logics in the FNPOA do not seem to be too far from the groundwork in capitalist accumulation and the elevated moral status of property ownership that was laid out by Locke and critiqued by Macpherson. The authors of *Beyond the Indian Act* are focused on the merits of private property for individual First Nations members. They also believe that land in its communal or natural state is of little value, invoking the logic of de Soto's dead capital. The authors promote the idea of individual entrepreneurialism and how it can unlock the "entrepreneurial spirit" in Indigenous people by which they too can be part of the moral economy in liberal society through independence and individual private property ownership. In the FNPOA land needs to be enclosed, titled, made accessible, and commodified.

The property logics in the FNPOA are consistent with the logics of neoliberalism and an "adulation of the market, the privileging of freedom, the private accumulation of wealth, small government, and promotion of the self" (Thornton, 2015, p. 71). Locke was aware that not all men would be property owners and it is clear from our discussion that Locke did not envision women, the poor or racialized peoples as property owners. Karen Vaughn (1978) writes, "To Locke, interest and rents were market means of allocating resources from the less enterprising to the more enterprising" (p. 322). Labour alone did not create value but the "usefulness and scarcity" (p. 322) of the commodity also contributed to its value. Vaughn writes that the type of value-creating labour Locke had in mind was "one might almost say the entrepreneur" (p. 323). The logics of the FNPOA have taken Locke's theoretical precepts, dusted them off and sifted them through the neoliberal sieve.

One of the main premises that Flanagan et al. (2010) promote is that the common belief, based on historical evidence and Indigenous claims that Indigenous peoples are "natural collectivists, indeed proto-communists" (p. 30) is actually a widely held misconception. The authors quote Vine Deloria, Jr. from his 1970 book *We Talk, You Listen: New Tribes, New Turf*, challenging Deloria's claim that Indigenous peoples follow a "tribal-communal way of life, devoid of economic competition (Deloria, 1970/2007, p. 175 quoted in Flanagan et al., 2010, p. 30)...While the rest of America is devoted to private property, Indians prefer to hold their lands in tribal estate, sharing the resources in common" (p. 170, quoted in Flanagan et al., 2010, p. 30). The authors write that "such conceptions of American Indians lacking institutions of private property are simply wrong" (p. 31). The authors spend a lot of effort trying to establish that Indigenous peoples are not averse to private property or that they practice an alternative relationship to land. However, what the

authors failed to include in their quoted passages are Deloria's clarification that "White America speaks of individualism on an economic basis. Indians speak of individualism on a social basis...Thus the two kinds of individualism are diametrically opposed to each other" (Deloria, 1970/2007, p. 170). The next section presents a challenge to the common sense of private property through a discussion of some examples of Indigenous thought.

### **Thoughts on Indigenous ontological thought**

A deeper, more nuanced understanding of some culturally specific examples of Indigenous ontological thought in relation to land is helpful to understand how the ontology of Lockean property theory operates. The FNPOA is void of putting forth any worldview that is based in anything but what may be characterized as neoliberal values or that challenges Canadian sovereignty. For example, in the regions of Alberta and Montana, the Blackfoot people believe that reality is fundamentally about relationships (Little Bear, 2009) and "The meaning of life is rooted in the experiences grounded in the sacred relationships of alliances" (Bastien, 2004, p. 84 cited in Little Bear, 2009, p. 10). Gregory Cajete (2000), a member of the Tewa of Santa Clara Pueblo states, "This relationship is predicated on the fact that all Indigenous tribes—their philosophies, cultural ways of life, customs, language, all aspects of their cultural being in one way or another—are ultimately tied to the relationships that they have established and applied during their history with regard to certain places and to the earth as a whole" (p. 4, as quoted in Little Bear, 2009, p. 14). A distinct connection and identity based on the idea of relationships to a particular place is not shared in a Lockean or liberal understanding of land as a commodity resource.

#### ***Origin stories: Creation as female***

Spirituality in Indigenous worldviews is a guiding factor as it is in Western political philosophical analysis. It frames Indigenous understandings of the relational aspect of humans in the world. Creation or origin stories of North American Indigenous peoples are diverse and integral to their worldviews. As told by Indigenous peoples through oral narration over generations, the origin of peoples often relates to nature in a fundamental way (Verney, 2004). As Vanessa Watts (2013) writes, "This is not lore, myth or legend...This is what happened" (p. 21) and the consequent theorizations "are not distinct from place" (p. 22). Believing in these stories as actual events is critical for understanding a particular Indigenous worldview. Watts' description of the

Haudenosaunee creation story of Sky Woman gives important insight into critically differing ways of understanding agency between the human and non-human world, arguing that agency has “erroneously” become exclusive to humans in constituting societies. In the story, several kinds of animals help Sky Woman adjust to her new earthly environment after she falls to earth from a hole in the sky. When Sky Woman fell she landed on the back of a turtle and the two “began to form the earth, the land becoming an extension of their bodies” (p. 21). Importantly, Sky Woman “becomes territory itself” (p. 23). Thus, agency in these complex ecosystems comes in a variety of sources through not only human form, but also animals. Because “all elements of nature possess agency” and “contain spirit” (p. 23), Watts writes that from an Indigenous point of view these ecosystems “are better understood as societies...hav[ing] ethical structures, [and] inter-species treaties and agreements (p. 23). In this way, the structure of society, human and non-human, is established by connection to specific territory.

In other stories, for example in the Haida origin story, the raven opens the clamshell filled with humans. Animals play a key role in the facilitation and well-being of humans on earth as humans arrived into a fully functioning society and remain dependent on it (Watts, 2013). The stories are profound representations of the interdependency with which the Haudenosaunee interact in the human-non-human world. This is in stark contrast to the Christian-based worldview brought by Europeans to North America. The plurality of spiritual beings believed by Indigenous peoples was not readily accepted by the Christian origin story, which believed in a singular male God figure that created all life and in which women were created from the mortal male body. Through some Indigenous creation stories the female remains integral to life origin and life sustainability, whereas in Christian based stories, female is a source of evil and becomes subjugated to male.

Several of the creation stories, for example from the Iroquois, Blackfoot, and Cree, feature female creators of life and peoples. Leroy Little Bear (2011) writes that Aboriginal peoples view the earth as their Mother, not in a metaphorical way, but in an acknowledgement that the “Earth cannot be separated from the actual being of Indians” as it is where “the continuous and/or repetitive process of creation occurs. It is on the Earth and from the Earth that cycles, phases, patterns – in other words, the constant motion or flux – can be observed” (p. 78). In this profound relationship and acknowledgement of Earth as an interdependent life force, tribal territory becomes essential for Indigenous peoples. For example, in the creation story of the Diné, Marilyn Notah

Verney (2004) writes that it is through Indigenous spiritual connection with Mother Earth that people understand to live communally with all living things. This interdependency, according to Verney, leads to a philosophical understanding of sustainability and relations of equality, which in turn means that as the Earth is shared with all things, ownership does not occur, at least not in the Lockean sense of the individual possessive. The lack of commodification of Indigenous peoples' environment before contact meant that material resources could be shared more equally, as were they needed. Verney writes, "it is inconceivable to claim (own) that which must be shared" (p. 135). Land is seen as Mother Earth, as an "interdependent sustainer of life...not to be stripped, taken apart, or desecrated, nor should boundaries or property (ownership) be placed upon her" (p. 134).

For the most part, female images were not taken positively by the early Europeans. Barbara Mann (1997) writes of how the powerful female images in Haudenosaunee women's traditions and history were misinterpreted by anthropologists or reinterpreted through Christian missionaries. Traditional stories that portrayed female characters as central and instrumental were often changed to enhance the position of a lesser male figure. The dichotomy of good versus evil, reflecting the Christian influence, was imposed on some traditional stories where no such reference existed in the original. Furthermore, the Christian legend of Eve's causing of the fall of humanity meant that it was difficult for Jesuits and missionaries to accept a female creator in Indigenous origin stories (Mann, 1997). Thus, in the Christian retellings of these stories, the female characters were often interpreted in negative ways, or entirely erased. To the Haudenosaunee peoples, "creativity abounded" (p. 426) and came from many different sources, whereas for the Christians, there was one true God. In this way, we can see the European dispossession of women's strength from metaphor and mythology and their severing from their role as Creators beyond individual human beings.

### *All my relations*

Fundamental then to the belief in the interdependency between different forms of life in creation stories is the belief in life in both the animate and inanimate world. All things practiced in the "ceremonial world has some elements of an epistemological function" (Cheney, 2002, 95) and is a "practical methodological tool for investigating the natural world" (Deloria, 1999b, p. 34). It refers to a unified knowledge of time and space creating a "connectivity" of all life forms (J.

Anderson, 2011, p. 99). The Lakota phrase *mitakuye oyasin*, translated into English as “all my relatives/relations,” is often used as an “opening invocation and closing benediction” for the sweat lodge and other important ceremonies expressed through the Sacred Hoop (Deloria, 1999a, p. 52). Recently, this phrase is used widely, even outside of the Lakota peoples<sup>56</sup> in some ways “encapsulating the ‘Native American’ view of life” (S. Owen, 2008, p. 54).

In the following quote about Indigenous interpretations of a living universe, Vine Deloria Jr. (1999a) makes strong reference to the strength and respect that the individual has for other life beings, whether human or not, to allow other life forms to fulfill themselves:

The living universe requires mutual respect among its members, and this suggests that a strong sense of individual identity and self is a dominant characteristic of the world as we know it. The willingness of entities to allow others to fulfill themselves, and the refusal of any entity to intrude thoughtlessly on another, must be the operative principle of this universe. Consequently, self-knowledge and self-discipline are high values of behavior. . . . Respect . . . involves two attitudes. One attitude is the acceptance of self-discipline by humans and their communities to act responsibly toward other forms of life. The other attitude is to seek to establish communications and covenants with other forms of life on a mutually agreeable basis. (p. 50-51)

For Deloria it is logical “that the universe is moral or has a moral purpose without simultaneously maintaining that the universe is alive” (p. 49). In other words, the life that is contained in non-human persons is as natural as any other animate life and does not need to be distinguished. Deloria emphasizes “few people understand that the phrase [all my relatives/relations] also describes the epistemology of the Indian worldview, providing the methodological basis for the gathering of information about the world” (p. 52). Deloria makes the distinction that the gathering of information is not about humans collecting information about objects, but rather a “reciprocal communication within a more-than-human world” (Cheney, 2002, p. 95). The concept of life in everything is plainly evident:

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<sup>56</sup> In her extensive discussion of the appropriation of Native American spirituality, Suzanne Owen (2008) argues that the racial categorization of Native Americans during the establishment of the reservation system “created a shared experience and hence identity among the diverse peoples Indigenous to North America” (p. 56). Owen writes that she has heard an Apache, Choctaw, and Ojibwe Indian use the phrase (p. 54).

The practical criterion that is always cited to demonstrate its validity is the easily observable fact that the earth nurtures smaller forms of life—people, plants, birds, animals, rivers, valleys, and continents. For Indians, both speculation and analogy end at this point. To go further and attribute a plenitude of familiar human characteristics to the earth is unwarranted. It would cast the planet in the restricted clothing of lesser beings, and we would not be able to gain insights and knowledge about the real essence of the earth. (Deloria, 1999a, p. 49-50)

As opposed to a Christian-based worldview which recognizes only human beings as having spirits, Ojibwa for example, acknowledge “plants and animals” and “soils and waters” as having “personhood” (Overholt & Callicott, 1982, p. 154-155). Though Western-based ontology would dispute or ignore this, this is being more and more challenged recently through scientific findings. In fact, some have argued that plants can: recognize and communicate with their plant relatives (J. Owen, 2007); that plants have sensory perception; or that plant emotion is being explored through the newly hypothesized plant neurobiology (Brenner et al., 2006). However, unlike Western scientific approaches, in which plants and animals must prove themselves as sentient and intelligent before they are deemed worthy of respect and care,<sup>57</sup> amongst the Ojibwa or Haudenosaunee, for example, these non-human persons are granted respect simply as existing in nature along with humans. And most importantly, these other-than-human persons “are not...rightless resources, as is the case in Western economic assumptions” (Overholt & Callicott, 1982, p. 155).

Life in all things as a concept is quite real and can be seen manifested recently, for example, among the Maori peoples in New Zealand. In 2013, the Tuhoe people and the New Zealand government agreed upon the Te Urewera Act, which gave the Te Urewera National Park, “all the rights, powers, duties, and liabilities of a legal person” (Parliament of New Zealand, 2014). Although a board of human guardians will act on its behalf, the Te Urewere area is now protected as a life form unto itself, rather than as a resource for human sustainable consumption. More recently, the New Zealand government is seriously considering extending the same rights as a human citizen to the country’s third largest river, the Whanganui River. These types of legislation

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<sup>57</sup> This can be seen for example in the discovery of the intelligence of the whale and the subsequent Western-led, anti-whaling movement.

give recognition to nonhuman entities as having a life force that warrants protection, as having legal personality but also recognizes the interdependency and non-hierarchical relationship between human persons and nonhuman persons.

With a belief in the network of relations comes a value in wholeness and totality (Little Bear, 2011). Little Bear (2011) explains the concept of *all my relations* in the following way:

... the categorizing process in many aboriginal languages does not make use of the dichotomies either/or, black/white, saint/sinner. There is no animate/inanimate dichotomy. Everything is more or less animate. Consequently, aboriginal languages allow for talking to trees and rocks, an allowance not accorded in English. If everything is animate, then everything has spirit and knowledge. If everything has spirit and knowledge, then all are like me. If all are like me, then all are my relations. (p. 78)

Little Bear raises the belief in non-binary categorizations of the living world. Things are always overlapping into other categories therefore it is impossible to delineate and bound something into one category as there is a value to the wholeness of creation rather than focusing on the individual. Kinship ties are extended and complex rather than focusing on the biological nuclear family. Individuals do have responsibilities to the group and it is important to maintain harmony and mental and physical strength in order to fulfill their individual responsibilities. In this way, individuals can be independent. Little Bear (2011) describes independence as “being a generalist, which means knowing a little about everything” (p. 79). He gives examples such as being away from the group for extended periods of time on a trapline, not asking for help when in trouble, and in being a “jack of all trades” (p. 79). In order to allow people to have their independence they practice “noninterference” that means a “respect for others’ wholeness, totality, and knowledge” (p. 79).

The possibilities that are inherent in an ontology that perceives all life as interdependent and connected would theoretically not make hierarchical, categorical distinctions based on gender or race. On this ontology, it is more understandable why at least some Indigenous nations were more egalitarian. Humans are in an interdependent relationship with the material world, Mother Earth. Land is not seen as a resource or as a lower form of life. The relationship between humans and land is not in a one-way relationship to be used only for human consumption or control. In this

way, the world does not categorize easily into binary, opposing categories of male/female, good/bad, masculine/feminine, human/non-human. Indigenous and non-Indigenous feminists (see for example, Crenshaw, 1989; Flax, 1987) critique binary categories as being integral to Othering non-conforming behaviour and persons from the “dominant” group. Without such clearly distinct categories understanding intersections allows for more nuance, fluidity, and empathy.

### *...Time...*

The idea that the world is in constant motion or flux is fundamental in many Indigenous philosophies (Deloria, 2004; Little Bear, 2011). Life in everything can be understood to mean that existence consists of motion, or energy. Everything for the Blackfoot is “animate, imbued with spirit and in constant motion” (Little Bear, 2011, p.77). In this way, all things are related and those interrelationships are very important. There is a belief that all things are in constant motion and changing but that there are important patterns that occur in the seasons of the year or migration of animals. In this way, process is emphasized rather than product. Little Bear writes, “Time is part of the constant flux but goes nowhere. Time just is” (p. 78). In this way, the constant changing “transformation, deformation, and restoration results in a ‘spider web’ network of relations out of which arises the concepts of interrelationship which are summed up in the saying ‘all my relations’” (Little Bear, 2009, p. 9). For the Navajo, Gary Witherspoon (1977) observes, “... the assumption that underlies the dualistic aspect of all being and existence is that the world is in motion, that things are constantly undergoing processes of transformation, deformation, and restoration, and that the essence of life and being is movement” (p. 48).

For Indigenous planner Ted Jojola (2004), a tribal member of the Pueblo of Isleta, the Western-liberal concept of property has a sense of temporality, whereas for Indigenous peoples, valuation in land use is found in the long-term and the “operative principle being that of land tenure” (p. 89) versus ownership. This sense of length of tenure, over generations, brings a sense of responsibility and awe in terms of maintaining land over successive generations where “the notion of property becomes one of inheritance” (p. 89). Take, for example, the 2014 designation of a tribal park by the Tla-o-qui-aht<sup>58</sup> First Nation on Vancouver Island, British Columbia in an attempt to protect their traditional territories from outside development (Hoekstra, 2014, para 11). A statement by

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<sup>58</sup> Pronounced Clay-kwot in English.

Saya Masso, the then councillor and resource manager for the Tla-o-qui-aht First Nation explains the principles behind the development model:

If there is one thing salient about all this is we just finished a tribal park planning unit that has jobs for 500 years, not 10 years of jobs and 500 years of impact...that's the premise: we are developing plans for our future. We regard fish as a value, the serenity of the area, and spiritual practices that we have to do. (para 11)

Jojola (2004) continues, “The community is mobilized, therefore, to make certain that individual activities uphold their collective agenda. And unlike mainstream society, the acquisition and retention of a land base or territory becomes paramount” (p. 89). Individuality among Indigenous communities at the highest level becomes “subsumed in [collective] values (p. 89). For Jojola, the collective relationship with land is in stark difference to the individualism of mainstream American society that he characterizes as an often temporary or ephemeral relationship with land:

In mainstream American society, ‘identity’ appears to be invested in ‘property rights’ with a paradigm shift decidedly towards the notion of ‘individualism.’ Individuals become the sum of their tangible goods, particularly as these pertain to property and land. And when people grow discontented and are ready to move elsewhere, they literally ‘pull up stakes’ and transplant themselves. (p. 89)

According to the belief in collective relationships, if the individual is acting on behalf of the group and the group is acting on behalf of the individual then women’s needs would not be singled out as being apart from the group. For example, in matrilineal inheritance land was passed down through the female line primarily to women who shared the land for all of the community to benefit from. Matrilineal societies did not set up a system of individual ownership for individual profit as in the European system of ownership. In matrilineal lineage, women’s power was more laterally shared among both women and men.

## Space

Space is an “important referent” for Indigenous peoples (Little Bear, 2011), more so than time which is much more important in Western ontology. In terms of space/place, land becomes a major referent and a sacred trust from the Creator and is therefore a source of deeply embedded identity for Blackfoot peoples (Little Bear, 2009). Indigenous spiritual connection and relationships to land in general and to homeland in specific are now “constitutionally recognized and legally protected” by Canada<sup>59</sup> (Indigenous Corporate Training [ICT], 2015b, para 1). Indigenous people feel “they have been bestowed with a responsibility for the land (and sea) and all of the creatures that inhabit the land with them. This sense of responsibility is greater than an emotional tie – it is intrinsically tied to the spirits of all aspects of the earth” (ICT, 2015c, para 2). Several different types of sites are considered sacred as “the land is not spiritually homogeneous” (ICT, 2015c, para 3):

First Nation sacred sites are the very heart of traditional lands. These sites could be buffalo jumps, sweat lodges, whaling shrines, transformation rocks, first ancestor sites, petroglyphs, birthing spots, where gods live, where First Nations people go for cleansing, where leaders go to communicate with gods, where ancestors are buried. (ICT, 2015c, para 2)

As well as diversity in types of places there is diversity in why a site is considered sacred. For example, some sites may be near uranium deposits, or be a natural habitat to certain plant or animal species that are considered significant to the culture. In this way, many sacred natural sites are being recognized more and more as areas of relevance to the conservation of biodiversity (Oviedo, Jeanrenaud, & Otegui, 2005). They argue the reasons for protecting sacred sites are often tied to areas of biodiversity or important areas that are environmentally sensitive and these two reasons are often related because the ecological aspect of Indigenous knowledge is often centred around traditional land sites. Oviedo et al. (2005) clarify “What is ‘traditional’ about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each Indigenous culture, lies at the very heart of its ‘traditionality’” (p. 16). Unlike how Indigenous knowledge is often understood as primitive and

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<sup>59</sup> The 1973 Calder Supreme court decision recognized Aboriginal title existed in law; the 1997 *Delgamuukw* and *Gisdayway* decisions legally recognized and constitutionally protected First Nation relationships and ownership to their land in Section 35 of the *Constitution Act*. (ICT, 2015b)

unchanging by non-Indigenous peoples, traditional knowledge and practice does grow, modify, and adapt depending on what new information it encounters.

First Nations traditional and treaty lands are under extreme pressure from development. There continue to be court cases and protests from Indigenous Nations to protect their sacred sights and their homeland territories on which they rely for survival. For example, in a neighbourhood of what is now Vancouver, the Musqueam people have been protesting to protect the burial grounds of the Marpole Midden, which was recognized as a national historic site<sup>60</sup> of Canada in 1933. After intact human remains were found during a recent archaeological excavation on the Marpole, several members of the nearby Musqueam community held a 200-day vigil as the land was scheduled for condo development by its owners (Cole, 2013). As Musqueam identity, nationhood, and culture is interconnected to their land, in 2013, with no other choice, the community successfully bought the land to preserve it for future generations.

### ***Harmony***

Harmony of the group is very important in much of Indigenous thought. Harmony means that there is sharing, which involves both material goods and good relations. This involves peaceful relations with neighbours, or customs about utilization of resources. Little Bear writes (2011) about how traditionally, extended families moved around territories in an ordered fashion but often joined each other to hunt and gather together in certain parts of the territory. Collective hunting and harvesting of plants helped to equally share resources although families traditionally had areas of priority. One of the most well-known Indigenous social systems of redistribution is the potlatch<sup>61</sup> that was practiced by many of the Indigenous peoples in the northwest of America. The practice is highly overgeneralized by outsiders as functioning solely as a redistribution of resources (Ebert, 2013), but the ‘feasts,’ as they are more commonly called, embody relations of kinship and authority, establish territoriality, reaffirm the obligations and responsibilities of the host, and involve gift-giving. There are variations in potlatch systems and cultural practices in the region but some of the main precepts are shared. For example, Tsimshian feasting demonstrates that the

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<sup>60</sup> The actual historic marker was placed by the government in nearby Marpole Park, whereas the actual midden, where the Musqueam traditionally would have left the remains of their meals, is located a few blocks away.

<sup>61</sup> “‘Potlatch’ is a Chinook term meaning ‘to give away’ that has been applied to a variety of gift exchange systems” on the Northwest Coast of North America (Masco, 1995, p. 42, FN4).

host respects the land and the House<sup>62</sup> members and the common serving of foods from the area demonstrate the connection between the hosts and the land (McDonald, 2016). The public aspect of the feast establishes and formalizes status and responsibility and provides a place to air disagreements (A. C. Mills, 1994). Giving was seen as a valued life practice and “extravagant wealth accumulation was viewed as antithetical to tribal existence” (EagleWoman, 2007, p. 45).

### Unsettling private property logic

In Lockean property theory land is deemed to be a commodity, only valued when labour is added to it with the purpose of improving or developing it. Land is seen as mainly a resource to be exploited and alienated. Owning and accumulating property is seen as integral to one’s identity and self-worth, at least for those who are deemed to be subjects of ownership—white European men. In the Lakota and Blackfoot belief in the concept of *all my relations* it is clear there are alternative worldviews which do not create such distinctions between the human and non-human realms. A more interdependent view of land and the non-human world challenges the Lockean view of human hierarchical independence and individualism and the view of land as only a commodity to be owned, developed, and exchanged. Indeed, the idea of harmony as expressed in the Blackfoot traditions and the West Coast practices of giveaway ceremonies challenge the possessive individualism that is foundational in Lockean thought. Rather than a linear understanding of time in which certain behaviours and attitudes indicate a movement from primitive to modern, undeveloped to developed, uncivilized to civilized, explanations of time, for example, in the Blackfoot patterns of life, indicate a “transformation, deformation, and restoration” of the process rather than the product of things.

Though there have been some more recent shifts in accepting some of these precepts, especially in terms of Western-liberal environmentalism, problems often arise in non-Indigenous interpretations and appropriations of these very complex and culturally specific concepts resulting in the maintenance of settler colonial structures of ownership and hierarchies. For example, in the latter half of the quote on page 107, Deloria criticizes the Western-liberal penchant for the anthropomorphizing of nonhuman nature (Cheney, 2002). In this (mis)recognition of life in nonhuman nature, the discourse often ends up gendering and heterosexualizing nonhuman nature

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<sup>62</sup> Another name for House is Wilp. These are units of social organization similar to clans.

and animals (Lee, 2009), whereas in some Indigenous concepts, Mother Earth or Mother Nature relates to interconnectivity and reciprocal life support, rather than a hierarchy in which humans are of a superior status, in a dominating role, trying to control the uncontrollable. In Western-liberal interpretations, the usage of the term Mother in relation to nature has been argued by ecofeminists to reflect a “pattern in the way we conceive of women” as “irrational or ‘untamed’” (Lee, 2009, p. 200) much like how nature is seen to be unpredictable and therefore in need of taming and controlling. Unlike the Haudenosaunee in which the “relationship between animals and [Sky Woman] is regarded as sacred and ritualized over generations” (Watts, 2013, p. 25), Christian teachings present the female as dangerous and evil. For Watts “if you belong to a structure where land and the feminine are not only less-than, but knowingly irresponsible, violations against her would seem warranted” (p. 26). Lori Gruen (1993) writes, “The categories ‘woman’ and ‘animal’ serve the same symbolic function in patriarchal society. Their construction as dominated, submissive, ‘other,’ in theoretical discourse...has sustained male dominance. The role of women and animals in postindustrial society is to serve/be served up; women and animals are the used” (p. 61). Greta Gaard (2011) argues, “Ecofeminists also rejected the gender-oblivious ‘deep ecological self’ concept which was developed by deep ecologists to articulate their experiences of oneness with nature, as fundamentally narcissistic, androcentric, and colonizing” (p. 40) rather than as interdependent in the Blackfoot or Lakota sense of human/non-human relations.

Essentializing is inherently problematic. Certainly, making general assertions about Indigenous cosmology and philosophy, especially given the diversity in specific beliefs and histories, can lead to major misunderstandings that can further entrench Western-liberal hegemonic values and what is considered common sense in the settler logic. The *Indian Act* though, is federal legislation that is applied across the country to all First Nations, although unevenly. While individual First Nations experience nuanced struggles, federal policies, including the FNPOA, aim to standardize relations and practices. As First Nations justify their land claims and rights to sovereignty individually, referring to their specific traditional practices, beliefs, and histories as evidence, these combined offer a general challenge to the contemporary rationales of settler logic and status quo. The challenge is in how we use the generalized differences to challenge the colonial status quo rather than to uphold it.

## Conclusion

Lockean theory of property has provided an important historical context for the current understandings of private property in the Canadian liberal settler society. The tethering of labour and accumulation to property legitimizes individual ownership of enclosed parcels of land and the taking of lands from Indigenous peoples based on an exclusive gendered and racialized understanding of entitlement and legitimacy. Early associations of property accumulation and development through the property-owning class utilizing the labour of non-property-owning people was indicative of early entrepreneurialism. Locke's moralism in the industriousness and rationality of property ownership created the liberal contradictions, especially in terms of the practice of equality. The reading of Lockean theory through a gender and race lens further elucidated how the European male hierarchy was established and used as the justification of women's subordination to men and the colonial dispossession of Indigenous land. These philosophical underpinnings of property were forged into legislation, laying the groundwork for the continued severing of Indigenous women and peoples from entitlement to, and ownership of, property.

The chapter has discussed some specific examples of Indigenous ontology from particular Indigenous Nations to de-naturalize and unsettle the common sense of private property rooted in the 17th century Lockean property theory. The Lakota belief in life energy in all things, human and non-human; the Haudenosaunee belief in female deity and life force and the co-constitution of human and non-human; the Tewa belief in collectively and individually inheriting the earth versus owning it; and the Blackfoot practice of harmony through responsibility, all enable the potential for more lateral, fluid human-human and human-non-human power relations and less hierarchical and heteropatriarchally dominated power structures than those that underpin Western Christian ontology.

With an understanding of divergent ontologies of property, the following chapter illuminates how Indigenous women were positioned in precontact societies. Indigenous matrilineal social organization, as well as women's position within Indigenous societies, was first disrupted and derided by colonial interpretations and then controlled and eradicated through colonial legislation. Chapters 4 and 5 unsettle the lack of historical account of women's custodial power over and relationship to land in the FNPOA and links this historical revision to a long history of European

colonial concerted derision and fear of Indigenous women's power and status to the contemporary maintenance of settler logic.

## Chapter 4: Women's relationship to land

### Introduction

Nothing...is more real than this superiority of the women. It is essentially the women who embody the nation, the nobility of blood, the genealogical tree, the sequence of generations and the continuity of families. It is in them that all real authority resides: the land, the fields and all their produce belongs to them: they are the soul of the councils, the arbitrators of peace and war...

(17th century French Jesuit missionary, ethnologist and naturalist, Joseph-François Lafitau on the position of women in the matrilineal society of the Iroquois he encountered in Canada, written circa 1724, quoted in Jamieson, 1978, p. 9)

That was then.

The purpose of this chapter is to foreground the oft downplayed or hidden traditional relationship to land that many Indigenous women had via their labour and through matrilineal social kinship organization. This chapter conceptually links the gendered and racialized Lockean precepts of private property as discussed in Chapter 3 to the exploration of the carceral colonial mechanisms, legislation, and policy used to dispossess Indigenous women of their status and relationship to land that will be discussed in Chapter 5. The paradox of Lockean property theory becomes apparent when challenged with the traditional practices of Indigenous women who worked in agriculture and were the stewards of the land. According to the theory of Locke, Indigenous women should have been prime candidates for property ownership. However, the gendering and racialization of who could be subjects of property and land ownership outlined in the property theory of Locke laid the fundamentals for not only the colonial confinement that targeted Indigenous women as a strategy and logic of Indigenous elimination (Wolfe, 2006) but also the masculine and racialized subjectivity of the entrepreneur. Indigenous feminists (Allen, 1992; Ramirez, 2007; Smith, 2003), as well as feminist anthropologists and historians (K. L. Anderson, 1991; Carter, 2016; Klein & Ackerman, 2000; Leacock, 1977; Leacock et al., 1978; Mann, 2000; Sanday, 1981; Seed, 2001)

are among those who argue that Indigenous women in matrilineal/matrifocal communities experienced more egalitarian social relations in which women had more social autonomy and power, and were able to exert more social and political influence prior to the administration of British colonial policies through the *Indian Act*. This contrasts with a variety of interpretations of Indigenous women's particular history through a contrived, racialized, and gendered narrative of belittlement, revision, and erasure. This chapter directly challenges the gender neutrality of "restoring" private property rights via the FNPOA as presented in *Beyond the Indian Act* in which the authors argue at length, and present examples regarding how property ownership was common among many First Nations by directly denouncing Indigenous scholars, such as Vine Deloria Jr. and Ward Churchill, who write of the communal social organization of Indigenous peoples. However, the authors ignore any historical or Indigenous oral evidence of matrilineal social organization and the status of the power of women's relationship to land. The omission of Indigenous women's history is consistent with a legacy of continued exclusion of matrilineality that in turn supports the heteropatriarchal roots and workings of private property. The chapter argues that pre-contact egalitarian social relations were not a primitive phase of modernization but that they were destroyed because these gender relations directly threatened the European colonial appropriation of Indigenous land via private property acquisition. This chapter draws from the previous chapter's discussion of ontology of property and further builds on a relational approach to understanding autonomy and power drawn from Indigenous ontological precepts and feminisms. In this way, this chapter further elucidates the heteropatriarchal underpinnings of private property as developed in Locke's theory of property and utilized in the appropriation of Indigenous lands. Understanding and taking seriously Indigenous matrilineality as a socio-political organizational model is key to building the main argument of the thesis. Questions arise as to why it was so critical for the Europeans to dispossess women of their traditional status and roles and how does the undermining and ignoring of women's historical status contribute to their sustained dispossession? This chapter supports the argument that Indigenous women were dispossessed from their societal roles and their agricultural practices as a necessary constituent in the development of the gendered and racialized capitalist state structure. Furthermore, the breaking up of traditional Indigenous social orders continues to be critical to the present ongoing maintenance of settler colonialism.

In order to proceed with the chapter argument, the links between patriarchal social relations,

women's traditional labour and status, and the burgeoning colonial capitalist market are explored. Land reform, such as that outlined in the FNPOA, is based on individualistic capital accumulation. This is counter to Indigenous women's relationship not only to land, but their autonomy and powerbase gained from female kinship. The chapter begins by clarifying the use of potentially unclear and provocative terms. That is followed by a discussion of pre-contact, matrilineal First Nations and how power was more laterally dispersed with a focus on women's relationship to labour and land in both agriculture and the fur trade. The chapter then moves to an historicized discussion of interpretations of matrilineal social organization and how they continue to support an acceptance of male hierachal power structures.

### **Terminology as non-binary**

Terminology on women-centred societies tends to be unclear or inconsistent, especially across research disciplines (Goettner-Abendroth, 2004). Terms such as matrilineal, matriarchy, matrifocal, and egalitarian are used in this thesis consistent with how they are used by Indigenous feminists following oral traditions. As was discussed in the previous chapter, Indigenous concepts tend not to be binary in nature and understanding this will be useful for this discussion on traditional Indigenous gender relations and status. Matrilineal descent refers to property being passed down through the female line; however, this term is criticized for being too specific and narrowly focused (Dashú, 2005; Goettner-Abendroth, 2004). Matrifocal is a more modern anthropological term that is used to describe a women-centered society in which a family unit or structure is headed by the mother and is focused on extended family members through the female lineage. Again, this term is thought to be too vague and is easily discounted as it is argued, "many patriarchal societies retain a strong emphasis on the mother" (Dashú, 2005, p. 186). Matriarchy, perhaps the most politically charged, is described by Indigenous writers in a way that is consistent with how Heidi Goettner-Abendroth (2004), a leading scholar on matriarchal societies, understands the concept. Rather than defining matriarchy as the binary opposite of patriarchy, the "domination of fathers," Goettner-Abendroth uses the other meaning of the Greek word "arché" to define matriarchy as "the mothers from the beginning" (p. 71). This more normative and historically accurate definition reflects a less binary understanding of matriarchy as the exact opposite of patriarchy. This is consistent with how Indigenous people generally understand pre-contact social and gender relations as complementary rather than in opposition to patriarchy.

As we shall discuss in this chapter, more recent anthropological research has also analyzed egalitarian societies as being related to matrilineality and more equal gender relations rather than a reverse of power relations, which is erroneously understood by the concept of matriarchy. In much of Indigenous feminist scholarship the term egalitarian is used to describe the relatively balanced power dynamics between Indigenous women and men in many pre- and early contact societies. The term is used as a contrast to the patriarchal gender relations that were imposed on Indigenous peoples by European Jesuits and later by colonial administrators. Indigenous scholars refer to traditional Indigenous societies as: having practiced “gender egalitarianism” (Jaimes Guerrero, 2003); following an “egalitarian ethic” (Cunningham, 2006, p. 57); been “traditionally egalitarian” (Mihesuah, 2003, p. 54); and as having ensured “gender equity prior to colonization” (Native Women’s Association of Canada [NWAC], 2007, p. 1). This use of the term egalitarianism is directly related to kinship systems of matrilineal social organization, signifying that societies were headed by an elder clan woman. Extended relationships and power were not structured in a strictly hierarchical way but rather in shared decision-making and shared roles.

Clans are social groups whose members follow descent from either the mother’s ancestors—matrilineal, or from the father’s ancestors—patrilineal. Clans are often named after animals; for example, the Ojibwe is made up of a seven-clan system—crane, loon, bear, deer, bird marten and fish. These categorizations helped to regulate many important things such as marriage, where to live, and property inheritance (Brunner, 2012) and formed a complex and comprehensive system of governance. Clans tended to be exogamous, meaning that members could not marry within their same clan because people from the same clan were considered family even if they lived in different regions.

### **Women-centred societies: Matrilineal/matrifocal kinship as egalitarian**

In North America, several of the Indigenous nations were traditionally matrilineal Clans, including the Navajo, Iroquoian groups, and Ojibwe (Green, 1980), as well as the Haudenosaunee, Anishinabeg of the Northeastern Woodlands, Haida, and Tsimshian on the Pacific coast, and the Southwest Pueblos and Navajo/Diné. The Great Plains Tribal Nations in the Dakotas practiced a type of matrilineal social organization (Jaimes Guerrero, 2003) as did the Hopi in northeastern

Arizona and the Cherokee of the Southeastern Woodlands. These matrilineal clans<sup>63</sup> were in opposition to the English system of patrilineal descent and patriarchal leadership that had developed in much of Europe and that the colonial administrators imposed.

Female centered societies exhibited different social relations and power structures from male centered ones. They tended to have more laterally shared power structures, with less hierarchy based on gender. Even surviving matriarchal societies<sup>64</sup> also have both women and men in leadership positions and tend to share power rather than hoarding power as is done in patriarchal social structures. This is an important distinction to patriarchal power relations, which manifest as male power over women and over less powerful males (G. Barker, 2016). In matrilineal/matrifocal societies women tended to have more input in societal affairs, fewer sexual constraints, and their work was more varied and valued. Although much of the land was held in common and used collectively among the clan members, people did have certain material goods that they used exclusively such as clothes and other more personal items. Land was passed down through the female line and managed by women.

The power in women-centred communities was derived from the shared communal practices and the freedom from male control of their labour, sexual relations, political participation, and social organization. Women were also able to manage and farm the land, gaining status and power through their important contributions to the sustainability of the community. In these communal households, more than one woman was usually involved in childrearing and the children were related as kin through the female line of descent. The husband/father was marginal to the complex internal relationships of the group. Because of these strong matrifocal kinship ties, women maintained an elevated status in gender relations (Leacock, 1983; Leacock et al., 1978).

This maternal lineage further determined roles, responsibilities, and status, often through clan systems. For example, in the complex and structured matrilineal societies of the Haudensaunee of the Iroquois Confederacy in Lower Canada, women's power was maintained in a social unit composed of three to six matrilineally related households, known as the longhouse (Anderson,

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<sup>63</sup> While this thesis looks at the Canadian context and specifically areas that adopted English laws, North America's border between Canada and the United States of America crossed/crosses through traditional lands and therefore the regions such as the Dakotas were peopled up into Canada.

<sup>64</sup> There are at least six *known* present-day matriarchal societies: the Musuo in the Yunnan and Sichuan provinces of China; Akan people in Ghana; Minangkabau of West Sumatra; Kashi peoples of North-East Indian state of Meghalaya; Bri bri in the Limón province of Costa Rica; Garo and Papua New Guinea, Nagovisi of South Bougainville (Gottner-Abendroth, 1999; Goettner-Abendroth, 2012; Garrison, 2017).

1991). According to Karen Anderson (1991), women were the authority figures in the longhouses and men were relatively dependent on their wives as they could be rejected and banned if the women decided they were being irresponsible. These close kinships through clans, especially with other women, gave women extended power in the society. Communal social organization resulted in collective cultural practices and reciprocal kinship traditions were often based around matrilineal/matrifocal societies.

In most Indigenous communities sexual relations were very different from the hetero-monogamous relations that were moralized by the Christian Europeans. Women often took more than one mate and relationships such as marriages were not necessarily permanent and could often be dissolved at the wishes of the woman. Because of the matrifocal organization of the communities, women were not vulnerable nor wholly dependent on any one man (Jaimes Guerrero, 2003). As maternity of children could be easily determined as opposed to paternity and childcare was more shared among women these also contributed to creating a strong matrifocal kinship dynamic.

Political participation was much more dynamic in many pre-contact societies. Iroquois societies, for example, developed complex systems of government based on democratic principles and although the women did not hold political positions per se, they had decisive power over which men would be appointed or removed as leaders, as well as final decisions over matters of war, even though, for Iroquois men, the warrior tradition was a large part of the masculine construction, along with hunting, fishing, waging war, diplomacy, and oratory (Graymont 1991). Some Iroquois women, especially the clan elders, held a substantial amount of power in matters of war. Women could either initiate or prevent men from going into battle, a power they could easily wield by, for example, refusing to mend the warriors shoes or plant corn, either of which could mean the warriors would not survive the harsh environmental conditions. The consent of at least some of the women was essential for the men (p. 100). Furthermore, the women were charged with actively initiating peacekeeping by “persuasion” (Mann, 2000, p. 180), rather than instigating war. This is also a noteworthy difference in power usage associated with leadership. In a patriarchal model, leaders would be more associated with instigating shows of aggression. This power distribution was also reported by European travelers in other Indigenous clans, for example, among the Seneca Indians south of Lake Ontario (p. 181). The elder women in each clan were empowered to choose

the sachems, or peace chiefs, for their clan and they could also remove a man who was not performing his duties in a responsible way.

### **Indigenous women's relationship to land through labour**

Women were primarily responsible where farming was practiced in cultures in the North Eastern region of America. For example, the Huron, Montagnais-Nascapi and the Six Nations (Iroquois) women were in charge of agricultural production and distribution of most of the subsistence goods (K. L. Anderson, 1991). Among the Huron-Algonquian people, women cultivated corn, squash, beans, as well as sunflowers for oil. They also gathered nuts, vegetables, and fruits, and did some fishing as well. Women, in turn, taught their daughters agricultural skills and knowledge and, in this way, women's relationship to the clan's land was strong and definitive. These crops were not only subsistence crops for the community but also were valuable trading commodities, especially corn, with other peoples further north, such as the migratory hunters and gathers of the Ojibwa people (Castellano, 1989). The Ojibwa Clan members, although nomadic, also tapped maple sap from trees that often were stewarded by women. We should pause here to reflect that the use of the concept *to own* to refer to an Indigenous context was different from what it is in the colonial understanding of exclusive individual domain. For Indigenous peoples much of their material goods were shared amongst members of the clan. Of course, not all things, such as clothes or other small personal items, but certainly larger resources such as food were shared (Anderson, 1991; Castellano, 1989).

Throughout the year, Ojibwa women participated in fishing, gathering berries, hunting small game, and harvesting grains. Women were responsible for domestic chores including cooking, sewing, and childcare. Their areas of expertise and skill also included weaving the fish nets, paddling canoes during the duck hunt, tanning the hides and constructing protective fur robes, as well as layering the birchbark on the wigwam<sup>65</sup> (RCAP, 1996a). In these ways, women were "essential economic partners in the annual cycle of work" (Castellano, 1989, p. 47). Although it was mostly men that ventured further away from settlements and who were the ones to primarily engage in inter-tribal trade and hunting (Stasiulis & Jhappan, 1995), some Indigenous women did

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<sup>65</sup> Wigwam is different from a teepee in that it is a more permanent structure. It is a semi-permanent dwelling used by some Indigenous peoples in the east. It is in the shape of a dome.

sometimes travel far distances to trade or for other reasons (Caffrey, 2000). Marlene Brant Castellano<sup>66</sup> (1989) writes, “pinning family and residential structure to relationships among women served, then, to provide the greatest economic security and the greatest family stability in a culture where men were highly mobile and engaged in hazardous pursuits” (p. 46).

Women’s work was considered valuable because it converted raw materials into useable resources for the community. For the Chippewa, “The finished product is what leads to status, influence and reputation” (Sharp, 2000, p. 58). For the Iroquois, stored food was controlled by women and considered to be a form of wealth (K. Anderson, 2000).

### ***Women as farmers***

Traditional farming was practiced among several Indigenous groups, especially in what is now Ontario and in the Great Plains<sup>67</sup> areas, with women primarily in charge. However, early explorers, settlers and colonists mostly dismissed or degraded women’s agricultural practices. In her book, *Imperial plots: Women, land, and the spadework of British colonialism on the Canadian prairies*, Sarah Carter (2016) explored the erasure from history of British women as agriculturalists in the early settlement of the Canadian prairies. In her section on Indigenous women’s agricultural traditions and the colonial reaction, Carter writes that European accounts of Indigenous women working the land were mostly tempered with derogatory interpretations diminishing their work as ‘horticulture’ or dismissing the relevance and sophistication of it altogether (p. 31). It was often assumed by European male observers that because women worked in the fields that farming in general must be beneath men’s participation, as illustrated in the remark “the men never turning their heads to such degrading occupations” (artist George Catlin quoted in Carter, 2016, p. 33) or disparaging women’s technical agricultural skills as in “their system of tillage was rude. They knew nothing of the value of manuring the soil, changing the seed, or alternating the crops...they had no regular system of fallowing” (Washington Matthews, 1877 quoted in Carter, 2016, p. 33).

There were some other less biased observations made, for example, by Rudolf Friedrich Kurz, a Swiss painter (1818-71) who did not dismiss Indigenous agriculture as “gardening” and was also

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<sup>66</sup> Marlene Brant Castellano is a Mohawk of the Bay of Quinte.

<sup>67</sup> The Great Plains include parts of 10 states of the United States (Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Wyoming), the three Prairie Provinces of Canada (Alberta, Manitoba, and Saskatchewan) including portions of the Northwest Territories.

less focused on gendered roles writing, “whether men or women worked the land when they first began to farm is a matter of no consequence” (quoted in Carter, 2016, pp. 36-37). However, neutral, less gendered perspectives were rare. Carter argues that in the Plains, the women were commercial farmers and for that era should be considered to have been doing large-scale agriculture rather than being “dismissed or diminished as ‘horticulture’” (p. 31). In her research about Iroquoian women farmers and farming techniques Barbara Mann (2000) found that women farmers made many agricultural innovations such as using tobacco as a natural pesticide, utilizing fish heads as fertilizers, implementing efficient seed planting methods, and making use of village rotation (Mann, 2000). They were deeply attached to the land through their labour and expertise,<sup>68</sup> as was expressed in ceremony, song, and ritual. More accurately, in many Indigenous societies, women’s role in agriculture gave them a higher status in their society (Baker, 1989) as food production was highly valued and agriculture was often more stable a food supply than hunting. Furthermore, Indigenous men were traditionally not involved in farming to any great extent, “except for assisting with the harvest and cultivating tobacco” (Carter, 2016, p. 33).

Despite these formalized cultural practices in Indigenous societies, the Jesuits and the colonial government were adamant that Indigenous men take up farming on reserves and that women do more work in the house. Indigenous men were taught how to use Western farming technology and methods. Some accounts reported “the men apply themselves willingly to the labors of the field; and the number of working men is constantly increasing” (Mathews, 1877 as quoted in Carter, 2016, p. 36) while other accounts show the resistance of Indigenous men to agricultural work.

Indian reserves were early captive “social laborator[ies]” (Tobias, 1983, p. 41) for the social construction of colonial gender relations and the general cultural assimilation of Indigenous peoples. For Indigenous women, these were spaces where the colonial agenda would have increasing control over their social and cultural practices and eventually over their very subjectivity. Modeled after the European conception of gender hierarchy, Indigenous women were instructed, regulated, and legislated into a subordinate sociopolitical position in colonial North America. As Indigenous peoples were thought to be uncivilized, it was the goal and divine mission to civilize them via conversion to Christianity, introducing them to a sedentary way of life based on agriculture and later, under British colonial rule, based on the adoption of private property.

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<sup>68</sup> Gilbert Livingstone Wilson’s Buffalo Bird Woman’s Garden (~1917) documents much of the techniques and knowledge of Hidatsa women and the Great Plains Indigenous agricultural practice.

Indigenous women were no longer to be the main agriculturalists, as that was considered to be the work of industrious property-owning men. Women on the other hand were to learn finer, domestic duties like housekeeping. Indigenous women and their daughters were taught “civilized domestic skills” under the instruction of the missionaries’ wives (Ng, 1993, p. 54). In many ways, the Christian community became an instrumental enforcer of assimilation for the colonial administrations under the belief of salvation. In her extensive historical study of gender discrimination among women in 17<sup>th</sup> century New France, Karen L. Anderson (1991) found that for Indigenous women it was the undermining of egalitarian values and collectivist structures that were imposed upon by Jesuit missionaries that seem to have been the most devastating to Indigenous communities. How colonial occupation has led to the sustained alteration of Indigenous gender relations, as well as gendered legislation, will be further explored more fully in Chapter 5 on culture, family, and legislative dispossession.

### **Indigenous women: Work in the fur trade**

This section explores the involvement of Indigenous women’s work in the fur trade. The peoples who lived on the grasslands of the Canadian Plains, the main ancestors of the Métis, tended to be more migratory as they could hunt large game, mostly buffalo, and as the weather in general was too unfavourable to practice agriculture. In the boreal forests, for example, the Lubicon Cress Nation was a traditional hunting, trapping and gathering society. Women performed many important roles in the production of goods, in ritual ceremonies and partook in important decision-making within the communities. While the men hunted, the women prepared the animal skins to cover the tipis,<sup>69</sup> processed the meat and made essentials such as clothes and tools from the other parts of the animals. The women usually chose the campsite and set it up, and they also owned the tipis and the hides that covered them (McMillan, 1988). These skills would prove essential in the burgeoning fur trade.

Women worked in the fur trade as they were highly skilled and knowledgeable in the field, yet were unpaid labourers in the market end of European fur trade. Their part in garnering diplomatic relations between the Europeans and the different Indigenous clans was critical to the

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<sup>69</sup> Tipis are homes that are cone-shaped tents, traditionally made of animal skins placed on poles made of wood. Generally, they are used by semi-nomadic Plains Indians.

success of the market. As the market in England for other commodities grew and as more European women made the voyage to America, Indian and Métis women were less desirable and useful for men in the fur trade. This early dispossession helps to make the links between how Indigenous women's knowledge and skills were initially used to build the export resource market yet the majority of women were not integrated as key trappers and beneficiaries of the wealth and status generated. Women were economically marginalized but they were brought in through sexual unions in marriage or less formal relationships with European trappers and company administrators. This early marginalization of women in the economy points to a legacy of gendered marginalization in the settler colonial economy.

To be sure, the relationship between the French and Indigenous peoples required intense and dependent contact in order to have successful commodity exchange (Van Kirk, 1984). Eventually the English would also come to appreciate the symbiotic relationship that was necessary for successful trapping and trading. For example, Sir George Simpson, governor of the Hudson's Bay Company (HBC), testified at the 1857 parliamentary enquiry into the extension of the HBC's trade privileges that “[Indians] hunt and fish, and live as they please. They look to us for their supplies, and we study their comfort and convenience as much as possible, we assist each other” (quoted in Van Kirk, 1984, p. 2). As the fur trade was based on a commodity exchange between Indigenous peoples and the European traders, there was a mutual dependency on the two groups. Indigenous peoples wanted European goods and traders needed the expertise, cooperation, and labour of Indigenous trappers and communities in order to acquire enough products to send back to a demanding English customer base.

In particular, Indigenous women were integral to the fur trade, making critical contributions (Kwolek-Folland, 1998) in all areas of economic, cultural, and social aspects (Van Kirk, 1983), playing a key role in its success (Barman, 2014). Indigenous women were especially important as a “liason between the two cultures” (Van Kirk, 1991, p. 180) fostering smooth relations between them,<sup>70</sup> providing language translation and intercultural understanding, as well as supporting European traders in their basic survival needs. It was because of Indigenous women’s “socio-economic roles in Indian society” that these alliances were increasingly pursued by Hudson’s Bay

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<sup>70</sup> Especially illustrative and notable was Thanadelthur, sometimes referred to as “Slave Woman,” who was used by the British at York trading post to achieve peaceful working relations between the Chipewyans and Crees in order to facilitate trading relations with the Chipewyans (Heber, 2011).

traders (Brown, 1996, p. 64). Women provided trappers with essentials such as moccasin footwear and snowshoes. They also did traditional food preservation, gathered food, hunted small game, helped build canoes, and provided other vital skills (Van Kirk, 1983).

### ***The growth of colonial market relations***

Despite being relied on heavily by British trappers, women primarily remained an “unofficial part of the labour force” (Van Kirk, 1983, p. 53). For example, despite the skills and production of foods stuffs, Van Kirk notes that Indian women in general “did not, for example, take over the official role of cook at the fur-trade posts as might be expected” (p. 59), although they did enjoy a certain amount of privilege from their close association with European fur traders. Thus, Van Kirk (1984) argues, “like most women, because their labor was largely unpaid, their contribution has been ignored” (p. 11). To further that argument using Karl Marx’s theory of primitive communism, Ron Bourgeault (1983) argues that the fur trade not only transformed Indian labour into that of a peasantry class but also the subjugation of Indian women helped to establish the fur trade as a capitalist industry. Indians traditionally trapped furs for sustenance use and exchanged furs and products between groups, but until the Europeans started trapping to send furs back to a European market, the production of commodities for exchange was not part of Indigenous economic structure. Indigenous peoples increasingly abandoned their traditional lifestyles and economies, quickly becoming reliant on the foreign tools and foodstuffs for their survival. Peoples also started to move out of their traditional hunting territories and so clashed and competed with other communities over resources. Through the development of the fur trade as a capitalist enterprise that served the foreign European markets, local Indigenous peoples acted as a kind of “peasantry” (Bourgeault, 1983) as their production of goods and services for their collective use was altered to cater to particular fur trading posts. Bourgeault notes that trade was at first conducted collectively, but with the introduction of the rifle in the barter process trade was conducted on an individual basis and traders would often demand to only trade with particular Indian men,<sup>71</sup> refusing to trade with a group. This contributed to the development of individualized trading and was associated with individual resource accumulation, which characterized the developing market system.

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<sup>71</sup> Instruction from Governor and Committee, London, 23 June 1702, HBCA, PAC, A6/3, f.99; the instructions were to trade with the leading (male) Indians (Cited in Bourgeault, 1983, Endnote 17, p. 76).

Bourgeault argues this resulted in Indian men becoming key in the production of fur commodities for market exchange. This further led to a dramatic shift in Indigenous women's status, as well as rearranging communal work behaviour. While using Marx's theory is useful in understanding how Indigenous and Métis women were specifically locked out of compensated labour exchange, it is important to acknowledge the limitations of using Marx. In his discussion of the merits and cautions in using Marxist theory, Glen Coulthard (2014) writes that in order for it to be useful as an analytic for colonialism Marx's focus on how capitalism involves the separation of workers from the means of production needs to be refocused from the individual worker, suggesting a "conceptual shift" taking instead "the subject position of the colonized vis-à-vis the effects of colonial dispossession" (p. 11). In this way, it is much easier to challenge the argument that private property on reserve land will emancipate First Nations and unlock the so-called dead capital. In other words, marginalization of Indigenous women in the market economy is critical to their subjugation under settler colonialism, and consequently dispossession from land is essential to any analysis. As Coulthard writes, "the history and experience of dispossession, not proletarianization, has been the dominant background structure shaping the character of the historical relationship between Indigenous peoples and the Canadian state" (p. 13). On this view, the dispossession of Indigenous women, not only from their traditional labour and how that should have fit in to the developing colonial capitalist market, but the dispossession from their lands, becomes the focal point. It then becomes clearer how women's dispossession from capitalist relations is a thin veil that is hiding the more critical goal of appropriation—Indigenous land.

Although unpaid, Indigenous women were uniquely positioned as relations officers during the fur trade. Not only were they able to work with the European trappers but also there were many intimate relations between the Europeans involved in the fur trade and Indigenous women. It was not uncommon for Indigenous groups to offer women to Europeans when they first met. To European men, the practice of polygamy and especially wife-lending, a traditional practice among many western clans (Van Kirk, 1983, p. 25), seemed savage. Prostitution, on the other hand, was much more understandable to the Europeans. Sexuality and sexual relations were much more fluid among Indigenous people, though, than the 17<sup>th</sup> century European concept. For example, as clan members were considered family members, Indigenous peoples married outside of their clan, which also functioned as a way to establish good relations between clans and other tribes. However, intimate relations were not necessarily long term or monogamous. Among the Huron, for example,

divorce was quite easy and either partner could terminate the union if necessary (Steckley, 2014; Trigger, 1976). The relatively relaxed sexual practices of Indigenous peoples were initially viewed as sexual promiscuity through the moral lens of the Europeans. In fact, there are many written records of European men's disdain and their belief that Indigenous men treated women poorly. Many British could not understand this cultural practice except in terms of English ideas of prostitution, although the lending of wives and daughters is theorized to have been how "many northern Indian groups customarily established friendship bonds with strangers not by means of impersonal diplomatic contracts and trappings such as the early London committee had proposed to use, but by lending or exchanging wives or daughters" (Brown, 1996, p. 60). Although historical records, written or otherwise, of an Indigenous woman's point of view of her situation are almost non-existent, recent analysis draws attention to agency in Indigenous women's sexual choices and agreements. For example, women could refuse to comply with going with another man (Van Kirk, 1983). This acknowledgement of "agency" infers a certain level of women's power in inter-group relationship building. Prostitution did occur, though marriage between European men and Indigenous women was quite common according to the "custom of the country." These "country marriages" (Brown, 1996; Van Kirk, 1983) resulted in cross-cultural unions producing a "distinctive, self-perpetuating community," the Métis (Van Kirk, 1983, p. 5) of Indian-French descent. Van Kirk (1983) postulates:

In reality the Indian woman may have enjoyed an easier existence at the fur-trade post, but she sacrificed considerable personal autonomy, being forced to adjust to the traders' patriarchal views on the ordering of home and family. In the final analysis, it is debatable whether the lot of an Indian woman in marrying a European was improved to the extent that the fur traders claimed. (p. 7)

Initially Indian wives were "the vogue" (Van Kirk, 1983, p. 5) as their wisdom, labour, and companionship were critical to success in the harsh conditions, not only in the environment but also in the lack of family relations for European men. Van Kirk argues that the sexual relationships in fur trade society were not casual and based in short-term prostitution, but rather, many relationships endured into long lasting commitments, "which gave rise to distinct family units" and were a "central aspect of the fur trader's progress across the country" (p. 4). The next

generation of mixed-race children signaled the changes in racial relations with a general tendency, especially among the trading company officers, to enculture the girl children in the finer ways of European femininity, and in the early 19<sup>th</sup> century when white women were finally allowed to come to the New World, the girls became a status symbol for Hudson's Bay Company officers. Although Métis girls "symbolized the coming of a settled, agrarian order. [T]his would be a world in which native women would have little role to play" (p. 5). And even these inter-marriages started to decline as more white women started to come in the early 19<sup>th</sup> century. For the first 100 years or so European women did not come to the continent. With the eventual arrival of European women there was a rise in racist sentiments. As Daiva Stasiulis and Radha Jhappan (1995) write, "In a familiar pattern within the British empire, the appearance of white women was coterminous with white settlement and brought both a sharp rise in racist sentiment and heightened class-consciousness within fur-trade society" (p. 102). During this era, marriage was key for English woman's social and economic position so the complexities of colonial gender relations, as they are tied to heteropatriarchal and racial capitalist relations, start to become clear. From their perspective, as needing and feeling entitled to be part of the burgeoning colonial settler state, English women would have to compete with Métis women for their "right" to marry European men in order to survive economically.

### **Colonial Legacies: Interpretations of and reactions to matrilineal Indigenous societies**

This next section takes a closer look at how matrilineal societies have been and continue to be interpreted. Despite evidence of some Indigenous societies as having more egalitarian relations as discussed above, interpretations from early Europeans and many Western anthropologists negatively portrayed the status, power and autonomy that matrilineal societal organization afforded women and, in doing so, this continues to reaffirm heteropatriarchal, colonial, gender norms.

#### ***Early Europeans and gendered dispossession***

The Europeans did not think too much of Indigenous societies and polities in general. Despite Lafitau's positive observations of the position of women among the Iroquois, the initial European male horror at Indigenous gender relations and lifestyles was frank and obvious in early contact records (Mann, 2006). The early explorers and Jesuits commonly described Indigenous women as

being “slaves and drudges” (Carter, 1996, pp. 51-52) who “work without comparison more than men” and were “real pack mules” (Davis, 2003, p. 137). Indigenous men, on the other hand, were portrayed as being idle and lazy (Stremlau, 2005, p. 273). Although there were some exceptions to these interpretations, historical journals were overwhelmingly similar in framing Indigenous societies as savage and primitive.

The irony of these accounts is telling in the colonial logic. Indigenous women were described as working much harder than men. As we have discussed in Chapter 3, the 17<sup>th</sup> century English logic of property ownership mandated exactly that: hard physical labour. Thus, according to the terms of colonial land entitlement, Indigenous women should have been prime candidates to build the settler nation through their agricultural skills and hard work, as for centuries they had been involved in cultivating the land and held valuable traditional knowledge. Their knowledge and skills were, in fact, beneficial to early European settlers in terms of how to utilize the unfamiliar landscape and survive the harsh unfamiliar weather. Women’s dispossession, therefore, required maneuvering on the part of the settlers to reframe women’s labour practices in a way that would justify reconceptualizing women’s working of the land into something that was not worthwhile while subsequently taking over Indigenous knowledge as their own.

Furthermore, Europeans persisted in this negative interpretation of Indigenous peoples, which contrasted with Euro-Americans’ ideal sexual morals and gender roles, as “proofs of savagism” among Indigenous peoples (Smits, 2007, p. 29). Versions of these enduring constructed narratives would be repeated for centuries and would be invoked to justify the dispossession and containment of Indigenous peoples. With very different religious sensibilities, cultural practices, and with goals of colonial expansion, the British actively set out to dismantle Indigenous social and political relations that were seen as uncivilized obstacles to their plans for extracting the bounty of this seemingly endless resource-rich New World of America. Fundamental to this narrative was a European assumption of how labour should be interpreted along gendered and racialized lines. As men’s labour in the European concept was tied to material resources in land, power and status were then thought to be naturally situated with men’s labour. This was also the case in England where women had limited access to property ownership. There were significant barriers to 17<sup>th</sup> and 18<sup>th</sup> century English women owning landed property,<sup>72</sup> nor were they allowed to participate

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<sup>72</sup> A guiding principle of property law in Europe and England in 19<sup>th</sup> century was *coverture*. It put all of the control of family assets legally in the hands of the male head of the household. England was more restrictive than the rest of

substantively in politics. At least among some Indigenous cultures, such as the Iroquois, for example, “women in their own society enjoyed more power and higher status than did white women of the day in their society” (Graymont, 1991, p. 100).

Through the advances of industrialization, certain upper classes of women in England were being forced into the private unpaid sphere of the household, and men were being constructed as the sole breadwinners and heads of households. Thus, women were becoming more and more dependent on an individual husband. These limitations and expectations were increasingly placed upon Indigenous women, despite their resistance. As we shall discuss in more detail in later chapters, Indigenous peoples were forced to accept the heteropatriarchal nuclear family structure through Christian teachings and later through legislation. The Europeans firmly believed they were more civilized in their beliefs and behaviours as compared to Indigenous peoples, but nonetheless, they also divided work/labour along gendered lines. However, gender division in European terms had a very different purpose and result, especially for Indigenous women.

Indigenous women’s involvement in political decision-making, especially in military matters, also did not fit into European conceptions of appropriate roles for women. The famous characterization of “petticoat government”<sup>73</sup> was a clear slight to the power and participation of Cherokee women in the political process (Allen, 1992). In fact, the Jesuits and other European men during early contact were quite intent on disparaging the power of the *gantowisas*, or elder Clan Mothers. Perhaps due to these pressures and ridicule by European men, in 1794, the power of the *gantowisas* was uncharacteristically and openly challenged by the Indian War chief *Hasanowanna*. When the *gantowisas* were opposed to fighting a war with the Americans, at the urging of the British military commanders, *Hasanowanna* broke tradition and urged the men to seize power from the women (Mann, 2000). The women resisted and eventually won the argument, and events later showed that the women Elders had been right in avoiding war at that time. However, the act of questioning their political decision-making seems to indicate an early effect of the power of Euro-patriarchal ideology and its seeping into the fabric of Indigenous societies. Still, a century later, in 1884, Lucien Carr characterized women’s veto power as “pure mockery of the man’s helplessness,” that women could stop their going to war, continuing, “the man ought to

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Europe. Thus, a married woman could not own property independently of her husband unless individual arrangements were made. All assets a woman owned, pre- or during the marriage became her husband’s legal property that he was fully in control of to manage or sell (Zaher, 2002).

<sup>73</sup> Made popular by James Adair in 1755 in his *History of the American Indians*.

have been master of his own acts" (quoted in Mann, 2000, p. 180-181). The European hyper-masculinized narratives and criticisms of Indigenous women's status and power, resulting in Indigenous men's supposed emasculation, were relentless and damaging. As M. A. Jaimes Guerrero (2003) writes, "what sexist Western Europeans mistook as the subjugation of Native men to their women was actually the gender role dynamics of an egalitarian society that valued both women and men" (p. 68). The military support of Indigenous Nations was critical to the British during the War of 1812. Thus, the British considered the women to be a threat as they may have unknown motivations for stopping war.

### ***Western anthropologists' interpretations***

This section looks at early anthropologists' views on Indigenous societies. It is important to understand the normative impetus behind the usurping of women's power, since this bolstered the moralistic initiatives that undid women's power and specifically their access to land ownership. Western anthropologists also have not been particularly amicable to the idea of matrilineality, matrifocality or women's elevated status in Indigenous societies. Eleanor Leacock et al. (1978) assert that anthropologists and social scientists have, for the most part, undermined women's autonomy through patriarchal theories and interpretations of women's historical position in societies through making Westernized assumptions about the roles of women. Leacock (1977) cites numerous anthropologists who attested to the natural state of women's subordination including: E. E. Evans-Pritchard (1965) who wrote "it is a plain matter of fact" that "men are always in the ascendancy" (quoted in Leacock, 1977, p. 10); E. R. Leach (1968) who wrote "history and ethnology combine to show that male domination has always been the norm in human affairs" (quoted in Leacock, 1977, p. 10); and Claude Levi-Strauss (1969) who enthusiastically promoted the idea that human society has always been male dominated and that men valued women only for sex and other services and that matrifocal organization was basically "not viable" (Leacock, 1977, p. 12). These and other influential writers attempted to erase any evidence or inquiry into any other social organization besides the patriarchal. Men were to be seen as the natural and ultimate heads of family and state, even in the face of evolving women's rights in the 20<sup>th</sup> century, and most likely because of it.

The politicization of matrilineality by political theorists Karl Marx and Frederick Engels resulted in a further denial or retreat by many anthropologists (Knight, 2008). Lewis Morgan's

*Systems of Consanguinity and Affinity of the Human Family* (1871) promoted the idea that matrilineal clan descent preceded patrilineal. Morgan theorized “the rise to alienable property disempowered women by triggering a switch to patrilocal residence and -patrilineal descent” (Knight, 2008, p. 68). In the *Origin of the Family, Private Property and the State* (1902/1972), Engels adopted Morgan’s findings as they supported Engels’ and Marx’s political ideas. Now, anthropologists were in real trouble. Here was a theory that opened the door to the idea that patrilineality was not the only organizational system and that matrilineality might have been even better for women. Marx and Engels politicized the idea of matrilineality, proposing the idea of primitive communism (Marx, 1867/2010; Engels 1902/1972) in which the social relations of the traditional hunters and gatherers were based in egalitarianism. Although Marx and Engels did not deny matrilineal social organizations, they would not incorporate it into their analysis of capitalist relations as an alternative outcome. Unfortunately, they saw this as a primitive stage of development that would eventually lead to patriarchy and a more modern economy of capitalist exchange. Knight (2008) writes, “A widespread consensus developed on both sides of the Atlantic that regardless of the intellectual merit of Morgan’s ideas, ‘group motherhood’ was in any event too dangerous an idea to be allowed” (p. 70). This rejection in anthropology is reminiscent of the early negative accounts by European explorers, which we will return to later in this chapter. Thus, matrifocal social organizations are typically seen as “troublesome departures” (Narayan, n.d.) from the male head of the household norm, viewed as temporary arrangements that only occur in the absence of men, for example, when they are off hunting or fighting wars or engaging in business afar. This can be seen in many Western countries, for instance, in women’s temporary participation in positions usually reserved for men during war eras. Matrifocality is also questionably believed to be a temporary stage in societal development, enroute to modern patrilineal/patrifocal social systems (Narayan, n.d., para 12).

Bronislaw Malinowski (Montagu, 1956) was also instrumental in making a great effort to eradicate the possibility of anything but women’s subordination. He adamantly denounced group motherhood saying, “group maternity does not exist...nor yet can the maternal clan be a domestic institution” (p. 50), influencing generations of anthropological thinking (Knight, 2008). Malinowski’s adamant rejection of the idea of Lewis Morgan’s (1871) findings that the Iroquois, whom Morgan lived among for quite some time, had a concept of multiple mothers inspired Malinowski to state in a radio broadcast (1956[1931]): “I believe that the most disruptive element

in the modern revolutionary tendencies is the idea that parenthood can be made collective...The question, therefore, as to whether group motherhood is an institution which ever existed, whether it is an arrangement which is compatible with human nature and social order, is of considerable practical interest" (quoted in Knight, 2008, p. 70). Malinowski insisted that “‘real’ kinship must always be ‘individual’” and that any other accounts were fiction (p. 63).

The rise of patriarchy has been widely argued, especially by Marxists and feminists (see Hartmann, 1976), to be connected to economic developments including more intensive agriculture and capitalism, or at least that these developments happened in tandem. An economic analysis of gender discrimination looks to factors of patriarchy to explain the economic power and participation discrepancies between women and men. For Marx (1867/2010) and Engels (Engels, 1902/1972), the declension of women’s status began with certain “advances in technology, the production of goods for exchange, and the ownership of private property” (cited in Wood & Eagly, 2002, p. 714). Women were subsequently relegated to the unfunded private sphere; meanwhile men dominated the public sphere of commodity exchange and paid employment. Engels (1902/1972) called women’s unpaid housework the “domestic slavery of the wife” (p. 137) and argued that women’s economic status is limited by their lack of participation in the marketplace. This public/private distinction has been a foundational understanding of women’s subjugation in much of liberal feminist analysis.

For two centuries, the majority of Europeans in the Americas were men: European women only came much later as wives. Thus, there was ample time to establish patriarchal values based in gendered and racial hierarchies of dispossession. There is enough verifiable evidence that some Indigenous women were in positions of political power and the societal arrangements were such that women held positions of decision-making. What is pertinent to the discussion here is that regardless of the extent to which individual Indigenous cultures were egalitarian, colonial governments created rules that imposed certain hierarchical gendered relations modeled on European ones. The colonizers claimed these changes were necessary for the civilizing of Indigenous peoples—a clear example of benevolent racism—but the resulting dispossession of men and women that undermined and devalued their traditional roles, status, and relationship to land, suggests this was not civilizing; it was the beginning of the neocolonial process that resulted in land dispossession. I am arguing in this thesis that privatization, such as that promoted in the FNPOA, with its roots in neoliberalism, has the potential to be a continuation of the neocolonial

process of women's land dispossession, especially if social protection is not in place to ameliorate the unequal impact neoliberalism has had on women generally.

### ***More positive accounts***

Despite the past contention and the more recent lack of interest in the idea and importance of matrilineal and matrifocal kinship systems (Knight, 2008), more recently anthropologists are challenging existing sexist interpretations of social organization. For example, for the most part it was believed that hunting societies were male-centred and Indigenous men were thought to be the "undisputed heads of their households" (McMillan, 1988, p. 146). However, in a cross-cultural study, Frank Marlowe (2004) found that "the greater the dependence on gathering, hunting, and fishing, the less likely that residence is virilocal"<sup>74</sup> (p. 280), "contrary to the orthodox view" (p. 283). Furthermore, in situations where it is uncertain whether married couples followed matrilocal residence or patrilocal residence, evidence in recent ethnographic research suggests it is the mother-daughter connections that are positively correlated (Knight, 2008). This suggests that there was a recognizable human-societal benefit in daughters living with their mothers. In living arrangements where women remain with their mothers they are more supported by the strong female clan network. Also, matrifocality is believed to create more incentives for the males to contribute to the community because they need to prove their worth to their kin-in-law (Marlowe 2004). Knight (2008) concludes, "Females, then, obtain the best deal when they remain following marriage with close kin" (p. 80). The example of Kerala, India is also informative of the long lasting and evolving benefits of matrilineal social organization. From 300 BCE to 400CE, the Chera Dynasty of the Sangam Age followed a matrilineal social organization. Even now, women in the State of Kerala enjoy higher status in health, education, economic and social power and general well-being (Eckermann, 2017).

Anthropologists Stephen Beckerman and Paul Valentine (2002) also put forward evidence to challenge beliefs in the natural human evolution to heterosexual monogamy proposed by some writers.<sup>75</sup> They write that in small-scale egalitarian societies,

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<sup>74</sup> Virilocal means patrilocal-locating near the husband's father's group; versus matrilocal.

<sup>75</sup> See for example: Boyd & Silk (1997/2015); Evolutionary psychologist Steven Pinker (1997).

women's reproductive interests are best served if mate choice is a non-binding, female decision; if there is a network of multiple females to aid or substitute for a woman in mothering responsibilities; if male support for a woman and her children comes from multiple men; and if a woman is shielded from the effects of male sexual jealousy. Male reproductive interests, contrariwise, are best served by male control over female sexual behavior, promoting paternity certainty and elevated reproductive success for the more powerful males...this state of affairs is maintained by disallowing women reliable support networks, or male support other than that of the husband and his primary male consanguines. (p. 11)

This interpretation is instrumental in understanding the implications of enforcing the changes to patrilineal descent as the colonists eventually did in Canada.<sup>76</sup> The attempted and successful fragmenting of Indigenous kinship relationships, especially female kinship, has had uniquely devastating effects on Indigenous women. As we discussed briefly in Chapter 2, legislative changes to lines of property inheritance when shifted (back) to women, expose far-reaching implications on cultures, gender relations, and structures of power.

Indigenous oral records and anthropological evidence confirm that most work in most Indigenous societies in North America was primarily segregated along gendered lines. Oral testimonies, though, clarify that men and women sometimes engaged in cross-gender work depending on community needs and sometimes the wishes of the individual (K. Anderson, 2000, p. 59). Questions arise as to the significance of this gender division, and how it affected women's status. Anthropological theories as to the origins of sex differences in roles in non-industrial societies are largely based in social constructionism,<sup>77</sup> wherein gender is constructed within cultures from aspects related to local history and environment, and also based in evolutionary psychology, wherein different reproductive influences cause psychological dispositions. In attempting to explain the cross-cultural pattern of male and female behaviour, Wendy Wood and Alice Eagly (2002) develop a biosocial theory of the origins of sex differences combining elements of both theoretical approaches. Wood and Eagly emphasize the "physical sex differences, in interaction with social and ecological conditions" as origins of why roles were divided based on

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<sup>76</sup> In Canada, patrilineal descent was eventually legislated in the Indian Act although it was not in the US.

<sup>77</sup> Margaret Mead (1963) was among the first to promote the idea in *Sex and temperament in three primitive societies*. New York: Morrow.

gender (p. 702). On their view, roles were based primarily on efficiency and practicality. This efficiency occurs because people were “allied in complementary relationships” (Wood & Eagly, 2002, p. 702) rather than in relationships of hierarchies of power and status.

Through this discussion, it is clear matrilineal social organization, in which women owned and managed land and were instrumental in political decision-making, is conceptualized by some as a primitive social organization, a blip on the road to development and “wholly unprecedented in human history” (Leacock, 1977, p. 10). The obscuring of matrilineal social organization serves to lessen awareness of the ongoing political impact of colonial dispossession of women. The decline in women’s status, when acknowledged, is then relegated to the distant past that is not deemed relevant to present socio-economic relations. Thus, even if matrilineal social relations are recognized to some extent, to consider women’s oppression as inevitable “affords an important ideological buttress for those in power” (p.11). In this way, the progression of development as practiced by European settlers becomes normalized and seemingly inevitable. It is no wonder then that the promotion of Western liberal style private property policy in, for example, the FNPOA, has virtually erased women from their version of history and the concept of private property becomes gender blind. The erasure and marginalization of Indigenous women has enabled the formation of the capitalist relations of the settler state that is dependent on the dispossession of Indigenous peoples as a whole, and women specifically. As Leacock (1977) writes:

The undermining of women's autonomy and the privatization of their social and economic roles have consistently been linked with the breaking up of the egalitarian and collective social forms that are anathema to capitalist exploitation. Little wonder, then, that theories of development in the imperialist context ignore the precedent of egalitarian society, where women, acting as women in their own interests, were at the same time acting in the interests of the group. The image put forth to be emulated is rather that of the individually prominent woman, whose very success is measured by her isolation from the vast majority of her sex, and by that token from the working class. (p. 15)

Leacock’s reference in the last sentence of the quote above to women as individually self-interested and “being measured by her isolation” seems to foretell some of the effects of neoliberal capitalism on women that will be discussed in the later chapters of this thesis.

Patriarchal relations are not quite as clear and predictable as they once were thought to be. The division of labour between women and men, and the degree of patriarchal status, power, and resources held by men over women are now theorized to be independent factors (Leacock et al., 1978). More recently, in anthropological studies, patriarchy has been found to not be a universal feature of societies as it was once thought to be.<sup>78</sup> This view is more in line with the belief that gender relations have the potential to be complementary depending on the power dynamics and social structure. Examining patriarchy in egalitarian societies, Martin King Whyte (1978) identified 10 independent factors in his examination of 52 indicators of sex-linked status in 93 nonindustrial societies using the Standard Cross-Cultural Sample:

- (a) property control by women;
- (b) power of women in kinship contexts;
- (c) value placed on the lives of women (e.g., sex of child preference);
- (d) value placed on the labour of women;
- (e) domestic authority of women;
- (f) ritualized female solidarity (e.g., female initiation ceremonies);
- (g) absence of control over women's marital and sexual lives;
- (h) absence of ritualized fear of women;
- (i) male–female joint participation in warfare, work, community decision-making;
- (j) women's indirect influence on decision-makers

(Whyte, 1978 as cited in Wood & Eagly, 2002, p. 712)

Unsurprisingly, Whyte found a range of egalitarianism in the societies he studied, depending on how many factors each society followed, but importantly, although most egalitarian societies showed equality or superiority of women on some of the above ten indicators of status, cross-culturally, Whyte found that power tilts toward men, though how power is defined may underlie this (Whyte, 1978; Wood & Eagly, 2002). Whyte's findings are informative for our discussion. Most of the factors on the list have been evidenced in North American matrilineal societies as previously discussed. Indigenous women continue to draw on similar categories to explain the

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<sup>78</sup> Ortner 1974; Ortner & Whitehead, 1981 originally claimed that in every culture women are to some degree inferior to men (Eagly & Wood, 2002, 712).

relatively elevated status of women in traditional Indigenous societies. By these studies, it seems that women's kinship and the interdependence of peoples in general, has been a source of relative power for women. Also, the inclusion of property ownership in the above list is of crucial importance. As we have discussed in the previous sections, Indigenous women had more access to land before it became a commodity in the form of private property as something to own by settlers.

### ***Feminist interpretations***

Some feminists have interpreted the concept and historical reality of matrilineal and matriarchal social organizations. Much of Western-liberal and radical feminist strategy, at least in what is termed second wave feminism, was primarily related to material ideals targeting individual gendered power struggles in employment, the home and family, sexuality and reproductive rights, with the goal of elevating women to equal status of men (seminal works include de Beauvoir, 2010/1949; Friedan, 1963/2013; Greer, 1970/2006; Millett, 1970/2016). Although gender equality is still a primary goal of many feminisms, the neoliberal or market turn has "contributed to the construction of equality as cumbrous, outdated, and an impost on business" (Thornton, 2015, p. 71; see, for example, Federici, 2004; Fraser, 2013; Jackson, 2001; Mies, 2014). The shift away from social welfare politics to a focus on the individual can be seen to have had an effect on how social powers of women are being interpreted and pursued. The egalitarian status of Indigenous women in matrilineal societal organization has been argued to have been considered a threat to colonial authority. Women's complementary status and lateral power relations with men were largely due to female kinship networks.

However, among some non-Indigenous feminisms the concept of matriarchy has also been interpreted as a hierarchical power structure with women holding power—a mirror image of patriarchy where power is held by male domination. This narrow interpretation has led to a dismissal of historical women-centered power and focus and has obfuscated reclamation. For example, feminist Cynthia Eller (2000) promotes the narrative that all societies have been patriarchal and women have been subjugated. The narrow definition of the concept of matriarchy as well as its conflation with matrilineality has led to a strand of feminist discounting of the relevance of matrilineal social organizational practices as a potential challenge to patriarchal power relations. In a detailed critique of Eller's book, feminist historian Max Dashú (2005) points

out that “more needs to be learned about the history of women’s power, oppression and resistance...Some of the most exciting contributions [of scholarship], histories never published before, are coming from Indigenous perspectives and from the global South. The real task of synthesizing and analyzing information from archaeology, oral history, linguistics, and written records is just beginning” (p. 214).

### ***Indigenous teachings: Complementarity***

Indigenous oral records have long confirmed women’s important work and status in some of the matrilineal Indigenous societies in North America. Work was segregated along gendered lines, although oral testimonies clarify that men and women sometimes engaged in cross-gender work (K. Anderson 2000, p. 59). The significance of the gender division of work in traditional cultures is theorized by Indigenous writers and scholars as being complementary (Sneider, 2015; Sousa, 1999; Monture-Angus, 1995) with women and men having their own mutually important roles to play in the survival of the community. Without the skills and work of both genders the community would perish, thus both genders were mutually dependent on one another. In writing about complementary gender roles in Mixtec and Zapotec Mesoamerican societies, Lisa Mary Sousa (1999) describes the concept as “recogniz[ing] the contribution of both male and female as necessary to create the whole and, thus, accorded both men and women important relationships and responsibilities in the household and the community” (pp. 200-201). Sousa differentiates this from EuroWestern practices of a gendered division of labour, which involved men working in the public sphere and women “relegated to the home” (p. 201). In the theorization of complementarity, though, the home is not a place of confinement. This was illustrated in the discussion of traditional matrilineal societies earlier in this chapter. Indigenous feminists further argue that the role of the nurturing mother is often valorized beyond the bounds of reproduction (St. Denis, 2007), again reiterating the extended importance of women’s roles in the form of mothering.

From a liberal feminist standpoint the theory of complementarity stands on shaky ground (Glick & Fiske, 2001). Traditional and stereotypical gendered roles have been critiqued as being based on the low societal value and treatment of housewives and mothers by the patriarchal capitalist system, which relegates women to the private sphere and encourages men into the public sphere. Strategies pursuing gender equality aim for parity in the economy; however, because housework and mothering does not earn money (unless it is done in someone else’s home) it

continues to be challenged in this neoliberal age. Christian fundamentalist movements use the concept of gender complementarity differently, as a religious explanation of egalitarian relations based on “God-given” gender identities (Piper, 1991, p. 33 cited in Scholz, 2005, p. 87), with the male as the head of the household who holds power in decision-making over the family. This idea of complementary gender relations is often used to repudiate feminist ideals. Thus, how can we understand power relations in egalitarian societies in a way that is useful for present concepts of equality?

Conceptual differences in complementarity are based in ideas of relationality. If we draw from the discussion on ontological differences in Chapter 3, it is easier to understand the validity of an Indigenous conception of complementarity. In Indigenous ontology, all things human and non-human are considered dependent and interdependent on one another, rather than in a more Christian idea of a gender-based hierarchical power relations.

## Conclusion

This chapter argued that Indigenous women were dispossessed from their societal roles and their agricultural practices as a necessary constituent in the development of the gendered and racialized capitalist state structure that is premised on the patriarchal accumulation of land through private property. The chapter argued that matrilineality was critical to Indigenous women’s power and status. It was not a primitive, temporary social organization, but rather its existence was a direct challenge to the burgeoning heteropatriarchal colonial settler state formation.

How to interpret matrilineal social organization has been confused and is confusing. Fear and derision of women’s power through misleadingly binary terms such as matriarchy, in which women’s emancipation has been interpreted to mean the mirror image of the patriarchal power structure, can be seen in the negative reactions to liberal feminist ideals of equality, for example, in emotive and sensational scare tactics<sup>79</sup> against the women’s movement’s push for formal

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<sup>79</sup> For example, American constitutional lawyer and conservative political activist Phyllis Schlafly led the campaign against the ratification of the Equal Rights Amendment to the U.S. Constitution in the Stop-ERA campaign starting in 1972. She warned that if ratified, the ERA would mean that all laws would become gender-neutral and result in no benefits for women. She famously used the example that the ERA would mean women being drafted into war like men (Solomon, 1979). The Vietnam war was in progress at the time 1965-1973, thus making the threat much more visceral.

equality. Understanding and taking seriously notions of egalitarian relations in Indigenous communities tied to matrilineal social organization has important implications for our present understandings of power relations, as well as how private property is still a gendered process.

To be sure, not all matrilineal clans were organized in exactly the same way, and some experienced higher levels of egalitarian relations than others.<sup>80</sup> Thus, it is impossible to generalize that all pre-contact Indigenous cultures were egalitarian to the same degree, but what we do know for sure is, as Shari Huhndorf and Cheryl Suzack (2010) point out, “although Indigenous women do not share a single culture, they do have a common colonial history. The imposition of patriarchy has transformed Indigenous societies by diminishing Indigenous women’s power, status and material circumstances” (p. 3). The next chapter returns to a discussion of the colonial legislation targeting First Nations women. The chapter explores how reserves can be thought of as carceral spaces in their boundaries and the confinement wielded in the *Indian Act* that resulted in dispossession, violence, and dependency.

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<sup>80</sup> On the Pacific Northwest coast, many of the Gitksan, Haida, and Tlingit Nations also passed all property through the female lineage (McMillan, 1988). Even though the Haida and the Tlingit followed matrilineality, women had a subordinate status in marriage and limited access to formal political power.

## CHAPTER 5: The carceral construction of gendered dispossession

### Introduction

Building on the analysis in Chapter 4, this chapter continues to challenge and critique the revisionist history in contemporary rationalizations of privatization of Indigenous lands, which not only obscures the import of Indigenous women's traditional social, economic, and political status, as well as the significance of the legislative and colonial practices that have created a legacy of trauma and dispossession for Indigenous peoples, but also that presents private property as a depoliticized, emancipatory solution. The chapter examines colonial legislation in the *Indian Act* focusing on how reserve land has been and continues to be a source of both confinement and exclusion for Indigenous women, challenging the depoliticized promotion of reserve lands as dead capital to be unlocked by the adoption of private property and the free market. Based in Lockean rationalizations of privatization of Indigenous lands through settler appropriation and possessive individual accumulation, contemporary hyperincarceration, violence, and poverty are foreshadowed in early mechanisms of confinement and elimination of Indigenous peoples. Indeed, the threat that Indigenous women specifically posed to the successful appropriation of Indigenous lands or the elimination of Indigenous peoples was not lost on colonial authorities. The chapter argues that the policies in the *Indian Act* have not only locked-in persistent, deep-seated gendered discrimination and marginalization of Indigenous women based in European notions of heteropatriarchal gender relations, but these policies and tactics should be characterized and analyzed as carceral. The chapter further argues that the legacy of dispossession and dependency continues to underpin the present-day barriers, discriminations, and violence that Indigenous women and their Nations face, and in turn continues to affect women's access and relationship to their lands.

The chapter draws from the important scholarship in contemporary critical prison analysis and carceral geography theory to analyze how colonially constructed spaces, such as the reserve, should be considered carceral. As historic and contemporary carceral mechanisms function both to lock in and lock out of, for example, homeland, culture, and status, leaving people without security and vulnerable to the violence of colonial occupation and assimilation, an analysis of

carcerality in the settler context needs to be based in its colonial history (Nichols, 2014; Veracini, 2010; Wolfe, 2006). Strategies used in the *Indian Act*, including legislating Indigenous identity, forced assimilation, and cultural destruction, are argued to be the foundation of contemporary mechanisms of confinement and dispossession. The first section of this chapter describes carceral geography theory and how the reserve can be considered a carceral space. The next section discusses colonial legislation that was used to discipline and confine Indigenous women through: gendered definitions of identity; gendered enfranchisement and property access; the reordering of gendered socio-sexual relations; and gendered mobility and economic controls through the Pass and Permit system. The last section explores how other types of carceral spaces and mechanisms are linked to contemporary carceral confinements of Indigenous women and their communities.

### **Carcerality hidden in plain “site”**

Contemporary critical prison analysis has been highly influenced by the work of scholars including: political activist and prison abolitionist Angela Davis (2003) who challenges us to question the efficacy of the prison system and the over-incarceration of racialized people from Black, Latino, and Native American communities; Ruth Wilson Gilmore (2007) who makes links from prison expansion to the political economy in California; and Löic Wacquant (2009) who links “‘the invisible hand’ of the unskilled labor market” to the “‘iron fist’ of the penal state” (p. 6), highlighting the penalization of poverty through public policy. These critical theories are important in understanding carceral expansion not only as a social problem of racial and gender discrimination but also in political foundations in which “surplus state capacity...emerge[s] over time as a result of the difference between what states can do *technically* and what they do *politically*” (Gilmore, 2007, p.113). In other words, it is much easier politically and more fruitful economically to build prisons than to reduce the social effects of poverty. Thus, governance policies utilizing hyperincarceration help to uphold and further the white supremacist status quo and appease hard-working citizen’s racist fears in insecurity, as well as in financial theft of *giveaway* social welfare policies. As Davis (1997) writes, “Crime is...one of the masquerades behind which ‘race,’ with all menacing ideological complexity, mobilizes old public fears and creates new ones” (p. 266). In the settler state context, high incarceration rates of Indigenous women and men are fundamentally based in the state response to claims of Indigenous sovereignty and territory, and in the inherent challenges to state legitimacy (Nichols, 2014). To avoid understanding

contemporary incarceration as a “*dehistoricized* tool of state power” and to ensure that the “linkages between carcerality, state formation and territorialized sovereignty” are analyzed, interrogating “the political function of the carceral system as a whole beyond that of racialized bodies within” (Nichols, 2014, p. 444) is necessary. As Luana Ross (2016) writes, “Incarceration, no matter the form, was a strategy of settler colonialism” (p. 4).

In carceral geography, carcerality is conceptualized and theorized beyond the studies of the physical prison. Carceral geography is continuing to broaden the concept of spaces of carcerality as not only bounded spaces but also emphasizes the connections *between* carceral spaces (Allspach, 2010). Gill et al. (2018) extend the epistemology of carceral spaces to “give priority to the connections between, around, within and beyond carceral institutions” (p. 184). For example, these authors identify the movement of peoples as being a characteristic of carceral space. Forcibly moving people from their support networks and threatening them with relocation is a common tactic to destabilize and control people. Gill et al. write that this “spatial churning” of people from place to place is an important tactic in establishing “symbolic power of carceral spaces” (p. 187). In attempting to more precisely define or conceptualize the carceral, Dominique Moran, Jennifer Turner, and Anna Schliehe (2017a) consider three conditions necessary for carcerality: detriment, intention and spaciality. Very simply explained: detriment implies the “lived experience of harm, as perceived by those suffering it” (p. 31). Carcerality, on their view, also includes the intention to confine; and involves some kind of space, and this space does not necessarily present as a usual space of confinement, but can be more innocuous such as a home, a school, or private property. They write, “Carceral spatiality, however manifest, seems characterised by a technology of confinement; (intentionally) keeping-in, (detrimentally) containing, those ‘within’. ...carceral spatiality refers to diverse (im)material techniques and technologies (which deliver intent), and spatial relationships to them (through which detriment is experienced, contested and resisted). Together these enable the *achievement* of carcerality” (p. 35). Although the reserve acted as a carceral space for the colonial authorities, it also was an important site of community and support, and grounding to traditional ways and lifestyles, especially if the reserve was located on traditional territory. Thus, the use of the reserve as a carceral space by the colonial authorities exacted a powerful colonial control mechanism.

### ***The reserve as a carceral space***

The reserve is an important space to understand. Although reserves are a fraction of First Nations traditional territories, and sometimes situated (by colonial forces) in non-traditional places, for Indigenous peoples reserves are places where traditional governance systems continue to exist and evolve, cultures are practiced, resistance to the “erosion that colonization demands” happens, and where Indigenous people have “a place to go back to” (Vowel, 2016, p. 265). In these ways, reserves operate as important spaces of social, cultural, and spiritual support (Goeman, 2013). Reserves are homelands, but they are also spaces constructed by colonial imaginings for colonial purposes, “remnants of homelands ‘loaned back’ to Aboriginal people as rock-bottom payment for their ancestors having signed treaties” (Campbell, 2007, p. 221).

For the colonial government and non-Indigenous population of Canada, the tangible and symbolic significance of the reserve differ from that of Indigenous peoples. As Adam Barker (2016) writes,

While Indigenous peoples have repeatedly articulated reserve spaces as homelands and as signifiers of the much larger territories stolen by the settler states around them, on the other side of the coin, settler people clearly think of reserves as carceral: places to constrain and store indigeneity and Indigenous peoples until they are inevitably ‘corrected’ by civilisation. (para. 5)

This section will examine the contested space of the reserve and many of the policies that helped support that space as a place of colonial control and which, in some cases, continues to do so through the legacy of dispossession or through present policy. Although the setup of Indian reserves continues to be rationalized by colonial authorities as spaces of protection against early marauding white settlers who would steal Indigenous lands, other scholars have identified the reasons as administrative, economic, and political (Deloria, 2004; Tobias, 1983). Cole Harris (2011) identifies the reserve as a distinctly carceral space bounded by boarders imposed by the colonial administration, the goals being to further the settler economic development and set aside but a “tiny fraction” of land for Indian peoples (p. xviii).

The reserves were an effective way to control the movement of Indigenous peoples through defining where, who, and how they had a right to be and at the same time to further the goal of

land appropriation. Indigenous peoples were thought of as little more than primitive peoples who had become wards of the Imperial Crown and were deemed to be in need of protection and guidance. This narrative is an important one in making the spaces that are not recognized as formal carceral spaces such as prisons invisible. The spaces can then operate to confine and constrict in ways that go undetected. Residential schools were portrayed to be of benefit to Indian communities in helping them to become civilized and breaking them from their primitive ways. However, these places were utilized in ways that furthered the “genocidal carcerality” in terms of how they were used in the “physical, biological, and cultural destruction of group life” (Woolford & Gacek, 2016, p. 400).

Woolford and Gacek (2016) employ the term “genocidal carcerality” to examine how the carceral space of residential schools was used in the “physical, biological, and cultural destruction of group life” (p. 401) for Indigenous peoples. They examine one school as an example and discuss how the forced removal of children and the ways in which their identities were denigrated and how they were “compelled …toward a Europeanised future” (p. 413) was evidence of genocidal carcerality. In examining the general characteristics of carceral spaces, they argue “the reserve, as we know it in Canada, shares qualities with both forced removal and the wasteland, as it requires an Indigenous population to remain sedentary on a portion of their territory” (p. 406). The wasteland refers to the genocidal tactic of segregating or cutting of a target group into a “space that cannot sustain life” thereby becoming a space of “famine and unregulated murder of members of the despised group” (p. 406). Locke also understood that as “Land that is wholly left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, wast; and we shall find the benefit of it amount to little more than nothing” (TT§42, p.297). This mechanism of carcerality can also be understood as a non-physical segregation or a threat of segregation. In understanding the reserve as a carceral space, the colonial mechanisms used to further enclose the reserve were centred on the concept of Indian status, which is the government system used to define First Nations who are legally under the federal jurisdiction of the *Indian Act*. This next section explores the concept of Indian status and how it was used to specifically control Indigenous women and how it contributed to both the physical and non-physical carceral nature of reserve land.

## Construction and control of First Nations identity

### *The power to define: Who is Indian?*

In the government definitions of who was to be considered a legal Indian and able to receive government annuities and reside with their families and communities, Indigenous women were targets for exclusion and confinement. In the mid 19<sup>th</sup> century, in part due to a growing occurrence of intermarriage between Indigenous and non-Indigenous couples living on reserve land in Lower Canada, the government deemed it administratively necessary to legislate who was legally considered to be an Indian (Tobias, 1983, FN 3, p. 53). Under treaty obligations the government was responsible to provide care and protection to Indigenous peoples, which also meant financial obligations. It was in the government's interest to manage and limit the number of Indigenous people. Thus, for the first time, legislation in Lower Canada defined who was an Indian. The 1850 *Act for the Better Protection of the Lands and Property of the Indians in Lower Canada* included a set of criteria for an Indigenous person to be considered a legal Indian (Cannon, 2006). This description was a forerunner to the concept of Indian status:

First.—All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.

Secondly.—All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.

Thirdly.—All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such: And

Fourthly.—All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their Descendants.

(“*An Act for the Better Protection of the Lands*” 1850, 13-14 Vicotoriæ, CAP. 42-43:1248).

This early legal definition was very broad and included basically all persons of Indian ancestry regardless of gender, as well as anyone who married an Indian. The definition was quickly amended in 1851 to clarify that “All women now or hereafter to be lawfully married to any of the persons included in the several classes heretofore designated the children, issue of such marriages

and their descendants” (“An Act to repeal” as quoted in Masiewicz, 2016, p. 213). This revised definition clarified that non-Indian men who married Indian women were excluded from the definition but non-Indian women who married Indian men were included as well as their descendants. This definition was utilized until the *Indian Act* of 1876 when the clause “Any woman who is lawfully married to such persons” was added. This government-imposed definition settled on a way to lock Indigenous women out of their identity and in some cases their communities. This 1851 definition originating in Lower Canada became national policy (RCAP, 1996a, p. 256). J.R. Miller (2000) points out, “the civil government, an agency beyond the control of Indians, a body in which Indians were not even eligible to have representation, arrogated to itself the authority to define who was and who was not, an Indian” (p. 138). This changed everything. Now it was the government, through Indian agents, that would determine who was eligible to be an Indian. Before that each First Nations had defined themselves. Defining who was an Indian enabled the government to increase its control over Indigenous peoples greatly (Tobias, 1983, p. 42). Now it was possible for the government to decide not only who was to be a beneficiary of government benefits but also who was able to maintain social ties with their traditional communities. Starting in 1851 until about 1951, Indian agents, on behalf of the colonial government, kept records of registered or status Indians and bands. In this way, the government could control much more easily who would be entitled to benefits from it as per treaty agreements.

The implementation of the *Gradual Civilization Act of 1857*<sup>81</sup> (Gradual Civilization Act [GCA], 1857), one of the final acts of the British imperial administration, enabled the colonial project to dismantle legal distinctions between Indian people and non-Indian peoples in certain circumstances. It also inscribed gendered ways of inheritance and tied Indian women’s legal rights firmly to a male relative, making it clear that individual male Indians were being targeted for enfranchisement, rather than the collective or entire community. Tobias (1983) argues that the preamble of the *Gradual Civilization Act* laid out “the paradox that was to become and remains a characteristic of Canada’s Indian policy” (p. 42):

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<sup>81</sup> The full name of the act is: An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians; however, it is common convention to refer to this as the Gradual Civilization Act in literature.

Whereas it is desirable to encourage the progress of Civilization along the Indian Tribes in this province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such an encouragement and to have deserved it. (preamble of GCA 1857, p. 84)

On the one hand, colonial policy shifted to assimilate, not educate, Indigenous peoples in European ways. However, laying out a detailed and decisive definition of Indian status meant that Indians would not be given all the rights and privileges that Canadian subjects were entitled to unless they could meet certain criteria that was linked with the colonial understanding of being civilized. In this way, the policy clearly gendered citizenship and established the racial parameters of what it was to be a citizen—white European male. The preamble phrase “Individual Members of the said Tribes as shall be found to desire such an encouragement and to have deserved it” is noteworthy as it is clear the policies were directed at creating and rewarding individuals rather than collectives. Also, the reference to “desire such an encouragement” in the preamble above is reminiscent of the Lockean criteria for becoming civilized—or at least showing desire to own property—indicating rationality, which was a requirement for white European men. Indigenous women, on the other hand, were not envisioned by the colonial administration as the target of enfranchisement, although would come to be seen as the key to its success.

### ***Enfranchisement***

Enfranchisement was a gendered policy of confinement and was a form of control, especially for women. Indian males who were over the age of 21 and could read and write in English or French, who were of good character, and free from debt, were required to enfranchise (GCA, 1857, sec. III). Enfranchisement for Indian people meant that they would no longer be considered to be a registered or status Indian but would become a British subject. A man’s wife and children, not having full recognition of independent personhood, would automatically become enfranchised under him. Tobias (1983) doubts that most EuroCanadians at that time would have been able to meet the criteria as few settlers were able to read and write, free of debt, and of high moral character, writing, “the ‘civilized’ Indian would have to be more ‘civilized’ than the EuroCanadian” (p. 43).

Enfranchised Indians were entitled to “a piece of land not exceeding fifty acres out of the lands reserved or set apart for the use of his tribe” (GCA, 1857, Art. VII), allocated by the Superintendent General of Indian Affairs, and “a sum of money equal to the principal of his share of the annuities and other yearly revenues receivable by or for the use of such tribe” (GCA, 1857, Art. VII). Enfranchisement meant, though, that the land would become his property in fee simple, but he would have to “forgo all claim to any further share in the lands or moneys then belonging to or reserved for the use of [their] tribe and cease to have a voice in the proceedings thereof” (GCA, 1857, sec. VII). Upon death of the enfranchised man he could dispose of his property to his children or lineal descendants and they would own the land in fee simple. However, if there were no children but only a wife, she could have access to the land for life or until her re-marriage, and after either of those scenarios, it would escheat to the Crown (GCA, 1857, Art. X).

The Crown controlled Indian women’s estate much more strictly than they did for Indian men. A widow could continue to live on the land inherited, as long as she had been living with her husband at the time of death and was of “good moral character” as judged by the Superintendent General. This kind of control of good and bad behaviour was up to the discretion of the superintendent but was usually centred on an image of a hard-working, good housewife and mother, who had been supportive and obedient. The wife would have to appear as doing her best at being a model of English domesticity. How these behavioural controls fit into the “entanglements of varied specialities and techniques” (Woolford & Galeck, 2016, p. 401) of genocidal carcerality will be discussed in more detail further along in this chapter.

Owning property came, at least for Indigenous men, to be seen by the colonial administrators as the only way for Indigenous peoples as a whole to achieve civilized status. The *Gradual Civilization Act* was based on the assumption that the “full civilization of the tribes could be achieved only when the Indians were brought into contact with individualized property” (Milloy, 1983, p. 58). The Bagot Commission in the 1840s and the Methodists missionaries in the 1850s agreed that property, along with Christianity and European clothes, would create “industriousness” and lead to hard working, “self-reliant native farmers” (Milloy, 1983, p. 58). However much the colonists hoped for this, Indigenous peoples were not quite as cooperative as had been imagined. Tribal councils in the mid-40s across the colony rejected the subdivision of their reserve lands and the majority of status Indians did not chose to become Canadian citizens “despite the opportunities enfranchisement afforded” (Warry, 2008, p. 34). In a strange twist of colonial logic that would

occur again and again, these instances of Indigenous resistance confirmed to the colonists that Indigenous peoples were not civilized, and therefore a much more aggressive assimilation policy was needed. The reserves in Upper Canada were thought to be a failure as Indigenous people were not adopting European ways as colonial authorities expected. Therefore, it was believed that Indigenous peoples could not be left on their own to develop in the image of the Europeans (Tobias, 1983). Thus, colonial logic meant that stronger and more paternalistic measures had to be implemented. For the British government, managing First Nations was a costly and bureaucratic system, so by 1860 complete control of Indian affairs had been transferred over to the Canadian colonial government. This ushered in a change in the policy goals from isolated reserves aimed at civilization to more central reserves aimed at assimilation.

### ***Gendering status***

The Dominion of Canada set out the legislative authorities with Section 91(24) of the *Constitution Act of the 1867*, giving the Parliament of Canada legal authority over “Indians, and land reserved for the Indians.” The federal government then became responsible to provide programs and services, such as education and housing. Several laws governing Indigenous peoples were amalgamated and formed the early version of the *Indian Act* in 1876. The major change in legislation involved further revisions to the definition of who qualified for Indian status. In 1869, section 15 of the *Gradual Enfranchisement Act* was amended in the following way:

Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father’s tribe only. (31V., c. 42, s. 15, 1869)

Now, women with Indian status would lose status, as would their children, if they married anyone other than a status Indian male. It then became possible that Indigenous women were separated out of the collective and would lose their status by marrying a non-status Indian man, by marrying

an enfranchised Indian man, by marrying a non-Indian man, or by divorce. For the most part, women's status now became fastened and dependent on that of a male Indian. The only way for an enfranchised woman to regain Indigenous status was to marry another Indian man with status.

Following this change, in the *Indian Act* of 1876 the definition of Indian persons was revised as:

The term "Indian" means.

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

The insertion of the qualifier *male* meant that in order to be considered to be an Indian by the government, one had to be a *male* Indian, the child of a *male* Indian, or the wife of a *male* Indian; female Indians were not included. These discriminatory and arbitrary standards for who was and was not eligible for status was divisive and undermined First Nations identity and social relations (Mercredi & Turpel, 1993). Under this definition,<sup>82</sup> though, EuroCanadian and non-Indian women who married an Indian man would both gain Indian status. The Act also further disregarded matrilineal rules of descent and inheritance that were practiced by many First Nations peoples enforcing Eurocentric patrilineal lines of descent,<sup>83</sup> positioning only Indian men as heads of households and political leaders. Indigenous women were thus legislated to be dependent on their husbands. The definition of Indian was now fixed to a designated band and eligible members could vote in band elections, receive monies, and live on reserve land (*Indian Act*, 1876). A women's status became that much more precarious than her male counterpart. Milloy (2008) notes that the preamble to the definition of Indian tied the definition of Indian in relation to property ownership and designated male lineage despite other systems of matrilineal descent that were practiced. This is what Brenna Bhandar (2016b) calls "status as property."

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<sup>82</sup> The Act also defined two more types of Indian peoples: a non-Treaty Indian was "any person of Indian blood who [was] reputed to belong to an irregular band or who follow[ed] the Indian mode of life"; an Enfranchised Indian was "any Indian...who received letters patent granting him in fee simple...an allotment of the reserve" (*Indian Act*, 1876, c.18, s. 3.4 and 3.5).

<sup>83</sup> The US, unlike Canada, never enforced a patrilineal tribal inheritance system on its Iroquois reservations (Shoemaker, 1991, p. 48).

Almost a century later, the 1951 amendments to the *Indian Act* did not eradicate the marrying out sections. The 1951 version, subsection 12(1)(b), dubbed the “marrying-out rule,” had severe consequences on generations of Indian women and their children. If women married out of their band they lost substantial benefits including their ability to: pass on legal status to their children; reside on the reserve; inherit or possess reserve property; receive treaty benefits; participate in community political decision-making; be buried with their ancestors; or partake in many other rights and resources (Dick, 2011). In contrast, Indian men who married out did not lose status or any other rights and Subsection 11(1)(f) ensured that men could transmit their legal status and band membership to their non-Indian wives and any resultant children. Subsection 12(I)(a)(iv) also introduced the “double mother” clause. This clause stipulated that an Indian child would lose status at the age of 21 if both her/his mother and grandmother had not been recognized as status Indians before marriage, but only acquired status through marriage, irrespective of whether their father or grandfather had status. Furthermore, in the event of the death or abandonment of her husband, the Indian woman would automatically lose her status and she would be forcibly enfranchised along with her children. For an Indian man to be forcibly enfranchised was a much more time consuming and difficult process. Until 1920,<sup>84</sup> the band council could determine whether Indian women who married out were able to continue to collect treaty annuity payments, in this way retaining some connection with their communities (RCAP, 1996d). Women who married out not only lost their Indian status but were also not considered British<sup>85</sup> subjects either (RCAP, 1996d). Thus, in the 1951 amendments to the *Indian Act*, the government made enfranchisement of women who married out mandatory. This carceral tactic of locking women out of their communities sent waves of dispossession affecting generations of Indigenous peoples. The laws remained in place until poorly amended in 1985. The following chapter will examine the amendments in more detail.

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<sup>84</sup> After 1920, the Superintendent General took over this decision.

<sup>85</sup> The first nationality law to define people as Canadian was the *Canadian Citizenship Act* that came into effect on January 1, 1947.

## Shifting Status

### ***Location Tickets***

A critical loss for women due to the marrying out rule was tied to reserve property allocation. Believing that Indian dependence on the welfare system was due to their “communal lifestyle” (Flanagan et al., 2010, p. 66) the government introduced the location ticket system for reserve land, in which small plots of land were surveyed and given to individual Indians (Flanagan et al., 2010). According to Tobias (1983) the most important innovation of the *Indian Act* of 1876, in the eyes of the government, was the introduction of the location ticket. This was considered to be a very important part of the assimilation process and was argued to be a necessary component of enfranchisement. The location ticket was designed to be a “halfway house to private ownership” (Notzke, 1994, p. 175) in which reserves could be partitioned and distributed to individual Indian peoples (Miller, 2000). The new policy stipulated the superintendent general should survey the reserve into individual lots to create a form of private property designed especially for Indian peoples.

Under this new location ticket system, an Indian person could occupy and use a section of reserve land. Before an individual received a ticket, s/he had to prove her/his suitability. There was a three-year period during which s/he had to prove s/he was worthy and could use the land as a EuroCanadian might. If, after three years, s/he passed the test, s/he was enfranchised and given the title to the land. If an Indian man earned a university or a professional degree such as minister, lawyer, teacher, or doctor then he would be given a location ticket, be enfranchised, and the three-year probationary period would be waived. The colonial policy aimed to eradicate primitive Indian values through “education, religion, new economic and political systems, and a new concept of property” (Tobias, 1983, p. 44-45).

The location system was under the regulation of government agents and placed restrictions on transfer of property and legal seizure (Flanagan et al., 2010). How the system of individual private property possession was implemented, though, ended up disadvantaging women as the Indian agents most often assigned location tickets to the male partners only. The RCAP (1996d) report states:

There is no actual prohibition against women owning land through a certificate of possession. But the cumulative effect of a history of legislation that has excluded women and denied them property and inheritance rights, together with the sexist language embedded in the legislation before the 1985 amendments, has created a perception that women are not entitled to hold a CP [Certificate of Possession]. (p. 48)

Hence, the “imposition of non-Aboriginal concepts of private or individual property rights combined with numerous forms of patriarchal bias have led to First Nation men being the primary holders of Certificates of Possession on reserve” (Cornet & Lendor, 2004, p. 145-146). The long-term effects of this legislation are directly related to how the FNPOA might be implemented as fee simple ownership of property will most likely be based, in some form and to some extent, on pre-existing CPs (Flanagan et al., 2010).

### ***Imposition of colonial systems of governance***

In order to effectively make these changes to First Nations social relations and land ownership, the government legislated formal and mandatory changes to First Nations traditional governance structures. Importantly, the *Indian Act* redistributed power relations among Indigenous communities, strictly mandating band councils and the powers of chiefs, and regulating election procedures, creating “municipal” councils whose authority to govern had to be confirmed by the Governor in Council (Milloy, 1983, p. 62). The government established all-male Indian councils and, in this way, established fraternal relationships between Indian and colonial men. In 1876, the Canadian federal government took control of reserves and tribal nations by replacing Indian governments and installing “Indian-agent-controlled models of white government” (p. 57). During this era the regulation of Indian life became much more invasive. John Milloy (1983) argues that it was the relentless and strategic legislative acts geared at behavioural control, which really developed a logic of heightened assimilation. Under this consolidated version of the *Indian Act* the government could create “individualized land holding, determine the use of resources, and create particular educational systems” (Milloy, 1983, p. 62), which meant Indigenous people would essentially “los[e] control of every aspect of their corporate existence” (p. 62). At this time Indian policy objectives were aimed at ensuring Indian peoples would eventually disappear

(Palmater, 2014) and so there was not a lot of emphasis put on prioritizing their health and abilities to participate in building the nation (Huhndorf, 2001).

The Canadian government forbid women to vote or participate in band elections and only Indian males aged 21 and older could vote<sup>86</sup> for chiefs and councillors. Independent authority of band chiefs was now under the discretion and evaluation of the Superintendent General of Indian Affairs who could disempower a chief “for dishonesty, intemperance, or immorality” (Milloy, 1983, p. 62). As was discussed in the previous chapter, matrilineal societies often were headed by elder women clan members who were in charge of regulating the quality of Indigenous governance. Colonial practices set patriarchal boundaries of exclusion and inclusion between Indigenous men and women. Julia Emberley (2001) argues, “establishing relations among Indigenous ruling male elites proved a highly important strategy in British colonial expansion” (p. 69). The federal government was determined to abolish the self-governing powers of Aboriginal peoples (Milloy, 1983). Elected band councils were empowered to make bylaws on minor police and public health matters, but they had to have approval by the superintendent general of Indian Affairs (*Gradual Enfranchisement Act*, 1869). This act was designed for the Six Nations<sup>87</sup> and other Indian people who had had a relatively long exposure to Europeans (Tobias, 1983). These people were considered to be worthy of receiving advanced assimilation education. However, the elective system met with some disinterest on the part of Indigenous peoples and so it was no longer to be imposed but only applied if the band requested it. The legislation also set out the number of councillors, and in order to encourage the system band councils were given some increased authority (Tobias, 1983).

The *Indian Advancement Act* (1884) increased the powers of the band just enough to encourage First Nations to learn and become more committed to the EuroCanadian political system. The colonial logic was that band councils would encourage their members to cooperate with assimilation. The band council’s powers were enhanced, giving them the authority to levy taxes on the real property of band members, as well as authority over police and public health matters.

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<sup>86</sup> The vote in Canada was a privilege reserved for a limited segment of the population, mainly affluent white males. White EuroCanadian women’s suffrage was granted in 1918. Status Indians gained the federal vote in 1960 along with many other ethnic and religious groups who had been excluded until the 1960 revisions to the *Canada Elections Act*. It was not until the revised *Indian Act* of 1951 that status Indian women were able to vote in band elections.

<sup>87</sup> Six Nations of the Grand River in Ontario is the largest First Nations reserve in Canada and has all six Iroquois nations living in the area.

At the same time the Superintendent General was able to have more regulatory powers in terms of the size of the band council and the elected officials. The superintendent could supervise the council, call for elections, call for and preside over band meetings, record them, and advise the band council (Tobias, 1983). Many of the bands continued to elect their traditional leaders; however, they were often quickly deposed as being incompetent and immoral by the superintendent. Tobias writes that the same male leaders were continuously re-elected. With this increased control in the bands political affairs, the government gained more control of the bands resources. Although the government wanted the bands to use funds for carrying out police and public health expenditures, bands were reluctant; therefore, the government took that over as well (p. 47).

### ***Lessons on becoming European***

Gendered colonial policy exhibited multiple forms of social control. The most influential forms of social control were those conducted on women. Chapter 4 discussed how many precontact matrilineal cultures were targeted by Jesuits. For Indigenous women, these were political spaces where the colonial agenda would have increasing control over their social and cultural practices and eventually over their very subjectivity. While Indigenous men were given the illusion of inclusion and recognition as legal subjects, Indigenous women were clearly put on the outside, to be included only in association with an approved Indigenous male. Modeled after the European conception of gender hierarchy, Indigenous women were instructed, regulated, and legislated into a subordinate sociopolitical position in colonial North America.

For the 17<sup>th</sup> century Jesuits, as well as the colonial administrators in Upper Canada, the key to civilizing egalitarian Indigenous societies became women's submission to individual Indigenous men, achieved through belief in a Christian God and religious teachings, monogamous marriage, and shifting lineage to the males (Anderson, 1991). This was a mirror to gender relations and practices among 17<sup>th</sup> century European men and women. Indigenous men were thus taught how to be patriarchs, learning how to be heads of households, a position unfamiliar to many of them. On reserves, Indigenous women were taught to mimic European norms of femininity and domesticity. The home was used to domesticate Indigenous women and teach them the ways of civilized women and culture. It was thought women could then educate their children. The family became "the most

important social apparatus to import various technologies of surveillance to further colonial governance” (Emberley, 2001, p. 61).

In early relations there was a relatively mutual exchange of knowledge and information between settlers and Aboriginal peoples. The knowledge and expertise of Aboriginal women was initially valued and necessary to the survival of white settler women, for example, in midwifery or in medicinal skills utilizing local natural medicines (Carter, 1996). In writing about First Nations women in the Prairies, Sarah Carter (1996) discusses when EuroCanadian settlement reached a dense state in the late 1880s the government placed more effort in controlling the lives of Aboriginal peoples and specifically marginalizing Aboriginal women through official publications that “deliberately promoted images of Aboriginal women as “gossipy” and “idle” (p. 64). As Carter notes, the shift in colonial narrative from the early “squaw drudge” to one who was now “idle” served to explain away “the poverty and suffering that characterized early reserve life” (p. 64). Carter explains that typically government officials did not acknowledge in their reports the lack of resources and raw materials, or even the insufficient clothing and footwear on reserves needed to maintain subsistence levels. Thus, Aboriginal women would revert to traditional ways of cooking and organizing their homes. Despite the government bans, cooking traditional bannock, a type of flat bread, in self-made clay ovens made sense since the Indian agents would not ensure there were resources to, for example, bake Euro-Canadian style bread. Banning traditional food gathering, preparation, and eating was another colonial attempt to “civilize” Aboriginal peoples. Government inspectors also “lamented about the state of housing” (Carter, 1996, p. 65). Without sufficient supplies, such as adequate and potable water, it was impossible to maintain healthy conditions. Indigenous women were consequently blamed and their “abilities as housewives and mothers were disparaged, as were their moral standards” (p. 65). This type of bracketing out of information is reminiscent of the narrative in the FNPOA in that it does not deal with the systematic or historical causes of poverty on reserve.

The colonial authorities aimed to leave nothing of Indigenous culture and spirituality, but rather replace it with Christian teachings and morality. Indigenous women were taught homemaking skills such as nutrition, gardening, and sewing. Indigenous women were moved from agricultural to work inside the home. In her extensive historical study of women in 17<sup>th</sup> century New France, Karen Anderson (1991) found that for Indigenous women it was the undermining of

egalitarian values and collectivist structures that were imposed by Jesuit missionaries that have been the most devastating to Native women and their communities.

Some Indigenous women initially met these new and foreign ways with resistance, as they had a lot to lose in terms of their status within their communities. Indigenous women were particularly problematic for the Jesuits, as they did not easily agree to the dispossession of their relative autonomy, political influence or sexual agency and fluidity—things that deeply horrified colonial Christian sensibilities. Nonetheless, Christian missionaries were determined to convert Indigenous peoples and, as Stasiulis and Jhappan (1995) write, “female autonomy became a matter of considerable anxiety to European males and a prime target for the Christianizing drive of the missionaries” (p. 101).

The political utility of the strategy to reconfigure gender relations into the European heteropatriarchal model to the colonial project is illuminated in the gendered undercurrent to the *Dawes Act* in the U.S. A prominent anthropologist, Rose Stremlau (2005, 2011), gives a detailed account of how the *Dawes Act* methodically locked Indigenous women out of property ownership in order to help civilize Indigenous peoples. Stremlau (2005) writes, “kinship systems, especially as they manifested in gender roles, prevented acculturation by undermining individualism and social order” (p. 265). Settler colonialists who wanted to solve “the Indian problem” (p. 265) were obsessed and exasperated with trying to encourage Indian peoples to take an interest in private ownership of property and foster self-interest. According to Stremlau (2005), the best way to do this was to “create the gender inequalities that characterized civilized society by creating male-dominated, nuclear families” (p. 277). In destroying and dividing kinship lines and eliminating women through isolation in the longhouses (homes), individual allotment would advantage individual men and “foster individualism, promote economic self-interest, defeat tribalism, and instill the core values of Anglo-American culture in Native people” (p. 266). According to Stremlau, the *Dawes Act* targeted the “growth and development of men” and was designed to disintegrate the extended kinship families and enforce the nuclear family, forcing Indian men to “assume domestic leadership as husbands and fathers” (p. 277). The lawmakers saw extended families as unnecessary responsibilities that were thought to be demotivating to a man’s labour and his enjoyment of material possessions. Stremlau notes that the lawmakers were aware that women “owned households and governed domestic affairs” in many Native societies and that shifting ownership of property to men was a methodical move to “eliminate married Indian

women's customary property rights and means to economic independence from men" (p. 277). It was critical to strip Indigenous women of their status in order to complete the colonial policy of assimilation and land appropriation. For the designers of the *Dawes Act*, the primary concern was communal property ownership, and the best way to stop that practice was through changing gender roles.

Similar to the United States, Canadian colonial policy necessitated disarming Indigenous women of their stature and making sure that the Indigenous family unit was in alignment with that of the heteropatriarchal colonial model. Even though Canada now recognizes same sex marriage and allows same sex couples to adopt children, still the predominant family unit is, in many ways, considered the nuclear family with the *de facto* head of the family as the father. Although many Indigenous peoples still value and thrive on the extended family structure, the toll of colonial policies continues to be felt.

### ***Sexual othering and women's work: Prostitution***

Although hard work was considered a positive virtue in colonial Canada, somehow Indigenous women's willingness to work hard in the public sphere signaled sexual availability (Racette, 2012, p. 160). Hard work was also a traditional virtue in Indigenous clans. Here again a strongly positive part of Indigenous women's identity was taken and reframed as negative by white patriarchal settler society. A lot of Indigenous women's training and education was about taming their sexuality and making them into good, obedient, and chaste girls. Indigenous women working as domestic servants in urban areas meant that they were in contact with the white population and sometimes fraternizing, which was highly discouraged. The *Indian Act* prohibited Indian women from going to bars in order to control their involvement in prostitution (Miller, 2000). For instance, in an 1875 report on Indian reserves, it was written that in order to stop prostitution the only viable solution was thought to be to remove the entire population away from the urban centre:

Prostitution is another acknowledged evil prevailing to an almost unlimited extent among the Indian women...the only direct step...would be to remove the entire Indian population to a distance some miles from Victoria...for the improvement in this respect of the moral and social condition of the Indian population (Trutch, 1875, p. 12).

The government did not want Indigenous peoples to mix with white settlements. In fact, the 19<sup>th</sup> century program of promoting immigration among poor white women as domestics was envisioned for white women to “tame working-class white men and encourage them to settle down in white marital homes and have white legitimate children” (McCallum, 2014, p. 60), although the grander motivation was to sever the relationships that white men had with Indigenous women. Jean Barman (1997) argues that colonial laws and regulations targeted Native women’s sexuality and in fact they were “rarely permitted any other form of identity” (p. 264).

This is reminiscent of the colonial stereotype, as discussed in Chapter 4, regarding Indigenous peoples’ relation to land articulated in a way that made them appear as savage, primitive, and sexual. For example, travel writers in the early 20<sup>th</sup> century wrote about white tourists going into the wilderness areas of Canada to relax and experience adventure but that they were clearly better suited to the challenges of civilization, as opposed to Aboriginal peoples who were “at home only in the wilderness” (Thorpe, 2011, p. 206). These narratives of primitive Indigenous peoples and highly sexualized Indigenous women worked to confine Indigenous peoples to areas outside of white settlements and “in the context of European colonial expansion” these served as “an assertion of control” (p. 206).

### ***Employment off reserve***

Indigenous women were not forbidden entirely from employment off reserve. However, if they could get work they were confined in the types of work. Métis women, and sometimes Indian women, were able to work as domestic servants for European families. Fur trading posts started to shift to permanent settlements as the fur trading industry started to die down, and more women became hired as cheap manual labour. Sherry Farrell Racette (2012) wrote, “By the twentieth century...There seemed to be a concerted effort to adapt women’s manual work of the fur trade into emerging rural economies” (p. 159). Aboriginal people, though, were at the bottom of the labour hierarchy and were seen as fit for low status, hard manual labour.

The emergence of industrial schools in the late 19<sup>th</sup> century meant that Indigenous girls were being trained to do certain kinds of typically gendered jobs such as housework, cooking, dairying, and laundry work, as well as some light farm chores such as gardening, milking, and taking care of poultry (Racette, 2012, p. 159). With this history of training in these types of jobs it is no wonder that between 1920-1940 about 36-57% of Aboriginal women worked in the domestic service

market (McCallum, 2014, p. 20). Federal Indian schools designated training for Indigenous women as domestics. There was little other choice and other types of training were unavailable to Indigenous women until after the 1940s (McCallum, 2014, p. 28). In her extensive study of Indigenous women and labour from 1940-1980, Mary Jane Logan McCallum (2014) describes how Canadian Indian education policy divided training for work along gender lines, resulting in men being targeted for outdoor work and women thought of as more suitable for indoor work. Industrial schools and residential schools became training grounds in how to be a proper woman but McCallum suggests there were other more nefarious motivations: to prepare Indigenous women to be good mothers and wives who would basically pass on this information and skills to their children; the unpaid labour was used to run the residential schools; and to train Indigenous women for their future as domestic servants to the white settler elite. Some women were trained to work in hospitals, especially due to the need around the WWII era and then later, in the 1970s, when a small group of elite Indigenous women worked in the Medical Services Branch (McCallum, 2014). These confined possibilities in women's paid work have resulted in a legacy of feminized poverty and vulnerability leading to increased violence against women both off and on reserve.

## Carceral mechanisms

### *Pass and permit system*

A telling invention of colonial carceral policy was the Pass and Permit system. Around the mid 1880s, *Indian Act* agents were able to enforce a “Pass and Permit system” outside of the formal legalities of the *Indian Act*, that prohibited the mobility of Indian peoples, as well as goods and services to and from reserves. This system meant that Aboriginal people who lived on reserves were required to carry passes issued from their Indian agents that detailed the reason and length of their departure. If people left without passes the police were informed. In her discussion of the pass system, Sarah Carter (1996) notes that the effectiveness of restrictions on mobility for women were achieved through “ideological and psychological suasion” (p. 68) rather than the physical force used on Indian men. The pass system was “combined with powerfully negative images” of the women (p. 68) and threats of public humiliation, and that seemed to be enough to keep most women self-confined to the reserve.

The pass system made it difficult for Aboriginal women to get employment off reserve in neighbouring villages and settlements (Carter, 1996). However, there really was not much employment off-reserve, especially for women. Carter supposes that women “might have been obliged” (p. 69) to work as prostitutes because of the dismal economic situation on reserve. However, the government attributed Indigenous prostitution to a “personal disposition” and “inherent immorality” (p. 69) of the women rather than to the poverty caused by colonial policies.

Any natural causes to poverty on reserve were exacerbated by the pass and permit system. Indigenous people could not sell any produce unless they had a pass that was meted out by the Indian agents. The colonial authorities broke treaty agreements and imposed conservation measures restricting Aboriginal hunting and fishing beyond the reserve lands, usually refusing to give permits for butchering animals or selling most other products to people off reserve (Carter, 1996). Despite “complaints from residents that they did not get enough to eat...they were not allowed to sell any of their crops to buy goods” (p. 70). Violations were punished severely with jail. The system was designed:

... not only to prevent Indian leaders and potential militants from conspiring with each other, but also to discourage parents from visiting their children in off-reserve residential schools and to give agents greater authority to prevent Indians from participating in banned ceremonies and dances on distant reserves. (INAC as cited in Naumann, 2008, p. 347)

The pass and permit system worked as an effective way to confine Indigenous peoples to the reserve area; however, for Indigenous women, the confinement worked in gendered ways. The early dispossession of women from their traditional duties meant that women were not envisioned by Indian agents to need to go off reserve land. When women did they were suspected of engaging in sexual misconduct and prostitution, much like how Joseph Trutch wrote in his report on Indian reserves. For many communities on the west coast of Canada, the potlatch ban worked in similar confining ways for women.

### ***Potlatch ban***

With the pass and permit system came other controls on the cultural practices of ceremonies that involved peoples traveling from one reserve to another. For example, in the West from 1885 until

1951, practicing potlatches was severely punished by colonial law under the *Indian Act*. The government's understanding of the event was that it was a display of how Indian peoples did not value private ownership and was thought to be "by far the most formidable of all obstacles in the way of Indians becoming Christian, or even civilized" (Miller, 2000, p. 261). The government did not see the festive redistribution of material goods as a form of generosity, or redistribution in Indigenous culture, but rather saw it as a threat to assimilation as it maintained Indigenous communal ownership and affirmed Indigenous leadership through the potlatch and potlatches and many of its related ceremonies subsequently were banned. For example, the Sundance, sweat lodges, potlatches, and all Give Away ceremonials and feasts were banned because they were in conflict with the concept and acceptance of systems of private property and individual accumulation. The authorities would usually confiscate all belongings of any value, including ceremonial articles, and the hosts could be jailed for up to six months.

Jean Barman (2004) argues that another reason why the potlatch was banned was the fear of Indian women's sexuality. There was a belief among missionaries and colonial authorities that Aboriginal women were being sold as wives or prostitutes in order to raise monies for the potlatch feasts. At the very least, in the colonial writings by non-Indian men, it was clear that women were not allotted any sexual agency but rather they were portrayed as being either victims of barbaric cultural practices or "prostitutes or, at best, potential concubines" (p. 233). In the colonial narrative, the sex trade was firmly associated with these types of ceremonies (Barman, 1997, p. 257). By the end of the 19<sup>th</sup> century the press was convinced that the potlatch was the route cause of all evil for Indian women (Barman, 2004). These bans on potlatches have had lasting effects on women (Monkman, 2017). Philip Brass, a traditional knowledge keeper from Peepeekisis First Nation in Saskatchewan, notes that because Indian Agents policed and governed the communities during the potlatch ban the Indian men would say they were going hunting or fishing, which was still allowed, but sometimes they would really be going to perform potlatch ceremonies in the bush (Monkman, 2017). For Indian women it was almost impossible to leave the reserve by using the excuse of going hunting or fishing as they were supposed to be taking care of domestic chores, according to the rules of the Indian agents. In this way, women quickly became marginalized from traditional ceremonial roles that has had lasting effects on more recent women's leadership participation.

Furthermore, in a Canadian Broadcasting Corporation (CBC) news interview, Idle No More<sup>88</sup> co-founder Sylvia McAdams says the ban on other types of ceremonies, such as the medicine lodge, law lodge, and the clan mothers' Sundance lodge, also had effects on women's leadership in the Saskatchewan area. She said, "Prior to treaty, women were the ones that held the ceremonies. They were the doctors and the healers. All of that has been flipped now" (quoted in Monkman, 2017, para. 13). Marginalizing women from passing on Indigenous knowledge was a key mechanism of carcerality, both physical and mental.

### ***Residential schools***

The government became frustrated with the slow rate of assimilation that was being fostered on the reserves. Even though there were schools set up on some reserves, children were not attending them (RCAP, 1996c). In order to better educate Indigenous children in the ways of civilization, residential and industrial schools were created by the government and were in operation from the 1870s to the 1990s. By the time the last one closed at Gordon Indian Residential School in Saskatchewan in 1996, approximately "150,000 children [had] passed through the system" (Truth and Reconciliation Commission [TRC], 2015, p. 3). During their time at residential schools, children were prevented from speaking their native languages or performing their traditional cultural practices; they were often beaten, taught how to be violent, and made to work long hours doing manual labour (RCAP, 1996c). They were basically taught to hate who they were as Indigenous peoples (Miller, 1996; Woolford, 2015) and the schools "killed the spirits of so many people" (Borrows, 2014, p. 486). Attendance in the church-run residential schools was seen as key in creating the next generation of Indians that would be civilized and could assimilate into the settler society properly. Although girls were not targeted for education at first, the colonial authorities came to believe that educating girls was the key to ensuring that the Christian teachings would be passed on and men would then not "relapse in to savagery" (Miller, 1996, p. 219) after marrying an uneducated woman. However, many people refused to send their children to these often distant and foreign boarding and industrial schools; subsequently, in 1894, the Governor-in-Council was empowered to "direct industrial or residential schools, and made school attendance

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<sup>88</sup> A grassroots Indigenous rights movement started in 2012 in response to government legislation threatening Indigenous treaty agreements as well as facilitating development projects. The movement promotes environmental protection and Indigenous sovereignty.

compulsory, with strict truancy penalties" (Leslie, 2002, p. 25) with the aim of severing children's ties with their families and communities. The recent Truth and Reconciliation Commission (TRC) Report (2015) has documented testimonies from several thousand Aboriginal peoples in Canada about their experiences in regard to the colonial history and its contemporary legacy in Canada. The report documents that as a general policy, residential schools were involved in the genocide of Indian peoples estimating that a minimum of 6,000<sup>89</sup> children died while in the custody of residential schools (TRC, 2015). Woolford and Gacek (2016) identify residential schools as carceral spaces. These carceral spaces were filled with sexual and physical violence, unpaid child labour, poor care, and inhospitable living conditions (Miller, 1996).

A clear causality has been established between the present abysmal situation of poverty and violence against many Indigenous peoples in Canada and the historical trauma inflicted upon Indigenous peoples through colonial policies and especially in the carceral spaces of residential schools (TRC, 2015). This violent dispossession has been linked to high rates of violence, suicide and trauma among Indigenous peoples, and disproportionate number of inmates incarcerated in the prison system (Elias, Mignone, Hall, Hong, Hart, & Sareen, 2012; Gagné, 1998; Regan, 2010). The extreme damage to families and communities that happened because of the residential schools will continue to be experienced for generations to come. Although the last residential school was closed in the 1996, research has found that the number of Indigenous children in the child welfare system rivals that at the height of the residential school era (Blackstock, 2007; Kirkup, 2016). This is an indication of the continuing and expanding system of carceral confinement and carceral genocide. This will be discussed more in Chapter 7 in terms of how carcerality and capitalism serve to perpetuate the colonial barriers that Indigenous women face, specifically examining economic implications in market participation.

### ***Violence and incarceration: The continuing legacy***

The amount of violence directed against Aboriginal women in Canada has been a topic of media and scholarship attention for a while now. In 2013, the Royal Canadian Mounted Police (RCMP)

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<sup>89</sup> "TRC Chief Commissioner Murray Sinclair cited this number at the release of the final summary report in Ottawa on 2 June 2015." (Woolford and Gacek, 2016, p. 413, FN 1).

did a study of the reported incidences of 1,181 cases of missing and murdered Indigenous women across Canada between 1980 and 2012 (RCMP, 2014). The study reported that violence against Indigenous women is much higher than the national average for non-Indigenous women. In contrast to Indigenous women, most non-Indigenous women know their perpetrators and the majority of the homicides are solved. The study also found that a higher percentage of Aboriginal women were murdered by “acquaintances” rather than intimate partners, which makes up a higher percentage of murders for non-Aboriginal women. This is a significant finding as it indicates that there is a social context of discrimination against Aboriginal women and this violence does not just happen on reserve as is often characterized (Harper, 2007). Amnesty International conducted a 2004 report, *Stolen Sisters*, which concluded that “discrimination, marginalization and impoverishment” work together to increase the risks to Indigenous women, “encouraging some men to target Indigenous women for acts of racist and misogynist violence, and in denying indigenous women equal access to services such as shelters that are required for their safety” (Hansen, n.d., para. 27).

In a 2009 General Social Survey (GSS) on victimization, the rate of victimization among Aboriginal women was almost three times higher than that of non-Aboriginal women (cited in Brennan, 2011). Cases involved in illegal activities such as prostitution were solved less frequently and the risk factors among Aboriginal women included higher unemployment rates, higher use of intoxicants, and higher involvement in the sex industry. These factors are argued to be causally-related to colonial policies which have created poverty and violence on reserve, and racism and violence off reserve, for example, in the trafficking of Aboriginal women and girls (Sikka, 2010). However, more importantly, historical stereotypes of Aboriginal women as being sexually promiscuous and having a propensity for prostitution, has led to extreme sexism and violence in law enforcement and in settler society (Lugones, 2007; Weaver, 2009).

The incarceration of Aboriginal people is a strategy of settler land dispossession (Nichols, 2014; Ross, 1998). The Canadian prison system has extremely high rates of incarceration and over-representation of Indigenous women and has been linked to the legacy of colonial trauma. In her extensive study of Native American women and incarceration, Luana Ross (1998) links contemporary practices of incarceration of Aboriginal women with the loss of sovereignty and the confinement of life on reserve land. Much important scholarship has examined: the relatively high rate of incarceration of Indigenous women in prisons (Allspach, 2010; Balfour, 2008; Jackson,

1999; Williams, 2009); how increased homelessness makes Aboriginal women at increased risk for incarceration (Walsh, MacDonald, Rutherford, Moore, & Krieg, 2011); and how Indigenous women are “hunted, harassed and criminalized” (Dhillon, 2015, p. 1). The legacy of land and status dispossession due to heteropatriarchal settler colonialism is still in operation as a strategy of accumulation and will most likely be a factor in women’s relationship and access to land in the event of an adoption of a system of private property on reserve.

## Conclusion

This chapter examined the colonial policies that promoted the legally sanctioned dispossession of Indigenous women by looking at legislation as a form of carceral land-based dispossession. Women were targeted by the colonial legislation because they had relative power within their communities and colonial legislation went to great lengths to make sure that Indigenous women’s social and political position became subordinate to Indigenous men. Legislation forcefully restructured Indigenous kinship organization along the lines of patriarchal hierarchy, heteronuclear family, and patrilineal descent; women were locked out of political decision-making and property ownership. To control women outside of the reserves, women were stereotyped as prostitutes and confined to low education and low paying employment. The chapter argued that confining policies within the *Indian Act* created a network of carceral circuits that turned the reserve into a carceral space for colonial authorities. These policies created persistent, deep-seated discriminations based in colonial dispossession and dependency that continue to be in full force. This legacy of dispossession and dependency is connected to present day barriers and discriminations Indigenous women face.

In order to make the argument that the contemporary rationalization of private property for First Nations reserve land found in the FNPOA operates as a gendered tool of dispossession for Indigenous women it has been necessary to understand the colonial legislation Indigenous women have endured has not been incidental to land appropriation but rather women have been targeted using carceral mechanisms. The logic behind privatization of land in the FNPOA identifies entrepreneurialism as a self-sufficient means of emancipation from poverty and the ongoing colonialism in the *Indian Act*. Indigenous women’s historical dispossession from land exposes the depoliticized rendering of entrepreneurialism as a market-based solution to colonial socioeconomic, cultural, and political dispossession, despite the legacy of violence, trauma, and

marginalization of Indigenous women and their communities. Chapter 7 will use carceral theory to elaborate on how capitalism operates to create carceral barriers for Indigenous women. The next chapter takes a much closer look at how individual rights operate for Indigenous women with the *Indian Act* as a focus. Individual rights are fundamental to private property, thus a further examination of how Indigenous women have experienced individual rights, both inside and outside of their communities, will illuminate some areas of concern in an adoption of private property. The chapter examines the utility of the contested realm of individual human rights, especially in relation to land, as a volatile platform in the pursuit of gender justice.

## Chapter 6: Citizens divided<sup>90</sup>

### Introduction

This chapter explores more deeply the enduring effects of colonial heteropatriarchal legislation that were discussed in Chapter 5. The chapter uses pertinent legal cases to explore the interconnections between First Nations women's individual human rights and emerging tensions with Indigenous collective rights. Rights, as understood in a Western-individualistic sense, are argued by several scholars to be inadequate in dealing with the specificities of Indigeneity (Holder and Corntassel, 2002; Mende, 2015; Thornberry, 2002) and, more specifically, to remedy the precarious nature of Indigenous women's equality and their capacity to belong. These scholars argue for a formulation of rights that address the specificities of Indigenous women's diverse realities (Arvin, Tuck, & Morrill, 2013; Borrows, 1994; Grey, 2005; Kuokkanen, 2012; Kuokkanen, 2016; Richards, 2005; Suzack, 2016). Furthermore, as rights are either denied, given, or imposed by the colonial settler state, the very nature of the rights paradigm is laden with hierarchical gendered and racialized power relations complicated by issues of dispossession and settler sovereignty. This chapter argues that individual gender rights and equality<sup>91</sup> must be based in an analysis of settler heteropatriarchal colonialism in order to be effective for Indigenous women to achieve gender justice both within the settler state and within their Indigenous communities. The discussion is significant to the overall thesis question in two important ways. First, as private property in the FNPOA is fundamentally based in individual rights to private property, the tensions between individual rights and collective rights to traditional lands will inevitably lead to conflict. Under the FNPOA, access to the right to own private property on First Nations land would depend on the ability to have equal access to membership to, as well as equal rights within, a band.<sup>92</sup> The

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<sup>90</sup> This title is inspired by two books with very different stances on Aboriginal citizenship in Canada: Cairns, A. (2000). *Citizens plus: Aboriginal peoples and the Canadian state*, which promotes assimilation of First Nations into the dominant policy and Jamieson, K. (1978). *Indian Women and the Law in Canada: Citizens Minus*, which focuses on legislation that discriminates against First Nations women.

<sup>91</sup> I am not using the terms *rights* and *equality* as they are debated in sociological/political science discussion, but rather as they are utilized in discussions on gender justice within Indigenous communities.

<sup>92</sup> A "Band", or "Indian Band," refers to a governing body of Indigenous peoples stipulated in the *Indian Act*, 1876. The *Indian Act* defines a "band" as a "body of Indians ... for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart" (*Indian Act*, 1951, c29).

discussion in this chapter will show that the right to band membership for many women continues to be precarious. Second, adoption of the FNPOA in its current version means a departure from the *Indian Act* by the First Nation. The First Nation then must have the collective responsibility and political will to ensure the equal treatment of Indigenous women and all members. Thus, how First Nations will interpret and govern the rights of women is of great significance to this research project.

Each of the cases discussed in the chapter involves a dispute related to section 12(1)(b), the so-called “marrying out” clause of the federally legislated *Indian Act* (1951) as discussed in Chapter 5. The cases richly illustrate the circuitry of discriminations, especially as they relate to severe consequences in Indigenous women’s cultural capacity, including the loss of their ability to inherit or possess reserve property, reside on reserve land, and transmit legal status either to their children or to their spouse. The government’s attempts to rectify the discrimination with another gender-neutral legislation, Bill C-31, has been proven to create other avenues of discrimination, injecting yet another level of patriarchal colonial influence and divisiveness into individual lives and collective communities of First Nations peoples.

The chapter begins with a discussion of how the concept of rights for Indigenous peoples are different from Western-liberal concepts, including a discussion of the conflict between individual property rights versus collective rights. The chapter then explores three intertwining interactions involving the Canadian state, First Nations communities, and First Nations women.<sup>93</sup> The first interaction between the Canadian state and First Nations women is discussed using three legal cases to examine the tensions in Indigenous women’s ability to claim individual rights and the role of international legal conventions and the tensions between domestic sovereignty and Indigenous women’s rights. Further to this interaction is the difficulty in disentangling state legislation from its gendered, settler colonial underpinnings. In this way, the persistence of the settler logic and structure can be seen, despite the efforts or appearance of equality reform. This echos back to the gender-blind approach taken in the FNPOA and the destructive forces looming in state policy that lack a focus on social justice. The next part of the chapter examines the second interaction, which occurs between the First Nations community and the Canadian state. Here the struggle between state objectives to maintain sovereign control and First Nations need for self-determination occurs

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<sup>93</sup> This organization was inspired by Caroline Dick’s (2011) study on Indigenous group rights to self-determination versus individual gender rights in *Sawridge Band v. Her Majesty the Queen*.

with Indigenous women at the centre. The next section of the chapter examines the interactions between the First Nations community and Indigenous women reclaiming their right to band membership. In this section the veins of heteropatriarchal colonialism are illuminated in the interlocking mechanisms of state and Aboriginal governance that work together to lock women out of their rightful place. The chapter ends by bringing these three interactions together into a discussion of how patriarchy and paternalism, through culture and tradition, are often mobilized to inhibit women's claims to equality.

### A language of rights, an idea of relations

There are conceptual differences between Indigenous and Western ideas of rights and equality and this in turn affects relationships and contributes to tensions between individual and collective rights, self-determination, and gender equality. Human rights can only be interpreted through a cultural lens (Vincent, 2010), although international human rights treaties are based on an assumption of universalism (Zechenter, 1997). Aboriginal peoples critique the Western legal system as being heavily situated in cultural values embedded in Western-liberal ontology and in that way the legal system and language does not allow them to express alternative ontological concepts in a way that is understandable and effective.

Even though the language of rights and equality has been utilized by Aboriginal peoples to combat the effects of colonialization (Turpel, 1989), the concepts of rights are still seen by many First Nation's peoples as being "*prima facie* incompatible with Aboriginal approaches to land, family, social life, personality and spirituality" (p. 37), as equality is often characterized as based in a Western-Euro cultural concept of individual rights. Because of ideological or ontological differences and the ultimate power of the state to enable or gate-keep group rights, Indigenous rights have a dual focus of "asserting the right to be simultaneously different from and equal to the majority population" (Grey, 2005, p. 17). Another consideration is that rights for Indigenous women are desired within the goals of Indigenous self-determination and sovereignty (Arvin, Tuck, & Morrill, 2013). In this way, rights are approached in tandem with the survival and recognition of the entire community, not just focused on individual self-interests.

The very idea of rights and the language used is based in a Western notion of equality and individual self-ownership. Cindy Holder and Jeff Corntassel (2002) argue that the language, for example, used in human rights discourse such as "populations" and "persons who are members"

versus “peoples” cannot sufficiently “protect those for whom communal life is vital” (p. 127). For Vine Deloria (2003) “equality is...not simply a human attribute but a recognition of the creatureness of all creation” (p. 89). Self-determination is the very goal of minority group claims and, therefore, they argue that because the human rights discourse prioritizes a liberal-individualist framework, group rights will ultimately not be accepted, as they will always be seen to be in potential conflict with individual rights. The problem is that for Indigenous claims to group autonomy and self-determination, Indigenous ontology is not factored into the liberal underpinnings of the human rights framework, and thus a robust and accurate understanding of how the individual and the group is understood in Indigenous ontology is missing from the Western framework (Holder & Corntassel, 2002). Holder and Corntassel (2002) cite many of the precepts of Indigenous ontology that were discussed in Chapter 3 as being better able to reconcile the tensions of Indigenous community citizenship as opposed to how rights are understood in a Western sense. First, Indigenous ontology understands individual and collective rights as being interdependent. Secondly, interdependence between individuals within the group is important and is based in a network of kinship. The Indigenous concept of *all my relations* as discussed in Chapter 3 underscores the importance of human interaction on an individual level but also the interaction and interdependence of other humans and of non-human entities. This leads to a traditional Indigenous self-definition “in terms of a ‘spiritual compact’ rather than a social contract. The ‘tribal will’ constituted a vital spiritual principle which for most tribes gained expression in sharing and cooperation rather than private property and competition” (Boldt & Long, 1984, p. 541-2).

Although there is an idea of collectivity and cooperation there is also recognition that harmony is a complex endeavour and that individuals may diverge from the group. Despite more interdependent relational understandings in Indigenous ontology, Holder and Corntassel (2002) acknowledge that some individuals may need a method of recourse and some communities have incorporated this into their community structure (Ladner, 2010). Different kinds of justice are advocated in feminist scholarship (Bernstein, 2012; Deveaux, 2000; Ladner, 2009; Suzack, 2015; Whiteman, 2009; Willison & O’Brien, 2017). Western-liberal feminists have also worried about the pressures that collective rights place on women (Cohen, Howard, & Nussbaum, 1999; Deveaux, 2006; Okin, 1999; Phillips, 2007), arguing, for example, that recourse to the existing legal systems is a necessary tool for minority communities, especially for women (Phillips, 2007).

## Private property<sup>94</sup> as an Aboriginal women's human right

Aboriginal women's collective and individual civil and political rights within the context of Aboriginal self-government: are "foundational and do not derive from documents or treaties;" cannot be "extinguishe[d] by regulation" as in the *Indian Act*; nor do they need "the imprimatur of state action to qualify as rights" as they are "central to traditional, matriarchal, and egalitarian forms of government" (McIvor, 1999, p. 169). This is true even though colonial regulation through the *Indian Act* denied many women's civil and political rights and "led to their banishment from Aboriginal communities" (p. 169). It is in this constructed conflict between individual rights of women and collective rights of the communities they belong to that is of concern in this chapter. Locke theorized that a primary role of government is to protect the natural right to private property ownership and, in fact, civil and political rights in both international and domestic laws do just that. Private property is considered a human right in international law, most notably in the *Universal Declaration of Human Rights*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, the *Convention on the Rights of Persons with Disabilities*, and the *International Convention on the Elimination of All Forms of Discrimination against Women*. Even though a country may recognize or even ratify an international law, they do so as they see fit, giving priority to their own sovereign laws that are sometimes in conflict with international laws.

Property rights are seen by some as the fundamental right that should be used as the basis for all other rights (Rothbard, 1982/1998) because "property can only accrue to humans" (p. 113). However, treating and enforcing private property as an individual human right, especially at the constitutional level, has been argued to legitimize and justify the "modern Western state" (Christie, 2009, p. 177), which is problematic given the competing claims of Indigenous peoples. Indeed, Article 25 of the UNDRIP provides a distinct challenge to private property rights stating, "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard" (UN, 2008). Private property then is unsettled in the UNDRIP by an alternative notion

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<sup>94</sup> The term property is used here rather than land as it is the focus of the FNPOA. I do acknowledge that property has specific legal and ideological connotations and is not generally used to describe the relationships and responsibilities that First Nations people experience with the non-human life on earth.

of land protection in the recognition of traditional collectively-owned territories. However, while the UNDRIP guarantees Indigenous rights in relation to culture and traditional territories, the execution of these collective rights can only be exercised within each state's domestic laws. The 1948 *Universal Declaration of Human Rights* protects the right to property, which, in a settler context is invariably in direct conflict with Indigenous claims to territorial lands. As Brian Thom (2014) writes, there is a "profound difference in vision between Indigenous territorial relations and state forms of property. The consequences of these differing abstractions of territory and property relations are significant and bear on basic human rights of Indigenous peoples" (p. 3).

As we have discussed in early chapters, Indigenous women's individual rights have not fared well in the settler state. The next section of the chapter examines case studies regarding the rights of Indigenous women and focuses on the interactions between different stakeholders in disputed sections of the *Indian Act* illuminating how women's rights have been used in precarious ways to bolster different spaces and relations of patriarchal power.

### **Interactions between First Nations women and the settler state**

The following three legal cases involve challenges to gender-based discriminatory policies in the *Indian Act*, as well as challenges to internal discrimination via Indigenous governance. The cases challenged section 12(1)(b) of the *Indian Act* (1951), which stated that a woman who married a non-status Indian man would no longer be legally recognized as a registered<sup>95</sup> or status Indian. Legal cases are instructive as the opposing viewpoints of the various stakeholders are documented and they can reveal how the legislative aspect of settler state politics is enacted, upheld, and actively involved in colonial dominance and settler sovereignty (Cannon, 2005; Monture-Angus, 1995). These particular cases reveal the legacy effects of heteropatriarchal colonial policy on women and how that discrimination has dispersed through the very fabric of Indigenous communities and Indigenous governance. These disputes are grounded in historical settler appropriation of Indigenous land, territory, and the application of definitions of status tied to the settler government's ongoing fiduciary obligations to First Nations peoples.

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<sup>95</sup> Registered Indians are persons who are considered to have status under the *Indian Act* of Canada.

### ***Lavall v. Canada, Bédard v. Canada, and Lovelace v. Canada***

Jeanette Corbière Lavall, an Ojibwa woman and Wikwemikong Band member, lost her Indian status in 1970 because she married a non-Indian man. In 1971 she took action against subsection 12(1)(b) in *Lavall v. Canada*, charging that it was discriminatory based on sex as it violated the “equality under the law” clause in the 1960 *Canadian Bill of Rights* (BOR). The initial judge’s decision was that the *Indian Act* did not violate Lavall’s equality before the law as it treated all Indian women the same. There was no recognition by the courts of the discrimination in the law between Indian men and women (as Indian men retained their status no matter who they married), nor between Indian and non-Indian women (as non-Indian women would gain status if she married a status Indian man). Shortly afterwards, Yvonne Bédard challenged the *Indian Act* in court on similar grounds. Bédard, a Six Nations Iroquois woman, married a non-Indian and subsequently lost her status. Years later after leaving her husband, she moved back to her reserve with her two children, moving into a house that she had inherited, although she had no legal right to it because of the marrying-out law. The Six Nations Band Council gave Bédard permission to stay in the house for approximately a year in order to settle the estate. However, when she did not leave the Council ordered her to dispose of her property and leave the reserve as she was not married to a status Indian of that reserve. The band argued that they had the right to permit, refuse, or revoke permission as to who could reside or occupy land on the Reserve. Bédard argued that because the band ordered her off the reserve and she lost Indian status because of her marriage to a non-Indian, she was therefore denied her rights due to racial and sexual discrimination to “enjoyment of property, and the right not to be deprived thereof except by due process of law,” as guaranteed by Section 1(a) of the BOR. The Supreme Court of Ontario ruled in Bedard’s favour holding that subsection 12(1)(b) was rendered inoperative because it “[denied] equality before the law” (Attorney General of Canada v. Lavell, 1974). The Crown appeal of both the Lavall and Bédard cases were heard together in the Supreme Court of Canada (SCC) in 1973 but were struck down with the court upholding subsection 12(1)(b) of the *Indian Act*. The two cases were significant in that they influenced the evolution of human rights and equality in the *Canadian Charter of Rights* (Borrows, 1994).

A similar case was then filed by Sandra Lovelace, a Maliseet Indian, who, like Lavall and Bédard, had also attempted to return to her reserve and was denied access to housing, healthcare, and education for her family by the band council. In 1974 she took her case to the SCC; however,

the court continued to uphold subsection 12(1)(b). Also noteworthy, the government argued that the statutory definition of Indian in the *Indian Act* was consistent with Indigenous tradition (Knop, Michaels, & Riles, 2012). Finding no justice in the Canadian courts, and with no other choice, Lovelace pled her case before the United Nations Human Rights Committee (UNHRC), making her case much more prominent in the domestic and international forum. She argued that the marrying-out legislation violated two articles of the International Covenant on Civil and Political Rights (ICCPR): Article 26, which guarantees equality before the law; and Article 27, which prohibits states denying members to be in “community with the other members of their group, to enjoy their culture, to profess and practice their religion, or to use their own language” (United Nations, 1976). In 1981 the Committee ruled that Canada was in fact in breach of the ICCPR and decided that “denying Ms. Lovelace access to live on the reserve was neither reasonable nor necessary to preserve the group’s identity; therefore, stripping her of Indian status denied her Article 27 rights and was a violation of the ICCPR” (Lovelace, 1977, para. 3). As Lovelace had already lost her status before Canada ratified the Covenant in 1976, the Committee could not rule on the claim of sexual discrimination (Borrows, 1994). However, the Lovelace case was successful on several levels. More importantly, involving the UN as an outside arbitrator showed that the case was much more complex than only gender discrimination against women by the colonial state legislation, as this was the Band that denied her access to her property/land. The UN case exposed the circuitry of dispossession, not only from material and resource dispossession, but also from the right to belong to one’s own community. Still, even the UN is conflicted with how to judge these types of cases. Seven years after the Lovelace ruling in a similar case involving a dispute over a Sami man who was denied reindeer hunting rights by his village in *Kitok v. Sweden*, the ICCPR found in favour of the group to determine its membership (Engle, 2010). The contested nature of Indigenous sovereignty and self-determination in relation to state control is complicated by individual rights of the group’s members.

### ***Maintaining colonial law: Where you stand depends on where you sit***

The vote in the *Attorney General of Canada v. Lavell* (1974) case at the SCC was close, 5-4. The justices argued that the law was not discriminatory because it treated all Indian women equally. Despite disagreement between Justices, the Supreme Court was not willing to apply the BOR in order to challenge laws that gave the federal government the power to uphold the *Indian Act*. It

was argued by the SCC that the BOR did apply to ensure that all Canadian married women were treated equally before the law; however, the BOR did not apply to discrimination within the “class of Indians.” The SCC further argued that the BOR should not be able to invalidate the federal government’s special powers to enact the *Indian Act*.

The SCC was not willing to use the BOR to override Section 12(1)(b) of the *Indian Act*. Gender discrimination within the *Indian Act* was not considered worthy enough to be overturned by the BOR. The *Indian Act* stood impervious to the equality set out in the BOR. This was in contrast to the previous landmark Drybones case (Queen v. Drybones, 1970) that was able to use the BOR successfully to argue that section 94(b)<sup>96</sup> of the *Indian Act* was discriminatory based on race. While the Drybones case was extremely important, the stakes in the Lavall and Bédard cases were arguably much more significant and far-reaching; they challenged the underlying gender regime in the *Indian Act*, further challenging power relations both within the federal government and within First Nations community and national leadership. The refusal to view the Drybones case ruling as applicable to the Lavall case brings up issues of gender bias in law. In her 2007 book *Are Women Human?* Catherine MacKinnon argued that laws enshrine the legislator’s point of view, the point of view of power. She used the example in rape laws, that the law was created when women were not allowed to vote and certainly did not have any input into the design of the legislation. Similarly, the *Indian Act* was written without the input or consent of Indigenous people or Indigenous leadership and, as was discussed in Chapter 5, women were specifically legislated out of their traditional social and political positions. The *Indian Act* legislated Indian women’s status to be dependent on a male (whether that be husband or father). The power of the *Indian Act* as a tool of the settler colonial government to maintain jurisdiction over First Nations people meant that the legislative dominance of the state was left intact.

The stakes were much higher for the Crown if the BOR could be used to strike down discriminatory sections of the *Indian Act* such as Section 12(1)(b). In the Lovelace case, the Canadian government argued a definition of Indian was necessary and “inevitable in view of the

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<sup>96</sup> *Drybones v. Regina* (1969) challenged Section 94(b) of the *Indian Act* that made it illegal for Indian peoples to become intoxicated off their Reserves. If found guilty, a status Indian could be charged with fines, court costs, and short-term jail time. This did not apply to all other non-status Indians or non-Indigenous Canadians. The freedom to ‘get drunk’ (generally a male activity) was applied equally to all Canadians. In contrast, the BOR was not, however, successful in ensuring that Indian women would be treated the same as non-Indian women. One could argue that alcohol sales would have been a factor in the Drybones instance, and it addressed a right that was important to men, while the Lavall case had no apparent direct benefits for men, since it was a ‘women’s issue.’

special privileges granted to the Indian communities, in particular their right to occupy reserve lands" (Joseph & Castan, 2013, p. 757) and that the statutory definition of "Indian" in the *Indian Act* was consistent with Indigenous tradition (Knop et al., 2012). In line with the erasure of many pre-contact matrilineal societies, the government argued that traditionally patrilineal family relationships determined legal claims to land. Thus, in order to protect reserve land in the nineteenth century from encroaching non-Indian men the male normative definition was created (Joseph & Castan, 2013). However, the legislation creating the definition of Indian has been argued to have been motivated primarily for administrative purposes, to aid in cost cutting, and for the purpose of assimilation of First Nations peoples, as has been discussed in the previous chapter (Barker, 2008; Miller, 2000; Milloy, 2008; Tobias, 1983). It was also not created in consultation with Aboriginal peoples, nor did it take into consideration how each First Nation determined their own membership codes. The Lavall case directly challenged not only the marrying out rule but also the gendered nature of Indian status and the continued paternal government control of Indian identity.

Lovelace made a critical argument against the government's interpretation of traditional identity. She argued in her case that the Maliseet peoples were traditionally a matrilineal society; however, through the imposition of patriarchal colonial policies some members of the "male" Maliseet community had accepted these imposed ways in the *Indian Act* as authentic Maliseet tradition (Knop, 2002; Knop et al., 2012). Knop et al. (2012) note that Lovelace made the point that "what appeared to be Indigenous tradition was, in fact, an invention of colonial bureaucrats" (p. 603). This brings us back to the discussion on the significance of patriarchal colonial reinterpretation and erasure of many Indigenous women's traditional status that was discussed earlier in Chapter 4. The importance of this cannot be understated. Lovelace used this reference to matrilineality to argue for property rights. However, the contested nature of who gets to decide that is tradition and how it is used comes to light in this case.

### ***Beyond cultural essentialism***

Both Lovelace and the Assembly of First Nations (AFN) used the idea of traditional culture to make their claim for equality. The AFN used it to confer the idea that they did not need formally stated equality rights because tradition ensured their existence. In this way the AFN was broadening the possibilities of self-determination and reducing the notion of Western-liberal ideas

of equality as outside tradition. On the other hand, Lovelace used the idea of tradition to challenge the government's rationale that patrilineal descent was traditional to Aboriginal culture and their claim to ensure its protection.

The legal case of *Lovelace v. Canada* is often cited in feminist literature to exemplify the conflict between individual rights of women's equality versus group cultural rights to determine membership and cultural traditions (Deveaux, 2006; Kuokkanen, 2012). In general, women's equality, or more specifically challenges to discrimination based on female gender, is criticized as being in conflict with group and cultural rights (Cohen et al., 1999; Phillips, 2007), in other words the status quo. Women's rights are marginalized and contested across societies, geographies, and cultures, and are often in opposition to the male heteronormative status quo. This dualism is also a criticism of UN conventions and international laws. Instruments like UNDRIP emerged in order to address group rights, while the *Convention on the Elimination of Discrimination against Women* (CEDAW) emerged to address weaknesses of international instruments in addressing culture-based discrimination and inequality in gender.

Recent anthropological understandings about culture have shifted scholarship more broadly to view culture as being a dynamic, changeable set of practices (Handler & Linnekin, 1984; Hobsbawm & Ranger, 2012) that are invented and constantly influenced by outside forces, rather than a set of fixed, static behaviours and beliefs. However, culture does not change so easily when it comes to gendered practices and beliefs. Sandra Lovelace argued in her case that the Maliseet traditionally, or precontact, were a matrilineal society; however, colonial policies had changed the lineage and that recently some members of the Maliseet community had come to understand or accept their culture in this imposed, patrilineal way. According to Knop et al. (2012), Lovelace was using the "tradition as being invented" argument, not only arguing that because of the outside influence or imposition of the colonial government of Canada, the traditions of her culture were dramatically changed, but also that tradition had been misunderstood and misinterpreted by her own peoples. In the case of Lovelace, the tradition of matrilineal lineage to membership was argued to have been overrun by the cultural imposition of a patrilineal lineage. On the stronger end of the scale of post-essentialist critique of culture, Knop et al. (2012) argue that all tradition is invented and therefore contestable. On such a view, any claim to equality based on culture would be dubious and thus the tension and opposition between culture and equality would be "undercut" (Knop et al., 2012, p. 604). They identify two principal ways that this tension has been achieved.

The first pertains to the idea that if culture is invented then it can be transformed and changed. Sally Engle Merry (2006) writes, “Seeing culture as open to change emphasizes struggles over cultural values within local communities and encourages attention to local cultural practices as resources for change” (p. 9). This leads Knop et al. (2012) to conclude that, “there is room to transform a given culture while still paying respect to culture as a concept” (p. 604). This is really key to privileging gender issues in the struggle for self-determination. Secondly, because tradition is invented, then it would be prudent to identify exactly who is doing the inventing and for what purposes. In this way, a more critical and nuanced understanding of what remains the normative understanding and lived experiences of what is referred to as traditional cultural practices can be found. The opposition of culture to equality has been challenged by calling attention to the *who* in the process of reclamation and cultural preservation, exposing tensions as being tied to powerful elite male privilege (Visweswaran, 2010). Uma Narayan (2000) describes how we tend to essentialize culture using a metaphor of a “package picture” of culture and how the essentializing actually “obscures how projects of cultural preservations themselves change over time” (p. 1085). She describes how culture changes over time and that “Dominant members of a culture often willingly discard what were previously regarded as important cultural practices but resist and protest other cultural changes, often those pertaining to the welfare of women” (p. 1085).

Another line of theorizing in respect to minimizing the overpowering cultural frame is presented by Anne Phillips (2007) in her book *Multiculturalism without Culture*, in which her central argument is that it is crucial to recognize that culture is an essential part of our identity and lives but we must understand how power, opportunity, and status work as well as how class, gender, and race intersect with culture. She argues that the values of equality and autonomy are political rather than cultural in nature and cautions against the belief in the consensus of cultural values as this essentializes culture. For example, Phillips (2010) argues that culture should be “diluted” as promoting the notion of people as products of their culture as it “encourages the unhelpful distinction between traditional and modern cultures” (p. 66). She promotes the idea of agency and consent in choosing which parts of culture to utilize so in this way she employs what Gayatri Chakravorty Spivak (2012) calls strategic essentialism. Phillips (2007) writes, “It is time for elaborating a version of multiculturalism that dispenses with reified notions of culture, engages more ruthlessly with cultural stereotypes, and refuses to subordinate the rights and interests of

women to the supposed traditions of their culture” (p. 72). However, Maneesha Deckha (2004) rightly cautions that alternative reframing of cultural practices is not always possible:

Eliminating cultural claims at this historical moment would leave many vulnerable groups without any legal tool to guard against cultural disintegration, extinction, or exploitation...[S]ome essentialism in cultural claims must be tolerated. It will be a trade-off of potentially essentialising means for egalitarian ends. (p. 38)

In order to deal with this seeming impasse, Spivak’s strategic essentialism, which understands that culture and social relations are basically constructed, may be useful to intentionally “develop a general category or essentialized community, such as ‘indigenous,’ for the purpose of achieving particular political aims” (Knop et al, 2012, p. 604). According to Spivak, this type of strategy is empowering as it allows groups to name their own identities rather than being ascribed identities by others. However, strategic essentialism depends on “*who* is utilizing it, *how* it is deployed, and *where* its effects are concentrated” (Fuss, 1989, p. 20). This questions the validity of what is deemed traditional culture and how effective it is to use cultural claims.

Still, culture and equality are at a crossroads since how we apply or interpret strategic essentialism is laden with cultural values. In other words, it has been quite clear that at least some Western-liberal feminists have, though more so in the past, imagined that women would utilize strategic essentialism in order to promote the idea of equality, as it is understood in a liberal sense (Squires, 2007). Lovelace was able to use the tradition as constructed argument and in doing so leveraged the strategic anti-essentialism argument against a preconceived colonial construction of patriarchal, male dominated primitive Indigenous societies.

### **Continuing effects of gender-based discrimination: Bill C-31**

In order to eliminate sex discrimination in the *Indian Act*, the government replaced Section 12(1)(b) with Bill C-31. David Crombie,<sup>97</sup> the minister of Indian Affairs at the time, was of the belief that Indian status could be viewed as an individual right that would be bestowed upon the individual Indigenous person by the government. As Joyce Green (2003) writes, “Truly liberatory

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<sup>97</sup> Minister of Indian Affairs and Northern Development September 17, 1984 – June 29, 1986.

constitutional and legal strategies must ... not simply reduce Aboriginal and women's claims to simple equality with the not-so-neutral white male norm in the colonial state" (p. 40). The government's lack of attention to the collective impact of viewing the issue of women's loss of status in purely an individual rights perspective meant that it pitted the rights of the individuals, mostly women, against the rights of the First Nations community's ability to self-govern. Bill C-31,<sup>98</sup> passed into law in April 1985, was meant to bring the *Indian Act* pursuant to the *Canadian Charter of Rights and Freedoms*. The Bill made significant changes to how status was conferred and to how band membership was decided and attempted to repair gender discrimination in the *Indian Act*, to reinstate Indian status to victims of Section 12(1)(b), and to allow bands to determine their own membership (Clatworthy, 2007). It ended Section 12(1)(a)(iv), which was called the "double mother rule."

Bill C-31 has not offered the justice that the government hoped it would do. There continue to be far-reaching effects emanating from the discriminatory legislation on First Nations women and their descendants. Instead of granting status to all First Nations women who had lost their status due to the marrying out clause, the government created a very complex formula that has perpetuated further dispossession and that "ensures the eventual legislative extinction of Aboriginal peoples" (Palmater, 2010a, para. 18). For example, 1985 changes also included rescinding status to those who gained Indian status only through marriage. The precarious nature of the colonial logic of control of the Indigenous population resulted in 127,000 persons, mostly women, being reinstated with status (Borrows, 1994). Although the revised 1985 *Indian Act* reinstated many women<sup>99</sup> it also introduced two new categories of Indian status. The revised Section 6 of the *Indian Act* outlines "Persons Entitled to be Registered":

6(1) – Under this section a child who has two registered Indian parents

6(2) – Under this section a child who has only one registered Indian parent would have to marry another status Indian in order to pass on status to their children.

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<sup>98</sup> Full name is A Bill to Amend the Indian Act.

<sup>99</sup> The majority of the 1<sup>st</sup> wave of people to be reinstated were predominantly women (Borrows, 1994, p.35, FNPOA 81); although many have been descendants (Clatworthy, 2007).

As the 1951 *Indian Act* enabled status Indian men to pass on status to their non-status wives, under 1985 changes their children were considered status Indians under sections 6(1). On the other hand, for status women who had “married out,” their children were considered 6(2)s and therefore could not pass on their status, creating a second-generation cut off.

In 2007, Sharon McIvor challenged Bill C-31 for generational discrimination because the second-generation clause excluded grandchildren of reinstated Indians their rights to status unless they married status Indians. McIvor argued in her case that the government’s denial of status to her son’s children is discriminatory on the basis of gender. In *McIvor v. Canada* (2009) the British Columbia Supreme Court ruled that section 6 of the *Indian Act* constituted discrimination under the equality provisions of the Charter and that discrimination was based on “matrilineal as opposed to patrilineal descent” (Lehmann, 2009, p. 5). In 2009, the British Columbia Court of Appeal agreed with the finding of discrimination made by the Supreme Court and declared section 6(1)(a) and 6(1)(c) to be of “no force and effect,” suspending the order for one year allowing Parliament time to amend the legislation (*McIvor v. Canada*, 2009, para. 166). In March 2010 the Minister of Indigenous and Northern Affairs (INAC) introduced Bill C-3 to deal with the problems created by Bill C-31. Again, the government did not consult Aboriginal groups (Palmater, 2010a). Bill C-3 has been recently challenged in the *Descheneaux* case,<sup>100</sup> which brought up a number of further issues related to status. In a recent article in the *Globe and Mail* newspaper, Thomas Flanagan, one of the main advocates of FNPOA, has blamed “the feminist movement” for “affecting the character of the Indigenous population” (para. 1) eventually “allow[ing] anyone who can demonstrate a degree of Indian ancestry to apply for … Indian status” (Flanagan, 2017, para 4). The problem is one of benefits, not identity, as Flanagan continues, “today, the balance of incentives surrounding legal status has switched from negative to positive” (para. 5). For Flanagan, assigning benefits on the basis of heredity “is not really compatible with the ethos of liberal democracy” (Flanagan, 2017, para. 7). While Indian status is important in order to access certain fiduciary responsibilities that the government provides through the *Indian Act*, and it has been argued to be a source of

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<sup>100</sup> Cousins Issue: “cousins are treated differently depending on whether the paternal or maternal grandmother lost status” (INAC, n.d.).

Siblings Issue: “women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985 were treated differently than male siblings” (INAC, n.d.).

Issue of Omitted Minors: “under age children who were born of Indian parents or of an Indian mother, lost their right to Indian status because their mother married a non-Indian after their birth between September 4, 1951 and April 17, 1985” (INAC, n.d.).

positive identity that Indigenous peoples can reclaim (Borrows, 1994, p. 40), it has been applied to First Nations women differently than to men. As Palmater (2010a) writes:

Canada essentially incorporated an idea into the Act that gave the message to communities that Aboriginal women were less worthy and less capable of passing on Aboriginal identity and culture. This has had an incredibly damaging effect on both Aboriginal women and their communities. (para. 16)

The implications of Bill C-31 and section 6(2) are substantial. This distinct group of status Indians is sometimes referred to as “‘Bill C-31 Indians,’ who in many cases were disparaged or not accepted back into their original communities” (Clatworthy, 2004, p. 4) and has emerged as a “negative state of being” (Fiske & George, 2006, p. 69). Through the government reinstatement of Indian status some bands grew in size substantially, although the average band increased by about 19% (Borrows, 1994, p. 35 NF 81). John Borrows (1994) believes that this type of discrimination “illustrates the limits of ‘rights’ discourse in being able to transform community structures away from discriminatory practices” (p. 36).

### **Interactions between First Nations and the Canadian state**

First Nations women continue to challenge the Canadian government on gender discrimination in the *Indian Act*. However, as the rights and well-being of Indigenous women are tied to their communities, their culture and their land, the struggle for women’s rights has directly involved the interaction between First Nations leadership and the Canadian state. The interaction involves the issue of self-determination at the collective level.

The challenges to the *Indian Act* by numerous women, some having been discussed above, had profound effect on Canadian law. In 1982, the Canadian Constitution was patriated resulting in control being transferred from Great Britain to Canada. A more robust declaration of rights than in the BOR<sup>101</sup> was articulated in the *Charter of Rights and Freedoms*. Section 15 of the Charter reads “every individual is equal before and under the law and has the right to the equal protection

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<sup>101</sup> The 1960 *Canadian Bill of Rights* was the first federal law to protect human rights. It does protect the enjoyment of private property, though not its possession.

and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.” This section was thought to be able to challenge sexual discrimination in the *Indian Act* (Eberts, McIvor, & Nahane, 2006). In fact, at the Constitutional conferences<sup>102</sup> that were mandated to discuss constitutional matters pertaining to Aboriginal peoples, sexual equality was a key issue. These conferences were between Aboriginal representative groups and federal and provincial governments; however, the Native Women’s Association of Canada (NWAC), the only Aboriginal women’s group, was not invited by the Prime Minister (Eberts et al., 2006). At the conference in 1983, even though Section 15 of the Charter addressed gender equality, all governments and organizations except the Assembly of First Nations (AFN) supported putting sexual equality into the Canadian Constitution. The AFN felt that “protections were already implicit in Section 35 as a part of self-government” (Borrows, 1994, p. 31). The AFN gave the following statement regarding their wish to exclude sexual equality in the Constitution:

We would like to make it clear that we agree with the women who spoke so forcefully this morning that they have been treated unjustly. The discrimination they suffered was forced upon us through a system imposed upon us by white colonial government through the *Indian Act*. It was not the result of our traditional laws, and in fact it would not have occurred under our traditional laws. We must make it perfectly clear why we feel so strongly that we must control our citizenship. The AFN maintains that ‘equality’ does already exist with the traditional “citizenship code” of all First Nations people. (cited in Borrows, 1994, p. 31)

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<sup>102</sup>Conferences took place in 1983, 1984, 1985 and 1987 between the Prime Minister, the Provincial First Ministers and representatives of the Assembly of First Nations (AFN), Native Council of Canada (NCC) Inuit Tapirisat of Canada (ITC), and the Métis National Council (MNC). The PM did not invite the Native Women’s Association of Canada (NWAC) (see Borrows, 1994, p. 29).

The AFN did eventually accept the amendments in the end. However, they did so only after the government consented to allow individual bands to determine their own membership, something First Nations had been fighting for since 1946.<sup>103</sup>

### ***Band membership codes***

Although the federal government still retained the power to determine who was a status Indian, the change in the 1985 *Indian Act* to increase self-determination through the ability to determine band membership gave bands several new by-law powers. This is significant since before 1985 Indian status and band membership were tied. After 1985 these were severed, which meant that one could be a status Indian but not be a member of a band. After the changes, bands could decide who was able to live on the reserve, whether or not benefits could be accessed by non-member spouses and children of band members residing on the reserve, as well as regulating the safety and placement of dependent children (National Centre for First Nations Governance, 2006). This change was a very positive step in allowing First Nations to self-determine; however, it also made individuals, especially reinstated women, potentially vulnerable to community exclusion or marginalization. This is evident in the continuing clashes between communities and women who partner with non-Indigenous men. For example, in an effort to preserve their culture, language, and identity, the council of the Kahnawake reserve near Montreal instituted a law in 1981 to ban non-Indigenous people from living on the reserve. The council issued eviction notices to 26 non-Indigenous residents in 2010. Seven people sued (legal proceedings started in 2017) the Kahnawake Mohawk council for this law as it bans mixed Indigenous/non-Indigenous couples. The ban was recently found to be unconstitutional in the provincial court (Peritz, 2018). The plaintiffs argued that the ban is against their human rights as outlined in the 1982 *Canadian Charter of Human Rights* and the 1948 *Universal Declaration of Human Rights*. Similar bans are also happening in other areas of Canada.

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<sup>103</sup> In 1946, the government reviewed the *Indian Act* and solicited ideas from Indian bands and associations across the country receiving an overwhelming appeal for the abolition of involuntary loss of Indian status (Giokas, 1995). This, of course, did not happen.

### ***Government control***

While many bands welcomed reinstated members, others challenged the federal government for interfering in band membership. The federal government did not provide any more funds to reduce the financial burden on already stretched band budgets, and there were concerns the increased burden of legal recipients would be overwhelming and unsustainable. The government has yet to provide a funding scheme to help bands accommodate the increased numbers of reinstated status Indians under the Bill C-3 (National Aboriginal Law Section-Canadian Bar Association, 2010). Also, some bands disputed this influx of new members on the belief that many of them had not lived on reserve land or previously expressed a desire to do so (Borrows, 1994). As many Indian Chiefs and their political organizations stood opposed to reinstating band membership for women<sup>104</sup> they “managed to resist recognizing and re-settling fewer than two percent of persons who obtained legal reinstatement” (Green, 1993, p. 113). This was a serious loss, sometimes permanent, for many Indigenous women of their identity and cultural membership, but also their access to many types of material resources such as housing and, importantly for the discussion in this thesis, land.

### ***Sawridge Band v. Canada***

One prominent example of the problems that the government policy has caused is the Sawridge Band case. In 1985, Sawridge, a small (50 members) but prosperous First Nations band in Alberta, challenged Canada’s decision to reinstate membership to women who had lost it during the 12(1)(b) amendment to the *Indian Act*. After Bill C-31 came into effect, almost 400 applications for membership to the band were filed. In *Sawridge Band v. Canada*, the band cited they had the right under the *Canadian Charter of Rights and Freedoms* to determine who would be allowed to be a member of their band and they were also justified in excluding these women from their band membership on the basis of Cree laws and traditions (Ladner, 2010). Since the federal government had allowed bands to determine their own memberships in 1985, anyone wanting to join had to apply directly to the band they wanted to (re)join. Even though the government envisioned a huge increase in the number of status Indians, they decided not to provide bands with additional lands or monies to deal with the Bill C-31 peoples (Congress of Aboriginal Peoples, 2012). Thus, even

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<sup>104</sup> Not only women but also their descendants were rejected.

though the federal government had reinstated legal Indian status to women affected by the marrying-out rule, the government no longer held jurisdiction over band membership. Sawridge lost the first case against the government in 1995 but was granted a second trial. In 2003, the band was ordered to add 11 women to their membership. The Band has maintained that, as it does not receive funding from the federal government for the 11 reinstated women, it cannot afford them. Cecile Twinn and her sister Margaret Ward were two of the 11 reinstated women who were struggling to get adequate and fair funding from the band council and as of 2017 their family members are still trying to get membership in the band. The band maintains that the issue is not about money but about control over membership rights (Barnsley, 2003).

In light of changing populations and increasing out marriages (Clatworthy, 2007), creating membership codes that reflect the changing demographics is becoming increasingly more complex and open to being challenged. First Nations autonomy in determining membership is seen as an “essential component of the right of self-government” (Furi & Wherrett, 1996, p. 16). In 2003, there were 232 First Nations that had created their own membership codes (Clatworthy, 2007). The pressures of determining membership codes will most likely be repeated in the event of the adoption of FNPOA, as land ownership and entitlement will be in flux on multiple grounds. Increased self-determination has been a step towards justice for First Nations autonomy, although there are some important negative effects on reinstated women and their descendants. These effects will be discussed at more length in the following section on the interactions between First Nations communities and reinstated women.

### **Interactions between First Nations communities and reinstated women**

According to the Feminist Alliance for International Action (2003), by June 1995, 95,429 people were reinstated with more than half being women. The reaction of several First Nations communities to the sudden influx of reinstated people, many of whom were women, has not always been positive and welcoming. In order to push back against the government, some band councils refused to accept housing funding that was earmarked for Bill C-31 Indians, which “created a degree of animosity between lifelong band members and reinstated band members” (Borrows, 1994, p. 36). It was also felt that Bill C-31 funding should not be accepted as “our treaty right is not for sale. No amount of force or intimidation practiced by the bureaucrats will have the legislation imposed on our people” (Sharon Venne, legal counsel, Chiefs of Northeast Alberta as

cited in Borrows, 1994, FN 89, p. 36). Bill C-31 members were viewed as jumping the queue by some members as the wait for on-reserve housing was often several years. While these maneuvers by some band councils were directed at the federal government, the refusal of federal funding meant that Bill C-31 members could not benefit from the proposed government funding. Several individual legal cases were pursued against some bands that refused membership to reinstated women. For example, in 1989, Elizabeth Poitras filed a case against the Sawridge band for membership. She and other women waited years before their membership was reinstated, and longer still for their grandchildren to be accepted as band members due to the second-generation cut-off (Pointras, 2011).

In a settler colonial environment that continues to have a goal of elimination of Aboriginal peoples, land appropriation, and in some cases genocide against Aboriginal peoples, why would a band not welcome the reinstated women? Would it not be better to increase the population of their bands? If cultural reclamation and preservation are goals of First Nations then would it not be advantageous to have greater numbers so that more pressure could be put on the federal government? Would it have not been a stance of justice and decolonization to demand that the government reinstate all dispossessed women and compensate the individuals as well as their communities? Although some bands have now recognized that the augmented establishment of different tiers of Indian status was a “strategy of divide and conquer” (Borrows, 1994, p. 37), would it have been different if the victims of Bill C-31 were primarily Indigenous men? In *Sawridge Band v. Canada* the Sawridge Band argued against getting rid of section 12(1)(b) as it “merely represented the legislative codification of the pre-existing Aboriginal custom of ‘woman follows man,’ which was used to control community membership and land use” (Dick, 2011, p. 12). If this tradition is accurate:

Aboriginal women’s sex equality litigation is a story of women striving to achieve the most basic incidents of citizenship: equal status and membership within Aboriginal communities, equal entitlement to share in matrimonial property, and equal participation in Aboriginal governance. (McIvor, 2004, p. 108)

### **Patriarchy of the oppressed**

As Indian status and band membership are directly connected with resource allocation and legitimate political power-related status within the Aboriginal community, which is conferred by the state, that this means that Indian status is very political in nature, and thus any gender equality rights are related to Indian status have become very political in nature. These cases just discussed help us to understand how high stakes like status and citizenship, which are tied to material resources, are gendered. Because of the discriminatory legislation in the *Indian Act* that has ensured the extreme poverty on much of First Nations reserve land and for Aboriginal peoples in general, the reinstatement of such a large number of people would overwhelm the resources and capabilities of some reserve communities and potentially destabilized them (Coulthard, 2014). This is of grave concern to the bands. If one holds that the government has a policy of elimination of Indigenous peoples, then it would have made political sense to have a class action suit against the government to reinstate all eligible Indian women and allow them to pass on their status to their children. However, the marrying out rule applied only to Native women and their descendants. If communities had fought to challenge the marrying out rule and to have their people (women) reinstated at a time when bands were able to challenge the government (1970's),<sup>105</sup> and then they lost their challenge, then communities' would have been clear they were fighting for the survival of their band or community. At the time, they could have attempted to negotiate financial and/or land settlements and welcomed women back to the land. If this challenge had occurred, then arguments that the reinstated persons would have suddenly overwhelmed bands financially and resource-wise would have had more resonance. This indicates the gendered power relations that determined the course of action that led to the situation where women were dispossessed in the long term, even when legislation was developed in their favour.

If we return to our understanding of the workings of patriarchy then these questions can be approached in terms of women's association to men. Through the *Indian Act* the government has marginalized and individualized Indigenous women within their communities and within the settler state. Indigenous women were only part of the collective if they behaved in a certain way, i.e. married the right person. By designating women who marry out as no longer having status, this meant they would not necessarily be understood by First Nations communities as agents of change

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<sup>105</sup> There were laws that forbade any challenges to the *Indian Act* before the 1970s.

in the decolonial process, or as challenging the discrimination within the *Indian Act*, but rather as unentitled non-members, dependents on already materially resource strapped communities. Reinstatement then becomes reinstating individual women outside of the communal identity. The above cases draw a complex picture of how race and gender intersect in colonial legislation. Indigenous women become subjected to multiple grounds of discrimination (Monture-Angus, 1995), from both within their communities and from the colonial settler state. The patriarchy within the communities cannot be fully explained by the imposition of colonial policies; to do that obfuscates the agency that Indigenous men chose not to exercise and it also reifies traditional cultures (Jaimes Guerrero, 2003).

### ***Trickle down patriarchy<sup>106</sup>***

Indigenous peoples have been continuously subjected to patriarchal ideas and practices that still operate in the current modern Canadian landscape. Vera St. Denis (2007) argues that all Aboriginal peoples in Canada have undergone socialization, to varying degrees, by “Christianity as well as incorporation into the patriarchal capitalist political economy and education system, and are therefore subject to western ideologies of gender identities and relations” (p. 41). Colonialization, seen as the foremost cause of the oppression of Indigenous women, as well as eclipsing any possible inherently discriminatory cultural practices, is also critiqued by some Indigenous feminists as being “a simplistic and superficial explanation and a repudiation of responsibility” (Eikjok, 2007, p. 118). Reflecting on discriminatory practices and processes internal to culture and community, Jorunn Eikjok (2007) writes,

the colonization of Indigenous societies strengthened the original patriarchal structures and, in introducing modern, masculine power, over-rode any non-patriarchal elements within Indigenous society. (p. 116)

Eikjok does not shy away from acknowledging the potential for male power dynamics within Indigenous traditional societies. She is not alone. Authors such as Lina Sunseri (2000), Joyce Green (1993), Andrea Smith (2005b; 2006) and Emma LaRocque (2007) also argue that the band

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<sup>106</sup> From Jaimes Guerrero, M. A. (2003). “Patriarchal colonialism” and Indigenism: Implications for Native feminist spirituality and Native womanism. *Hypatia*, 18(2), 58-69.

council's governments have been colonized and that this colonization has perpetuated a fissure between gender rights and sovereignty. However, despite this more egalitarian history, Ladner (2009) writes that the "mere existence" of more egalitarian traditions and ideologies does not mean that, therefore, Indigenous culture is exempt from sexism or discrimination noting the improbability, "Given the normalization of state and individualized violence, sexism, heteronormativity, racism and the institutionalisation of neo-colonialism" (p. 71). Furthermore, Ladner cautions that the lack of understanding of traditions by many Indigenous peoples due to colonialization increases the probability of colonial behaviours being perpetuated and entrenched, such as violence against women and children and male hierarchy. Ladner warns that this conflict is not just academic but "continues to define and divide the Indigenous women's movement and Indigenous politics in Canada" (p. 63).

### **Sovereignty and women's rights: Examining the "incompatibility"**

While mainstream feminism in a settler context has avoided confronting the issue of nationalism head on for the most part, sovereignty is central to Indigenous feminism (Arvin, Tuck, & Morill, 2013). Decolonization and sovereignty are key to Indigenous women's emancipation both within the settler state and within their communities. As has been seen, though, in the various cases regarding gender discrimination and status there has been significant resistance to the inclusion of Indigenous women's rights in the sovereignty movement for several related reasons. First, it is argued that the problems of gender discrimination and other social issues in Indigenous communities can be traced to the patriarchal and assimilationist colonial policies imposed by the state. As discussed at length previously in Chapter 4, anthropological evidence establishes that in some areas precontact North American Indigenous societies were more egalitarian and some were matrilineal passing land through female lineage (Davis, 2003; Hann, 1998) and many had strong kinship social relations. Women were active in decision-making in governance (Barker, 2008), gender and sexuality were more fluid (Lugones, 2007; Smith, 2003), and roles in general were not as strictly tied to gender (Allen, 1992). Some scholars evade dealing with the issue of oppression within their communities by blaming colonial impositions as the only source (Smith, 2005a). Thus, the need for gender equality has been perceived to be a colonial construct, laden in Western-European liberal ideals and caused by imposed colonial gender relations. Feminism has been seen

as only pertaining to white women, with neither being compatible with Indigenous sovereignty (Green, 2007a, 2007b).

It is therefore understandable that the perceived incompatibility of sovereignty and women's rights is theorized by Indigenous scholars such as Patricia Monture-Angus, (1995) and Elizabeth Archuleta (2006) as being overcome by a return to Indigenous traditions, which are believed to put women more at the centre of life, reclaiming the relatively elevated status of women of precolonial times (St. Denis, 2007) in which gender roles were complementary. Gender complementarity, as it was discussed in Chapter 4, is the notion that women and men had gendered roles that were perceived as being crucial to the survival of the community. The concept of gender complementarity has been used to imagine decolonized relations in an effort to avoid essentializing notions of gender as male or female. As Darcy Leigh (2009) notes, this mode of feminism is part of a wider Indigenous strategy of traditionalism, which promotes reclaiming Indigenous values and customs in order to resist assimilation and promote decolonization (see Alfred, 1999; Monture-Angus, 1995). Although much of Indigenous feminist thought is wary of the uncritical adoption of traditional ways as delivering gender equality, there is merit in the idea that a focus on state and international laws as the arbitrator and guarantor of gender equality "helps make even more invisible the sex equality of women in traditional Native culture" (Kirkness, 1987, p. 413). As discussed in Chapter 4, the possibility of other forms of social organization such as matrifocal become overshadowed and obscured by the dominance of rights law, despite laws being difficult to enforce.

Second, sovereignty and women's rights are seen as incompatible since women's rights are portrayed as strictly individual rights and in that way take on the ascribed characteristics of Western ideology, which is supposedly in opposition to the collective nature of Indigenous ways of being. This is thought to potentially fragment the efforts to re-establish the strength of communities and the traditional cultural values. Sovereignty, it is argued, should be prioritized, and any internal problems are best dealt with, not via the colonial state but rather through traditional, autonomous governance. In these ways, gender discrimination, including violence against women, is seen as being important although subsumed in the sovereignty movement and ultimately rectified in the process of decolonization (Archuleta, 2006; Monture-Angus, 1995; Tohe, 2000). Sarah Radcliffe (2002) writes, "gender issues remain secondary to the cultural politics of the indigenous movements, where the persistence of a complementary dual model of gender

underpins a traditional and symbolic role for indigenous women” (p. 162). The impact of colonialism will, in many cases, create a perceived need to resist through the sometimes unquestioning preservation of traditional culture. This can be seen very clearly in the Sawridge case that still maintains that their main issue is not with the status of, or even reinstating Indigenous women, but with the settler colonial government ordering First Nations governments to change their membership rules.

### Cultural autonomy

A common response to the pursuit of women’s rights is a criticism that it goes against the harmony of the group or culture. In the context of Indigenous rights, Jo-Anne Fiske (1991) writes that the accusation of incompatibility between women’s rights and self-determination is a constructed discourse invoking cultural relativism. Fiske (1996) disagrees with the rationale or logic of the common argument, that says:

Any appeal to an outside authority diminishes the autonomy of the community/nation, imperiling the struggle for self-determination and diminishing the traditional culture and decision-making processes. The narrative continues: Human rights, being a Western concept cannot be unilaterally imposed upon Indigenous peoples; to do so violates principles of cultural integrity, abrogates inherent rights of self-determination and weakens the collective in favour of the individual. (p. 69)

Joanne Barker (2006), agreeing with Fiske, states, “the idea that by affirming Indian women’s rights to equality, Indian sovereignty is irrevocably undermined affirms a sexism in Indian social formation that is not merely a residue of the colonial past but an agent of social relationships today” (p. 149). On this view, gender discrimination is disentangled from culture. This is an important shift in recognizing both external and internal sources of gender discrimination in Native communities and political agendas. Smith (2006) argues bluntly, “The fact that Native societies were egalitarian 500 years ago is not stopping women from being hit or abused now” (para. 3). In challenging the idealism often associated with precontact gender relations, Elizabeth Archuleta (2006) warns not to reclaim traditions that might “mimic patriarchal ways...[T]he constant focus on women as the backbone of the nation forestalls any discussion about men’s roles and

responsibility in reclaiming traditions and rebuilding the nations” (p. 96). The political recognition of extreme violence against Native women as caused by racism and ongoing colonial attitudes does not necessarily lead to internal community transformation in gender relations. Since colonial gendered relations continue to be reinforced and perpetuated in the dominant society, it is not realistic to imagine a consciousness of sexism or racism as enough to eradicate its deep-seated ideological influences. As Smith and other Indigenous feminists argue, centuries of patriarchal influence and training is not going to be eradicated easily. The challenge is in balancing the recognition of source with the responsibility of actions in order to change the paradigm.

The conflicts between individual human rights and collective cultural rights are not unique to the Indigenous context. The rights of women in general are arguably seen as challenging the status quo and thus seen as being inherently special interests of women based in individual rights. It is women who have gender issues, not men. Thus, culture seems to put limitations on women’s rights rather than advancing or protecting them. Alexandra Xanthaki (2011) writes, “although viewing the experiences of indigenous women as a unified whole would be erroneous, they are often, like women in many other communities, seen as carrying the honour of the community and, as such, they are encouraged to suffer in silence and put the ‘wider rights of the community’ above their own rights” (p. 421).

## Conclusion

The purpose of this chapter was to explore the tensions between individual and collective rights within the settler state. The chapter drew from legal cases that dealt with Indigenous women claiming equal rights to Indian status from the Canadian government and then subsequently to community membership from their band councils. Although the claims are fundamentally based in gendered colonial legislation that continues to discriminate against Indigenous women, the cases also point to the effects of centuries of colonial heteropatriarchal ideology and practice on gender relations and equal rights of Indigenous women within First Nations communities. This has often resulted in painful and deep-seated divisions within First Nations communities. The need for self-determination is critical for First Nations to be sure; however, neither band leadership, nor community members at large, have been immune to the effects of centuries of sexism and patriarchal rule imposed upon them. From the discussion in this chapter it is clear that many hurdles need to be cleared before Indigenous women can have access to equal citizenship, both in

the settler society and within their communities. This means that access to a potentially high value resource like private property would most likely bring up the same conflicts regarding who is entitled to individual resource allocation. It is conceivable that since women are typically associated with individual rights in property, especially in claiming matrimonial real property rights, that in the event of negative repercussions of the adoption of private property on reserve, women could directly or indirectly be held responsible.

The chapter also drew attention to the limitations for Indigenous women in using the rights framework but at the same time the need to be able to access international legal mechanisms if necessary outside the domestic state realm, as well as traditional frameworks in order to achieve justice. Therefore, this chapter argued that rights and equality must be based in an analysis of settler heteropatriarchal colonialism in order to be effective for Indigenous women to access their rights both within the settler state and within their Indigenous communities. The different potential sources of discrimination that Indigenous women face—from federal government legislation, as well as from their communities—means that women's rights are not easily accessible or necessarily protected.

The issue of how First Nations can balance the needs of a growing population with limited resources will be further explored in the final chapter. Individual property rights on reserve would invariably raise issues related to uneven distribution of resources. For reserves that are in financial difficulties this will present substantive management issues. Neoliberal policies like the FNPOA are pushing the agenda of self-sufficiency through promoting entrepreneurship, a further attempt to individualize Indigenous identity. The final chapter examines how capitalism may act to utilize disciplinary carceral mechanisms to limit Indigenous women's choices.

## Chapter 7: The entrepreneurial subject in a legacy of dispossession

Once we restore our property rights to our lands, I believe we will unleash a wave of First Nations creative and entrepreneurial spirit. (Jules, 2010, p. xii)

### Introduction

This chapter returns to interrogate the property-owning, entrepreneurial subject that the authors of *Beyond the Indian Act* (Flanagan et al., 2010), and other advocates of private property on reserve land are keen to promote (Akee, 2009; Alcantara, 2007, 2012; Cornell and Kalt, 1992; Flanagan & Alcantara, 2002; Flanagan & Alcantara, 2004; Flanagan, 2000/2008; Quesnel, 2012, 2013). Under the “grow-or-die culture of capitalism” (Gilmore, 2009, p. 73) advocates of private property rationalize how the FNPOA can enhance an individual’s entrepreneurial prowess, which the authors of *Beyond the Indian Act* have pitted against the “danger of [Aboriginal] politics” (Flanagan et al., 2010, p. 88). To the authors, communal development and communal property possession create constraints and inefficiencies stemming from Aboriginal political corruption, as well as foster demotivation for economic activity among individuals. The FNPOA, on the other hand, taps into the self-interested nature of each individual and promises to facilitate a kind of Indigenous citizen that is innovative, contributes to Canada, and is ideally “just like other Canadians” (p.161). Dempsey, Gould and Sundberg (2011) note the citizen in *Beyond the Indian Act* is imagined as someone who is “self-sufficient, enterprising, and never demands special rights based on history/geography/culture” (p. 235). Indeed, due to a legacy of colonial legislation and policies that continue to impact Indigenous women and their communities, the ways in which the FNPOA will be a part of this interaction with capitalism will be problematized in this chapter.

In order to interrogate how the neoliberal rationalization of private property for First Nations reserve land contemporarily operates as a gendered tool of dispossession for Indigenous women, this chapter draws on scholarship in the area of how capitalism works through carcerality, and how carcerality is constituted in capitalism. Scholarship that examines the political and economic implications of neoliberal capitalism can help to pull apart the networks and circuits of carceral relations that are obscured in rationales of entrepreneurialism.

I use Genevieve LeBaron and Adrienne Roberts' (2010) framework of "capitalist relations of carcerality," to interrogate the "broader disciplinary mechanisms and relations of unfreedom through which capitalism is sustained and reproduced" (p. 19). Given the gendered and racialized operations of private property in settler colonial Canada, their theoretical framework will be useful in identifying and analyzing the carceral mechanisms that "lock in" Indigenous women's "current and future life choices and possibilities" (p. 19). I argue that under a system of FNPOA-style private property that is undergirded by a Lockean entrepreneurial subjectivity, Indigenous women and their communities become vulnerable to carceral strategies that operate to lock participants into dependence on the neoliberal market—a market that positions those who belong to the subjective intersection of Indigeneity and women at the bottom of hierarchical capitalist relations. Indeed the capitalist market, as it stands now, exhibits biased outcomes that disadvantage along racial and gender lines (Acker, 2006; Bertrand & Mullainathan, 2004; Charles & Grusky, 2004; Cudd & Holmstrom, 2011; Oliver & Shapiro, 2006; Piketty, 2014), and without gender-sensitive social, economic, and political policies, as well as support services, the market will likely disadvantage First Nations women even further.

Chapter 5 drew on carceral geography to analyze the carceral nature of confinement exacted by the colonial authorities under the *Indian Act*. In this chapter, I examine three spaces as experiencing carceral relations of capitalism—debt, the household, and private property—as all three involve "disciplinary mechanisms" that further constrain First Nations women's "choices and possibilities" placing them further "into unequal and unfree capitalist social relations" (LeBaron & Roberts, 2010, p. 20). The first section in the chapter outlines the theoretical framework as used by LeBaron and Roberts (2010), elucidating how the concept of carceral relations is utilized in this chapter in relation to my thesis question. That is followed by a brief discussion of Indigenous women's experience in entrepreneurship and of the entrepreneurial subjectivity that Indigenous women are being expected to adopt. The chapter then focuses on each carceral space in turn—debt, the household, and private property—and examines the disciplinary mechanisms that operate to lock in Indigenous women's choices and freedoms.

### **Capitalist relations of carcerality**

Much has been written about the expansion of the carceral state, especially in the United States context, and how it functions to protect and increase capitalist accumulation through

criminalization of marginalized peoples including: the poor (Wacquant, 2008); racialized peoples, especially African Americans (Clear, 2009; Davis, 2003; Davis and Shaylor, 2001; Gilmore, 2007, 2009; Lapiro, 2001; Pettit, & Western, 2004); women (George, 2014; Haney, 2010; Lempert, 2016; Richie, 2012); and Indigenous peoples (Million, 2000; Nichols, 2014). In Canada, much important scholarship is also revealing how the Canadian state is legitimizing various forms of carceral expansion (Piché, Kleuskens & Walby, 2017), while perpetrating various forms of violence such as poverty, incarceration and exploitative labour practices against Black women and men (Maynard, 2017; Sudbury, 2005), and Indigenous peoples (Razack, 2015; Roberts & Reid, 2017; Walsh, MacDonald, Rutherford, Moore, & Krieg, 2011), particularly Indigenous women (Balfour, 2013; Williams, 2007). Carceral geographers have extended the idea of what carceral confinement is and where it occurs, for example in prisons to other less recognizable spaces of carcerality such as refugee holding centres, child social services, residential schools (Woolford & Gacek, 2016), and Indigenous reserve lands (A. Barker, 2016; Goeman, 2013; Cole Harris, 2011). Carceral geographers critique neoliberalism “looking for [the] root causes [of confinement] at the intersections of capitalism and shifting state formations amid globalization” (Brown, 2014, p. 178).

Another vein of scholarship on carcerality looks at *racial capitalism* in relation to understanding the political and economic dynamics as to how social and economic value is derived from racial identity. For example, Ikyo Day (2016) theorizes about racial capitalism in Canada and the US looking at how Asians in North America continue to be made alien by settler colonialism and racialized labour. Days’ analysis links race to capital through examples such as the negative and resentful linkage of Asians and capital as Asian peoples are “subordinat[e] under a colonial mode of production driven by proprietorial logic of whiteness” (p. 14). Jackie Wang (2018) also theorizes about racial capitalism in her examination of the political economy of the carceral US state, identifying two forms of oppression in the carceral-debt economy: predatory lending and parasitic governance (p. 69). Supposedly colour and gender-blind financialization operate to include marginalized populations into financial markets while at the same time they are excluded from credit markets. She asks the question whether market mechanisms will have the capacity to redress hundreds of years of structural inequality” (p. 138). Although these two authors do not focus specifically on the impact of racial capitalism on Indigenous peoples, their insights and analyses are fruitful for this chapter’s discussion on how racialized and gendered neoliberal

capitalism and settler colonialism work together in current forms of dispossession, accumulation, and state violence.

Capitalist relations of carcerality will be illuminated through an exploration of “the broader disciplinary mechanisms and relations of unfreedom through which capitalism is sustained and reproduced” (LeBaron and Roberts, 2010, p. 19). Using feminist political economy (FPE), LeBaron and Roberts argue that carcerality is central in capitalism as it “operate(s) to lock people’s current and future life choices and possibilities into unequal and unfree capitalist social relations and to limit their social and physical mobility within these relations” (p. 20). Their conceptual framework focuses on prisons, debt and households, in order to draw attention to the “interplay between states, markets, and households” (p. 20), arguing, for example, that the US government plays a central role in promoting debt in American families. Through the participation of the state, institutionalized gendered and racialized discrimination becomes intertwined with the success or failure of the market system. Not only are there real obstacles to material acquisition and usage of property for women, but the “reproduction and extension of capitalism continues to involve relations of violence, coercion, and constraint” (p. 19).

I extend LeBaron and Roberts’ analysis by applying it to settler relations in the Canadian context. In the US, the privatization of prisons and other related institutions have brought carcerality into the capitalist market, and LeBaron and Roberts argue that the US government “has increasingly relied on police and prisons to govern social marginality, [which] cannot be separated from the shifts in the broader political economy that have increased the insecurity of particular segments of the population” (p. 20). Furthering the use of this analytical tool to the context of this research project, I use a feminist political economy analysis to argue that it is through debt, the household, and private property as outlined in the FNPOA, that carcerality is exercised as an indirect and direct form of discipline for Indigenous women. Surely, debt and poverty do not inevitably lead to incarceration. However, it is more likely that poverty for Indigenous women may increase their vulnerability because of both the potential lack of access to secure employment, as well as the extreme social norms of confinement, policing, and punishing of Indigenous peoples. This colonial violence continues to occur in the settler state where, not only through government neglect but also through active perpetuation in policies such as the FNPOA. These types of neoliberal market-based policies are presented as emancipatory; however, I argue they are constitutive of contemporary forms and rationales of dispossession through carceral mechanisms

including debt, the household, and private property. How Indigenous women may be particularly vulnerable to these mechanisms is of concern in this thesis.

It will be useful to this present project to conceptually link the high incarceration rate of Indigenous peoples in Canada with capitalist market development and in this way make salient historical links with power relations while challenging the ahistoricity<sup>107</sup> of neoliberal policy. I argue not only that the ahistoricity of the neoliberal FNPOA is problematic, but also that in its gender-blind form it is not gender neutral. I expand the concept of carcerality to illuminate the historical carcerality that has undergirded land reserves. Furthermore, it is important to link actual (physical) carcerality with the impact on the psyche of those in Indigenous communities whose realities include both high incarceration rates as well as the accompanying real fears that daily existence may be abruptly altered through potential incarceration due to prejudices or the forced (perhaps risky) choices that capitalist relations promote.

Neoliberalism has been critiqued as simply “redistribut[ing] wealth rather than generat[ing], wealth and income” (D. Harvey 2005, p. 159). There is not less state power but only its “restructur[ing] in ways that privilege capital and the wealthy at the expense of the majority of the population” (LeBaron & Roberts, 2010, p. 24). David Harvey (2004) has written that much of this wealth accumulation has been accomplished through “accumulation by dispossession,” through the privatization of previously public services such as water and the deregulation of financial institutions, all at the expense of the majority of the population. Research in the area of carcerality and capitalist relations of carcerality will help us understand the “broader disciplinary mechanisms and relations of unfreedom through which capitalism is sustained and reproduced” (LeBaron & Roberts, 2010, p. 19) and in this way allow me to further interrogate the supposed enhanced autonomy promised by the FNPOA through economic development and private property.

This next section examines gendered entrepreneurial subjectivity as it relates to private property under the FNPOA. The authors of *Beyond the Indian Act* establish the rationality of ownership of property in fee simple for individuals so they can be more entrepreneurial. In order to analyze the disciplinary mechanisms of capitalist relations under the FNPOA a discussion of entrepreneurialism for Aboriginal women is undertaken.

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<sup>107</sup> Authors such as Shiri Pasternak (2014) and Pamela Palmater (2010b) have argued that the FNPOA is ahistorical in that it does not attribute Indigenous poverty to the legacy of government colonial policy, but that the policy attributes poverty to the inability of First Nations to have not been able to freely alienate their lands and participate in the free market.

## Entrepreneurial subjectivity: The “untapped” potential of Indigenous women

As Indigenous development continues to expand in various ways, Indigenous women are increasingly viewed, as non-Indigenous women are, as an untapped potential for economic development (Baughn, Chua, & Neupert, 2006; Chiste, 1994; Fielden & Dawe, 2004; Vossenberg, 2013). Entrepreneurship is seen to offer a “promising pathway for Indigenous women to enrich their lives, strengthen their families and uplift their communities” (Impakt, 2017, p. 1), often “posited as a space of liberation” (Knight, 2006, p. 153). In their 2017 report, Impakt<sup>108</sup> states that Indigenous women’s entrepreneurship has the potential to transform communities, allowing Indigenous women to “achieve financial independence and stability, while elevating others in the community” (p. 14). This rise in autonomy and empowerment of Aboriginal women and Aboriginal economic development in communities is happening alongside a general increase in neoliberal state responses to Aboriginal demands for increased self-determination and decolonization (MacDonald, 2011).

It has been argued that the neoliberal political context in Canada has provided some opportunities and newly opened avenues for Aboriginal self-government (Slowey, 2008), while others are critical of neoliberal policies as a way to off-load government responsibilities with privatization measures leading to a “marketization of Indigenous citizenship” (Altamirano-Jiménez, 2004, p. 349). Fiona MacDonald (2011) argues that neoliberal type state responses to Aboriginal issues and demands “promote shifting contentious issues out of the public sphere, thereby limiting public debate and collective—that is, state—responsibility” (p. 258). For example, around the time the FNPOA was being introduced by the government, mainstream media was supportive and matter of fact about the commonsensical need to restore private property rights to Indigenous peoples,<sup>109</sup> despite much contention in the alternative and Indigenous media. In *Beyond the Indian Act*, the authors framed the FNPOA in a way that redacted the colonial history of violence and dispossession, thereby depoliticizing the policy. In other words, the autonomy from government regulation and control that neoliberalism purportedly offers is virtually free from any

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<sup>108</sup> Impakt corporation is a non-Indigenous organization that helps corporations “maximize business investments in social change” (<http://www.impaktcorp.com>). The report was funded by Indian Business Corporation [IBC], a company owned by the three treaty areas of Alberta that provides financial lending and support to Indigenous businesses.

<sup>109</sup> See, for example, Helin (2011).

kind of baggage that might put a limitation of the imaginings of freedom and liberation. Neoliberal goals often overlap not only with Indigenous goals of less state control and more self-determination but also with broader feminist goals of increased economic independence for women.

Present development ideology idealizes the entrepreneurial subject as being able to join modern society powered by a free market capital system. The titling and ownership of land by women and their involvement in entrepreneurship has been linked to the enhancement of women's equality (Agarwal, 1994a, 1994b; Ellis, 2007; Jiggins, 1989; Stevenson & St-Onge, 2005) and remains an international policy objective of the World Bank, International Monetary Fund (IMF), and the United Nations, as well as numerous non-governmental organizations and financial institutions. Women now have more opportunities to access the free market system and become entrepreneurs. This has been argued to lead not only to their own emancipation, but also to uplifting the health of their families and their community. However, the capitalist free market remains gendered and racialized, and thus, in many ways, not a level playing field for most women (Cudd & Holmstrom, 2011; Fraser, 2013; Kuokkanen, 2008; LeBaron & Roberts, 2010; Mohanty, 2003; Wilson, 1996; Young, 2009).

While some women have managed to achieve increased economic parity with men, less privileged and racialized women are pushed even further into low paid work with no benefits (Eisenstein, 2016; LeBaron & Roberts, 2010). The privatization of social services means that critical support mechanisms for women in areas of family care or healthcare often becomes inaccessible or unavailable, as it is not profitable under neoliberal capitalism (Walby, 2011). Margaret Thornton (2010) writes, "The shift away from the familiar relationship of citizen and state to that of consumer/entrepreneur and market points to the way that the discourses of social justice and common good have been replaced with those of individual desire and private profit" (p. 7). Nancy Fraser (2009) argues, "we can now see that the rise of second-wave feminism coincided with a historical shift in the character of capitalism, from the state-organized variant...to neoliberalism" (p. 107). Thus, Fraser argues, just as second-wave feminists were critiquing the social welfare states as being androcentric and bureaucratically hierarchical in nature, thus disadvantaging women, neoliberalism offered an answer in a shift away from big government and controlled markets.

Michel Foucault's understanding of neoliberalism as a form of governmental rationality is that it produces "new kinds of political subjects and a new organization of the social realm" (Oksala, 2013, p. 34). For Foucault, neoliberalism is not simply an economic system of free markets but is a rationality of governmentality; if good governance and development goals are concerned with the well-being of citizens, the way to achieve that optimal wellness is thought to be through more economic development. Indeed Flanagan et al. (2010) state that private property ownership would lead to increased employment and wealth generation reducing dependency on government social welfare assistance and "fiscal costs of First Nations poverty [would] be reduced for all governments" (p. 173). In contrast to the typical neoliberal portrayal of welfare programs as a drain on society rather than generative of economic growth, social welfare programs are argued to be a way to manage the negative effects of the liberal capitalist system (LeBaron, 2008). However, if welfare programs are understood to be necessary for the well-being of women, and the only way believed to fund these programs is with economic growth, then "women's welfare and neoliberalism are not so obviously opposed anymore" (Oksala, 2013, p. 39). On this view, women's subjectivity is destined or more precisely pressured, then, to transform under the auspices of neoliberal governmentality. The question is, transform into what?

It is here that a return to Locke's idea of the property-owning subjectivity is useful. Despite the authors' denial of Lockean influence on their theoretical underpinnings of the FNPOA, their tying together labour in the form of entrepreneurialism with property ownership is instructive. For Locke, one's labour is the thing that creates property and the ability to own property motivates one's self-interest to improve on the property further. In this way, Locke's symbiotic relationship of labour and property feeding into each other has a disciplinary effect resulting in industrious and rational individual subjects who are responsible for their own success and failures as individuals. Property rights then become an incentive to engage in labour, which increases the common good. Like Locke, the authors promote the idea that private property will lead to abundance through the enterprising individual.

Within both the Indigenous and feminist struggles it appears that the capitalist system has proved flexible enough to adjust itself to the challenges laid upon it, without rectifying inequality or ensuring human rights. With this in mind, the next section looks at how Aboriginal women experience entrepreneurialism as the FNPOA promotes private property as being necessary and integral in entrepreneurialism. Aboriginal women are being encouraged and expected to participate

in the market as entrepreneurs, from both neoliberal governance and Aboriginal pursuit of self-development. Given that neoliberal capitalism and entrepreneurialism have been found to raise gendered and racialized difficulties for women, entrepreneurialism will provide a useful way in to understand the disciplinary mechanisms of carcerality and how private property through the FNPOA may affect women specifically. There is a lacuna of research and information on Aboriginal women and entrepreneurialism, and especially entrepreneurialism as it is happening on reserve.

### ***Aboriginal women as entrepreneurs***

For some Aboriginal women, entrepreneurialism is a strategy of economic survival, as well as a way to maintain traditional cultural practices (Lituchy et al., 2006). However, in many respects, the development of entrepreneurship for Aboriginal women is similar to the gendered trajectory of non-Aboriginal women. For example, statistics from 2014 indicate that the vast majority of small and medium-sized enterprises (SMEs) are owned by men, and about 65% were majority male owned, 16% were majority female-owned (Government of Canada, 2015b, p. 2). The most common way for SMEs to finance the business is through earnings (Heidrick & Nicol, 2002, p. 6), and about 51% of SMEs requested external financing. This typically puts women at a disadvantage as they tend to earn much less than their male counterparts and unemployment is very high on many reserves, especially ones located in rural areas (National Aboriginal Economic Development Board [NAEDB], 2015). It is interesting to note that both request and approval rates for debt financial support increase with business size. This indicates that it is more likely that larger businesses are not only asking for more money through debt financing but are also successful in acquiring it (p. 1). As women tend to own smaller businesses in sectors that are not seen as money making such as the service sector, retail and wholesale, and agriculture, accessing financing for women is one of the most preventive barriers they face (Brindley, 2005; Winn, 2005). When they do succeed in getting financial support the interest rates are usually much higher than for larger loans (Heidrick & Nicol, 2002).

It is not clear from the statistics, also, whether Aboriginal women are entering the economy for necessity or opportunity (Findlay & Wuttunee, 2007). Nor is it easy to get disaggregated data for on- and off-reserve participation in business. General statistics show that, for example, in Canada: off reserve self-employed workers are the majority of self-employed, with only about

14% on reserve being self-employed; a fairly even split between rural and urban; and just over a third of self-employed are women (Weir, 2007, p. 22). The number of SMEs that are majority women owned is increasing (GoC, 2015a, p. 2) as more and more women become entrepreneurs (Heidrick & Nicol, 2002). Like non-Aboriginal women, most Aboriginal women that own businesses were in typically gendered industry sectors seen as an extension of women's roles in the home (Smith-Hunter, 2006) while having much less involvement in the typically male oriented sectors such as agriculture, forestry, fishing and hunting, construction, and manufacturing. A few women are active entrepreneurs occupying key leadership roles in male-dominated business; however, gender-stereotyped barriers are not uncommon and hold many women back (Morin, 2017b).

Aboriginal women entrepreneurs also appear to behave in ways that are typical of women entrepreneurs in the wider population. They tend to borrow less money than their male counterparts, grow their businesses slowly, and be more risk-adverse (Bitti, 2012). A 2002 study found that female Aboriginal entrepreneurs were more predominant in the "secondary and knowledge economies, have college or university training, and run their businesses in partnership, than their male counterparts" (Weir 2007, p. 23). According to a 1998 study the situation of Aboriginal female entrepreneurs was reported to have difficulties:

Compared with Aboriginal business in general, Aboriginal female entrepreneurs were doing badly. The percentage of female entrepreneurs declined from 1991 to 1996, and the number of females whose businesses failed was proportionally higher than expected. Female-owned companies were smaller and considerably less profitable... and it seemed that once females' businesses failed, females did not continue as entrepreneurs. (quoted in Weir, 2007, p. 41)

Like their non-Aboriginal counterparts, Aboriginal women face the gender-based barriers that many women in Canada (and worldwide) experience that are not experienced in the same ways, or at all, by their male counterparts. However, for Aboriginal women the barriers are compounded by their dispossession as Indigenous women in a racialized settler colonial state. If we assume that Aboriginal women engage in entrepreneurialism for both necessity and desire, what are the constraints that they face that are tied in with the colonial operations of capitalism? How should

these constraints be viewed as carceral disciplinary mechanisms? Would entrepreneurialism, facilitated by private property ownership, as envisioned under the FNPOA, lessen or exacerbate these constraints and dispossessions? The next section of the chapter turns to a discussion of each space in turn—debt, the household, and private property—and examines the disciplinary mechanisms that operate to lock in Indigenous women’s choices and freedoms.

## Disciplinary mechanisms

In the following section three areas of capitalist relations of carcerality are discussed—debt, households, and private property. In analyzing the disciplinary mechanisms in carceral relations for Indigenous women, it is critical to include the intersection of colonial relations of carcerality. LeBaron and Roberts (2010) argue that carceral relations are “informed by various hierarchies” as commonly identified in feminist scholarship as class, gender, and race. However, consistent with Indigenous feminist theorizations, I am centering settler colonialism within this analysis (Arvin, Tuck, & Morrill, 2013) in direct opposition to the narrative of the advocates of the FNPOA.

### *Debt as a disciplinary mechanism*

In their discussion of debt and the 21<sup>st</sup> century rise of debt prisons in the US as a carceral space, LeBaron and Roberts (2010, 2012) identify debt structures as examples of structural and indirect relations of carceral capitalist relations forcing people into “dependence on the market, often under highly inequitable terms” (LeBaron & Roberts, 2010, p. 30). Debt prisons do not exist anymore in Canada,<sup>110</sup> yet there are ways that debt can lock in women’s choices and possibilities.

Debt has become thought of as the “new normal” in the neoliberal era of capitalism (Roberts & Soederberg, 2014, p. 657). David Graeber (2011) writes about how debt is connected to questions of morality, about accepting one’s responsibilities, and fulfilling obligations, as being “self-evident” (p. 4). In a Western-liberal sense, debt is seen as something that is owed to someone else and to society itself (Graeber, 2011) creating an overriding sense that there is a hierarchy of ownership. This echos back to the Lockean justification of individual property ownership through accumulation (i.e. labour). If we return to the precepts in Indigenous ontology discussed in Chapter 3, the idea that both humans and non-humans are governed by interdependent and non-hierarchical

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<sup>110</sup> Debt prisons were discontinued in early 1880s (Kolish, 1986).

relations, then the common sense of debt, in its current understanding, becomes unsettled. For example, rather than interpreting the occurrence of some First Nations band member's nonpayment of housing rents and the reticence of band councils to evict those members as emerging from a lack of disciplinary incentives (Flanagan, et al., 2010), an alternative understanding can be imagined if a less financial and more interdependent relational approach is taken. Referring to Indigenous practices in gift economies through, for example, complex socio-political, cultural, and economic *give-away* ceremonies, Graeber (2011) writes, "Indeed, one could judge how egalitarian a society really was by exactly this: whether those ostensibly in positions of authority are merely conduits for redistribution, or able to use their positions to accumulate riches" (p. 113).

This connection of debt to morality echos back to the discussion in Chapter 5 regarding colonial relations of carcerality and carceral spaces. For example, the *Gradual Civilization Act of 1857* required Indian men who were educated, of good character, and free from debt to enfranchise and become British subjects and were the ones targeted to become property-owning British subjects. Indeed, Locke took a "dismal view of poverty" (Hirschmann, 2002, p. 336) believing that as everyone has property in their person through their labour, poverty must then come from a lack of effort rather than lack of resources.

In a paternalistic vein, because Indigenous people were not seen as fully civilized or primitive, there were certain safeguards built into early legislation and later into the *Indian Act* to protect status Indians from debt collectors. From the early contact, the Royal Proclamation protected Indian lands from outside encroachments and in the 1876 version of the *Indian Act* land was protected from seizure. More recently, in Section 89 of the *Indian Act*, a non-Indian creditor cannot garnish wages from a status Indian as those wages are designated as personal property. On-reserve businesses are liable to other reserve members and council for debts. However, for off-reserve, Canadian laws apply equally to both Indian and non-Indian and any assets held off-reserve are not protected from non-Indigenous creditors. If an official claim is made, then a person's credit rating will affect their ability to get any future loans. First Nations people can claim against each other though, and a band can sue and garnish wages from its members. There continue to be misunderstandings and clashes with these protections, and recent court cases utilize different

interpretations of section 89.<sup>111</sup> Assuming First Nations people and governments will access more credit in light of development, there will most likely be more litigation.

Debt for First Nations is becoming the new normal as well, but with capitalism situated in settler colonialism, debt in this context raises issues of dispossession and assimilation. For example, the B.C. Treaty Process<sup>112</sup> has resulted in First Nations being in debt approximately 420 million dollars in legal fees due to negotiating treaty rights to lands or resource use ( Canadian Press, 2012). Eight modern treaties<sup>113</sup> have been completed in British Columbia with over 60 others at various stages of negotiation (British Columbia Treaty Commission, 2017). This means that First Nations are becoming indebted for negotiating with the settler government to regain possession of their own traditional lands and resources, which in turn means the limited monies for governance focus on community well-being services have become compromised. Underfunding and under servicing by both the provincial and federal governments have left many First Nations in severely impoverished and dangerous living conditions. One notably example is the Attawapiskat First Nations, where unemployment is around 90% despite the multinational DeBeers mining company that is situated 90 kilometres away (Arsenault, 2012). Shiri Pasternak (2016) writes that this case brings to the fore the tension between the state expectation of First Nations self-sufficiency and state investment in dispossession of Indigenous lands. Chief Theresa Spence was accused of mismanaging funds; however, it was found that half of the housing budget allocated from the government was actually spent on repayment of the debt (p. 322), and for cleaning up the environmental damages caused by the nearby diamond mine flooding damages to the community and their houses (Pasternak, 2016). As Attawapiskat, like most First Nations, was underfunded to begin with, debt repayment means that important services cannot be given to community members. Pasternak argues that this case is one example of how “colonial forms of fiscal warfare work” (p. 318). The state continues to clear the way for resource extraction and development, meanwhile neighbouring First Nations communities or unceded traditional territories continue to suffer the health and environmental consequences, often at their own expense, both financial and otherwise.

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<sup>111</sup> “In 2006, in *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, Chief Justice McLachlin held that Parliament, through section 89(1), did not seek to exempt Indian property in a broad sense, thus implying that in some cases, particularly in matters of credit, enforcement would be possible by a creditor against the property of an Indian” (d’Auteuil & Therrien-Lapointe, 2017). See also “Indian Act blocks Saskatoon landlord” (2015, Oct 13).

<sup>112</sup> Discussed in Chapter 1.

<sup>113</sup> Seven are through BC treaty process. Nisga’a treaty did not go through the BC treaty process.

This is an example, repeated on other reserve land, of the state being implicated in forcing the community into capitalist relations that lock them into dire straits with limited escape routes.

First Nations have been struggling with the adverse effects of colonial generated poverty, violence, and neglect through carceral legislation for centuries. As the shift in state-Aboriginal relations becomes more in line with neoliberal governance strategies, it would seem predictable that more and more individual members of First Nations will be drawn into debt structures. This has happened in the non-Indigenous population, for example, not only in the US but also in Canada in recent years, as both mortgage debt and consumer debt have increased (Chawla & Uppal, 2012). From 1980 until recently, the ratio of household debt to personal disposable income has risen from 66% to over 150% (Chawla & Uppal, 2012). Reports show that consumer spending has increased debt and yet the government has encouraged people to spend even more despite the risks involved. Much of the spending has been on home improvement, which increased by 10%. The household debt to income ratio was at a record high in 2015 at 165%. However, spending has not been matched by growth in incomes and roughly 80% of Canadians are in debt (McMahon, 2015).

On reserve land, the lack of adequate housing is extremely severe across the country. According to 2016 census statistics, one in five Aboriginal people live in housing that is in need of major repairs (Statistics Canada, 2017a). The Royal Commission on Aboriginal Peoples found that 84% of households on reserves did not have adequate earnings to pay for safe repairs and basic housing costs (RCAP, 1996c, p. 372). Like in the US, the Canadian government has supported rising indebtedness, including indebtedness for First Nations peoples. The \$300 million First Nations Market Housing Fund by the Conservative government was supposed to create financing for 25,000 privately owned homes on reserve by 2018; however, after six years it had only built 99 homes (Beeby, 2015). Candice Bergen, the Minister of State for Social Development reported, “We want to see First Nations individuals to be able to have the pride, the security and the financial stability that comes with owning their own home” (Beeby, 2015, para. 3). However, the loans need to be guaranteed by the First Nation band council and most of them are carrying their own debts and cannot afford to secure their members’ housing loans (Stastna, 2011). Also, high unemployment rates on reserve are a substantial issue. Home ownership is seen as a national ideal but the issues of how to finance upkeep are enormous. On reserve, the limited local housing market would mean people would be locked into ownership and into debt for a house. This is the very problem that the FNPOA does not acknowledge.

Attempts are being made to draw First Nations people incrementally into debt—into the new normal. For many non-Indigenous, debt has become a means to maintain a standard of living. In the US, the subprime mortgage lending is a clear example of how debt is gendered and racialized. Women, and especially women of colour, were targeted as being high-risk borrowers and then were offered loans at high interest rates (Fishbein & Woodall, 2006). Thus, the people who were the most at risk of not being able to pay back their loans were being targeted. The same can be said of the Canadian context in relation to women in general, and particularly for Indigenous peoples. If property privatization is adopted, the trajectory would likely be the same regarding mortgage and debt issues. Risk has been theorized to be a key factor in entrepreneurial success (Caliendo, Fossen, & Kritikos, 2010); however, in the modern version of entrepreneur, the expectation of success has replaced the unexpected and the risky (Szeman, 2015). This means there is less of an acknowledgement of the risk involved in entrepreneurship, as well as the gendered and racialized structural barriers, to a shift to the individual capabilities and characteristics of the entrepreneur for success.

If we turn to the increasing funding possibilities (although relatively small) for Aboriginal women entrepreneurs, especially on reserve, credit would be considered high risk as there is high unemployment on reserve. For example, in 2017, Indian Business Corporation<sup>114</sup> (IBC, n.d.) opened a dedicated fund for Albertan women's businesses with a budget of 5 million dollars. Consistent with the FNPOA policy, the 2017 research conducted by Impakt concludes that the lack of access to privately owned property is a critical barrier to women being independent in business. This is linked to barriers for access to collateral, equity, and credit. This focus on self-development, equality of women, and the need for capital and equity highlights the strong underlying drive and advocacy for private property on reserve land in the support mechanisms that are emerging for entrepreneurial Aboriginal development.

Aboriginal women are hired less frequently off reserve especially in more remote rural areas in which employment tends to be in the male-dominated fields of resource development and the manufacturing sector. As the Canadian government does not collect detailed statistics on reserve unemployment, off reserve employers in a given area might then qualify to import temporary foreign workers into an area that may already have an unemployed (though not registered as such)

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<sup>114</sup> Indian Business Corporation (IBC), already mentioned above, is a company owned by the three treaty areas of Alberta that provides financial lending and support to Indigenous businesses.

Indigenous potential workforce (Friesen, 2015). In this way the government is directly contributing to unemployment on reserves. This is consistent with the historical government settler agenda of employing cheap migrant labour while at the same time marginalizing the Indigenous labour force, foreclosing one possible avenue of working their way out of debt.

Financial institutions are not the only organizations that are willing to help support Indigenous women in pursuing entrepreneurialism. In 2012, the Native Women's Association of Canada (NWAC) set in motion the Aboriginal Women's Business Entrepreneurship Network (AWBEN). Aboriginal Affairs and Northern Development Canada (AANDC) gave funding to NWAC to develop the network. AWBEN was created:

- To provide a safe, supportive, collaborative, empowering and culturally supportive environment that addresses the unique challenges of female Aboriginal entrepreneurs and aspiring female Aboriginal entrepreneurs.
- To enhance, develop and accelerate growth for current and aspiring female Aboriginal entrepreneurs in a sustainable way through programs and resources.

(Native Women's Association of Canada, n.d., para. 2)

It is important to note, though, that most small start-up businesses fail within the first year and this is a crucial point, given the potentially parallel finding in the global south that home ownership does not necessarily turn into usable equity or even capitalist development (Mitchell, 2007). These failures, if financed through credit, would inevitably lead to debt.

In a possible scenario under the FNPOA, if an individual got the title to a piece of property on First Nations reserve, and that person borrowed money using their property as collateral from an outside institution not connected with the First Nation, and that individual was not able to repay the loan, the Indian band would either have to absorb the debt and repay it to the lending financial institution or the lending institution would be able to claim title to the property. That would most likely present a significant financial burden on the band government that could result in putting the entire community at risk if default happened in multiple or high-cost cases. What that would mean in terms of stress and conflict within the community would have further implications in terms of individual relations, including stress and violence in the home, which is discussed in the next section. Conditions on reserve housing often involve very crowded living situations that can be

very stressful in itself, for occupants. Home security is a critical necessity for women as the lack of it is evidenced in, for example, cases of domestic violence, poverty due to lack of assets, and the burden of responsibility of childcare. However, as Peter Marcuse (2004) points out, “Titling a home and treating it as an asset, as likely collateral for a loan (assuming a significant mortgage), is not the same as providing security of occupancy or treating the home as shelter” (p. 41). Gaining legal title to property or land may increase security of shelter if there were guarantees that property could not be lost due to lack of property tax payment, for example. However, with property ownership usually comes other responsibilities such as paying property taxes, and fees for municipal services like water, electricity, sewage, and garbage collection. Putting the property up for collateral means that the property then is at risk of being lost and then, if this happens, the security, so crucial to the woman as both the entrepreneur when working and a woman outside of this role when not working, is also lost because of the incurred debt. Donald Krueckeberg (2004) also calls to question whether having a mortgage on a property or home actually constitutes ownership. It may constitute something more akin to renting with benefits. For many women living on reserves with hazardous living conditions, the benefits might be more out of reach.

In summary, in the expanding neoliberal era of state and Aboriginal governance, debt is expanding for First Nations governments and more credit opportunities, through, for example, housing funds and start up business funding, are being made available to First Nations individuals, potentially drawing them into debt structures. For First Nations women, the explicit nudge towards entrepreneurialism being presented as a way out of poverty and promoting self-development means women are being guided into shifting from their interdependency on community support and dependency on some state support to a dependency on the market and self-sufficiency. However, through neoliberal governance, fewer protections and safeguards are available to First Nations women as support including: social services such as health, family care, unemployment; infrastructure to support safe housing; and legislation to protect them from debt collection. This occurs alongside a lack of alternative or supplementary on- or near-reserve employment, which means that if women become indebted, especially to outside creditors, their employment opportunities would become even more limited as their off-reserve wages and any assets could be garnished. The connection between capitalist relations and carcerality, as LeBaron and Roberts (2010) posited, with their inherent disciplinary vein, could very well mean that unsuccessful market transactions through an exercise of the encouraged entrepreneurial impulse, could further

force some already vulnerable women into precarious and risky ways of survival outside of the formal capitalist market, leading them into the carceral state systems.

Furthermore, if women are indebted to on-reserve creditors their on-reserve wages and earnings would be vulnerable to collection, meaning property could be vulnerable to seizure. The ensuing tensions and possible social sanctions that might result from the moral aspects that Graeber (2011) argues are inherently tied to debt, might result in individuals being seen as financial burdens on the collective. I argue that the carcerality that LeBaron and Roberts (2010) propose, if extended, would most likely result in tensions between individual entrepreneurialism and the needs of the collective. This also needs to be considered in relation to women's further vulnerability. The push for individual entrepreneurship and individual property ownership leads to hierarchies of power and ownership and can have divisive effects on community relations. This was seen in our discussion of reinstated status for women, discussed in Chapter 6. This is not unique to the Indigenous context but is also seen in the wider Canadian society in terms of how people on welfare assistance programs are negatively viewed and marginalized. In short, the likelihood that credit through loans or through leveraging private property would be highly beneficial for women is questionable. Rather, it seems that women would be pulled into market dependence through debt as other safety nets are reduced. This discussion on debt begs the question as to what actually happens in the house, which is discussed in this next section.

### ***The household as a disciplinary mechanism***

Current capitalist relations have been buttressed by the dualism of the public and private realms, where there has been the expectation of the unencumbered individual male in the public and the supportive female in the private. In order to elucidate the gendering of carcerality, it is important for my argument to include the household as one axis of the disciplinary mechanisms of carcerality for Indigenous women. Through state perpetuated poverty and sanctioned violence in Indigenous communities, households are argued to be disciplinary mechanisms.

While on the one hand homes on reserves are critical spaces of resistance, survival, and community for First Nations peoples, colonial policies and practices continue to lock First Nations people in unfree choices and spaces. I refer to households on First Nations reserve in the way that they have, and continue to be, influenced by the legacy of colonial policies, as well as current incarnations, of capitalist relations and power hierarchies. Flanagan et al. (2010) promote the

FNPOA as a way to unlock dead capital through leveraging houses for equity to engage in entrepreneurialism, though they do not acknowledge, for example, the chronic housing crisis on many First Nations reserves. In the FNPOA scenario, housing and property on reserve should be taxed and owners should be held liable for their rents and debts in order to stimulate funds for local First Nations governments. In this way, as just mentioned in the above section, individuals would become less dependent on welfare social services and become more self-reliant individuals. In this FNPOA imagined scenario, after centuries of poor housing and substandard living conditions, the individual is suddenly required to be not only self-sufficient but also to be a source of revenue for the community.

The Canadian government has actively promoted entrepreneurialism as a way for both Aboriginal and non-Aboriginal people to enter the market place. For women, though, the entrepreneurial subject is to be freed most presumably within the home, especially for women, as in general they tend to operate home-based businesses (Marlow & McAdam, 2013) due in part to socially constructed and historically attributed gender expectations (see, for example, Bowden & Mummery, 2014; West & Zimmerman, 1987) such as child care responsibilities, elder care, and homemaking. However, if the home is to be a base of entrepreneurialism for women then the home should be a safe space to “unleash …[this] creative and entrepreneurial spirit” (Jules, 2010, p. xii). With the abovementioned poor housing conditions generally found on reserve land, it is extremely unlikely that First Nations women would be able to successfully run a business if their house is in need of repair or, furthermore, not a safe working environment due to the risk of violence. I argue in this section that contrary to the FNPOA portrayal of unfettered opportunity, the household, as it continues to be reorganized under colonial logic, serves as a disciplinary mechanism that creates carceral constraints for some First Nations women. Indigenous feminists have recognized how the control of Indigenous women in the family has been key to the colonial project (see Green, 2007a, 2017).

Lack of adequate housing on reserve land is extremely severe across the country, as mentioned above. In many communities, the occurrence of toxic black mold, which in some cases can lead to illnesses such as asthma and tuberculosis (Clark, Riben, & Nowgesic, 2002), the lack of potable water, and inadequate sewage systems, are endemic. The new Liberal government announced plans to build 300 new homes despite the need for 20,000 and an internal government assessment has estimated the need for 115,000 units by 2031 (Akin, 2016). This follows the failure of the

previous government's administering of the First Nations Market Housing Fund, as discussed in the section above. When the government does give funding for building houses there is invariably no funding for maintenance. In many remote areas building supplies are often unavailable as they have to be transported in, or else they are financially prohibitive.

High unemployment on reserve can be linked to the lack of ability to self-finance home repairs. Like neoliberal policies in the rest of Canada and many other states, labour is being redefined and reoriented to emerge from the individual rather than from employment in the traditional sense of working for a company. This means that unemployment is not being solved through governmental employment generation but through private entrepreneurialism (LeBaron & Roberts, 2010). Lower levels of education due to government neglect and control means Aboriginal women have been systematically locked out of educational opportunities, which has funnelled Indigenous women into domestic service employment. It is understandable that many Aboriginal women cite lack of self-confidence as a barrier to entrepreneurship. The lack of educational opportunities is one way to ensure there is cheap labour, thus, the gendered limitations and qualifications that many women have experienced are more disadvantaging in terms of employment on reserve than they are for men.

Another factor which leads to women not being able to be employed full time are the gendered expectations that women will be primarily responsible for family care. The home represents the double burden of family care and work for women. A 2009 report on Aboriginal women who were potentially interested in starting a business, identified a lack of Aboriginal childcare facilities, and/or a lack of funds to pay for quality private care as barriers to entrepreneurship (Aboriginal Business and Community Development Centre, 2009). For many women the double burden of caregiving and employment means that they either do not have enough time to build nor to concentrate on their business.

Childcare is not the only burden to entrepreneurialism for women. As elder care has become a large responsibility with the increases in lifespan experienced generally in Canada,<sup>115</sup> informal care for elderly Indigenous Canadians is usually done by “resident wives” and “non-resident daughters” and less often done by husbands and sons (Buchignani & Armstrong-Esther, 1999, p. 20). Because Indigenous seniors are much more likely to live with extended family members than

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<sup>115</sup> The average life expectancy of Registered First Nations is approx. 6 years shorter than the average Canadian (O'Donnell & Wallace, 2011).

non-Indigenous (Buchignani & Armstrong-Esther, 1999), Indigenous women are often preoccupied with a larger burden of caregiving responsibilities, which makes it difficult to nurture a business. These kinds of double burdens of full-time work and full-time care responsibilities are discussed at length in feminist literature (see, for example, Hartmann, 1981; Himmelweit, 1995; Lister, 1997), and these burdens are compounded for single mothers, especially for those not living with extended family members. Although traditional gender relations may have been more egalitarian in some communities compared to European gender relations, centuries of enforced gendered hierarchies under colonialism has meant that gender gaps related to certain repeated behaviours form or become more fixed (Pathak, Goltz, & Buche, 2013). Although referring to gender relations in general, Saurav Pathak, Sonia Goltz, and Mari Buche (2013) warn that “Practicing these activities over and over again could eventually ‘lock-in’ women to focus on ‘what is’ rather than ‘what could be,’ limiting their perceptions of challenging the socially established status quo and ultimately settling for whatever rewards—if any—the societal arrangements bestow upon them” (p. 481).

In mainstream Canada, the government relies on informal, unpaid caregivers as an answer to the growing homecare needs, especially for the elderly. This is putting financial, emotional, and physical burdens on untrained and sometimes ill-equipped family caregivers (Bernier, 2014). On most reserves there are no care or support facilities such as nursing homes and daycare facilities.<sup>116</sup> Hence, many women entrepreneurs work from home in between other family-related duties. This may contribute to low growth and limited networking, keeping these small businesses in a cycle of being underfinanced. These extra burdens and isolation in households for women can lead to “insufficient personal and professional networks” as a barrier to entrepreneurialism (Baxter, 2011, p. 11).

Scholarship by women of colour led to the important understanding and analysis that the household for women of colour is potentially both a place of unequal gender relations, as well as a reprieve from the structural racism (see, for example, hooks, 1984; Hull, Scott & Smith, 1982; Rich, 1976). For Indigenous women in Canada the household has also been a key site of colonial policy and state initiated cultural and physical elimination policies. The historical account of women’s dispossession that was discussed in Chapters 4 and 5 pointed to the institutional colonial

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<sup>116</sup> The first provincially licensed on-reserve child care centre opened in Alberta in 2017 (Morin, 2017a).

patriarchy that was imposed on Indigenous communities as being to a large and far-reaching extent the source of violence within Indigenous communities (LaRocque, 1994; Smith, 2005a; Turpel, 1993). While Indigenous women endure very high rates of violence in general, intimate partner and family violence is also substantial (Brownridge, 2008). However, it is the structural violence created by a legacy of carceral colonial policies that have exacerbated and created much of the violence within communities including alcoholism and substance abuse (see, for example, Czyzewski, 2011; Matamonasa-Bennett, 2015; RCAP, 1996a; TRC, 2015), crowded housing, loss of traditional culture, community, and values, and high unemployment, and poverty.

Women and girls who live in precarious housing due to colonial-based poverty are often vulnerable to this violence. Violence in the household can lead to women migrating to more urban areas. However, without support of family and community women can become vulnerable to further violence in urban areas. As previously mentioned, research has found that Indigenous women are substantially more likely to be victims of violence and murder than non-Indigenous women. This extreme and chronic violence beyond the reserve land, most notably the thousands of missing Aboriginal women and the hyperincarceration rates of Indigenous women, is indicative of the settler state as continuing to function as a racialized and gendered carceral state (Dhillon, 2015; Deer, 2015). Government imposed Western-style housing on reserves without adequate support has led to this housing crisis on many reserves in Canada (Palmater, 2011). This is further exacerbated by the government fueled public belief in corrupt First Nation Chiefs that supposedly misuse taxpayer funds and do not spend money on maintaining their on-reserve housing (Pasternak, 2016).

Substandard households are often interpreted as being equivalent to unfit parenting in the eyes of child welfare services, as they were in the eyes of Indian agents, and are hence used as a rationale to extract Aboriginal children from their homes. Aboriginal parenting has come under Child Services as a threat to women-as-mothers and their ability to be fit mothers. Similar to other settler contexts like Australia (Behrendt, 2016), the number of Indigenous children in the child welfare system in Canada is much higher than the national average (Blackstock, 2009; Kirkup, 2016). This threat to mothers and parents that their children will be taken away is a disciplinary mechanism and contributes directly to what Wolfe termed the “logic of elimination.” Aboriginal people make up almost five percent of the population but about 15% of children in care and children on reserves are close to “eight times more likely than other children to be taken into care” (Blackstock, 2009,

n.p.). Research has shown that Aboriginal children are “less likely than non-Aboriginal children to be reported to child welfare authorities for physical, sexual, and emotional abuse, and exposure to domestic violence but twice as likely to be reported for neglect” (Blackstock, 2007, p. 75). In Wacquant’s (2009) analysis the “(re)masculinizing of the state (p. 15) ...has “turn[ed] [child protective services] into adjuncts of the penal apparatus” (Wacquant, 2010, p. 51).

With systems of social support compromised either from neoliberal government reforms combined with lack of funding and services, substandard housing, poor infrastructure conditions, and the high incidence of domestic violence, the household can be seen as a carceral space that “confines certain people within capitalist social relations and limits social and physical mobility within these relations” (LeBaron & Roberts, 2010, p. 33). Given the neoliberal shifting of waged labour and unemployment to self-employment through entrepreneurialism for women, these constraints become tied in to capitalist relations.

### ***Private property as a disciplinary mechanism***

As has been discussed in earlier chapters in this thesis, private property is deeply embedded in the settler colonial strategies as a means to lay legitimate and definable claims to Indigenous land. However, Flanagan et al. (2010) are insistent that private property is the most efficient system:

...[First Nations] change with the times and are willing to adopt whatever institutions of property are most economically efficient for the world in which they live. Say goodbye to the primitive communist Marxist fantasy and hello to the worker, owner, and investor of the modern global economy! (p. 41)

For the authors, private property not only gives land jurisdictional certainty, cultural readability, and commodity exchangeability, but it creates a modern version of the enterprising self who can let go of primitive fantasies of collective ownership in order to participate in the modern global economy. There is no room for other types of land tenure or conceptions of relationships to land, communist, communal, flexible usage, or otherwise. The authors in *Beyond the Indian Act* try to distance their rationale for private property from that of Lockean theory. However, the subtlety is disarming. For Locke, private property was a form of self-fulfillment, and a sign of individuality. Through labour one could unlock the potential in real property. Whereas the underlying logic in

the FNPOA is that private property will be able to liberate the entrepreneurial spirit in people. Whether private property is thought to be a form of dispossession that disengages people from the means of production, as theorized by Marx, or a form of empowerment that liberates them to be self-sufficient and “rational” as theorized by Locke, “property disciplines both owners and non-owners to become market subjects” (Mansfield, 2007, p. 396).

As discussed in Chapter 3, Indigenous ontology in relation to land is different than the Lockean-liberal notion presented in the FNPOA of individual ownership, alienation, and exclusive usage. The FNPOA interpretation of private property is consistent with the basic ideas of the “ownership model,” such as that described by Joseph Singer (2000a, 2000b). Brian Egan (2013) argues that the federal government in treaty negotiations basically follows this type of ownership model seeking to “demarcate a clear boundary between Aboriginal and Crown lands” and in this way it is “reinforcing asymmetrical relations of power” (p. 34). In taking this approach to treaty negotiations the Crown, similar to the approach taken in the FNPOA, “transforms a territorially expansive understanding of aboriginal title into a specially confined form of property called fee simple plus” (Egan, 2013, p. 34). As mentioned in Chapter 1, the treaty process in Canada basically mandates that any settlements will be in the form of fee simple ownership, much smaller land acreage than originally claimed, and a stipulation not to make any further claims to territory. In this way, Canada is forcing Aboriginal peoples to conform to Western hegemonic notions of property ownership. Other types of tenure are not regarded as viable. C.B. Macpherson (1973) notes that the only way to see beyond hegemonic understandings of property is to recognize them as historically based in social and political relations that are particular and not universal. However, in pushing for privatization, the government is being true to its long liberal tradition in Canada of a centrality of property and individualism (Heaman, 2009; McKay, 2000). E. A. Heaman (2009) writes, “Once liberalism became hegemonic, it became all about justifying power in place rather than about instrumentalizing critiques of that power” and in that way liberalism “has shaded into conservatism” (p. 149). In the late 1800s, property in Canada reinforced authority and property ownership was thought to be more critical and relevant to the granting of voting rights than even education. Thus, for Indigenous peoples this thick underlying colonial protection of and reverence to property ownership means the negotiating strategies by the federal government, whether Liberal or Conservative, have remained true to the ownership model. The push for Liberalism’s success in being an “apologist for existing structures of authority,” Heaman continues, is that it always

“points to some aspect of individual rights and liberties” (p. 149). In fact, the government uses the individual ownership of private property as a way to discount alternative ways to share Crown land. The state’s insistence on delineation of the boundaries of wider territories creates not only conceptual discord from an Indigenous ontological point of view, but it also creates “overlapping claims” between other Indigenous Nations. Whereas traditional disputes could be negotiated with “strategies of sharing,” legal delineation shifts the power to “strategies of exclusion” (Thom, 2014, p. 4) that are consistent with the ownership model of land. Thom writes, “characterizing territory as necessarily being ‘exclusive’ to be legitimate actually has the potential to disenfranchise Indigenous peoples of their lands” (p. 4-5).

In the event that the FNPOA is adopted, land property then becomes differently valued and valuable, becoming a commodity for potential market exchange. In this way property takes on a kind of hierarchy of value that acts as a gendered disciplinary mechanism as it will most likely mimic how the free market and fee simple property ownership tend to operate for women in the open market. It is highly likely that members with more access to finances or other types of resources will benefit from a transition to a property market than others. Referring to the Nisga’a case mentioned at the beginning of this thesis, Sari Graben rightly cautions, (2014), “Based on the historical preponderance of historical allocations to men under the Indian Act, it seems likely that Nisga’a men will more often receive entitlements for land where houses have already been built” (p. 423). The past allocations of location tickets and certificates of possession that were typically issued to men and male heads of households also means that most likely the best locations of property have already been allocated. The governance involved in making sure that all members are treated equally would be a very challenging endeavor, as Graben suggests. Women such as Darlene Necan in the opening story of this thesis, as well as other women, have taken to different methods of direct action to protest not only the federal government’s part in the lack of housing on their reserve but also in claiming they have not been getting help from their band council to obtain housing despite waiting several years (“Indigenous woman protests”, 2016).

There is also the issue of the Bill C-31 reinstated women, discussed in Chapter 6. More and more women and their descendants are claiming their rights to legal Indian status and in doing so many are seeking to renew their connections to their communities and homeland, returning to live on reserve land. Many First Nations reserves are already too small to accommodate their populations, and with the growing population there will continue to be a housing shortage, at least

for the near future. The government has created funding specifically for Bill C-31 women but, as discussed in Chapter 6, that has caused divisions within communities. With an adoption of private property and its associations with individual ownership those same attendant problems of a shift in “strategies of sharing” to “strategies of exclusion” would most likely be experienced at the individual and community level. What that means for social relations and the disciplinary forces of social norms is a substantive issue that emerges from a change from Indigenous land ontologies, to an ontology of market capitalist relations.

## Conclusion

In this chapter, I argued that private property under the FNPOA that expects entrepreneurial subjects to blossom, Indigenous women and their communities will likely be vulnerable to carceral strategies that operate to lock participants into deeper dependence on the neoliberal capitalist market. The chapter showed how debt, the household, and private property under the FNPOA work as disciplinary mechanisms in capitalist relations of carcerality. These mechanisms work to lock Indigenous women into hierarchical capitalist social relations and draw them further into a dependency on an already gendered and racialized market. Furthermore, it is very doubtful whether private property on most reserves would be able to be effectively used as collateral as private property advocates promise due to geographic isolation, lack of market economy, and absence of supporting infrastructure. Thus, if entrepreneurialism needs private property ownership to be successful, as the authors of *Beyond the Indian Act* promote, it is doubtful whether entrepreneurs will be able to be as successful and more likely would lead to owners selling their plots of land in order to pay for other necessities. The legacy of colonial dispossession works to further enhance the capitalist relations of carcerality as the disciplinary mechanisms work through structures that enhance and protect the settler state sovereignty and hegemonic practices. Adoption of private property under the FNPOA that does not take into account the colonial legacy and current operations of poverty, violence, and gendered dispossession, will work to further what Wolfe (2006) identified as the settler logic of Indigenous elimination.

## Thesis Conclusion

A photo published on the Canadian National Broadcasting news website in 2013 presents a lone Nisga'a man standing proudly in front of his house (Figure 1). The photo caption reads that he is “one of the first to take advantage of the new law.” As of 2009, the *Landholding Transition Act* has enabled individual Nisga'a citizens to own their own property on their traditional land in fee simple. By 2013, two members had partaken.



Figure 1. Private property ownership (“B.C.’s Nisga’a becomes,” 2013)

The image is striking in its symbolic representation of the values fundamental to the 17<sup>th</sup> century Lockean property-owning subjectivity and subsequent colonial legislation and policy around private property ownership that emerged in the settler context, in which women were relegated to the private sphere and men were active in the public domain—agentic, property owning, and possessing civic power. The image portrays a single, unencumbered man, the head of the household, representing a family that is absent from the public sphere of economics and politics, presumably able to make independent decisions regarding usage, development, and alienation of his land.

The symbolism hauntingly echos back to the early *Gradual Civilization Act of 1857* and its laws of enfranchisement in which men over the age of 21 who could read and write, were of good character, and free from debt were allowed into the settler citizenry. The target of enfranchisement

was the deserving individual Indigenous male, whereas his wife and children would be automatically enfranchised as they were inconsequential to the desire, process, or products of material entitlements. The accompanying text to the photo reports that the owner is “proud to show off his home and the well-groomed grounds that it stands on” (para. 5). For Locke, desire to develop and accumulate land were important factors in the property-owning subjectivity. Locke’s assessment that Indigenous peoples did not desire to develop the land through labour in the English way, meant Indigenous land was considered unused, and therefore, able to be justifiably appropriated by supposedly ambitious hard-working settlers.

Owning private property, or at least the desire to do so, was seen by colonial authorities of the past as key to becoming civilized, or Europeanised. Indeed, in congratulating the Nisga’a in their treaty agreement, the then Indian Affairs minister said, “I want to say to you, welcome to the Canadian family” (Robert Nault quoted in Lang, 2000, para 5). To have Indigenous peoples assimilated into the settler polity has been the goal of the colonial project for centuries, for if they are part of the polity then they are not a threat to the sovereignty of the nation state. Through private property ownership, Indigenous lifestyle becomes readable, understandable, and relatable in the settler state.

The news article, arguably directed at a non-Indigenous readership, obscures the rich heritage and cultural of the Nisga’a peoples in their traditional matrilineal social organization (Nisga’a Lisims Government, n.d.a) in which matriarchal women “fully participate in Nisga’a society” (para. 1). In the photo, though, there are no women, no other family, or community members. Private property ownership is portrayed as an individual masculine accomplishment, with no allusion of communal or extended participation. Locke’s possessive individualism seems quickly embraced and unavoidable. The symbolism in the photo profoundly supports the colonial goal in making Indigenous land readable in the liberal settler state, by fragmenting and freeing up the supposed dead capital in collective land for investment and alienation through fee simple property ownership. Private property ownership, the core of the liberal settler status quo, has finally been validated by the very peoples who pose the most ardent and legitimate threat to settler sovereignty over land. Indeed, Indigenous representation and identity has been of utmost concern to, and manipulation by, non-Indigenous actors since contact.

Regardless of the reality of what is or is not “truly Indian,” these representations “emerge[s] from the interstices of a racial-colonial relation of power … [which can] circumvent the logic of a

corrective or restorative justice under the aegis of the Sovereign” (Cornellier 2013, p. 49). The authors of *Beyond the Indian Act* put a lot of effort into representing the FNPOA as a policy means to the “restoration” of Aboriginal private property rights. The authors frame Indigenous peoples as just “like other Canadians” (Flanagan et al., 2010, p. 161), at least in terms of private property. The authors assure the reader that Indigenous peoples have been like other Canadians all along, although presumably its the white EuroCanadians they are referring to. The early colonizers just did not recognize that Indigenous peoples were not collectively oriented. If this historical framing is true and the photo above is an accurate representation of the path that private property ownership on reserve land will take, then there is little doubt that property ownership will work as it typically does in terms of gendered, racialized, and class-based outcomes, especially in the neoliberal capitalist era in which the individual should be responsible for their own success, or lack thereof.

The main question posed in the thesis was how does the contemporary rationalization of private property for First Nations reserve land operate as a gendered tool of dispossession for Indigenous women. This question is in response to the depoliticized and gender-blind rationalization of land privatization schemes such as that articulated in support of the FNPOA in *Beyond the Indian Act*. In this particular rendition, both property ownership and entrepreneurialism are presented as emancipatory and as a way for First Nations to deal with their chronic poverty and financial dependence on the federal government. Both property ownership and entrepreneurialism are presented without any acknowledgement of intersecting gendered or racialized barriers, and market-based strategies are offered as solutions to chronic poverty and state violence. The authors frame the *Indian Act* as unjust primarily because it has prevented First Nations from following their traditional property-owning practices, which according to the authors, were based in much of the same values of self-interest and exclusivity that Western-liberal private ownership are based in. The architects of the FNPOA discount as “primitive … Marxist fantasy” (Flanagan et al., 2010, p. 41) any alternative relationships to land such as communal matrilineal systems or social organization.

In answering the main question, it is argued that the logic underlying land privatization policies like the FNPOA are framed in gender-blind historical revisionism and operates to erase and obscure not only the historical colonial dispossession of Indigenous women but also the current capitalist workings that maintain the heteropatriarchal settler state status quo. In order to make this argument, the thesis employed an interdisciplinary framework drawing on Indigenous

feminist theory and carceral geography to historicize traditional Indigenous matrilineal social organization and the settler colonial policies that aim to control and reorder social interaction. Indigenous feminist theory brings to the forefront the legacy of gendered and racialized settler colonialism, violence, and dispossession. It also is critical of the settler state structures that maintain the gendered and racist status quo that continues to marginalize Indigenous women as targets of violence and dispossession. This contrasts with feminist approaches typical in Western-liberalism, to analysis that would focus more on individual parity with men as a means to gender equality while not paying sufficient attention to intersections of race, settler colonialism, and the liberal machinery itself. Indigenous feminism, rather, takes into account the discrimination and logic of elimination that is lodged against Indigenous peoples as a whole, recognizing the shared colonial trauma with their entire communities and their homelands. Carcerality theory enabled a rich and critical approach to historicizing historical trauma and linking it to contemporary forms of dispossession and capitalist relations. Employing carcerality theory has enabled a deeper understanding of the depth and the tenacity with which colonial legislation and policy is committed to land accumulation.

The colonial reordering of Indigenous Nations, especially those that practiced matrilineal and matrifocal social organization, continues to have devastating effects on the health, security, and sustainability of many Indigenous communities across the country. The matrifocal collective dispersed power relations laterally rather than the common misinterpretation of matriarchal social organization as being the opposite of the male hierarchical model. Matrilineal social organization still provides an important alternative to challenge the gendered relations embedded in private property systems that buttress the capitalist system. Women were custodial owners and stewards of the land, the main managers and workers in agriculture, and in some Nations political and civic leaders. In erasing Indigenous women's involvement in land ownership/stewardship and matrilineal social organization in their historical narrative the authors follow a long tradition of anthropologists, early explorer, and colonial authorities who have also tried to erase and denigrate alternatives to patriarchal authority and hetero-hierarchical power relations. Indigenous women drew strength and egalitarian gender relations from matrilineal and matrifocal kinship and social organization. The colonial reordering of Indigenous social organization to create patriarchal, nuclear family systems with a male head has contributed to the fragmentation of Indigenous social power, and importantly it dispossessed Indigenous women from the kinship bonds and the

networks that ensured them status and power. Thus, the shift away from women aligning with a particular male or males meant that women were left vulnerable to male power. The modern version of this shift can be found in the neoliberal push to elevate the economic self-sufficiency of the individual, one outcome being the push for individual entrepreneurialism that has been a focus of this project. The effects of patriarchy on women's safety and relative power are widespread globally (Federici, 2004; Mies, 2014).

Colonial legislation and policy reordering of Indigenous gender relations was a colonial strategy deliberately and methodically aimed at the elimination of "the Indian." What is crucial is that colonial authorities recognized the threat that Indigenous women posed to the success of colonial policy. The colonial legacy of dispossession elevated Indigenous men above Indigenous women to emulate the patriarchal hierarchy present in Christian teachings. Indigenous women were displaced from tending to their crops and other work outside of the home. Instead they were trained in European-style domestic work, European cooking, and other subservient ways. Colonialism affected Indigenous women's status through altering kinship relations, as well as limiting women's citizenship rights. For example, in the colonial reordering of Indigenous political systems, women were not allowed to vote in band elections or be considered as candidates for council leadership. Under the *Indian Act* women lost their federally recognized status as Indians if they married a non-Indian man. This resulted in thousands of Indian women losing their legal recognition and rights to their Indigenous identity and community membership. Thus, generations of women and their descendants have not been able to claim the right to live on reserve land, live with their communities, or share in the benefits and annuities that status Indians are entitled to. Importantly, this federal legislation has led to deep socio-economic and political divisions in many First Nation communities. The thesis showed how government attempts aimed at correcting gender-based discriminatory policies have resulted in further discriminations and cultural and community devastations.

In liberal thought, individual rights are critical to private property ownership and private property ownership is critical to democracy. The FNPOA stresses the power of entrepreneurialism through the ownership of private property, especially for individual members as the authors believe that collective ownership is the "path to poverty, and private property is the path to prosperity" (Flanagan & Alcantara, 2002, p. 16). As the FNPOA is targeting First Nations communities on an individual level, it is important to the main argument of the thesis to understand how the individual

rights framework would operate within a collective Indigenous framework. From the discussion in Chapter 6, it is apparent the human rights paradigm is limited in how it can be effective for Indigenous women and their communities as it creates a tension between the rights of the individual and collective rights. The basic premise of the Western-liberal individual rights model will inevitably pit and make vulnerable individual members against a group. Women are particularly and historically vulnerable to these distinctions as women continue to be marginalized in decision-making and leadership positions and thus are forced into claiming their rights against a group or state. The public/private divide that Locke formulated, and Carole Pateman identified and critiqued in her seminal work of the liberal social contract, has had devastating effects on the status and equality of all women.

Entrepreneurialism is presented as emancipatory in the FNPOA, and much literature on Indigenous entrepreneurialism supports this positive stance. Although barriers are acknowledged in some of the literature there is an overwhelming support for the virtues of entrepreneurialism. These accolades are coming from both Indigenous and non-Indigenous sources as it is very much tied in with the convergence of neoliberal promises of autonomy and Indigenous claims to self-determination. However, in order to unsettle the supposed neutrality of the neoliberal marketplace, the thesis developed several supporting sub-arguments. Although the neoliberal logic in the FNPOA draws heavily from the precepts in Lockean property theory, it especially makes use of Locke's entrepreneurial subjectivity that tethers labour to land. Indeed, in the FNPOA, property is rationalized as necessary for entrepreneurialism.

Whereas in Lockean theory labour was the key that added value to land, in the FNPOA articulation the individual development of the emancipated entrepreneur's spirit is unleashed through the acquisition of private property and then is justified through active participation in the alleged security and abundance of the liberal market. The authors' rejection of any Lockean underpinnings in their rationalization of the FNPOA aims to diffuse criticisms that the policy is assimilationist; however, the rationalization that private property is necessary to achieve entrepreneurial capacity is a very subtle but crucial shift in how Lockean theory is used to depoliticize property ownership from its colonial baggage and (re)characterize it as emancipatory and restorative. The conflating and obscuring that ensues from this crucial shift is key in understanding the continued push for accumulation and development, not only in Western-liberal

subjectivity but also in the demand that Indigenous peoples partake in commodification of their lands as well.

If left unclaimed land is considered *vacant* and *unused* in the eyes of Locke, or *dead capital* in the eyes of de Soto. In contrast, for Indigenous ontology, the world is relational, and all life, human and non-human are interdependent. There is a lack of ideological binaries, meaning that hierarchy does not exist in the same prescriptive, gendered way as it does in Christian teachings. In this way, there seems to be some room for a way past the subjugation of women as, if followed, there is no way to argue that woman or other even non-humans are of less value. At least not in the same way that can be argued in Christian teachings. Certainly, making general assertions about Indigenous cosmology and philosophy, especially given the diversity in specific beliefs and histories, can lead to major misunderstandings that can further entrench Western-liberal hegemonic values and what is considered common sense in the settler logic. The *Indian Act*, though, is federal legislation that is applied and experienced across the country to all First Nations, although unevenly. While individual First Nations experience nuanced struggles, have unique histories, and follow distinctive cultural practices, federal policies such as the FNPOA aim to standardize relations and practices. As First Nations justify their land claims and rights to sovereignty individually, referring to their specific traditional practices, beliefs, and histories as evidence, these combined offer a general challenge to the contemporary rationales of settler logic and status quo.

Of interest is the use of entrepreneurialism to justify property ownership. This is atypical of the current characterizations of entrepreneurial subjectivity based in flexibility, independence, and innovation. The central principals in Lockean theory place private property as foundational to, and the essence of, individual self-interest. Current understandings of entrepreneurial subjectivity place the innovative and transformative qualities that are capable of creating something from nothing. Locke clearly understood that not everyone could or should be property-owners and those who could not be should work for property-owners. Although reverence to private property and its ownership is still vital in liberal normative thought, the neoliberal answer to rising unemployment, debt, and property costs is based in entrepreneurialism that is inevitably financed in ways not contemporarily typically tied to property ownership. Entrepreneurialism, then, becomes accessible and important to non-property owners and the marginalized as a way for them to control their own financial destinies, despite their lacking adequate access to material assets and financial resources.

The rationale to tie entrepreneurialism to private property as being critical to achieving entrepreneurial enlightenment is a very specific articulation and rationalization aimed at land appropriation and accumulation. The thesis developed the argument that not only is entrepreneurialism, like property ownership, a masculine and racialized subjectivity but that there are capitalist disciplinary mechanisms that work to limit choices and also to further dispossess Indigenous women.

In order to elucidate how the legacy of colonialism can be tied to contemporary forms of dispossession and violence, the thesis utilized carcerality theory to examine legislation in the *Indian Act*, focusing on how reserve land has been and continues to function a source of gendered carceral space of both confinement and exclusion for Indigenous women. While reserve lands are also sites of kinship and community, the thesis argued that the policies in the *Indian Act* have not only locked-in persistent, deep-seated gendered discrimination and marginalization for Indigenous women based in European notions of heteropatriarchal gender relations, but the policies were the precursor to the poverty and hyperincarceration of Indigenous women. Colonial legislation utilized Indigenous identity as a way to control Indigenous women. Using carceral theory as a lens to understand the confining aspects of policies has illuminated the circuits of dispossession that link historical and contemporary forms of dependency, poverty, violence, and high rates of incarceration for Indigenous women and their communities in, for example, the space of the reserve. The Pass and Permit system, in which Indigenous people had to ask permission to leave their reserve for any reason, or the numerous children who were forcibly separated from their families and sent to residential schools, were mechanisms designed to destroy traditional Indigenous practices that were seen to interfere with the adoption of private property and enfranchisement. The economies of the reserve were basically under embargo as, for example, people were expected develop their reserve through farming but not given access to the farm equipment that white settlers had, nor could they sell their products outside of the reserve. These carceral strategies have resulted in chronic poverty due to a stifling of Indigenous economic development, violence, and in some cases despair. The hyperincarceration of Indigenous women has been traced to the legacy of colonial trauma.

After having established colonial legislation as gendered and carceral, I was then able to make the argument that capitalism works in a circuitry of carcerality within the settler state. Private property and entrepreneurialism do offer opportunities to some women in the liberal settler state;

however, as a structure, research has clarified that neoliberal capitalism tends to limit women's opportunities and choices and that liberal feminists who support the capitalist system argue that state mechanisms of support are necessary for women to thrive (Cudd & Holmstrom, 2011). In Chapter 7, I examined three carceral mechanisms that operate as disciplinary agents within capitalism—debt, the household, and private property. Buying private property or becoming an entrepreneur are both risk-oriented endeavours. First, debt acts as a disciplinary mechanism as it is seen as the new normal in capitalist relations. First Nations communities are getting drawn further into debt either from borrowing money to meet their basic services or debilitating court costs over extended land claims. The advent of individual private property brings debt into the sphere of the individuals as it is a large part of the entrepreneurial experience. The FNPOA underscores the security of having formal property rights; however, it does not explore the risks of using one's house or property as collateral for entrepreneurialism. Secondly, the household can be considered a disciplinary mechanism that can be traced to colonial policies of repositioning Indigenous (semi)nomadic lifestyles and matrilineal social organization. The overcrowding and unmaintained housing crisis on many First Nations reserves due to a colonially induced factors resulting in a lack of funds remains chronic and facilitates major health problems, violence, government run child services taking children from their homes, and a host of other problems. This does not foster a secure environment then to engage in innovative business opportunities as suggested by the FNPOA. Finally, private property itself was argued to be a disciplinary mechanism in carceral capitalist relations. First Nations claim territories far beyond the confines of their bordered reserve lands. Private property makes Indigenous land tenure readable in the liberal system. It makes land a commodity for alienation and unsettles the interdependent relationship between the human to non-human world found in much of Indigenous thought and practice, turning it into a hierarchical relationship similar to those found in Western-liberal thought. Importantly, private property provides for the possibility of challenging the potential of decolonization by deradicalizing the threats to settler state structures in the ways that many Indigenous feminists, including Mishuana Goeman's (2013) concepts of (re)mapping of Indigenous space and belonging, aims to do. Goeman rightly cautions that "settler colonialism continues to depend on imposing a "planetary consciousness" and naturalizing geographic concepts and sets of social relationships" (p. 2). Private property continues to be one of these impositions.

The FNPOA was promoted in *Beyond the Indian Act* as an innovative policy as it was designed to be an opt-in policy, meaning that First Nations would be able to choose whether to adopt it or not, unlike past policies which were imposed on Indigenous communities. This rationale regarding choice is especially deceptive. For the moment, only a few First Nations have agreed to or are interested in adopting a system of private property; however, it is conceivable that the more they do conform the more other First Nations would feel increased pressure to opt-in in order to not be characterized as being a drain on Canadian tax payers.

As women are increasingly becoming targets of the “entrepreneurial solution” to feminized poverty and inequality, women are then particularly vulnerable to the inherent gendered and racialized pressures and risks in the neoliberal capital market. Entrepreneurialism remains contentious amongst many First Nations communities as it is seen as being counter to traditional ideas of communalism. Furthermore, Indigenous women’s access to rights are often associated with Western-liberal feminist ideals of individual rights, and typically seen as being in conflict with collective rights and traditions (Johnston, 1989). Thus, in a system of private property that typically discriminates against women, Indigenous women pursuing their rights may be seen as being in conflict with Indigenous sovereignty, at least in some communities. This was the case with the challenge to the marrying out laws.

Government promotion and increasing support of Indigenous entrepreneurialism at the individual level enables the government to circumvent the creation of social welfare policies and corrective measures to ameliorate Indigenous poverty and unemployment. With the reported rise in Indigenous entrepreneurialism among women, the conceptual push for privatization of property, from the government and industry, as a necessity for the success of business, is also rising. Faced with chronic poverty, endemic violence, and the lack of the federal government’s will to make any substantive changes to alleviate these structural problems, many First Nation nations and Indigenous individuals are faced with having to make choices that potentially compromise traditional values and beliefs. Young Indigenous people will play a critical part. If it is accurate that young Indigenous people are becoming less willing to dedicate the years and patience that land claims negotiations with the settler government take, as well as the exorbitant debt incurred by the process, private property ownership, especially as it is portrayed as an essential facilitator of entrepreneurialism, could become more acceptable among First Nations (O’Neil, 2014). The risks of entrepreneurialism are overshadowed by the certainty of the legacy of government

sanctioned poverty. Although outside of the scope of this thesis, parallels can be drawn to the neoliberal turn that much of feminist thought has taken. The deceptive convergence of neoliberal rhetoric with not only feminist goals (see Eisenstein, 2016; Fraser, 2013; Kantola & Squires, 2012), but also with Indigenous sovereignty (see Coulthard, 2014; MacDonald, 2011; Palmater, 2010b; Pasternak, 2014), puts real substantive change at risk. Although profound alternative ways of relating and living sustainably with the human-non-human world, as well as the existence of alternative economic models that have been practiced, neoliberal economic and governance pressures continue to rise and thus may become too much to resist.

In the way that it is based in individual rights, and consistent with equal access to employment and financial security, entrepreneurialism is consistent with liberal feminist ideals. The adoption of individual private property ownership, as practiced and understood in a liberal settler state such as Canada, is so rooted in colonial legacies of gendered and racialized tenets that although it may bring some material benefits for some First Nations women and their communities, the benefits will most likely be severely limited in the collective sense and follow the same gendered and racialized stratification in the neoliberal capitalism system that is reflected in non-Indigenous society (i.e. the surrounding Canadian society). When an FNPOA-type policy next resurfaces, it would be most prudent to use an Indigenous feminist lens, in assessing the potential dangers of such policy.

Darlene Necan's homelessness and dispossession, mentioned at the start of this thesis, is not uncommon for First Nation's women, nor is her active desire to change that situation. Her refusal to accept the government's offer to allow her to buy her traditional land because it was not theirs to sell, is a reminder that state sovereignty and Crown land is contested and unresolved. State initiatives like the FNPOA that offer depoliticized market-based neoliberal solutions to Indigenous poverty and dispossession only show a shift in rationale regarding the colonial-era goal of privatization of Indigenous lands rather than a shift in state-First Nations relations.

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