Law, Property and Power: A Critical Legal Geography of Matrimonial Real Property on Reserve

by

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Abstract

In Canada, spouses living on First Nation reserves do not have access to the same legal recourse and protection as people living off reserve when dealing with their family homes following the dissolution of their relationships. Federal law governing life on First Nation reserves does not address the division of matrimonial real property (MRP) after a marriage breaks up, and provincial/territorial law has limited application on reserve. In response to mounting concerns about this "legislative gap," the federal government undertook a nation-wide "consultation" process (2006-2007) aimed at identifying a viable legislative solution to deal with MRP on reserve. The outcome of this process was a seemingly straightforward piece of property legislation that would apparently resolve the legislative gap while simultaneously addressing First Nation concerns around jurisdiction, culture/tradition, and consultation. However, despite being championed as a viable legislative solution, the Act was not widely supported.

This research is broadly concerned with exploring theories of property to understand various ways in which property is conceptualized. I trace why these different and often competing conceptualizations of property matter in the context of matrimonial real property on reserve. The study is informed by critical legal geography literature and theories of property that argue spatial-legal categories are not fixed, apolitical and neutral. Rather, they are contested, enacted and inextricably linked to relations of power. I analyze discourses around "solving" the legislative gap in order to highlight the ways in which dominant conceptualizations of property serve to bracket matrimonial real property on reserve, and I consider the discursive "work" of property with respect to matrimonial real property on First Nation reserves in Canada. This research expands an understanding of the potential performativity of property with respect matrimonial real property, and explores the applicability of property theory to questions concerning Indigenous people(s) and spaces in colonial contexts. Exploring the legal geographies of property on reserve is relevant to current Canadian political and social life, and this research contributes greater insight into and appreciation of this under-theorized topic.

Keywords: matrimonial real property on reserve; critical legal geography; property; colonialism; Indigenous geographies; ownership model

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List of Acronyms

AANDC	Aboriginal Affairs and Northern Development Canada
AFN	Assembly of First Nations
BC	British Columbia
BQ	Bloc Québécois
CMHC	Canadian Mortgage and Housing Corporation
CP	Certificate of possession
CPC	Conservative Party of Canada
FNLMA	First Nations Land Management Act
INAC	Indian and Northern Affairs Canada
MP	Member of Parliament
MRP	Matrimonial real property
NDP	New Democratic Party
NWAC	Native Women's Association of Canada
RCAP	Royal Commission on Aboriginal Peoples
SFU	Simon Fraser University
UN	United Nations

1. Matrimonial Real Property on Reserve: A "Legislative Gap"

Matrimonial real property (MRP) is a Canadian legal term used to describe property owned by one or both spouses, and specifically refers to land (e.g., a lot) and anything permanently attached to the land (e.g., a home)[1] (Bissett-Johnson & Holland, 1980). When a relationship ends, the division of matrimonial property is often a primary concern. In Canada, jurisdiction over property and civil rights rests with provincial and territorial governments, and MRP laws are part of a broader legal framework that includes individual property rights, family law, wills and estates, and human rights. Every province and territory has its own laws that define exactly what is meant by matrimonial real property and that specify what types of relationships are relevant (e.g., same-sex, common law, etc.) (Ziff, 1981). These laws guide spouses in decisions regarding their property during marriage and when marriages break down. If property disputes arise between spouses, these laws provide a comprehensive framework for determining how the disagreement should be resolved. While there is diversity among provinces/territories, MRP laws typically deal with such issues as the sale of the family home, exclusive possession, the division of property, and domestic contracts (Bissett-Johnson & Holland, 1980).[2]

Although provincial and territorial laws govern the division of matrimonial property (both real and personal) in off-reserve contexts, spouses[3] living on First Nation reserves[4] do not have access to the same legal recourse and protection as people living off

[1] In contrast, matrimonial personal property includes moveable items such as vehicles and furniture.

[2] Domestic contracts are legal agreements about intimate relationships, such as co-habitation agreements or separation agreements (Bissett-Johnson & Holland, 1980).

[3] Spouses living on reserve may be Aboriginal or non-Aboriginal.

[4] In Canada, the federal government refers to Indigenous peoples as "Aboriginal." The federal government identifies three main categories of Aboriginal peoples: Indian, Métis and Inuit. "Indian reserve" is the official term for lands set aside for "Indians." It is more acceptable to refer to Indian peoples as First Nations, and I therefore choose to employ the term "First Nation reserve."

reserve. First Nation reserves are under federal jurisdiction, which limits (and complicates) the application of provincial law (Grant-John, 2007). Moreover, federal law governing life on First Nation reserves does not address the division of matrimonial real property. This situation has been described as a "legislative gap" (Assembly of First Nations [AFN], March 2007; Cornet & Lendor, 2002; Flies-Away, Garrow, & Jorgensen, September 2003; Grant-John, 2007; Indian and Northern Affairs Canada [INAC], 2007; Whonnock, March 2008) and has sparked national and international criticism claiming that the gap amounts to a human rights violation.[5] In particular, concern for First Nation women and their children has been expressed, and immediate action that would protect the property interests of women living on reserves has been strongly called for (see, for example, Standing Senate Committee on Human Rights, November 2003).

1.1. Understanding the "Gap"

Current provincial legislation dealing with matrimonial property in Canada developed relatively recently, in part due to a shift towards gender equality and legal principles that recognize marriage as a partnership of equals (Grant-John, 2007). Reforms to family property laws began in the early 1970s, when provinces began transitioning from systems of separate property, to systems of judicial discretion in the reallocation of property (Bissett-Johnson & Holland, 1980). More significant reforms came following a controversial decision in *Murdoch v. Murdoch* (1975), which denied the wife a share in her husband's ranch property despite having made significant contributions to its development (Bissett-Johnson & Holland, 1980). Soon after this decision was reached, the governments of Ontario and Saskatchewan implemented laws to mitigate the effect of the *Murdoch* ruling. Ontario's *Family Law Reform Act, 1978* was a particularly comprehensive approach that informed the other provinces; indeed, by 1980, all of the common law provinces and the Yukon had implemented similar legislation (Bissett-Johnson & Holland, 1980). The result of these reforms, broadly speaking, was to actualize the principle of equal share in family assets. In other words, property acquired during marriage would now be subject to equal division between parting spouses. It is important to note that despite resembling legislation in Ontario,

[5] Several reports were produced in 2003-2004: four reports by three Parliamentary Committees and eight United Nations (UN) reports. See Appendix A for a list of these reports.

every province's family property legislation is distinct, and brings about different decisions regarding matrimonial property disputes (Dulude, 1982).

By way of example, British Columbia's current *Family Law Act* was passed in 2011 and came into force in 2013; it replaces the previous legislation, the *Family Relations Act* (British Columbia, 2007). British Columbia's *Family Law Act* applies to spouses who are married or who have lived together in a marriage-like relationship for at least 2 years (Boyd & Prosser, 2012). Family property includes everything owned by one or both spouses at the time of separation, and it does not matter if the asset was used for family purposes or not. "The law assumes that spouses share this property equally" (Boyd & Prosser, 2012, p. 15). Inheritances and property acquired prior to the marital relationship are not eligible for equal division. If an asset is excluded from equal division, the increase in its value that accrued during the time of the relationship will be taken into account. In situations where it would be deemed "significantly unfair" to do otherwise, the court may order the division of excluded property or the unequal division of family property (Boyd & Prosser, 2012, p. 15).

With respect to MRP on reserve, provincial laws have limited application. This is because under section 88 of the *Indian Act,* all provincial laws of general application apply on reserves except where such laws are inconsistent or overlap with a treaty or federal statute. As Grant-John (2007) explains, "provincial laws cannot apply in any way that would change any individual property interest a First Nation person may hold under the *Indian Act*" (p. 18). This means that orders for possession, or for division, of real property on reserves cannot be made under provincial law, nor can provincial courts transfer interests in reserve land from one individual to another. A provincial court may only consider the value of the matrimonial real property in question, such as a family home on a reserve, and order compensation for the purpose of equalization (INAC, 2007, p. 3).

Two key cases are frequently cited in explanations of how section 88 affects MRP on reserve. The first is *Derrickson v. Derrickson*, which challenged the applicability of provincial law to questions of MRP on reserve in 1986. The parties involved in this dispute were members of Westbank First Nation (in BC). The wife applied under the *Family Relations Act* to be granted half of the husband's property, which he held through a Certificate of Possession (CP). The *Derrickson* case raised the issue of whether

provisions in the *Family Relations Act* could be applied to lands allotted to spouses by Westbank First Nation; in other words, would section 88 of the *Indian Act* hold? Ultimately, the ruling confirmed that the provincial legislation (i.e., the *Family Relations Act*) conflicted with the federal statute (i.e., the *Indian Act*) and therefore could not be applied on reserve (Mossman & Flanagan, 2004, p. 720). The matrimonial real property in question could not be divided.

A similar case unfolded in the same year. In *Paul v. Paul* the parties were members of Tsartlip First Nation, also in BC. Here, the wife requested interim possession, or "occupancy," of the family home rather than a share in the husband's property, which he held through a CP. The decision in *Paul v. Paul* stated that occupation was part of possession, and therefore, provisions in the *Family Relations Act* could not apply to matrimonial property on reserve. This decision further affirmed what was laid out in *Derrickson*: while provincial law may be applied to personal property on reserve, individuals who reside on reserve cannot make applications under provincial family legislation for occupation or possession of the home upon marriage breakdown or even "in the event of physical or emotional abuse from her spouse" (Borrows & Rotman, 2003a, p. 612).

Turpel (1991) has argued the legal issue at the centre of *Derrickson* and *Paul* was which branch of government controls First Nations people. For Turpel (1991), this focus on division of power effectively depoliticized a more pressing concern: state control of Aboriginal life. State control of Aboriginal life was first formalized in Canada in section 91(24) of the *Constitution Act, 1867,* which designated jurisdiction over "Indians and lands reserved for the Indians" to the federal government. The federal statute known as the *Indian Act* is a key legal apparatus through which the Canadian state's control over First Nations people is expressed and maintained; it governs many aspects of Aboriginal peoples' lives, both on and off reserve, including Indian status, band government, and the management of reserve lands and property on reserve. However, the *Indian Act* is silent on division of matrimonial property. Thus, in addition to the limits of provincial/territorial jurisdiction on reserve, the lack of applicable federal legislation directly contributes to the MRP on reserve "legislative gap." This is the focus of this dissertation.

While MRP on reserve may be (and frequently is) understood in terms that underscore the absence of law, it should be noted that existing law – namely, the *Indian Act* – and the colonial context in which it arose, has played a significant part in creating this issue. For example, patriarchal assumptions underlying the *Indian Act* have led to the unequal distribution of property (not to mention power and status) to men, and property rights on reserve are allocated in multiple, often informal, ways. Striking a balance between collective and individual interests in property remains a central concern, and the politics of band membership further complicates the matter. This cursory introduction to the important (colonial) context of property on reserve is expanded in Chapter 2 where I make clear that the phrase "legislative gap" is an oversimplification; it gives the impression that the problem is the *lack of a law* which can easily be solved with the creation of *a new law*. What is not captured by the phrase "legislative gap" is the complicated and troubling history of colonialism – including the presence of colonial laws (as opposed to their absence) and the suppression of First Nation laws (again, as opposed to their absence) – in which the issue of matrimonial real property on reserve emerged.

1.2. Seeking a Solution

Nearly a decade ago, the issue of MRP on reserve began to receive attention from the Canadian government. In 2003-2004, several reports used the term "legislative gap" to describe the problem and provided detailed discussion of the implications of the gap for First Nation individuals, families and communities across Canada (see Appendix A for a list of these reports). While MRP affects all members of a family and is not specifically a women's issue, these reports frequently noted the legislative gap is particularly consequential to First Nation women and children. The social injustices that result from the gap are therefore markedly gendered. For example, the Standing Senate Committee on Human Rights (November 2003) stated that because of the historical, geographical and social context of gender relations and property on reserve, "Aboriginal women living on reserves do not have the same rights as other women in Canada, Aboriginal and non-Aboriginal, living off reserve. They face unfair and unconstitutional discrimination in the exercise of a right which has profound effects on every day life; the right to a fair share of the matrimonial property on the break-up of their marriage or common law relationship" (p. 10).

In response to mounting concerns about the legislative gap, the federal government, led by the Honourable Jim Prentice, then Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, announced in June 2006 that the government would undertake a nation-wide "consultation"[6] aimed at identifying a viable legislative solution to the MRP on reserve "gap" (see Grant-John, 2007, p. 1). The "consultation" process was officially launched on September 29, 2006, and was organized by the MRP Working Group, which included two official representatives from the Assembly of First Nations (AFN), Native Women's Association of Canada (NWAC), and Indian and Northern Affairs Canada (INAC).[7] Ministerial representative Wendy Grant-John acted as chair of the Working Group (see Grant-John, 2007, Appendix J, p. 2). The ministerial representative was charged with facilitating the "consultation" process with the involvement of NWAC, led by President Beverly Jacobs, and the AFN, led by National Chief Phil Fontaine. These organizations – NWAC, AFN and INAC – were responsible for engaging with other First Nation stakeholders (individuals and organizations) across the country. For example, NWAC engaged First Nation women, the AFN sought input from representatives of First Nation communities,[8] and INAC focused on provincial and territorial governments[9] and Aboriginal organizations not engaged by NWAC or the AFN (INAC, 2007, p. 5).

The ministerial representative assisted the organizations in their "consultation" processes, which took place in 5 months between September 2006 and January 2007. The federal government drafted three possible legislative options to be considered in the

[6] The federal government used the term "consultation." However, there was disagreement about whether this term correctly applied to the 2006 process (see, for example, AFN, March 2007). I put consultation in quotations to acknowledge the tension around this term.

[7] INAC became Aboriginal Affairs and Northern Development Canada (AANDC) in June, 2011 (see Aboriginal Affairs and Northern Development Canada [AANDC], 2011).

[8] AFN dialogue sessions included the following: Federation of Saskatchewan Indian Nations; Saskatchewan First Nations' Women's Commission; Saskatchewan First Nations Treaty 4 (1874), Treaty 5 (1875), Treaty 6 (1876) and Treaty 10 (1906); Douglas Treaties; Treaty 8, Treaty 1 and 2 (1871), and Treaty 5 (1875); Treaty 6 (1876), Treaty 7 (1877), Treaty 8 (1978); First Nations Women Chiefs; AFN Women's Council.

[9] INAC consultations included the following: Assembly of Manitoba Chiefs; Congress of Aboriginal Peoples; Federation of Newfoundland Indians; Indigenous Bar Association; Les femmes autochtones du Quebec; National Aboriginal Circle Against Family Violence; National Association of Friendship Centres; Native Council of Nova Scotia; Native Council of Prince Edward Island; and, New Brunswick Aboriginal Peoples Council. Consultations with Aboriginal Communities included Eel Ground First Nation; Nishnawbe Aski Nation Treaty 6, 7, and 8 (Advisory Council of Treaty #6); and, Wet'suwet'en First Nation.

short "consultation" or dialogue sessions: 1) make existing provincial/territorial matrimonial real property laws applicable on reserve; 2) make existing provincial/territorial matrimonial real property laws applicable on reserve, and also grant First Nations authority to exercise their jurisdiction over MRP; or, 3) create federal MRP on reserve legislation, and include a mechanism through which First Nations can exercise their jurisdiction over MRP (see Table 1). The three organizations and the ministerial representative were to report on the opinions, reactions and feedback they received with respect to the options.

Table 1 Three Legislative Options

Legislative Option	Explanation
Option 1: Incorporation of provincial and territorial matrimonial real property laws on reserves	• Federal legislation would be adopted to make provincial and territorial legal protections on MRP available on reserves. • As changes are made to provincial and territorial laws relating to MRP, the same changes would apply on reserves.
Option 2: Incorporation of provincial and territorial matrimonial real property laws combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property	• Federal legislation would be adopted to make provincial and territorial legal protections on MRP available on reserves. • First Nations can exercise jurisdiction with respect to MRP on reserves. • The laws of the province or territory in which a reserve is located would provide an MRP regime unless and until individual First Nations enact their own laws on MRP.
Option 3: Substantive federal matrimonial real property law combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property	• Substantive federal law would provide protections for MRP on reserves. • First Nations can exercise jurisdiction with respect to MRP on reserves. • The federal law would apply on reserves unless and until individual First Nations enact their own laws on MRP.

Source: INAC, 2007, p. 5

The "consultation" process was completed on January 31, 2007. Four final reports were produced: 1) Wendy Grant-John's (March 9, 2007) *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserve*; 2) INAC's (March 7, 2007) *Consultation Report on Matrimonial Real Property*; 3) AFN's (March 2007) *Matrimonial Real Property on Reserves: Our Land, Our Families, Our Solutions*; and, 4) NWAC's (January 2007) *Reclaiming Our Way of Being: Matrimonial Real Property Solutions*. The Grant-John report summarizes the other three reports, and provides the most context and background material of the four documents. INAC's report is the most

cursory, providing details about the process and who participated. All of the reports conclude that options 1 and 2 were not supported, that federal involvement was preferred, and that First Nation jurisdiction and traditional/cultural values must be acknowledged. AFN and NWAC, in particular, emphasized the importance of First Nation jurisdiction, and a comprehensive approach involving non-legislative solutions.

Following the "consultation" process and final reports, the government drafted a new bill called *An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves* – or, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. The Act[10] represented option 3: federal MRP legislation along with mechanisms for First Nations to enact their own MRP laws. The Act included a verification process, which required a majority of eligible voters to participate in the approval process, and more than 25% of eligible voters to vote in favour of the MRP law. A verification officer, an official appointed by the federal government, would oversee and confirm the verification process. The Act was introduced in the House of Commons in March 2008 as Bill C-47. It passed second reading in May 2008 and was referred to committee in the House of Commons, but died on the Order Paper when Parliament was dissolved on September 7, 2008 (Tiedemann, 2011). The government introduced the same Act (no amendments) in the House of Commons in February 2009 as Bill C-8. It passed first reading, but died on the Order Paper when Parliament prorogued on December 30, 2009 (INAC, 2010). In March 2010, the government introduced the Act – now Bill S-4 (but with the same content as C-47 and C-8) – in Senate, which was then referred to the Standing Senate Committee on Human Rights[11] who studied the Act in May-June 2010. The Standing Senate Committee recommended twelve amendments, which dealt with the following major concerns: 1) making recognition of traditional dispute mechanisms more explicit; 2) making emergency protection orders more accessible; 3) making an applicant's ties to the community a greater consideration in emergency protection orders; and, 4) making collective interests a greater consideration in hearings on

[10] Throughout this thesis, I shorten the *Family Homes on Reserves and Matrimonial Interests or Rights Act* to simply "the Act," which, for the purpose of my work, includes the following iterations: Bills C-47, C-8 and S-4.

[11] The Standing Senate Committee on Human Rights is a permanent parliamentary committee that conducts in-depth studies on bills and policy matters related to human rights (Parliament of Canada, n.d.[a]).

emergency protection orders. The Standing Senate Committee's recommendations also included some technical clarifications. In July 2010, the now amended Bill S-4 passed in Senate and proceeded to the House of Commons, where it died on the Order Paper when Parliament was dissolved on March 26, 2011.

After Bill S-4 died on the Order Paper, the federal government amended the Act in several important ways and reintroduced it in Senate as Bill S-2 in September 2011. This version of the Act had removed the controversial verification officer, and changed the ratification threshold required for any First Nation seeking approval from their membership for an MRP law (developed by the First Nation). In Bill S-2, only 25% of eligible voters were required to participate, and a majority of those voters must support the proposed law. A third important difference in Bill S-2 was the addition of a 12-month transition period. The intent of this provision was to give First Nations a year to develop their own MRP law before the federal provisional rules begin to apply. While these are significant changes from previous bills, the response remained mostly negative. People expressed concerns that the Act failed to recognize First Nation jurisdiction over family and property law, and that issues around accessing justice would render the Act ineffective. NWAC and AFN also criticized the process through which the Act was developed and called for proper consultation and involvement of First Nations. Despite these concerns, Bill S-2 went before the Standing Senate Committee on Human Rights in November 2011 and the Committee returned the bill to the Senate with two amendments. After adopting the amendments, Bill S-2 passed third reading on December 1, 2011. It then went to the House of Commons and passed first reading on December 8, 2011. Nothing further occurred until 2013, when Bill S-2 was reviewed by the Standing Committee on the Status of Women[12] in May 2013, and passed third reading on June 11, 2013. The Act – as Bill S-2 – received Royal Assent on June 19, 2013. The first section of the Act – which provides for First Nations creating and enacting their own laws – came into force on December 16, 2013. The second part of the Act – federal law for First Nations who do not have their own MRP law – comes into force one year later. Table 2 outlines the Act's progress in the legislature.

[12] The Standing Committee on the Status of Women is a permanent parliamentary committee that conducts in-depth studies on bills and policy matters related to women (Parliament of Canada, n.d.[b]).

Table 2 Family Homes on Reserves and Matrimonial Interests or Rights Act

Bill C-47	
House of Commons (2nd Session of the 39th Parliament)	• Sponsored by Hon. Chuck Strahl, Minister of Indian Affairs and Northern Development. • March 4, 2008 – Introduction and First Reading. • May 15, 2008 – Second Reading and Referral to Committee (Standing Committee on Aboriginal Affairs and Northern Development). • September 7, 2008 – Died on the *Order Paper* when Parliament was dissolved.
Bill C-8	
House of Commons (2nd Session of the 40th Parliament)	• Sponsored by Hon. Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians. • February 2, 2009 – Introduction and First Reading. • December 30, 2009 – Died on the *Order Paper* when Parliament was prorogued.
Bill S-4	
Senate (3rd Session of the 40th Parliament)	• Sponsored by Hon. Marjory LeBreton, Leader of the Gov't in the Senate. • March 31, 2010 – Introduction and First Reading. • May 5, 2010 – Second Reading and Referral to Committee (Standing Senate Committee on Human Rights). • June 16, 2010 – Committee Report Adopted. • July 6, 2010 – Third Reading.
House of Commons (3rd Session of the 40th Parliament)	• Introduced by Hon. John Duncan, Minister of Indian Affairs and Northern Development. • September 22, 2010 – First Reading. • March 26, 2011 – Died on the *Order Paper* when Parliament was dissolved.
Bill S-2	
Senate (1st Session of the 41st Parliament)	• Sponsored by Hon. Marjory LeBreton, Leader of the Gov't in the Senate and introduced by Hon. Claude Carignan, Deputy Leader of the Gov't in the Senate. • 28 September 2011 – Introduction and First Reading. • November 1, 2011 – Second Reading and Referred to Committee (Standing Senate Committee on Human Rights). • November 30, 2011 – Committee Report (with 2 amendments) Adopted • December 1, 2011 – Third Reading.
House of Commons (1st Session of the 41st Parliament)	• Introduced by Hon. Gordon O'Connor for the Minister of Indian Affairs and Northern Development. • December 8, 2011 – First Reading. • April 17, 2013 – Second Reading and Referred to Committee (Standing Committee on the Status of Women). • May 27, 2013 – Concurrence at Report Stage. • June 11, 2013 – Passed Third Reading.
Senate (1st Session of the 41st Parliament)	• June 19, 2013 – Royal Assent. • December 16, 2013 – Sections 1-11 and 53 in force. • December 16, 2014 – Sections 12-53 in force.

Source: LEGISinfo website: http://www.parl.gc.ca/legisinfo/Home.aspx?ParliamentSession=41-1

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* was a seemingly straightforward piece of legislation that would apparently close the gap while simultaneously addressing First Nation concerns around jurisdiction, culture and tradition, and consultation. However, the Act was not universally supported. The AFN, NWAC and the ministerial representative criticized the federal government's "consultation" process in their final reports. The main concerns were that 1) the Crown has a legal obligation to consult given Aboriginal case law in Canada, but the process undertaken did not adequately fulfill its judicially defined duty to consult; 2) the federal government narrowly defined the problem and drafted the three solutions without any input or consultation; and, 3) the federal government imposed a very short time frame for the "consultation" sessions to occur and final reports to be submitted. The ministerial representative summarized these concerns in her report:

> Overall in my view, the expression of concerns about the depth of consultation and next steps raise serious legal and policy considerations for the government to consider. As is so often the case involving aboriginal and treaty rights issues, issues of substance and process are intimately connected. This is certainly the case respecting the challenge of developing a legislative option to address matrimonial real property that meets both human rights and aboriginal treaty rights requirements. (Grant-John, 2007, p. 38)

According to its critics, the process did not meet the Crown's duty to consult, and, in addition, there was dissatisfaction with the process itself. The AFN (March 2007) viewed the process as "structured for information purposes only and not as consultation forums with the Government of Canada or Department of Indian Affairs" (p. 6). Participants in the AFN's dialogue sessions – often community leaders – expressed concern that any kind of dialogue with First Nations would be construed as "'consultation' for the purposes of moving forward with its stated legislative agenda" (AFN, March 2007, p. 6). Indeed, they criticized the government for not consulting with communities directly and were adamant that "any decision regarding legislative or non-legislative options would require the input of their communities and they would not bind their communities without further discussion with them" (AFN, March 2007, p. 6). In 2008, NWAC president Beverley Jacobs stated in a press release "we have not experienced our relationship with the federal Department of Indian Affairs as being one of partnership or even consultation but rather it feels like another experience of colonialism, or at best piecemeal, individually based solutions that will not result in real equality for the women we represent" (NWAC,

March 4, 2008, para. 3). Both the AFN and NWAC noted their engagement process highlighted the lack of awareness and knowledge concerning MRP issues on reserve, and stated the short time allowed to complete the process made effective engagement extremely difficult.

The federal government staunchly defended the Act, characterizing it as positive and progressive because it included provisions for each First Nation to create and enact its own MRP laws. Ruru (2008), writing on matrimonial real property issues in both New Zealand and Canada, suggested that the Act was "historic in its reach in that it provides space for First Nations to revise and reassert their own laws" (p.348). However, critics of the Act – particularly of the first three iterations of the Act – pointed out that First Nations who formalize their customary legal systems (or establish new ones) by the terms of this Act could only do so subject to approval by the federal government (Ruru, 2008). An NWAC (November 21, 2011) press release stated "NWAC is being told by its members that the MRP legislation is too prescriptive and does not adequately support Indigenous legal systems" (para. 10). The Act, therefore, was seen as not recognizing First Nation jurisdiction, and many First Nation opponents expressed concern that it reflected a continuation of colonial relations. Indeed, if the federal government was hoping to win approval for its "culturally sensitive" approach, it was sorely disappointed: "The federal analysis of this gap is rooted in non-aboriginal notions of individual property ownership and the relationships of property, family and the proper role of law in regulating relationships to land and family relations" (Grant-John, 2007, p. 19). In addition, the government faced accusations of off-loading the issue onto communities without providing adequate financial and administrative means, or access to the justice system (Grant-John, 2007; Ruru, 2008). NWAC, in particular, highlighted concerns around family violence and access to justice:

> First Nations' communities are often in areas with limited access to courts or lawyers. Reliance on provincial courts may place additional financial burden on First Nations citizens in a marriage breakup, where they are accessible, if at all. In effect, the Bill may create additional barriers to justice for First Nations citizens and will not provide effective remedies for individuals seeking redress. (NWAC, November 21, 2011, para11)

Thus, despite being championed as a viable legislative solution, the Act was not widely supported by First Nations. Since its entry into the legislative process, many First Nation

individuals and groups (as well as their supporters) have fiercely opposed the Act, and it continues to be the subject of controversy.

1.3. Law, Property & Power

At the heart of the matrimonial real property on reserve issue is a question of property. But what is property? According to Underkuffler (2003), there remains "remarkably little exploration of what property – as a socially and legally constructed idea – really is" (p. 11). Academics from a range of disciplines have offered a variety of sometimes contradictory definitions of property. For example, property has been conceived as "rights over things" (Singer, 2000a, p. 2), a "complex bundle of relations" between persons (Waldron, 1988, p. 28), and a "socio-cultural practice" (Bryan, 2000, p. 3). According to Banner (1999), property is "the intellectual apparatus that organizes rights to use land" (p. 807) and can be arranged geographically or functionally. For Bryan (2000), "[p]roperty is an expression of social relationships because it organizes people with respect to each other and their material environment" (p. 3). Complicating matters is the fact that the concept of property is constantly evolving, often in contradictory ways. As Macpherson (1978) explains, "[t]he actual institution, and the way people see it, and hence the meaning they give to the word, all change over time," and these changes can make property a "controversial subject" (p. 1). The controversy involves not only what property is, but what it ought to be (Macpherson, 1978; Singer, 2000a). Property, therefore, is a complex and contested legal-spatial concept that features significantly in a broad range of political and ethical questions and concerns; it is inextricably wrapped up with history, law, politics, and socioeconomic relations, and imbued with such intangible notions as culture and morality. As such, and as Underkuffler (2003) asserts, there is "little doubt about the importance of property in our everyday lives, and as a fundamental concept in politics and law" (p. 11).

Despite this complexity, there is a tendency – by scholars, lawyers and lay people, alike – to treat property as something simple, neutral and apolitical. Scholarship on law and geography assists in elucidating why this phenomenon occurs; it draws attention to the interconnectedness of law, space, and power, asserting that law and space are socially produced and directly linked to questions of power. To understand this more fully, it is useful to look at the history of "law" and "space," and the traditional

approaches taken by the two disciplines most involved in the study of these concepts. Law and Geography have existed as "closed" disciplines for a long time and, until recently, have had little interdisciplinary contact (Blomley, 1994; Blomley, 2003). Furthermore, both law and space have tended to be "understood as distinct from or only partially related to something called society" (Blomley, 2003, p. 17). Law has traditionally been theorized as formal, autonomous and detached from society, and "[g]iven its closure, law vigorously polices knowledge, with a suspicion of that deemed to lie outside its boundaries" (Blomley, 2003, p. 21). Likewise, space has been treated as something abstract, apolitical and separate from society (Blomley, 2003). The result of these disciplinary closures is the pervasive belief that "…law is autonomous and asocial, and space is an uninteresting static surface" (Blomley, 2003, p. 21).

In the last several decades, however, the trend in both disciplines has been to shift away from positivist approaches and empirical descriptions (Blacksell, Watkins, & Economides, 1986) towards the recognition that both law and space are socially produced and socially productive (Butler, 2009; Cotterell, 1996; Travers, 2010). Law is now more likely to be treated as "a plastic medium of discourse that subtly conditions how we experience social life" (Gordon, 1986, p. 15), and geographers are more likely to argue that the "spaces of social life are not preformed but actively produced and that such spaces are themselves consequential for the production of identities, and our relations with others" (Blomley, 2003, p. 28). Furthermore, scholars began increasingly to examine law and geography for potential linkages. By the 1990s, there was a distinct move towards integrating law and geography more fully. For example, Blomley (1994) asserted, "[r]ather than seeking to bridge the gap between law and space, the argument here is that there is no gap to bridge" (p. 37). Conceptual advancements were thus made in "spatializing law" and "legalizing space" (Blomley, 2003, p. 24 and p. 27). Space and place, including the local and particular contexts of daily life, were said to influence the interpretation, understanding and experience of law, and law was argued to "actively create certain spatial arrangements, practices, or representations" including how community and place are constructed, notions of insider/outsider, rights to place, and even the construction of national identity (Blomley, 2003, pp. 26-27). Law acts discursively and practically in its constitution of social life, and since geographers are interested in social life and power dynamics, they must take law into account (Blomley, 2003). Legal

geography acknowledges the important role of law in the production of social spaces, as well as the important role of space in the production of law (Blomley, 2003).

Property is a concept that is closely intertwined with territorial jurisdiction and governance. Territorial jurisdictions are, according to Ford (1999), "the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions" (p. 843), and exist at both national and sub-national scales. They largely "define the identity of the people that occupy them" and they function to "separate types of people" (Ford, 1999, p. 844). To some extent, it is possible to choose a territorial jurisdiction, but there are also important restrictions; for example, it is not possible to become a citizen of another state merely because you choose to move there (Ford, 1999, pp. 844-845). The ideal vision of territorial jurisdictions is that within these bounded spaces of sovereignty, unified conditions of citizenship and authority exist. However, this ideal rarely (if ever) exists. Instead, an uneven terrain of citizenship and authority are usually evident. Thus, within territorial jurisdictions, there are legally distinct spaces that shape the conduct of both state and citizen; they dictate and constrain who can do what, where. Simply put, governments make laws, and laws frequently have a spatial dimension, a "where" for which the law applies. To this extent, property – whether private, public or communal – is a bounded location, a container, for many laws and subject to governance. But property's relationship with governance is more complex than that. Property might be imagined as a concrete legal space that largely defines the relationship between citizen and state, and the rights and responsibilities of each. For example, private property regimes regulate the relationship between state and citizens by mitigating the potential threat of government on the freedom and autonomy of individuals (M. R. Cohen, 1927).

Law and space, then, are both very important to the maintenance of social order. Examples of spatial ordering include maps and boundaries, and examples of legal ordering include such categorical distinctions as citizen and alien, employee and employer, and public and private. Frequently, however, it is difficult to separate the "legal" from the "spatial" as "[s]patial orderings are simultaneously legal orderings and vice versa" (Blomley, 2003, p. 29). The term "splice" is a concept that can be applied to categories that are simultaneously legal and spatial (Blomley, 2003). For example, property is a splice; it is defined through a process of legal and spatial categorization in which specific legal rules are applied to demarcated spaces. A plot of land that has been

legally categorized as private property will be understood to have certain characteristics; it will have an identifiable owner, a boundary, an economic value, and legal processes for formalizing all of these things. However, as Blomley (2003) points out, "[b]ecause law and space independently have an air of neutrality and objectivity, their combination in a splice allows for a very consequential "freezing" of social arrangements. A splice can appear simply part of the order of things, and thus non-negotiable" (p. 30). And so it is that categories of property become understood as fixed, neutral, and apolitical.

It is important to note that splices "tend to construct the world in ways that systematically favour the powerful" (Blomley, 2003, p. 30). Indeed, the categorization of a particular piece of land has ethical implications. The creation and interpretation of legal-spatial categories so central to the maintenance of social order is a political undertaking and often serves the interests of the dominant society. For example, in Canada, land set aside by the federal government for the use of a First Nation is called a reserve. Legal spaces, such as reserves, "serve to reflect and reinforce legal relations of power, through complex and layered spatial processes and practices that code, exclude, enable, stage, locate and so on" (Blomley, 2005a, p. 283). This concept has important implications for questions of justice and rights. For example, Cooper (1998) examines how space functions as a discursive technique to define who is "out of place" (p. 15). Space, she argues, is an effective political technique with material consequences for both citizens and governments. Returning to the example of First Nation reserves, Henderson, Benson and Findlay (2000) point out that Canadian legal categories pertaining to Aboriginal peoples and lands are a colonial legacy, and cannot be separated from questions of power. Anderson (1987) concurs, arguing that race is a socially constructed category attached to spatial boundaries (see also Razack, 2002). Neither law nor space is innocent, particularly in the context of colonialism.

The legal geographies of property on First Nation reserves, and the interconnectedness of law, geography and power, are critical aspects of the matrimonial real property on reserve issue. "Splicing," the verb, refers to the "the active, constructed way in which splices are made" (Blomley, 2003, p. 31), and provides a theoretical link between Canada's history of colonialism and the current concerns around MRP on reserve. By using "splicing" as an analytical tool it becomes possible to interrogate property's hypothetical neutrality and thus get at the discourses and enactments, and the questions of power, behind it. In so doing, a contribution can be made toward

“resplicing,” a process through which dominant splices “unravel,” are reworked and contested through alternative actions and discourses (Blomley, 2003, p. 32). A dominant discourse around property uncritically equates it with the characteristics of private property. Singer (2000a) has termed this common, hegemonic conceptualization of property, which assumes that property can be captured by a single category, the “ownership model” (Singer, 2000a, p. 3). A much deeper discussion of the ownership model and its consequences follows in the next chapter, but for now let me point out that splicing property as something simple, singular and ideal, encapsulated in abstract fashion by one universal definition, gives it the appearance of being “settled” (Blomley, 2004, p. 13). I would argue that it goes so far as to render “other” conceptualizations of property (e.g., collective and Indigenous property systems) nearly invisible. Nonetheless, multiple, often competing and contradictory conceptualizations of property exist and persist that challenge the ways in which property is imagined, envisioned and enacted. As I will argue in this thesis, the idea that law and space are apolitical concepts is a misapprehension that works to silence and obscure the power inherent in both (Blomley & Bakan, 1992). As socially produced and productive concepts, law and space are both politically charged and “deeply implicated in power relations” (Blomley, 1994, p. 42). I argue that a dominant colonial conceptualization of property reflects a continuance of colonial power relations and produces socially differentiated spaces of inequality and marginalization. At the same time, competing conceptualizations of property “unsettle” current classifications and categorizations of property, and make visible the problematic implications of the ownership model. Therefore, property is far from simple, neutral and apolitical, and the ways in which it is conceptualized are consequential.

1.4. Research Questions and Rationale

This research is broadly concerned with exploring theories of property to understand various ways in which property is conceptualized. I trace why different and often competing conceptualizations of property matter in the context of matrimonial real property on reserve. The study is informed by critical legal geography literature and theories of property that argue spatial-legal categories are not fixed, apolitical and neutral, but rather contested, enacted and inextricably linked to relations of power. My research is driven by three main questions:

1. What conceptualizations of property were part of, present in, or informed the "national dialogue"[13] about matrimonial real property on reserve?
2. Do various conceptualizations of property *matter* to matrimonial real property concerns on First Nation reserves in Canada? What discursive "work" do these conceptualizations of property do, or aim to do, with respect to matrimonial real property on First Nation reserves?
3. Does property theory assist in understanding the conflict over matrimonial real property on reserve?

In summary, I ask how property in the context of the MRP on reserve issue is conceptualized and what the consequences of these conceptualizations might be in order to arrive at a better understanding of the role property plays in the particular problems of matrimonial real property on First Nation reserves.

Why I am interested in these questions, in these research issues, is worthy of some explanation. I am a white, settler, middle-class, urban woman. I have not had any personal experience with matrimonial real property on reserve. The injustice of colonialism, and especially *gestures* of decolonization that have absolutely no material effect, has motivated me to undertake this work. For me, decolonization can only begin when something is *given up*: power, land, resources. My view is that, despite good intentions, colonialism persists; it only gets more or less visible. Therefore, I am interested in the power contained in ideas, especially those ideas that are taken-for-granted. Property is just such a concept; many people think they understand exactly what it is (i.e., the ownership model) and are confident that it makes perfect sense as an organizing idea for social, cultural and economic structures. Indeed, property as private property has become so common-sensical that the problems and injustices contained within it slip from view. I am also concerned with the unfolding relationship between settlers and Indigenous peoples in Canada. In particular, I would like my work to make colonialism – especially as it persists today – more visible. My position is that there are too many ideas, practices, processes, systems and structures taken-for-granted as good, just, and postcolonial, when in fact they work to perpetuate colonial relations and the injustices and inequalities that Indigenous peoples in Canada continue to

[13] The national dialogue is defined and discussed in Chapter 4.

experience. In this colonial era, these problematic ideas, practices, processes, systems and structures serve to distract from, make invisible – or even "erase" – the fact that real change is still wanted and desperately needed.

This work, then, engages with questions concerning Indigenous spaces, law and property, areas in need of attention and critical examination. Currently, a number of reports and papers describe the matrimonial real property on reserve issue, including an overview of current property laws and the resulting legislative gap (see, for example, Cornet & Lendor, 2002; Flies-Away et al., September 2003; Standing Senate Committee on Human Rights, November 2003). In addition, a recent surge in scholarly works demonstrate interest in how property on reserve is regulated, most notably, a public championing by some scholars of a private property regime for First Nation reserves (see, for example, Flanagan, Alcantara, & Le Dressay, 2010). However, while geographical scholarship concerning Indigenous peoples and spaces has increased over the last decade (e.g., de Leeuw, 2007; Peters, 2000; Shaw, Herman, & Dobbs, 2006), until recently geographers have given little notice to property and Indigenous geographies. In particular, the issue of matrimonial real property on reserve, has been under-theorized. The broad purpose of this research, then, is to interrogate property's apparent neutrality to uncover the multiple and complex interconnections between law, space and power that have such important implications for social, cultural, political and economic life. I argue that it is imperative that property is problematized so the power relations inherent in this legal-spatial ordering are made visible. Doing so will have ethical and practical outcomes. First, dominant conceptions of property can be "unsettled," revealing their political, unstable and contested natures. Second, alternative conceptualizations of property can be made visible. Third, social inequality and uneven power relations related to how property legally and spatially orders life on reserve can be identified.

1.5. Organization

The remainder of the thesis unfolds as follows. In the next chapter, I delve into the colonial context of matrimonial real property on reserve. In an effort to theoretically ground the discussion, I start by reviewing literature on Indigenous geographies and (post)colonialism, as well as law and colonialism scholarship. I then move into a

discussion of colonialism in Canada, paying particular attention to property's role in changing Indigenous geographies. I also provide an overview of the current status of property rights on reserve, and the colonial context of First Nation reserves in Canada. In Chapter 3, I continue the discussion of property with a focused look at the ownership model of property. Here, I introduce the notion of "bracketing" and the "work" of property. In Chapter 4, I describe my research methods, including ethical considerations, opportunities and challenges. Finally, I report and discuss empirical findings from the "national dialogue" and draw on property theory to examine the various ways in which property was conceptualized, and the consequences of these conceptualizations (see Chapters 5-7). In my concluding chapter, I critically consider whether property theory was a useful approach to understanding matrimonial real property on reserve. I conclude with a brief overview of the research, its key findings and some conjecture about where future research on this topic might go.

2. The Colonial Context of Property on Reserve

In this chapter, I review postcolonial literature as it relates to questions of Indigenous geographies to show how research concerning Indigenous people(s) and spaces – such as mine – is inextricably linked to colonialism. I continue the discussion of colonialism in the second section, paying special attention to law's role in the dispossession of Indigenous peoples of their identities and spaces. After setting down this theoretical basis, I turn my attention to contextualizing the matrimonial real property on reserve issue. I start with an overview of the colonial context, paying particular attention to property in this history. This leads to a discussion of property on reserve and of how it is administered, highlighting how it differs from property off reserve. Here, I provide information about Indigenous peoples' property rights in Canada – both collective and individual – as they have evolved over time. The collective nature of reserve lands and the legal context of federal jurisdiction (and underlying title) are explained, as is the formal ("official") and informal ("customary") administration of individual property interests on reserve.

2.1. Indigenous Geographies & (Post)colonialism

Human geographers concerned with spaces and places of Indigenous people(s) cannot escape the fact of colonialism and the largely unresolved issues around the dispossession of Aboriginal peoples' lands (Shaw et al., 2006). Thus, studies of Indigenous geographies tend to actively engage with the discipline's postcolonial turn, and to grapple with the many challenges related to colonialism. Even the concept of indigeneity is fraught with highly political, context-specific complexities related to colonialism (Shaw et al., 2006). Postcolonial literature, although not without limitations, can provide a useful theoretical grounding for studies of post and neo-colonial Indigenous geographies, including property relations and conceptualizations.

Colonialism refers to "[t]he establishment and maintenance of rule, for an extended period of time, by a sovereign power over a subordinate and alien people that is separate from the ruling power" (Watts, 2000, p. 93). Colonization involves the migration, occupation and settlement of the colonizing people to the territory of the colonized people (Watts, 2000). "Classic" – also known as "administrative" or "invaded" – colonization describes a small number of settlers colonizing territory far from their home and asserting control over its large Indigenous population (Weaver, 2005). The colonizers remain a minority (Weaver, 2005). This type of colonization is generally associated with Africa and Asia (Weaver, 2005). "Internal" colonization – also known as "settler" colonization or "paracolonization" – occurs when the Indigenous populations become a minority, when settlers stay for so long that they no longer have a place to return (Weaver, 2005). Examples of this type of colonization are found in North America, Australia and New Zealand (Weaver, 2005). The term imperialism is associated with colonialism, and describes the domination and subordination of one or more states by another state, but does necessarily involve the establishment of settler populations (Clayton, 2000). Said (1993) distinguishes between colonialism and imperialism this way: "'imperialism' means the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory; 'colonialism,' which is almost always a consequence of imperialism, is the implanting of settlements on distant territory" (p. 9). At base, both colonialism and imperialism involve controlling land that belongs to another people: "Imperialism after all is an act of geographical violence through which virtually every space in the world is explored, charted, and finally brought under control" (Said, 1993, p. 225).

According to Said (1993), "direct colonialism has largely ended; imperialism, as we shall see, lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic, and social practices" (p. 9). Clayton (2000) suggests that imperialism in current times is often enacted through neoliberal and capitalist economic practices such global business monopolies and transnational corporations. Alfred and Corntassel (2005) call this process "contemporary colonialism" and define it as "a form of postmodern imperialism in which domination is still the Settler imperative but where colonizers have designed and practice more subtle means (in contrast to the earlier forms of missionary and militaristic colonial enterprises) of establishing their objectives" (pp. 597-598). Others have used the term "neo-colonialism"

to describe the political and economic control powerful states wield over less developed nations (e.g., Lee, 2000). Canada's colonial history – which was largely a geographical project – has resulted in a colonial present that has materialized in particular ways. Indeed, the very material, geographical challenges that currently characterize the MRP on reserve issue are directly related to Canada's history of colonialism. Colonialism was and continues to be a geographical project such that the present day geographies of First Nation reserves share a direct lineage with Canada's colonial past.

Alfred and Corntassel (2005) suggest multiple ways in which contemporary colonialism dispossesses and disconnects Indigenous people(s) from their histories and geographies: for example, "new faces of colonialism […] use diplomatic language and the veneer of free trade to mask ugly truths" (p. 602). What is important to note is that colonialism is never simple, unified or complete; it is, rather, a complex and heterogeneous project made up of social, cultural, economic and political discursive and material practices and consequences (de Leeuw, 2007). In other words, colonialism is the result of both structural processes *and* the ideologies that work to legitimize and justify them (de Leeuw, 2007). As Said (1993) states:

> Neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with domination: the vocabulary of classic nineteenth-century imperial culture is plentiful with words and concepts like "inferior" or "subject races," "subordinate peoples," "dependency," "expansion," and "authority." (p. 9)

Thus, the study of colonialism is a study of the power relations developed through complex and interconnected discursive and material practices. There were, and are, "complexly differentiated contours of imperialism, colonialism, neo-colonialism and postcolonialism" (Anderson & Domosh, 2002, p. 125), all of which remain relevant today.

Postcolonialism is "[a] critical politico-intellectual formation that is centrally concerned with the impact of colonialism and its contestation on the cultures of both colonizing and colonized peoples in the past, and the reproduction and transformation of colonial relations, representations and practices in the present" (Gregory, 2000a, p. 612). Postcolonial theory is relevant to questions of Indigenous geographies because it seeks to upset entrenched assumptions, such as Eurocentric notions of knowledge,

culture and law (among other things). “One of the aims of postcolonial work is to decentre ‘Western’ authority over knowledge, requiring ‘Western’ theory and scholarship not only to listen to ‘the other,’ but acknowledge and fully incorporate differences to the broader body of intellectual theory” (Shaw et al., 2006, p. 271). While postcolonialism appears well-positioned to grapple with the effects of colonialism, both in the past and present, Weaver (2005) argues that “there are potentially troubling aspects of postcolonial discourse that must be debated seriously before it can be determined whether it is useful to hop aboard the postcolonial bandwagon” (p. 222). For example, postcolonialism may have the effect of being universal, neutral and ahistorical (Weaver, 2005), of generalizing (Anderson & Domosh, 2002; Nash, 2002), of relying too much on the analyses of texts and culture (C. Harris, 2004; Nash, 2002), and of reinforcing colonial epistemologies and hierarchies (Gilmartin & Berg, 2007). Weaver (2005) also highlights some important temporal and geographic challenges related to post-colonialism. First, when does the postcolonial period start? The “post” in the term postcolonialism seems to imply that it refers to a period of time *after* colonialism, *after* the achievement of independence by colonized nations from their colonizers. However, “[t]he problem is that for much of two-thirds of the world colonialism is not dead. It is not merely living as ‘after-effects’” (Weaver, 2005, p. 223). Bracketing “post” – i.e., (post)colonial – connotes a recognition that colonialism is not something relegated to the past, but that remains a current concern, even though it might have quite different characteristics in a post-independence era. Second, the notion of postcolonialism is primarily advanced in Anglocolonial countries (Weaver, 2005; Gilmartin & Berg, 2007) and the language of postcolonialism is almost always English (Shaw et al., 2006; Weaver, 2005). This can lead to a focus on the “faraway” to the neglect of the local, a production of binaries (e.g., metropole vs. periphery, “West” vs. “Indigenous”), and the homogenization of very diverse peoples, places and politics whether “colonized” or “colonizing.”

The power imbalance arising from colonialism can lead geographers to pay “exclusive attention to the dominant group’s role in the production of space” and to “misconstrue the complexity of the process” (Morris & Fondahl, 2002, p. 109). Similarly, Said (1993) reminds us that the relationships between colonizing and colonized peoples are important and that both groups influence each other. There is no clear divide between powerful and powerless; rather, there is overlap, and, in many ways, the

stronger depends on the weaker (Said, 1993). Morris and Fondahl (2002), like many scholars, “challenge caricatures of space as homogenous and myths of Native peoples as ineffectual victims of colonial forces” (p. 122). Instead, it must be recognized that “spaces produced in the midst of power discrepancies” are not “homogenous and devoid of internal difference, ambivalence, or contradiction” (Morris & Fondahl, 2002, p. 109). Wherever hegemonic powers assert themselves, there will be resistance to it in the form of representational and material strategies. Said (1993) describes primary resistance as physical struggle or fighting, and ideological resistance as the reclaiming of history and culture, and the reversal of imperial ideology. In internal colonies like Canada, resistance to contemporary colonialism takes many forms. For example, First Nations employ various political strategies to eke out spaces of negotiation that result in hybrid social spaces reflecting the goals of both groups (Morris & Fondahl, 2002). Blockades are a counter hegemonic spatial tactic that “challenges the dominant readings of place and the forms of mobility – both material and representational – visited upon Native peoples” (Blomley, 1996, p. 30).

Postcolonialism is fraught with challenges that are, arguably, impossible to completely overcome. Nonetheless, postcolonial theory remains useful for informing research concerning Indigenous people(s) and spaces, particularly when the following guidelines are heeded. First, it is important to pay attention to inconsistencies, uneasy alliances, different types of stories, and contradictions of colonial rule (Anderson & Domosh, 2002; C. Harris, 2002). Second, there is a great deal of complexity in colonial encounters (Anderson & Domosh, 2002; C. Harris, 2002; Nash, 2002) that demands acknowledgement of nuance and “messiness” (Jacobs, 2001; Kobayashi & de Leeuw, 2010), and an avoidance of binaries (Gilmartin & Berg, 2007) and grand theories (Nash, 2002). Finally, by employing spatial concepts such as scale and place (de Leeuw, 2007; Jacobs, 2001; Nash, 2002), geographers are well positioned to uncover colonialism’s material legacies (Kelm, 1998; Nash, 2002; Peters, 2000), its local and particular effects, and its in-between spaces and hybridities (Bhabha, 1994). In this way, postcolonial theory has the potential to do anti-colonial work through its critical application to questions of Indigenous geographies (Gilmartin & Berg, 2007; Jacobs, 2001).

2.2. Law & Colonialism

Law plays a very important role in colonialism. C. Harris (2001) argues that scholars must examine laws in their colonial context; he states "[c]olonialism usually involved not only the capture of land and resources, but also the large-scale transfer of laws and legal institutions" (p. 189). Henderson et al. (2000) concur, stating that "[l]aw was (and continues to be) a central process in legitimating colonization and its institutional and social arrangements" (p. 249). With respect to Indigenous geographies and experiences of colonialism, law is a discourse that "operates as a site for the construction of meanings and for the imposition of authoritative regimes of reality" (Turpel, 1991, p. 17), which "officially defines and sanctions political and social 'reality' for aboriginal peoples" (Turpel, 1991, p. 19). Similarly, Valverde (2012) has argued that "[t]he rules of the legal game have the effect of confining aboriginal peoples epistemologically as well as politically and legally" (p. 19). In other words, colonizers established a legal hegemony that increased their access to land and resources by outlawing and undermining Indigenous peoples' legal spaces (D. Harris, 2001). According to Henderson et al. (2000), in the interest of justice, judicial reasoning and interpretation needs to "confront the colonial origins, assumptions, principles informing government statutes, regulations, and policy" (p. 254).

In a similar vein, Dudas (2004) states that the fundamental premise of law and colonialism scholarship is that "[t]he implanting of modern, Western legal orders throughout the non-Western world was a central means by which European colonizers exerted control over Native peoples and their resources" (p. 862). Early studies of law and colonialism tended to focus on administrative colonies in Africa and Asia and the "dual" legal systems (i.e., "modern" European law and "customary" Indigenous law) that arose there. However, a more recent "second wave" of scholarship looks at law in "internal" colonies, clarifying "that the ambiguous effects of law in colonial settings depend less upon the existence of institutionalized, 'dual' legal systems and more upon law's own hegemonic place in the new worlds ushered in by colonial processes" (Dudas, 2004, p. 860). Law worked to order colonial encounters through both instrumental and cultural means (Dudas, 2004). Colonial legal institutions and apparatuses formalized expectations for appropriate behaviour and gave legitimate routes to discipline and punish, but "the more important and long-lasting impacts of law in colonial settings were

primarily cultural: law offered ways of 'seeing' colonial realities, especially for settlers (but also for Natives…)" (Dudas, 2004, p. 864).

Law has played a significant role in producing Indigenous identities. Identity is not neutral, passive or fixed, and "is about ways of looking at people, about how history is interpreted and negotiated, and about who has the authority to determine a group's identity or authenticity" (Lawrence, 2003, p. 4). According to Mawani (2002), legally formalized racial categories were an important part of how order was maintained in colonial settings. States impose identities on Indigenous peoples – e.g., "aboriginal" – which Alfred and Corntassel (2005) argue are "legal, political and cultural discourse[s] designed to serve an agenda of silent surrender to an inherently unjust relation at the root of the colonial state itself" (p. 598). In Canada, the externally imposed legal identity of "Indian" is based on race, and has a homogenizing (i.e., pan-Indian) effect, denying any association with one's nation (Lawrence, 2003). Alfred and Corntassel (2005) argue that the notion of indigeneity is also constructed through colonialism: "It is this oppositional, place-based existence, along with the consciousness of being in struggle against the dispossessing and demeaning fact of colonization by foreign peoples, that fundamentally distinguishes Indigenous peoples from other peoples of the world" (p. 597). While substantive differences among Indigenous peoples must be acknowledged, Indigenous peoples have in common the struggle to overcome colonialism and survive as distinct nations (Alfred & Corntassel, 2005). Indigenous peoples sometimes accept imposed identities and the practices of dominant non-Indigenous legal-political institutions (Alfred & Corntassel, 2005; Bhandar, 2004; Anderson & Domosh, 2002); indeed, they may feel compelled to cooperate with authorities in order to survive on a basic physical and material level (Alfred & Corntassel, 2005). Moreover, "the elusive promises of justice that rights discourse holds out to marginalized individuals and communities, along with partial and fragmented legal victories, entice us [Indigenous peoples] to continually engage with the law in an effort to achieve social justice" (Bhandar, 2004, p. 842). For Lawrence (2003), deconstructing Indigenous identities must play a crucial role in any efforts to decolonize or decentre colonial power relations.

According to Loo (1994), "Canada's legal system as a whole was and continues to be implicated in the production and reproduction of a racist, classist, and sexist system of domination, privileging the rights of the few over the many" (p. 5). Regulatory regimes are legal discourses, "a way of seeing life that is produced and reproduced by

various rules, systems and procedures – forming an entire conceptual territory" (Lawrence, 2003, p. 3). The *Indian Act* is a conceptual framework, a discourse, a regulatory regime of classification and control that has influenced and formed Indigenous experiences in ways so commonplace they now appear "natural" (Lawrence, 2003, p. 3). According to Lawrence (2003), "the crucial issue facing Native communities is whether they can break with the 'grammar' of government regulatory discourses to reform traditional geopolitical units and alliances without taking colonizer definitions into those recreated forms of Indigenous governance" (p. 25).

Indigenous geographies research is interested in questions of space and power and the production of space in which law and colonialism play important roles. C. Harris (2004), in his historical account of the colonization and settlement of British Columbia, argues that local laws were, over time, replaced with the foreign laws of the colonizers which he characterizes as "relatively placeless understandings embedded in contracts and private property rights" (p. 177). The imported laws represented the social and cultural values of the colonizers, and they worked to justify the imposition of a new geography of Indian reserves and private property. Thus, "a long line of legal opinion supported European claims to sovereignty" (C. Harris, 2002, p. xxi) resulting in "[o]ne human geography […] being superseded by another, both on the ground and in the imagination" (C. Harris, 2002, p. xvii). In a similar vein, Razack (2002) "explores *how* place becomes race through the law" and "how the constitution of spaces reproduces racial hierarchies" (p. 1). Like C. Harris (2002; 2004), Razack (2002) points to national stories or mythologies about the origin of a nation: "the story installs Europeans as entitled to the land, a claim that is codified in law" (p. 3). The law protects the interests of the colonizers, and makes their claims to take up and take over space appear just, even natural. Razack (2002) "challenges the racelessness of law and the amnesia that allows white subjects to be produced as innocent, entitled, rational, and legitimate" (p. 19). Instead, questions of race and space are central to how we understand law, and are particularly relevant to law's role in colonialism.

Like researchers of Indigenous geographies and (post)colonialism, scholars of law and colonialism are concerned with resistance. Indigenous peoples are neither weak nor non-resistant, but it is impossible to deny the impacts of colonial law (Foster, 1995). C. Harris (2001), writing about British Columbia, reveals the ways in which the law was part of both colonialism and resistance to it. For example, in some cases colonizers' laws

could work to some extent in the interests of the colonized peoples: “the power of the law is not totalizing. There are opportunities within the rule of law and the larger discourse from which it is derived that can be exploited and turned to radical and subversive ends” (Loo, 1994, p. 162). Foster (1995) shows how some First Nations people in Canada tried to use the colonizers’ laws to protect their rights. Law, claims Foster (1995), is not just a reflection of power and a justification for dispossession; it also has to appear to be just in order to work. Thus, “[l]aw mediated class relations for the benefit of the ruling class, while at the same time offering space for resistance” (D. Harris, 2001, p.11). According to Loo (1994), “in calling for a recognition of ‘*aboriginal* rights,’ native peoples are actually doing something quite radical and subversive of liberalism: they are exploiting the rhetorical power of ‘rights,’ which, in a liberal universe accrue to all individuals, in the name of a particular collectivity” (p. 161).

2.3. The Colonial Context of Property Rights on Reserve

The current status of property rights on reserve, and relatedly, the issue of matrimonial real property on reserve, developed in a context of colonialism (Palmater, 2012). First Nations had land tenure systems prior to colonialism and European settlement. Generally speaking, First Nation laws governing their relationships to land were integrated with all aspects of social life (Battiste, 2009; Rakai, 2005). This was in contrast to the British approach, which aspired to keep law a separate sphere. Colonizers understood property as “the collection of freedoms held by ‘private’ individuals or corporations in the colonies; sovereignty was the protection of the powers of the homeland state” (Henderson et al., 2000, p. 267). First Nation laws were dynamic, responding to the geopolitics of the era to have secure smooth trading and international relations. During the early era of contact, British and French colonists relied on developing and maintaining good relations with First Nations. Colonists were primarily interested in the fur trade and extracting resources for a European market, and colonial settlement in the new world was not yet firmly on the agenda (C. Harris, 2002). Securing military alliances with First Nations was crucial in this early era, and dealings between the newcomers and First Nations loosely reflected a nation-to-nation approach. Following the Seven Years War and the *Treaty of Paris* (1763), the British established control in North America among European powers. The Colonial Office, located in

London, administered affairs in the colony, and British policy with respect to Indigenous peoples became the most influential.

According to Harring (1998), the British colonial policy in Canada was built upon "the idea of an orderly frontier, regulated by the rule of law" (p. 16). British officials wanted to avoid the violence and unrest that characterized the American frontier; they suspected that such costly and unpleasant problems occurred when the "settling" of native lands was left in the hands of settlers. The *Royal Proclamation of 1763* prohibited the transfer of First Nation land without it first voluntarily being ceded to the Crown, and was a legal means for ordering settlement, of keeping land transfers under the Crown's control. Weaver (2003) argues the *Royal Proclamation* "was an unreasonable imposition on first peoples" (p. 55). He goes on to assert: "It was paternalistic and arrogant. It was also damaging, because it designated first peoples as political inferiors, and this status left them exposed to the erratic integrity of colonizing governments" (Weaver, 2003, p. 55). Nevertheless, the reliance on law to maintain order, Harring (1998) suggests, reflected an early policy of "liberal treatment" (p. 12): "its elements included a legal procedure for the orderly purchase of lands, the reservation for the Indian nations of sufficient lands, the provision of 'presents' as a sign of comradeship and good faith, and the full application of legal rights under English and Canadian law" (p. 11). The idea was to employ a comprehensive technical framework that would control the appropriation and reallocation of First Nation lands, and to apply the rule of law in the colony. British officials believed liberal treatment would not only hasten orderly settlement and avoid costly wars, it would be politically expedient to be considered "benevolent" in comparison to the United States.

The *Royal Proclamation* recognized, albeit in a limited way, the existence of Indigenous property rights (Borrows & Rotman, 2003b). It set out a treaty-based approach to acquiring land from First Nations. Land treaties established reserves for First Nations, and in many respects, they served to mediate political and economic relations between First Nations and settlers (Egan & Place, 2013; Langton, Tehan, Palmer, & Shain, 2004; Miller, 2009). Treaties were, in effect, contracts negotiated between nations and may be viewed positively for recognizing First Nations' rights and interests in their lands (Miller, 2009). However, many problems and injustices accompanied treaty making: legal procedures were not always correctly followed and recorded; coercion and false pretences were tactically deployed; and, promises made for

payment were not always kept (Harring, 1998; Miller, 2009). Indeed, a parliamentary inquiry into Indian policy in 1836 recommended against the use of treaties because they "require an equality between the parties that did not exist under these [colonial] political and economic conditions" (Harring, 1998, p. 29). While the large numbers and political power of the First Nations in Upper Canada necessitated treaties, in Nova Scotia colonial officials permitted settler encroachment onto Mi'kmaq lands without treaties (Harring, 1998). Despite the appearance of fair negotiation, nation-to-nation relations, and recognition of Indigenous sovereignty and property rights, "by the late eighteenth century treaties had primarily become a vehicle for the Crown to take possession of Indigenous land" (Egan & Place, 2013, p. 132).

C. Harris (2002; 2004) has written extensively about the history of the reserve system in British Columbia, where, for the most part, treaties were never signed. There, the implementation of the reserve system began in the 1850s and functioned to drastically reduce the Indigenous land base and demarcate Indigenous spaces (C. Harris, 2002). As C. Harris (2004) starkly notes: "As their land was taken away, native people had to be put somewhere. A solution with many precedents in other settler colonies was to put them on reserves" (p. 169). The reserve system – whether introduced by treaty or imposed as it was in BC – was a kind of legal-spatial strategy for dispossessing First Nations of their territories and, in turn, for opening up land to European newcomers (C. Harris, 2002). Colonial policy established reserves as protected areas with "special" status. Trespassing on lands reserved for the First Nations was illegal, reserve lands were exempted from taxation and legal seizure for debt repayment, and undertaking land transactions on reserves was prohibited without government approval. However, reserves represented only small portions of First Nations' larger territories, and this new geography greatly impacted First Nations' ways of life and livelihood (C. Harris, 2002).

After the War of 1812, British policy shifted from peaceful and orderly co-existence between nations to paternalism and assimilation. The War of 1812 had weakened First Nations' economies and sovereignty, and the British no longer relied on military alliances with First Nations against the United States (Cunningham, 1997; Harring, 1998). In addition, growth in settlement created pressure to further limit Indigenous lands so European newcomers could open up what were Indigenous territories to settler economic development. The 1830s and 1840s saw a surge in

legislation related to First Nations, with separate Indian policies carried out in the various colonies. Increasingly, the goals of paternalism and protectionism were imposed upon – and contradicted – earlier policies of liberal treatment. As Harring (1998) argues, liberal treatment was no more than "a well-meaning slogan of colonial authorities determined to take Indian land and then, with Christian humanitarianism, provide for the needs of impoverished Indians" (p. 12). The rule of law, it turned out, was not easy to achieve. First Nations did not readily abandon their own legal ideas, social values, and cultural understandings around human interactions with land (Fiske & Patrick, 2000; Mills, 1994; Overstall, 2004), nor were they eager to part with their land for the improvement of settlers. As Indian policy developed over the first half of the century, legal duality emerged, "which legally established different rights for Indians and non-Indians" (Harring, 1998, p. 18)

Colonial policy around assimilating, or "civilizing," Indigenous peoples was closely tied to British cultural notions of property (Henderson et al., 2000; McHugh, 2004). Henderson et al. (2000) have pointed out that land and landscape are cultural constructs, and "English land law emerged from particular cultural myths and traditions of another time and place alien to Aboriginal America" (p. 284). The British viewed property in land as a potent symbol of individual freedom, security and prosperity. Weaver (2003) notes that the British had a "powerful cultural ideal of improvement" (p. 12); property in land was considered a powerful forerunner of income and profit, an opportunity for free and equal individuals to raise their status in society by improving their property. In a liberal expression of "benevolence," the British granted "people of modest means" access to land in its colonies, which not only provided such people an avenue for achieving suffrage, it theoretically empowered them to significantly better their situations and, in turn, society as a whole (Weaver, 2003, p. 12). The legality of property was crucial, as only lawfully held interests in land could secure its value and leverage credit for improving it. Legal strategies – including surveys, statutes, common law and bureaucracies – were "employed on frontiers to convert land into private property" (Weaver, 2003, p. 43). Informed by the cultural imperative to improve land, settlers viewed Indigenous lands as largely unoccupied and unused. Settlers fully believed in their right to enclose these lands for their own private property. Settlers considered Indigenous peoples to be property-less, yet they also asserted that property could play a critical role in improving Indigenous people's lives. Thus, First Nations'

rights to their lands were usurped by colonial interests. At the same time, the colonial government, believing property to be a powerful mechanism through which Indigenous peoples would become "civilized" and assimilated, and perhaps hoping to encourage Indigenous peoples to buy into colonial values, granted First Nations a "new" set of more limited property rights.

In 1857, the *Gradual Civilization Act* effectively "charted a whole new course" in colonial Indian policy (Harring, 1998, p. 33). It made "Indian" a distinct legal category subject to "the paternalistic protection of government," and affirmed the inferiority of this category by denying Indians the right to vote. By legally binding First Nations in this category, the *Gradual Civilization Act* provided the government with multiple strategies of social control over First Nations, including education and religion, that would gradually prepare First Nations to bear the "full responsibilities of citizenship" (Harring, 1998, p. 33). "Then, when each Indian arrived at that level, a special board of examiners would examine his moral character, education, and personal habits, and, if all was satisfactory, would award him forty acres of land and the full privileges of citizenship that went along with it, including the right to vote" (Harring, 1998, p. 33). The aspirations evident in the *Gradual Civilization Act*, and elaborated in the *Indian Act* which came later, failed. First Nations were, not surprisingly, unwilling to cooperate with colonial efforts to "civilize" and assimilate them. Nonetheless, the legal strategies developed and deployed during this pre-confederation era set the stage for the treatment of First Nations and their lands following the official establishment of Canada.

In 1867, the *British North America Act* (BNA) section 91(24) formally allocated authority over Indians and lands reserved for Indians to the Dominion Government. The *Gradual Enfranchisement Act* (1869) established a weak system of individual property rights in the form of location tickets. According to Flanagan et al. (2010), location tickets "gave the individual Indian lawful possession of the land as well as exemption from taxes/legal seizure, limited the transferability to non-Indians, and allowed the ticket to pass to heirs upon death" (p. 65). Location tickets were the direct predecessor of the modern certificate of possession. In 1876, the Canadian Government introduced the *Indian Act*, which consolidated all of the "previous colonial legislation into one Act, with power over Indians centred in the superintendent-general of Indian Affairs" (Flanagan et al., 2010, p. 66). It included the location ticket system, but also established that enfranchised Indians would be eligible for fee-simple interest in reserve lands that could

be passed to their children (Flanagan et al., 2010). Enfranchisement was a method for assimilating First Nations and, at this time, could be legally imposed upon individuals against their will if they met certain criteria. For example, any First Nation individual who earned a university degree would be forcibly enfranchised. The majority of First Nation people were not eager to become enfranchised, despite the promise of property ownership and the right to vote that accompanied it.

Few significant changes occurred in the *Indian Act* with respect to property rights between 1876 and 1951 (Flanagan et al., 2010). However, the *Indian Act* affected the formation of property rights on reserve and First Nation relations to land in multiple ways besides direct references to property on reserve. Systems of residential schooling set out in the *Indian Act* enforced Euro-Western and Christian education of Indigenous children. According to de Leeuw (2007), the residential school system was "an agent for Indigenous social engineering and cultural transformation" (p. 342), and was "founded on a Euro-colonial ideological system premised on the conviction that Aboriginal peoples required transformation" (p. 341). Aboriginal children were forcibly removed from their families and communities to these schools, where vigorous – often violent – efforts were made to expel their languages and traditions. The lasting impacts of the residential school system, including loss of knowledge and language, breakdown of families and community social systems, mental and physical illness, poverty, and a legacy of abuse have been well documented in other places (e.g., Haig-Brown, 1988; Kelm, 1998). In every way, the residential school system undermined First Nations' relationships to their lands, attempting to break their ties to their territories and keep First Nations on reserves.

The *Indian Act* controlled (and continues to control) the identities of Aboriginal people in Canada through the legal categories of "Indian," "Métis," and "Inuit." Early on, even before confederation in Canada, colonial administrators were interested in defining racial categories. The first statute to define racial identity was the *Act for the Better Protection of the Lands and Property of Indians in Lower Canada, 1850* (Mawani, 2002). This early statute broadly defined the category of "Indian," but in "[a]lmost every year between 1850 and 1869, as long-term white settlement became a primary objective legislators revised, clarified, and significantly narrowed their definitions of Indianness" (Mawani, 2002, p. 491). Status Indian "is the only category of Native person to whom a historic nation-to-nation relationship between Canada and the Indigenous peoples is

recognized" (Lawrence, 2003, p. 6). Lawrence (2003) has argued that the "regulation of Native identity has been central to the colonization process" in Canada, and that the "[s]ystems of classification and control" that regulated Native identity allowed settler governments to "control access to Native land" (p. 3; see also Mawani, 2002). She makes the following assertion:

> A crucial issue to understand here is that without Indian status, and the band membership that goes along with it, Native people are not allowed to live on any land part of an Indian reserve in Canada (unless it is leased to them as an "outsider"). They cannot take part in the life of their own community unless they have Indian status and hence band membership in that community. (Lawrence, 2003, p. 6)

Therefore, identifying who was "Indian" and who was not had important implications for who was able to reside on a reserve, be part of a First Nation community, and a citizen of a First Nation.

Although it has been amended many times, the *Indian Act* established "patrilineality as the criterion for determining Indian status" early on, which ultimately "reified the sexist ideologies and practices of colonialism" (Barker, 2008, p. 259). First Nation women who married non-First Nation men lost their status, and subsequently, their band membership. First Nation men who married non-First Nation women did not. In these instances, "European women who married Native men were considered to have stepped outside the social boundaries of whiteness" (Lawrence, 2003, p. 9); they were granted status and rendered legally "Indian" (Lawrence, 2003, p. 8). The gender discrimination in the *Indian Act* has had significantly negative impacts on First Nation women. It undermined the matrilineal base of women's power within their communities, and made them vulnerable to poverty and displacement. The *Indian Act* also imposed a system of band governance, which displaced First Nations' hereditary forms of governance and disempowered First Nations by placing ultimate power over First Nation affairs into the hands of a settler federal government. Women bore the brunt of this, as patriarchal principles displaced matriarchal traditions and women's traditional roles became diminished. For example, First Nation women were prohibited from participating in band council elections until 1951 (Grant-John, 2007). According to Grant-John (2007), "First Nations are moving to overcome the long exclusion of First Nation women from governance resulting from the various discriminatory impacts of the *Indian Act"* (p. 7).

Colonial notions of gender were inextricably linked to the idea of race. Depending on gender and genealogy, people were assigned different identities (i.e., "Indian," "mixed-blood," "white") that ultimately determined who had access to what land and which resources (Lawrence, 2003; Mawani, 2002). For Lawrence (2003), the *Indian Act* is more than a regulatory regime; it has an "overarching nature as a discourse of classification, regulation, and control" (pp. 3-4) that has "shaped contemporary Native life in ways that are now so familiar as to seem almost 'natural'" (p. 3). Canada's colonial history, the *Indian Act*, and its assimilative and dispossessing policies continue to impact the social, cultural, economic and political aspects of life on First Nation reserves. The role and function of the *Indian Act* land policy underpins the matrimonial real property issue. Some have criticized the *Indian Act* for having dispossession and assimilation as central goals (Lawrence, 2003; Mawani, 2002), and it has had lasting social, cultural, economic and political impacts, including changing traditional gender roles and relations, as well as governance, land tenure and dispute resolution systems (Grant-John, 2007). As Grant-John (2007) notes in reference to the matrimonial real property on reserve issue, "the source of the problem in First Nations societies lies primarily in the imposition of the *Indian Act*, not First Nation cultural, legal or governance traditions" (p 7).

2.4. The Current Status of Property Rights on Reserve

2.4.1. Collective Indigenous property rights

Aboriginal collective interests in the form of Aboriginal title and treaty rights have been affirmed in court, which are now protected in section 35(1) of the *Constitution Act, 1982* (AFN, March 2007, Appendix 1, p. 6). First Nation collective interests are considered unique and are protected under Canadian law. According to McNeil (2001), Aboriginal title is a "constitutionally protected property right" (p. 301). Aboriginal title is "a proprietary interest in land" and therefore different from "common law property interests, like fee simple" (McNeil, 2001, p. 301). Aboriginal title has four important defining characteristics: 1) it is based on occupation of land prior to Crown sovereignty; 2) it is inalienable unless first surrendered to the Crown; 3) it is communal in nature; and, 4) it has limitations and can be infringed upon (Borrows & Rotman, 2003b). The term Aboriginal title would apply to First Nation traditional territories not included in their

reserves and would be protected under the constitution. Matrimonial real property is relevant only to reserve lands, and not the broader Aboriginal title lands.

In the current context, reserve lands continue to be "small portions of [First Nations'] traditional territories" the underlying title of which belongs to the federal government (Grant-John, 2007, p. 28). Therefore, it is "the Crown, not the First Nation or individual First Nation members, who holds the legal title to reserve lands" (Grant-John, 2007, p. 28). The *Indian Act* continues to be the federal legislation governing life on reserves, and is the primary regulatory framework for property on reserve. The federal government, specifically the ministry known as Aboriginal Affairs and Northern Development Canada (AANDC),[14] administers reserves as per section 18 of the *Indian Act*, which states that the federal government holds reserve lands in trust for the Indian Band to which it allotted the reserve. The *Indian Act* does not permit fee simple ownership of reserve lands by anyone, regardless of whether they are band members or not. Coupled with the fact that title to reserve lands is held by the federal government, and land can only be leased or sold with the consent of the band, the absence of fee simple ownership serves to protect First Nations' collective property interests in their reserve lands (Palmater, 2010; Woodward & Co., 2010). As Grant-John (2007) states, "[t]he purpose of this legal treatment of reserve lands is to create a system whereby no lands can be sold to a non-member without a valid prior surrender to the Crown of the parcel made by decision of the First Nation as a whole" (p. 28). First Nations have prioritized retaining and protecting their collective interests in their reserve lands, in order that reserve lands remain in the hands of First Nations and their members long into the future. "For the vast majority of First Nations today, this principle is seen not only as a necessary legal norm governing their relations with other people, it also reflects contemporary social norms and cultural values within their societies" (Grant-John, 2007, p. 28). The AFN (March 2007) similarly stated the "collective nature of reserve lands is recognition that First Nation societies have their own forms of land tenure and their values and beliefs about lands" (Appendix 1, p. 6). Admittedly out-dated and problematic, the *Indian Act* nevertheless plays an important role by protecting First Nations' collective land bases.

[14] Prior to June, 2011 the AANDC was known as INAC (see AANDC, 2011).

2.4.2. Individual property interests on reserves

While it is true that reserve lands protect First Nations' collective property interests in small portions of their traditional territories, a number of different types of individual interests also exist on reserves. Grant-John (2007) makes the important point that "there is a diversity of views among First Nations about the role of individual property ownership in their communities" (p. 27). Furthermore, property interests are not allocated and governed in a single or harmonized fashion (Ballantyne & Dobbin, 2000). As Grant-John (2007) suggests, "the scope and number of very different individual interests in land, and in housing, that exist on reserves and which do not exist off reserves in either common or civil law systems" is generally underestimated (p. 27). Some of these individual interests are formally recognized, but many others are created through "informal," locally specific, and/or traditional modes, which are not officially registered or recognized (Nemoto, 2002). Band councils have the authority to use reserve lands to benefit their members and are able to create individual interests in land through band council resolutions (Bartlett, 1990). Since the passing of federal Bill C-31 in 1985, a band member may be a status Indian or a non-status Indian. Only band members are eligible to hold property rights or interests of any kind on reserve, and band councils can allot land to non-status band members, but not to non-members (Ballantyne, 2010; Cornet & Lendor, 2002; Yuen, 2009). The most common categories of individual property interests are: certificates of possession (CPs); custom land allotments; and, leases. Property interests may also be established and governed under the 1999 *First Nations Land Management Act* (FNMLA) and self-government agreements.

In a formal, legal sense, *Indian Act* sections 19 to 29 govern individual property interests in reserve land. Two types of individual property regimes are included in the *Indian Act*: certificates of possession and leases. In 1951, the Canadian government amended the *Indian Act* with a primary goal being to "create a more comprehensive and expanded system of private property that would eventually allow for the permanent integration of Indians into Canadian society" (Flanagan et al., 2010, p. 68). In the 1951 iteration of the *Indian Act*, certificates of possession were born, which provided individual band members statutory property rights to plots of reserve land (Flanagan et al., 2010). This represented the beginning of the contemporary legal context of individual property rights on reserve. The CP system is governed by sections 20-29 in the *Indian Act*, and

involves band councils distributing reserve land to individual band members (status or non-status), and the federal government – specifically, the Minister of AANDC – approving the band councils' decisions, registering the allotted lands in the AANDC's Indian Lands Registry, and issuing CPs. Individuals can transfer CPs from one band member to another, but only with the approval of the band council and the Minister of AANDC. However, such transfers are not always formally registered and disputes sometimes arise. According to Flanagan et al. (2010), "more than 140,000 of these certificates have been issued to property holders on 288 reserves. Between 2002 and 2004 alone, approximately 40,000 new CPs were issued. Some reserves may have only one or two certificates, in contrast to the Six Nations reserve in Ontario, which has allotted almost all of its lands though 6,500 certificates" (p. 91). It is important to note that a CP differs from fee simple interests because it grants a beneficial interest to the CP holder rather than legal title, which remains with the Federal government (AFN, March 2007, p. 11); that is, the CP holder receives advantages such as possession and use of the property, despite not actually holding the title to it.

Leases are the second type of individual property right found in the *Indian Act* property regime. Leases can occur on collectively or individually controlled reserve lands, but can "only be leased through a federal statute, such as the *Indian Act*" (Flanagan et al., 2010, p. 97). There are three types of *Indian Act* leases: short-term leases, long-term leases, and leases granted on behalf of a CP holder. The Minister of AANDC can grant short-term leases for a period of time up to a year without the consent of the band council. Long-term leases require the consent of band members, and involve the conditional surrender of land to the federal government. The federal government can then lease the land to a company, which is permitted to further subdivide and sub-lease the land (Flanagan et al., 2010, p. 100). Individuals who hold CPs can lease their land through AANDC and approval by the Minister. This can happen in two different ways. If land is leased under section 58(1)(b), it requires the additional approval of the band, but if the lease takes place under section 58(3) consent of the band is not needed. Flanagan et al. (2010) point out that band councils and individual band members cannot lease land without first obtaining the approval of the federal government.

Although CPs are the "official" mode of allocating property rights on reserve, the most common system is custom land allotment (Flanagan et al., 2010). Custom allotments may recognize individual property rights formally through band council

resolutions or informally through community recognition. According to the AFN (March 2007), "[c]ustom land allotments are allotments of land made by bands or band governments to their members in accordance with their own customs and traditions" (p. 11). Using the terms "custom" and "tradition" is tricky, as both refer to evolving processes and practices and rely on shared understandings of their meanings. In the above statement made by the AFN, "customs and traditions" may apply to long-held, hereditary forms of allocating rights in land, or to relatively new modes for allocating property on reserve that do not flow out of long-held traditions. Flanagan et al. (2010) point out that custom allotments may occur where no traditional property rights were held. In some cases, "families can possess traditional lands not allotted by the Band Council," which means the community simply recognises their rights to the land and no government or band council process is involved (Standing Senate Committee on Human Rights, November 2003, p. 23). Conversely, some First Nations employ a "hybrid system which combines *Indian Act* Certificates of Possession and custom allotment" (Standing Senate Committee on Human Rights, November 2003, p. 24). Frequently, however, custom allotments are not submitted to AANDC for approval, and no CP is issued (Cornet & Lendor, 2002, p. 28). Therefore, custom land allotments are not formally recognized in law, a fact confirmed by the BC Supreme Court in *Lower Nicola Indian Band* (Standing Senate Committee on Human Rights, November 2003, p. 25). Often, disputes arise when two or more parties claim property interests based on different types of ownership, e.g., one party claims custom allotment or hereditary rights while another party claims to have a CP for the same area. There are multiple ways in which custom land allotments take place, but because these processes tend to be unwritten and unrecorded, data about them are limited.

The *First Nations Land Management Act* (FNMLA) allows First Nations to partially opt out of the *Indian Act* and to establish their own systems and codes for management of reserve land. In such cases, the underlying title of the land remains with the Crown, but the First Nation manages their land according to their own system. The FNMLA also provides a formal legal system for recognizing custom land allotments (Cornet & Lendor, 2002; Flanagan et al., 2010). The first phase is "developmental" in which the First Nation develops its land code and the community ratifies it (Grant-John, 2007, Appendix E). The First Nation is then considered "operational", and manages its lands and resources according to its own land code (Grant-John, 2007, Appendix E).

According to Flanagan et al. (2010), "[s]ince 1999, forty-one bands have opted into the FNLMA, ninety have inquired about doing so, and eighteen have their land codes in operation" (p. 71).

Property on First Nations lands may also be regulated through self-government agreements where land management provisions are included (AFN, March 2007; Cornet & Lendor, 2002). However, as Flanagan et al. (2010) point out, First Nations wanting to control their land through a self-government agreement or a treaty are faced with the question of whether to transfer ultimate or underlying title to the provincial government or keep it within the federal system. Of interest is the movement towards implementing systems of private property in First Nation communities that has occurred in recent years. For example, Manny Jules, a chief commissioner of the First Nations Tax Commission, with the support of Aboriginal Affairs and Northern Development, has proposed the First Nations Property Ownership Act that would allow First Nation individuals to own portions of reserve lands in fee simple (First Nations Property Ownership Initiative, 2012). In British Columbia, the Nisga'a First Nation – which has been self-governing since 2000 – introduced the *Nisga'a Landholding Transition Act*, which "gives Nisga'a citizens the opportunity to own their residential properties in fee simple" (Nisga'a Lisims Government, n.d., para. 2). Arguably, this private property system would not threaten Nisga'a Nation's collective interests because, as Flanagan et al. (2010) have argued, the Nisga'a hold the reversionary rights to their land. In other words, in a case where, for example, death without heirs renders property ownerless, the title would revert back to Nisga'a title, and not Crown title. Despite this reassurance, there are many critics of the move towards private property on reserve who suggest the increase in individual interests will undermine First Nations' collective interests and put them at risk of losing their territory (see, for example, Palmater, 2010).

2.5. Colonial Context of Property on Reserve

The matrimonial real property on reserve issue is situated; it is embodied and experienced in the places of First Nation reserves across Canada. The geographies of reserves, the specific localities where many First Nation people's lives unfold, are extensions of the colonial past. Reserves today are numerous and diverse. Some are urban, while many are rural or remotely located. Living conditions, employment, access

to services, and availability of housing are variable; however, reserve communities typically struggle with poverty, unemployment, poor health and lack of social services, such as shelters for women experiencing domestic violence, and access to legal services (Health Canada, 2008; Kelm, 1998; Marmot, Friel, Bell, Howeling, & Taylor, 2008; Regional Health Survey [RHS] National Team, 2007). Not all reserves are destitute, but many reserve communities do experience chronic housing shortages and much of the housing on reserve is sub-standard (AFN, March 2007). Moreover, reserves are limited land bases, which impedes efforts to expand home construction (AFN, March 2007). This has important implications for the issue of matrimonial real property on reserve, which will be discussed in detail in the chapters that follow.

In addition to housing shortages, ownership and financing of housing on reserve is different than off reserve. Over two-thirds of housing on reserves is band-owned (Grant-John, 2007). This includes social housing, which is band-owned housing that band members can pay off and take possession of, and band-owned rentals, which are band-owned homes that band members may rent from the band (AFN, March 2007, p. 11). The band council plays a role in leasing land and loaning money for homebuilding, and may even hold a CP as collateral (Flanagan et al., 2010). Bands finance social housing and band rental homes through the Canadian Mortgages and Housing Corporation (CMHC) (AFN, March 2007). Capital housing is housing financed by a band member, with or without the aid of a bank loan or band subsidy. In the case of capital housing, a band member occupies a house through a CP, custom allotment, or even a tenancy agreement with the band (AFN, March 2007). Financing of homes on reserves is limited by the Indian Land Registry, in which property interests in the form of CPs are formally registered, and does not provide a similar level of security found in provincial land registry systems (Grant-John, 2007, p. 27). In addition, it is difficult (if not impossible) to establish market values for on-reserve property because there is “no comparable market place by which to assign or even evaluate the value” of land and homes on reserve (AFN, March 2007, p. 22).

When a marriage breaks down, particularly in situations of family violence, it is common for one spouse to leave the home. In many cases, it is the female partner who leaves. Not only can this result in her losing any possible interest in the matrimonial real property (Native Women’s Association of Canada [NWAC], 2007; Standing Senate Committee on Human Rights, November 2003), it often ends with the woman leaving the

reserve all together (Standing Senate Committee on Human Rights, November 2003). Jeannette Corbiere Lavell, NWAC president in 2011, stated, "Too many of our women and their families continue to be subjected to violence and are often forced to leave their homes and communities to be safe" (NWAC, November 21, 2011, para. 6). This may be due, in part, to housing shortages on reserve that result in difficulty finding another home, or due to the threat of violence and lack of support services, such as shelters (Standing Senate Committee on Human Rights, November 2003). In some cases, discriminatory policies, such as "one house per family" policies, make a woman who leaves her matrimonial home ineligible for another home on reserve (Standing Senate Committee on Human Rights, November 2003). Such policies are often unwritten and left entirely to the discretion of the band chief and council, and are subject to change without notice (Standing Senate Committee on Human Rights, November 2003). Residency rights are in the power of the band council, and Indian status is not directly relevant (Cornet & Lendor, 2002). Reserve residency, in turn, has implications for band membership. For example, women who become members of their husbands' bands have encountered difficulties returning to their own bands and resuming residency rights there following breakdown of their relationships (Cornet & Lendor, 2002, p. 30). Ultimately, "individuals are assigned membership under regulations that do not always take their personal wishes, needs or interests into account" (NWAC, 2007, p. 9). The legal complexity created by the "legislative gap" combined with the diverse colonial geographies of reserves and unavailable and/or inaccessible legal services are significant barriers for many spouses dealing with property disputes during marriage breakdown. These challenges will remain for any proposed legislative solution for MRP on reserve that relies upon spouses using law enforcement officers, lawyers, and courts to resolve their property disputes.

2.6. Conclusion

Property law was "the most immediately powerful component of the legal ideas, social values, and cultural understandings embodied in English common law" (C. Harris, 2004, p. 177). Property laws of settler colonialists were imposed upon First Nations, largely displacing Indigenous property systems (Arneil, 1996; Seed, 1995). The theory and practice of both law and property were important sites of struggle; they were deployed in efforts to dispossess First Nations of their lands, but they were also used to

resist colonization (Egan & Place, 2013; Loo, 1994). The displacement of First Nation law was not complete, and instead, pluralistic and hybrid systems of property in Canada emerged (D. Harris, 2001). The current property regime in Canada reflects the partial displacement of these traditional property systems by European models of property. Reserves, in particular, are a colonial legal-spatial ordering, and property on reserves is quite different – in terms of its administration as well as its enactment – than off reserve. Reserve lands are "owned" by the federal government for the benefit of First Nations and First Nations have a collective property interest in their reserve lands. Moreover, First Nation individuals cannot own plots of reserve land in fee-simple. Instead, other ways must be sought to gain property rights (e.g., certificates of possession, custom allotments and leases). Most importantly, reserve lands and property on reserve reflect settler conceptualizations of what property is and what it should be; they do not necessarily represent First Nations' understandings of and aspirations for their relationships to land. The issue of the matrimonial real property on reserve legislative gap is a specific example of colonial interference with First Nations' land tenure regimes. The result is a complicated intersection of First Nation and settler conceptualizations of property.

3. The Ownership Model

In this chapter, I define and discuss the "ownership model" of property and review the ways in which various scholars critique it. This conceptualization of property proved to be very important to understanding the MRP discourses in the "national dialogue." Notwithstanding its inherent contradictions, the ownership model of property has become so pervasive as to be common-sensical, a phenomenon of much greater importance than its failure to accurately represent property. Indeed, what is critical to my argument is the way in which this dominant conceptualization of property is performative. I introduce the concept of "bracketing" to illustrate how legal, spatial and temporal closures work to frame concepts such as property and colonialism in particular ways and to powerful effects. I draw on performativity theory as a way to think about bracketing, and suggest that property does political "work." Therefore, property conceptualizations have immense social, cultural and political – as well as moral and ethical – implications and associations. As this section will elucidate, not only does the ownership model strongly influence what counts as property (heavily policing property from being defined too broadly, from non-private perspectives, and from its entanglements), it is put to work in moral, political and economic arenas where it has proven to be powerfully consequential.

3.1. Introducing the "Ownership Model"

A prominent misconception, even in scholarly work, is that whenever one talks about property, it can be assumed he/she is referring to the category of private property and all of its characteristics (Blomley, 2004; Macpherson, 1978; Singer, 2000a). Macpherson (1978) suggests the conflation of property with private property resulted from the rise of capitalism "and the replacement of the old limited rights in land and other valuable things by virtually unlimited rights" (p. 7). It became increasingly common to understand property as "things" and land, rather than as the *rights* to "things" and land

(Macpherson, 1978). Indeed, there is a popular reliance on "finite space" despite a general understanding that property is about more than things:

> Yet if asked to describe my property, for example, I would tend to delineate a space, rather than a bundle of jural relationships. In selling property, we imagine transfers of land, rather than the alienation of exclusionary rights. (Blomley, 2004, p. 6)

This material perspective of property as things or finite space has at its centre the concept of ownership. Progressive property scholars have noted the proliferation of this way of thinking about private property, and have termed this hegemonic conceptualization "the ownership model" (Singer, 2000a, p. 3; see also Blomley, 2004; Macpherson, 1978; Nedelsky, 1990; Nedelsky, 1993; Underkuffler, 2003).

The ownership model may be understood as a cluster of organizing ideas about property that essentially conflates property with private property, or more specifically, with a particular set of notions about private property. These notions were largely produced by a Western conception of property infused with particular values, such as individualism, freedom and liberty. Some of the ideas that constitute the ownership model are captured in property law, and so tend to be more formal; still others arise out of the "practice" of private property, and the centrality of private property within Western culture and economy. Perhaps most central to the ownership model is the idea of the owner. The ownership model imagines a "unitary, solitary, and identifiable owner" (Blomley, 2004, p. 2) who has nearly unlimited powers to use his/her property as he/she wishes, and exclude non-owners at his/her discretion (Singer, 2000a). Ownership is perceived as a fundamental right, the interference with which should be strictly limited. Government regulation of property has largely been viewed as being in contradiction to the principles of private property. "The more protection we have for property rights, the less government regulation we have, and vice versa" (Singer, 2000a, p. 3). A distinct line exists between the owner of property and the state: "although the state may intervene to limit the rights of the owner if they threaten harm to others, such interventions are seen as secondary to the core rights of the owner" (Blomley, 2004, p. 2). Private property, in many respects, "promises a decentralization and a dispersal of power" (Blomley, 2004, p. 4).

Property does not only function to protect individuals from interference by government; the state regulates property to protect the public from potential nuisance

and harm caused by property owners, and to protect owners from other owners and non-owners who might otherwise try and take their property (M. R. Cohen, 1927; Nedelsky, 1990). Owners are theoretically protected from having their property taken from them without their consent. If property is taken without consent – for example, if the state expropriates private property for public purposes – the owner must be compensated (Singer, 2000a). "Without security," Nedelsky (1990) argues, "property lost its value" (p. 164), and thus, "[p]roperty is a right that requires collective recognition and enforcement" (p. 165). It follows, then, that the preferred role of government (with respect to the ownership model of property) is to provide the necessary legal infrastructure to protect and enforce property rights while avoiding over-regulation of property (Singer, 2000a).

Just as property and regulation are positioned as opposites by the ownership model, so it is with ownership and obligation. According to Singer (2000a), the ownership model defines ownership as being in opposition to obligation: "Ownership, as we use the term, abhors obligation; for obligations, if they exist at all, are understood to limit ownership" (p. 6). The owner is seen as self-regarding, as if no one besides him/her exists, and property ownership (from this perspective) does not affect the interests or rights of other owners or non-owners (Singer 2000a). In absolute terms – i.e., in ownership model terms – property ownership provides individuals with freedom and liberty; the owner can ostensibly do whatever they wish on/with their property without fear of government interference or sense of obligation.

Another core organizing idea in the ownership model is the understanding of property as fungible, and owners as having power to transfer title – or ownership – to others (Singer, 2000a). As such, private property has been a central feature of free enterprise, capitalist economics, and as Singer (2000a) points out, "property as ownership forms the baseline for much economic analysis" (p. 5). Property as defined by the ownership model, then, is thought to provide the certainty and security necessary for investment and economic growth. Bell (1992) argues that underlying this rationalization for a private property system is a philosophy of economic liberalism founded on individual exploitation of resources for profit without interference by the state. Indeed, it is presumed that "the most efficient system of property law identifies an owner for every valuable, scarce resource and allows free transfer of those property interests through market exchanges" (Singer, 2000a, p. 5). Perhaps more important, however, is the faith that property, being a transferrable asset (Bryan, 2000), theoretically empowers

individuals to shape their own lives (Singer, 2000a). “Substantial freedom to control one’s property without interference by government regulation is believed to promote both individual autonomy and economic efficiency” (Singer, 2000a, p. 4). It is no wonder, then, that the ownership model is at the centre of many “market solutions to social problems” (Singer, 2000a, p. 1).

3.1.1. Critiquing the ownership model

The ownership model is a phenomenon in which property is widely and uncritically conflated with private property, but not with some clear and objective definition of private property. Progressive property scholars point out, as a set of organizing ideas and assumptions about private property, the ownership model represents a flawed – and paradoxical – vision of property. In his book *Entitlement: The Paradoxes of Property*, Singer (2000a) critiques the ownership model, pointing out many ways in which this dominant conceptualization of property is imbued with conflicting ideas and clashing norms. Singer (2000a) unpacks the ownership model view of obligation as being in contradiction to ownership. He reveals how the denial of obligation is problematic, since it represents a very real part of property ownership. Property relies upon cooperation and the adoption of the obligations that come with property rights (Rose, 1994), but the ownership model privileges the property owner and fails to acknowledge the ways in which property ownership affects the interests and rights of other people (Singer, 2000a). Singer (2000a) also notes the inaccuracy of positioning property and regulation in opposition to each other. According to Singer (2000a), property and regulation cannot be separated. Private property “requires a working legal system that can define, allocate, and enforce property rights” (p. 8); therefore, “private property itself is a form of regulation” (p. 8). Notwithstanding the common belief that private property ownership “enhances liberty,” important limits on property rights exist. The onus tends to be on the party seeking to limit property rights to provide adequate justification for doing so, and property ownership is thus considered a negative liberty (Blomley, 2004). Nonetheless, property cannot be used in ways that harm other people and property ownership cannot be used as an excuse for failing to respect the legal rights of others.

For Singer (2000a), “ownership is flawed as a description of both the social practice and the legal structure of property systems” and “misdescribes the ideals that

underlie the institution of private property, as well as the legal rules that define the basic structure of property rights" (p. 6). And yet, the ownership model cannot be written off or ignored because it represents reality so poorly; to do so would miss the crucial point that the ownership model, with its hegemonic position and its common-sensical status, manages to have a significant performative effect. In other words, it nonetheless influences reality – perhaps even creates it – in important ways, namely by closing down property and policing its boundaries. The ownership model assumes that property can be clearly and objectively defined, and seeks to conceptualize property in a way that keeps it separate from the various contexts that complicate it (Singer, 2000a). Indeed, the ownership model aspires to *disentangle* property from its ethical, historical, political and cultural relations in order to stabilize and simplify it. This "framing" (Callon, 1998) or "bracketing" is "the process of delimiting a sphere within which interactions take place more or less independently of a surrounding context" (Blomley, 2013a, p. 2). However, as Singer (2000a) points out, property systems are inseparable from moral and political considerations:

> [T]he institution of private property inevitably raises questions about the character of social relations and the nature of governance. Property is a form of power, and the distribution of power is a political problem of the highest order. Thus the problem of property goes beyond deciding whether to recognize particular property rights, or when to limit them; rather, it forces on us more urgent questions: What shall property be? What shall it mean? What kind of property regime should we construct? (p. 9)

For Singer (2000a), the absolutist conception of property as ownership limits discourse and debate, limits our understanding of our own legal practices around property (regulation), and limits the political potential of property.

And so it is that the question of what property *is*, is also tied up with the question of what property *should be*, and is therefore linked to a moral evaluation of property (Blomley, 2004; Singer, 2011; Singer, 2000a). A number of critiques of the ownership model have been posited, and indeed, these broadened or alternative visions of property open up some interesting political possibilities. For example, Macpherson (1973) argues that property was not always equated with private property as it is today, and that it has, in the past, been associated with a much broader bundle of rights, including the right to revenue. He argues that property can and should be re-envisioned to include such rights, as well as the right to a fully human life. Similarly, Underkuffler-Freund (1995-96)

argues that the idea of private property, while pervasive and enduring in our society, "must not solely govern our understanding" of property rights; she points out that property rights are, in reality, allocative and positive, and that "[t]he state, by protecting the property rights of one person, necessarily denies those of others" (p. 1047). Therefore, Underkuffler-Freund (1995-96) sees property as having political possibilities far beyond the "idea of absolute individual property protection and the security that it brings" and, as a special constitutional right, should include "social needs, goals, *and* aspirations" (p. 1047).

Nedelsky (1990) critiques the ownership model of property by pointing out how it works to support a boundary metaphor, or, a "focus on boundaries as the means of comprehending and securing the basic values of freedom and autonomy" (p. 162). Property, then, becomes part of how we imagine our very humanness as "boundedness." As a result, we understand autonomy as isolation rather than as relationship (Nedelsky, 1990). Nedelsky (1990) explains:

> There are practical virtues to better imagery. If we understand autonomy as made possible by relationship rather than by exclusion, we can better understand the genuine problem of autonomy in the modern state. Our central problem today is not maintaining a sphere into which the state cannot penetrate but fostering autonomy where people are already within the sphere of state control or responsibility. […] More broadly, we change our whole conception of the relation between the individual and the collective when we see that the collective is a source of autonomy as well as a threat to it. (p. 169)

Marx (1975) similarly critiqued the conception of "man" as a separate atomistic being defined by such individual rights as equality, liberty, security and property. He argued that while such rights may provide political emancipation, they act as barriers to community interaction, and thus, to the human emancipation that is achieved through human interaction within a community and not through the isolation of the individual, separate self. Subsequently, how we define property and enact it, particularly as a metaphor of our selves and our communities or societies, has important geographical implications. The ownership model of property produces space, often in oppositional, non-relational ways. For example, bounded spaces of property position the owner as separate from other individuals who are located outside of the property's boundaries; this way of thinking draws our attention away from interrelationality, and obscures such concerns as

colonial dispossession – private property becomes purely transactional in nature, and necessarily bracketed from its ethical, historical, political and cultural relations.

Nedelsky (1993) argues that property, when framed in particular ways that reflect the ownership model, is a problematic legal regime because it encourages commodification and exploitation. Instead, she argues, we should use a relational framework to assess whether a legal regime is appropriate, thus focusing on the types of relationships and values we wish to encourage in our society. Cooper (2007) also argues for an alternative or broadened conception of property. Looking at the property enactments at an alternative school, her analysis employs a lens of belonging. She reports that "two polarized conceptions of belonging as mastery, on the one hand, and membership, on the other" were shown to "overlap, combine, and reform […] and as a result […] provide the context, limits, and conditions of each other's existence" (Cooper, 2007, p. 661). Cooper (2007) also highlights the tension between property "utterances" and property practices, which accentuate "the mediated, contextualized character of property's effects" (p. 660).

Waldron (1988) and others have suggested property is better conceived in terms of rights rather than "things" (e.g., material objects, parcels of land). In lay terms, property commonly refers to "things," but from a legal or scholarly standpoint, it is more accurately described as rights (Macpherson, 1978, Singer, 2000a). As Macpherson (1978) states, "to have property is to have a right in the sense of an enforceable claim to some use or benefit of something, whether it is a right to share in some common resource or an individual right in some particular things" (p. 3). That property is an "enforceable claim" is important; it reflects the prevailing perspective that property is essentially a natural right and necessary for achieving human fulfillment. In other words, "[p]roperty is not thought to be a right because it is an enforceable claim; it is an enforceable claim only because and in so far as the prevailing ethical theory holds that it is a necessary human right" (Macpherson, 1978, p. 3). Property, however, cannot be boiled down to a single right, and is perhaps better understood as "bundles of rights" (Singer, 2000a, p. 9). This theory emerged from the legal realist tradition, and suggests that "property be viewed metaphorically as a bundle of sticks loosely tied together, and that particular sticks (rights) could be taken out of the bundle and given to various people" (Singer, 2000a, pp. 9-10). In other words, property rights may be held by an individual or a group, but can also be broken apart and divvied up among individuals

and/or groups. It is often the case, for example, that multiple people have interests in a single property and that each may have different property rights (i.e., hold a different "stick" in the bundle). This perspective underscores the relational aspects of property, i.e., property is not a relationship between an individual owner and a thing. Rather, as the "bundle of rights" advocates argue, property is a grouping of rights and responsibilities that represent relationships between people (Singer, 2000a).

However, Singer (2000a) points out that the bundle of rights model is limited to understanding "property rights as relationships only in the formal sense" (p. 11) and fails to adequately account for distributive concerns, i.e., social justice (Singer, 2000a). Thus, for Singer (2000a), the bundle of rights model surpasses the ownership model because it more accurate and provides a more nuanced framework for thinking about property, but fails to promote the best possible social life. More importantly, the bundle of rights model has never really replaced the ownership model; scholars, lawyers/judges and lay people continue to conceptualize property as ownership. Even the bundle of rights model itself contains assumptions about entitlements in the bundle that reflect "conventional understandings of ownership" (Singer, 2000a, p. 10). Singer (2000a) calls for "a new model of property" that "goes beyond ownership as an organizing category" (p. 7). This means understanding the tensions inherent in property as reflecting the tensions inherent in social relations. Singer (2000a) takes as a starting point the premise that "[t]he solutions to the problems of property conflicts lie in understanding the connection between property and human relationships" (p. 13). These relationships are continually evolving, continually being (re)constructed and (re)negotiated, and it is critical that property theorists attribute more to the power of "legal rules both to respond to and shape the contours of social relations" (Singer, 2000a, p. 11). For example, property law functions to shape and structure social relations because "property law establishes minimum terms for social interaction among individuals" (Singer, 2000a, p. 14). Property also relates to social relations and the nature of governance. More than entitlement and relationships between individuals, property is a social system (Singer, 2000a). For Singer (2000a), then, how human beings conceptualize property reflects how they conceptualize social life. Property law can respond to social relations between individuals and customary conduct; however, "[m]ore than we realize, the shape and content of property law defines a form of social life" (Singer, 2000a, p. 15).

What society must consider, then, is what "vision of social life" it collectively wants to inform its conceptualization of property (Singer, 2000a, p. 11). Therefore, no factors deemed relevant or important to relationship can be excluded, nor can answers to property problems be guided by a simple formula or single goal (as a guiding principle, for example). Progressive property scholars (for example, Alexander, 2009; Peñalver, 2009; Singer, 2000a) encourage the recognition and exploration of complexities, tensions and paradoxes within property concepts, law and systems. Singer (2000a) also suggests a political and moral goal: to "demonstrate that mutual obligations among property owners and between owners and non-owners are dictated partly by the enlightened self-interest of owners themselves and partly by consideration of justice" (p. 17). Human beings do not live alone, after all – they affect each other. This "progressive property" model calls for acknowledgement of social relations and the impacts of property law on social relations (and vice versa). Property, from this perspective, involves social obligation (Alexander, 2009), virtue (Peñalver, 2009) and democracy (Singer, 2009). According to Rosser (2013), "[p]rogressive property can be understood as both a reaction against the particularly strong influence of economic approaches to the law and an assertion that property law making must be more nuanced, more expressly political, and less preoccupied with the owner's right to exclude" (p. 110). In summary, progressive property offers a way to step out of the constrictive (though pervasive) ownership model and allows society to surpass the bundle of rights model by opening up possibilities of a political, contextual, relational – and, indeed, very complicated – conceptualization of property.

Despite these various critiques of the ownership model (see for example, Blomley, 2004; Singer, 2000a; Underkuffler, 2003), and the growing understanding of property as complex and deeply implicated in moral and political judgements, there remains a pervasive "faith in private property as a mode of social and economic organization" (Singer, 2000a, p. 1). Moreover, the ownership model has achieved a level of performativity, meaning that this dominant conceptualization of property manages to organize relations and networks and render them "true" (Bialasiewicz et al., 2007; Mackenzie et al., 2007). Ownership continues to be a central organizing idea in the dominant conceptualization of property (Bryan, 2000; Underkuffler, 2003), and "[s]cholars, lawyers, and judges all revert to the ownership model with surprising frequency" (Singer, 2000a, p. 6). It would appear that the ownership model has become

so widely taken for granted that the notion of property appears “settled” (Blomley, 2004, p.14) – a phenomenon that effectively functions to marginalize or “hide” other conceptualizations of property. As Rose (1998) argues, a “certain cultural myopia” regarding private property persists (p. 132), and other forms of property – such as common property – “do not look like property at all to us, and we have tended to ignore them” (Rose, 1998, p. 140). Indeed, they are rendered invisible. Indigenous approaches to property, in particular, have been “both overlooked and misunderstood partly, perhaps, because they do not conform to the ownership model” (Blomley, 2004, p. 9). The pervasiveness of the ownership model is, in part, due to the rise of capitalism, a context in which it seemed fitting “that the very concept of property should be reduced to private property – an exclusive, alienable, absolute individual or corporate right in things” (Macpherson, 1978, p. 10). The ownership model also persists because of its “cultural underpinnings” (Singer, 2000a, p. 10); it reflects popular understandings and enactments of property and therefore is reinforced not only in formal, legal arenas, but in the daily lives and experiences of “regular folk” as well. Finally, there is a powerful normative argument for private property. As Blomley (2004) argues, “private ownership is seen as good to the extent that it fosters valued behaviours, including responsible citizenship, political participation, and economic entrepreneurship” (p. 4). Private property, then, reflects not only what property is thought to be, but what it is thought that property *should* be as an important “mode of social and economic organization” (Singer, 2000a, p. 1). However, the ownership model represents a vision of social life that Singer (2000a) argues is “morally deficient” (p. 6): “[i]f property means ownership, and if ownership means power without obligations, then we have created a framework for thinking about property that privileges a certain form of life – the life of the owner” (p. 6). This “vision of social life” relies on such ideals as “a society of equal individuals” and “widespread ownership of property” (Singer, 2000a, p. 11) while in actuality the ownership model contributes to inequality and monopolization. The ownership model, in other words, is imbued with and producing of power.

3.1.2. Other forms of property

The ownership model may well be the dominant way of thinking about property, but there are numerous other categorizations, narratives and enactments worth considering. A large and vibrant body of literature dealing with the multiple meanings of

property has produced evidence and discussion of the many ways in which property might be conceptualized, and the tensions and negotiations that are continually unfolding among them. Despite Macpherson's (1978) claim that "[it] is not easy to define a changing and purposeful concept like property" (p. 2), there are several useful concepts to consider. Macpherson (1978) suggests that three typical categories of property – common, state, and private – are all forms of individual property rights. However, he distinguishes between "natural individuals" and "artificial persons" (p. 6). For example, common property – such as public parks, lands, waterways, and roads – are set aside for the use of individual members of a society; therefore, common property rights are rights of individuals. The state implements and enforces common property rights, but this does not make them the rights of the state; "the state *creates* the rights, the individuals *have* the rights" (Macpherson, 1978, p. 5). Common property rights may only be held by natural individuals and are different from other types of property rights because they revolve around the right *not* to be excluded (Blomley, 2008; Macpherson, 1978). By contrast, private property may belong to a natural individual or an artificial person, such as a corporation, and involves the right of the individual or group to benefit from and use the property, as well as the right to exclude non-owners. Private property, then, is also an individual property right. State property "consists of rights which the state has not only created but has kept for itself or has taken over from private individuals or corporations" (Macpherson, 1978, p. 5). It differs from common property because the state may exclude individuals from benefit and use of its property. Despite the commonly held vision of the state including and being controlled by all of its citizens, Macpherson (1978) argues that the state is, in fact, represented by a smaller, authorized group of citizens who are the bearers of state property rights. Thus, state property operates more like corporate private property than common property, and reflects "a corporate right to exclude" (Macpherson, 1978, p. 5); it is, therefore, an individual property right of an artificial person.

These three types of property – common, state and private – are "slippery" categories. There exists a lack of agreement about how precisely each is, and should be, defined. For example, I distinguished between state and common property above. However, both state and common property have also been described as collective property. According to Waldron (1991), with collective property "there is no private person in the position of owner. Instead, the use of collective property is determined by

people, usually officials, acting in the name of the whole community" (Waldron, 1991, p. 297). This statement, in some respects, agrees with Macpherson's (1978) description of state property. However, Waldron (1988) sees collective property as being something akin to common property, as well – rights enjoyed by members of a society to benefit from and use. With collective property "the problem of allocation is solved by a social rule that the use of material resources in particular cases is to be determined by reference to *the collective interests of society as a whole*" (Waldron, 1988, p. 40, emphasis added). In contrast to Macpherson (1978), Waldron (1988) says this of equating state ownership with corporate private property: while this "may be true at the level of legal rules […] at a deeper level of theoretical analysis, it is clear that 'ownership' by the state or its agencies is in quite a different category from ownership by a private firm or individual" (pp. 40-41). For Waldron (1988; 1991), then, both common property and state property might both be considered to be forms of collective property.

For Holder and Flessas (2008), common property is collective, local and distinct from private ownership, and may be understood as the rights and responsibilities that a group of non-owners share. Bell (1992) describes a "collective ideology" in which "access to and use of resources is determined by the collective interests of society as a whole. Disputes regarding use and control are not resolved by an attempt to isolate an individual owner, but in a way that is conducive to the well-being of the community" (Bell, 1992, p. 461). Therefore, the community rather than an individual has ownership. Common property – also termed "commons" – usually refers to shared access and control of material resources or lands, but common property can also be held in shared culture and history. The emphasis is typically placed on the right to *not* be excluded from the benefit and use of the property (Waldron, 1988). A communal system is distinct from a collective system, according to Bell (1992), because individual members cannot acquire special or superior rights within the community. Holder and Flessas (2008) distinguish common property from public property, stating "it provides a "liberal access regime," but not necessarily for the public (pp. 302-303). Here, common property could be something akin to state property or private property held by a non-corporate group. Again we see the slippage among the categories of state, common, collective and public property. Many scholars have drawn comparisons between Indigenous land tenure or property concepts and these common or collective forms of property. However, Holder & Corntassel (2002) point out that "Indigenous peoples generally recognize that collective

and individual rights are mutually interactive rather than in competition" (p. 129). Although common property has tended to receive relatively less attention from academics than other types of property (Blomley, 2004), it holds considerable power as a political tool and a framework for resistance (Blomley, 2008; Holder & Flessas, 2008). As Holder & Flessas (2008) assert:

> The commons are not just a regulated, physical entity, or the subject of a single dispute, but are a multi-dimensional socio-legal phenomenon, centered around how people relate to land (and other common resources) in ways other than through private property ownership, for example their social practices, recreation and protests, but also, and paradoxically, their sense of "ownership" of common land. (pp. 308-309)

One thing that common and collective forms of property share is the tendency to be understood as quite distinct from private property. However, according to Waldron (1988), there is little agreement regarding what private property actually is. As Macpherson (1978) has pointed out, private property is an individual right that may be held by a natural or an artificial person, and which is largely defined by the ability to exclude non-owners. As with the other forms of property, such a description does not begin to capture the complex and often contradictory ways in which property is conceptualized, especially in the "real world" (i.e., outside of legal theory). This difficulty stems, in part, from trying to apply abstract definitions to practical situations. Waldron (1988) distinguishes between concepts, which are abstract, and conceptions, which are specific. This allows us to define property using abstract terms while acknowledging that there are vast differences among specific instances of property. Moreover, Waldron (1988) draws on the notion of an "organizing idea", which is the general way in which we understand property in our daily lives (p. 43). The organizing idea behind private property is ownership, meaning that "each resource belongs to some individual" (Waldron, 1988, p. 38); thus, in abstract terms each object is associated with an individual's name and, subsequently, private property systems are often described in terms of ownership.

Holder and Flessas (2008) have argued the rules regulating common property "tend to arise out of social practices and are shaped by cultural influences" (Holder & Flessas, 2008, p. 300). This can be said, however, of other forms of property as well. Understanding property relies, in many respects, on narrative, on storytelling. Famous narratives of property include Locke's (2010) theory of labour, in which human beings

apply their labour to common resources to extract or create private property. Such a narrative explains and justifies a particular conception of property (Rose, 1994); indeed, "so persuasive is the narrative framework […] that it can serve to gloss over some contradictions within the story, as well as naturalizing prevailing forms of inequality" (Blomley, 2000, p. 3). Rose (1994) points out that theorists who have typically favoured scientific, non-narrative approaches to property have, paradoxically, used storytelling to convey knowledge about property. She reasons that the development of property regimes required cooperation, but that cooperation was not accounted for in classical theories of property. This is why, states Rose (1994), "the classic theories of property turned to narrative at crucial moments, particularly in explaining the origin of property regimes, where the need for cooperation is most obvious. Their narrative stories allowed them to slide smoothly over the cooperative gap in their systematic analyses of self-interest" (p. 37).

Chouinard (1994) warns that "texts are not enough" (p. 420) and that, in order to better theorize property, attention must be given to more material or physical enactments of property. Blomley's (2000) historical account of a property conflict in Vancouver, British Columbia details the violent enactments involved in the struggle over property, demonstrating "the workings of property entailed – at least in this case – a complicated mixture of both persuasive words and violent actions" (p. 1). In a second example, Blomley (2004) describes how residents of a low-income neighbourhood threatened by development and gentrification enacted their right to property through such practices as cleaning and painting the building they were claiming. Property derives meaning through enactment, which "entails various forms of continuing persuasive practice designed to legislate what property actually is and what it ought to be" (Blomley, 2004, p. 22). Enactment includes storytelling (Rose, 1994), but also performance or physical enactments, and so property is "simultaneously practical and representational" (Blomley, 2004, p. 23; see also, Blomley 2000). The differences between state and private property are stated in legal doctrine, but the way in which collective property is understood, imagined and enacted, and the ways in which it is distinct from private property, are "ingrained in our practical experience of the spatial organization of social life" (Brain, 1997, p. 237). Property, then, is categorized and conceptualized through formal legal definitions as well as through more informal modes such as storytelling and enactment.

In many respects, Indigenous perspectives of their rights to and relationships with lands serve as a counterpoint to the ownership model. The diversity among Indigenous peoples makes it impossible to identify one generalized Indigenous conceptualization of property, but as Bryan (2000) argues, "Aboriginal conceptions of property cannot be adequately described in a singular fashion but are to be articulated in the ontological terms specific to the discrete First Nation's culture" (pp. 3-4). While acknowledging the diversity amongst Indigenous peoples' cultures, values, legal systems and normative views respecting their lands and resources, Indigenous systems do not resemble the ownership model. Brody (2004), in his book *Maps and Dreams*, writes:

> The Indians of the northern forests, like the Inuit of the Canadian Arctic, have a socioeconomic system that is highly flexible and, generally speaking, without emphatic ideas of private or even family property. This does not mean that they feel less strongly than other peoples about the land and its resources. However, it does mean that they represent and express these feelings differently. (p. 16)

Indigenous approaches to lands are expressed through oral traditions rather than written down (Turpel-Lafonde, 2012). Stories about places, and about relationship to lands and resources, are told to define and describe rights to and interests in a given location (Rakai, 2005; Turpel-Lafonde, 2012). According to Dekker (2003), for Indigenous peoples, stories represent a "virtual land registration" that is confirmed when listeners acknowledge the speakers' stories.

It has been suggested that Indigenous conceptualizations of property often include the presence of collective rights and the importance of relationships, including with nature (Banner, 1999; Battiste, 2009; Brody, 2004; Bryan, 2000; Cove, 1982; Roseman, 1998). The Okanagan First Nation, for example, "understood 'property' in terms of a specific relationship with nature and the land because they understood themselves as having a very specific place in relation to nature" (Bryan, 2000, p. 19). Similarly, Fiske & Patrick (2000) note that the Lake Babine First Nation have no word for law, and that "[w]hat constitutes law is less a code of regulations, sanctions, and measured punishments and more a continuously unfolding body of principles defined by shifting social relations and economic exigency" (p. 18). Bell (1992) proposes that terms such as "steward" or "caregiver" are likely more accurate in describing Indigenous relations with lands than "owner" (Bell, 1992, p. 463). Indigenous property systems may also be based on functional rights rather than solely on geographic space, as Banner

(1999) reported in his comparison of Maori conceptualizations of property with British conceptualizations. This means that, in contrast to the ownership model, property rights are less about a specific bounded space than the particular uses or activities an individual or group may engage in.

Rakai (2005) points out that colonial processes, which involved the superseding of Indigenous land tenure systems with Western concepts of property, has resulted in Indigenous approaches to their lands "being misunderstood, underplayed, misrepresented or simply ignored by the colonising institutions" (p. 7; see also, Godden & Tehan, 2010). Brody (2004) concurs: "The Indians' use of the land, like every other aspect of their way of life, is little known and less understood by outsiders" (p. 146). The general neglect and lack of awareness and understanding has resulted in policies and approaches to property that do not adequately meet the needs of Indigenous communities (Godden & Tehan, 2010). The dominant conceptualization of private property makes finding a conceptual place outside the ownership model from which to critique it challenging. Even more difficult is trying to understand non-Western perspectives of property without drawing comparisons or using ownership model terms of reference. Bryan (2000) warns that asking "what Aboriginal property is" employs non-Aboriginal concepts and will not yield a plausible answer (p. 3). Overstall (2004), writing about the Gitxsan First Nation in northwestern British Columbia, likewise suggests that the term property is problematic as it "is only one of many ways that human cultures have developed legally sanctioned ties with the tangible and intangible world" (p. 23).

The concept of "land tenure," which is considered to be less prescriptive and constraining than "property," has been applied to Indigenous systems governing the legal relations between lands, resources and peoples. Land tenure includes both formal and informal ways in which rights and responsibilities to lands and resources are allocated and regulated. Land tenure accounts for the multiple and interrelated social, cultural, emotional and material aspects of Indigenous systems (Rakai, 2005). Whether employing the term land tenure or property, neither is objective, static, apolitical or value-neutral, and all relations among peoples and lands are contingent upon the social and cultural contexts in which they are formed (Bell, 1992). Palmater (2010) calls for greater awareness of the diversity of land tenure systems. However, as Bell (1992) warns:

> Although analogies can be drawn to help translate aboriginal concepts of property into Canadian legal language, we must question the appropriateness of imposing cultural values embedded in our legal system on the resolution of aboriginal claims. The concept of communal or collective property combined with aboriginal visions of the sacred creates a system of relationships that are very different from those found in the Canadian legal tradition and are difficult for decision makers influenced by Christianity and Western legal ideology to understand. (pp. 462-463)

Bell (1992) continues, arguing that in Canada (as with other Western, colonial cultures), the reliance on the private property system strongly influences economic and social policy; however, more frequently Aboriginal peoples are challenging the assumptions underlying the ownership model in court, and making claims to have their own concepts of property recognized.

3.2. Bracketing and the Performativity of Property

The central themes of this research – law, space, property and colonialism – are each strongly implicated in power relations, and, while questions of power cannot be boiled down to a single explanation, it is worthwhile to highlight a concept that very usefully informs how one might think about the legal, spatial, and colonial topic of matrimonial real property on reserve, both analytically and ethically. One way to carefully scrutinize power, especially in the areas of law and property, is through the conceptual framework of bracketing. “Bracketing” serves to integrate the key organizing ideas in this thesis, and provides a lens for interpreting my data (Blomley, 2013a, p. 2). Blomley (2013a) builds on Callon’s (1998) work on framing when he describes bracketing as follows:

> Bracketing, as I term it, entails the attempt to stabilize and fix a boundary within which interactions take place more or less independently of their surrounding context. That which is designated as inside the boundary must be, in some senses, disentangled from that identified as outside. (p. 4)

Bracketing, then, is a kind of “closing off,” disentangling, or framing of a particular topic from its relational or contextual components. In many respects, bracketing is a practice of boundary making; it aspires to create clarity and certainty, and it necessarily relies on value judgements regarding what should be included and excluded. The ownership model relies on legal and spatial bracketing to organize the world in particular ways, and

it performs itself through a series of manoeuvres. Thus, bracketing deserves critical engagement if legal and spatial norms are to be destabilized

Law, space, property and colonialism are all (interrelated) sites of frequent bracketing. For example, with its tendency towards closure, law is, according to Blomley (2013a), deeply concerned with disentanglement. Indeed, "law is particularly invested in producing clarity, legibility and certainty through the drawing of distinctions" (Blomley, 2013a, p. 4). A goal of bracketing is to define, rather strictly and narrowly, the various actors and concepts involved and to thus detach them from complications deemed not relevant. As Blomley (2013a) explains, "[m]essy urban conflicts involving homelessness, for example, that others may frame as centred on poverty, ethics, social exclusion, and citizenship are re-bracketed as disputes over jurisdiction" (pp. 5-6, citing Blomley, 2012). Like law, space has also been treated as something abstract and separate from relational concerns and is implicated in legal bracketing. For example, "[f]or a legal transaction to occur, a space must be marked out within which law's subject, object and relations are bracketed, and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the bracket" (Blomley, 2013a, p. 5).

It is crucial to acknowledge the ways in which different types of bracketing – for example, legal, spatial and temporal – can occur simultaneously. As Blomley (2013a) points out, "[l]egal practice brackets not only law, but also time and space. Legal fictions such as the doctrine of discovery, or Crown radical title, entail a parsing of history and geography" (p. 6). These "legal fictions" (doctrine of discovery, Crown radical title) are also examples of colonialism, and so it is that colonialism – so often relegated to the past, so deeply involved in spatial practices such as deterritorialization, and (in many respects) so reliant on law to accomplish its goal – may also be understood to bracket law, space and time. Property is another example of legal, spatial and temporal bracketing. As Blomley (2013b) explains, "[p]roperty is entangled in and inseparable from a multitude of relations (ethical, practical, historical, political and so on). Yet for property to function, some of these relationships must be bracketed" (p. 1). Property is very frequently spatially defined, either by boundaries or by the material specificity of the "thing" that is owned; it is further imagined to exclusively involve and effect only property owners. Property law, then, is limited to predetermined actors and spaces. Temporal bracketing occurs when narratives of property "organize history in powerful, yet contingent ways" (Blomley, 2013a, p. 7 citing Rose, 1990).

While the bracket around a legal transaction, for example, may appear to be natural and pre-existing, it actually takes a good deal of effort to construct and maintain it. As Blomley (2013b) states: "The ability to frame, and the sharpness of the line that is drawn is not, however, a given. It requires hard work, and requires the enrolment of other resources" (p. 1). Inevitably, leakages, overflows and entanglements occur. Indeed, "bracketing is always partial" argues Blomley (2013a); "[r]elationality intrudes […] or is necessary for the bracketing to hold together" (p. 3). The extent to which bracketing is policed varies depending on the context, and may be more or less open to entanglements. Furthermore, it should not be assumed that only the powerful within society participate in bracketing:

> Urban anti-poverty activists struggle to perform a purified rights-bracket, in which the homeless are understood as universal citizens and rights-bearers. Urban authorities, conversely, rely on often highly entangled and fluid framings predicated on police powers, discretion, nuisance and "community." (Blomley, 2013a, p. 8, citing Blomely, 2012)

Bracketing should thus be understood in terms of complexity and heterogeneity, as "a process of disentanglement [that] can go hand in hand with one of re-entanglement" (Blomley, 2013a, p. 8).

Here, it is useful to draw on performativity theory to understand the "hard work" of bracketing (Blomley, 2013b, p. 1). Performativity is "the idea that our statements and representations actively produce reality rather than being mere faithful copies of it" (Barnes, 2008, p. 1432). In other words, to think of bracketing as potentially performative is to see it as productive of reality. There are several approaches to performativity. Austin (1962) is generally cited as the first to use the term "performativity," by which he meant that speech acts are productive (see Barnes, 2008; Mackenzie, Muniesa, & Sui, 2007). For Austin (1962), "language is used not only to represent the world, but also to change it by producing a new entity through linguistic performance" (Barnes, 2008, p. 1434). Goffman (1959) formulated another approach, which was to use dramatic performance as a metaphor for understanding lived experiences (see Barnes, 2008; Gregson & Rose, 2000). Performativity theory has also been a topic of interest in science and technology studies and to economics scholars such as Callon (1998). In this approach, performativity theory is designed to capture the "interweaving of 'words' and 'actions' – of representations and interventions" (Mackenzie et al., 2007, p. 5) to understand how discourse has a performative effect, how it *makes* reality. As Mackenzie

et al. (2007) argue (with respect to economics), performativity is “not just about ‘knowing’ the world, accurately or not. It is also about producing it. It is not (only) about economics being ‘right’ or ‘wrong’ but (also, and perhaps more important) about it being ‘able’ or ‘unable” to transform the world” (p. 2). Following this logic, then, bracketing does not need to accurately represent reality in order to have a performative effect, for example, of emphasizing the importance of those entities deemed to fall inside the brackets, while minimizing (or even erasing) all that has been excluded.

The ways in which property is conceptualized are largely related to the ways in which property gets bracketed. And, as a performative practice – i.e., being potentially productive of reality – conceptualizing property and bracketing property *matters.* As Blomley (2013a) states: “Given the implication of property in life chances, identity, security and autonomy, property’s frames are particularly consequential” (pp. 7-8). Indeed, bracketing property is an ethical and political undertaking that has important economic and social consequences (Macpherson, 1978); it not only involves the legal categorization of space, but also of people. As Blomley (2004) argues in his discussion of gentrification in Vancouver, “dominant property narratives engage in a complex set of moral moves, including the erasure of an existent population (via renaming, presumptions of mobility, and so on), subjectification (casting gentrifiers as moral ‘improvers’) and teleology (through the logic of highest and best use)” (p. 102). A particular conceptualization of property – and the bracketing necessitated by it – can justify the primacy of the individual, the decentralization or limiting of the state, the dispossession of peoples of their lands, or the outlawing of normally legal actions. Property can also be employed in resistance to all of these things.

To illustrate my point, I turn to Waldron (1991) who argues that property systems are “rules that provide freedom and prosperity for some by imposing restrictions on others” (p. 324). Property rules are a legal bracketing of property that play an important role in the displacement of some people from some places. As Waldron (1991) explains, “one of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where” and what activities are allowed to be carried out in what places (p. 296). For homeless people, such rules make their everyday and very necessary activities (such as washing, sleeping and urinating) illegal (Waldron, 1991). In this way, bracketing “works” to outlaw certain people and activities and to make this outlawing seem appropriate and desirable. “At an extreme,

the effect [of dominant property narratives] is to render displacement natural, inevitable, and beneficial" (Blomley, 2004, p. 102). Mitchell (2005) concurs: "Laws of property, coupled with ideologies of individualism and freedom, combine to construct *economic* subjects that are 'free agents,' equal before the law, stripped bare of mutual obligation and dependency, left to sink or swim apparently on the basis of their own merits and their own talents" (p. 78).

The ownership model, while flawed as a representation of property, alerts us to the fact that the way in which we see property shapes what property becomes. Currently the dominant system of property, the ownership model, limits what kinds of relations may be called property and which social actors will be "recognized as viable owners" (Blomley, 2004, p. 8). As a set of categorizations and enactments, it effectively "shapes understandings of the possibilities of social life, the ethics of human relations, and the ordering of economic life" (Blomley, 2004, p. 3), and encourages certain behaviours such as "responsible citizenship, political participation, and economic entrepreneurship" (Blomley, 2004, p. 4). People who do not own property are "left out," socially and economically marginalized, and even viewed with suspicion. The privileging of the ownership model and private property, for instance, has been (and continues to be) used to justify colonial dispossession of First Nations' lands (Blomley, 2000; Dempsey, Gould, & Sundberg, 2011; Stanger-Ross, 2008). Private property is a value-laden concept seen to exemplify productivity, economic development, and "highest and best use" (Blomley, 2004, p. 82). These values are linked to the settler population, and, more broadly, to "whiteness" in general (Dempsey *et al*., 2011). Thus, "[p]rivate property became a key site through which First Nations people were racialized as uncivilized and inferior on account of their apparent lack of this particular land management regime" (Dempsey *et al*, 2011, p. 5). As Stanger-Ross (2008) argues, First Nation peoples were deemed to be in contradiction with urban development and modernity more broadly, and, backed by justifications based in part on property arguments, were dispossessed of their lands.

Flanagan et al. (2010) take a different approach, arguing that private property has great potential to provide First Nations people with economic opportunities that could lift them out of poverty. They assert that private property would provide the necessary security of tenure and financial incentives to allow First Nations individuals living on reserve to start participating more effectively in the Canadian economy. This assertion reflects an ownership model of property, which situates economic prosperity

and empowerment in private property while bracketing the history of colonialism and property's cultural contingencies. For these scholars, the current legal framework governing property on reserve (the *Indian Act*), as well as alternative conceptions of property such as customary property rights, are not economically efficient. They suggest a new legal framework that would introduce fee-simple ownership on First Nation reserves while also providing some protection of collective property rights.

While the ownership model remains the dominant conceptualization of property, it should always be recognized that alternative understandings of property also do work to counter, or resist, the dominant narrative. Blomley (2004), describing resistance to gentrification, states "those opposed to gentrification engage in a denaturalization of gentrification, through conscious attempt at rendering property as potentially inequitable" (p. 102). In terms of property on reserve, there is currently a great deal of debate regarding how best to conceptualize property. These debates take place through discursive and material modes in which private property and the ownership model are portrayed as both the cause of various problems on reserve and the solution to these problems. Thus, all conceptualizations of property – and the bracketing work they entail – are consequential. Conceptualizations of property are never fixed, apolitical, uniform or uncontested, nor can they be broken into simple categories. Rather, they are about rights, "mental structure" (Banner, 1999, p. 847), "cultural force" (Singer, 1996, p. 1459), social and political relations, and are always contested and (re)enacted. Furthermore, conceptualizations of property have immense social, cultural and political implications, as well as moral and ethical associations. Property, then, "as the rights, privileges, powers, and immunities granted over the tangible and intangible things of the world" wields a great deal of power (Underkuffler, 2003, p. 17), and "works" to accomplish various ends.

4. Methods

My research is epistemologically grounded in qualitative methodologies that "provide access to the motives, aspirations and power relationships that account for how places, people, and events are made and represented" (S. Smith, 2000, p. 660). In this work, I place emphasis on the perspectives and experiences of social actors, and I build from the assumption that society and space are socially constructed and, as such, dynamic, open to interpretation, and imbued with power. Knowledge production, therefore, is a subjective (rather than objective) activity that hinges to a great extent on the power of positionality (S. Smith, 2000), and the intersubjective nature of research means that researchers are involved in meaning-making, and in the construction and interpretation of social life.

The topic of matrimonial real property on reserve is a complex issue with a long history that affects countless individuals, organizations and communities. As such, many important research questions could be tackled, and any number of research approaches could be employed. My research focuses on a power-laden discussion and debate that took place at the national scale, and that impacts policy and law related to matrimonial real property on reserve. The ways in which issues such as MRP on reserve are represented in our governmental systems and processes offer important insight into the processes through which persistent systemic inequalities, problematic assumptions, hierarchies and hegemonies are normalized, erased, and (re)inscribed. Indeed, in choosing to interrogate and critique governmental discourse around MRP on reserve, I hoped to find opportunities to destabilize, make visible, and call into question taken-for-granted notions that re-entrench and re-affirm colonial relations between Indigenous peoples and the state.

4.1. Data Collection

The “national dialogue,” as I loosely define it, provided a manageable dataset. The national dialogue refers to the debates and discussions that took place on the topic of matrimonial real property on reserve from 2006 to 2013. In more specific terms, the national dialogue began on September 29, 2006 when the Honourable Jim Prentice launched the nation-wide “consultation” process and ended June 19, 2013 when Bill S-2 received Royal Assent. The national dialogue includes reports, transcripts and bills that emerged during that time. For example, the “consultation” process (outlined in detail in Chapter 1) resulted in four publicly available final reports (one by the ministerial representative, and one by each of the national organizations involved: NWAC, AFN and INAC). Draft federal legislation was developed and tabled in the House of Commons in 2008, 2009, 2010, 2011 and 2013, and transcripts of the speeches and debates that took place about these bills are publicly available. In 2010 and 2011, the Act was presented in Senate, and examined by the Standing Senate Committee on Human Rights. In 2013, the Standing Committee on the Status of Women examined the Act. During each of these Committee meetings, “witnesses” made presentations, or provided “evidence” respecting the Act, and the transcripts from these hearings are also publicly available.

This thesis was fully drafted prior to 2013 when the Act received Royal Assent, and I was therefore unable to include all of the data from the national dialogue in my analysis. My research activities and the national dialogue unfolded simultaneously, and in many respects, unpredictably. I initially analyzed data from the national dialogue up to March 26th, 2011 when Bill S-4 died on the Order Paper in the House of Commons. I had already begun writing about my findings when the next iteration of the Act – Bill S-2 – was introduced in September 2011; it made some progress up to the end of 2011, but was then stalled until 2013. I decided not to include the 2011 data on Bill S-2, in part because I had already completed my analysis and started writing, and in part because I determined there would be insufficient value in including a bill for which there was an incomplete story.

The data from the national dialogue that I did analyze included the four final reports and all of the transcripts from the House of Commons and the Senate up to March 26th, 2011, as well as the 2010 Standing Senate Committee on Human Rights

hearings. The final reports were available for download from the INAC website. The ministerial representative's final report included the INAC, NWAC and AFN final reports as appendices. The transcripts and the Act were available online through the LEGISinfo website,[15] where I downloaded all transcripts from the House of Commons (2008-2011), Senate (2010), and Standing Senate Committee on Human Rights (2010). In addition to the specific data sources that I selected for analysis, I drew on a number of other sources of information, such as the Acts as they were presented each year, legislative summaries, news articles, and press releases. Over the last decade since the issue of matrimonial real property on reserve first came to the attention of the federal government, there was an increase in matrimonial real property-related reports and discussion papers. I closely examined these documents and reports, which laid the groundwork for the study, providing me with historical, legal and geographical context for my analysis.

These data, especially the transcripts, were drawn from public performances, which took place in politically charged settings. The transcripts from the House of Commons indicated the riding of each speaker, so I was able to get a sense of the geographic distribution of Members of Parliament (MPs) who participated in the national dialogue. While there were MPs from across Canada who spoke about MRP in the House of Commons sessions, there were more voices from Ontario, Quebec, BC and the territories. All of the major parties, i.e., Conservative Party of Canada (CPC), Liberal Party of Canada, New Democratic Party (NDP), and the Bloc Québécois (BQ) were represented. The Conservatives were the proponents of the Act, and MPs from the other parties were critical of and generally in opposition to the Act. The transcripts from the Senate did not give any indication of the Senators' locations, but the Standing Senate Committee hearings noted the witnesses' roles (e.g., President of NWAC or Chief, Anishinabek Nation). In this way, it was frequently possible to ascertain where a witness was from, whether they were First Nation, and who they were representing. Some MPs and Senators self-identified as Aboriginal, however, it was not possible in all cases to know if a speaker was of Aboriginal identity. In the following chapters, I refer to all those individuals who were included in the transcripts as "participants" in the national dialogue;

[15] LEGISinfo provides access to information about legislation before parliament. LEGISinfo website: http://www.parl.gc.ca/LEGISINFO/Home.aspx?ParliamentSession=41-1

however, individuals who “gave evidence” at the Committee hearings were called “witnesses,” and so I also use this term to refer to some participants.

4.1.1. Making adjustments

My approach to data collection changed during the course of my research project. At the beginning, I proposed a research project that would involve analysis of secondary data (e.g., publicly available reports and transcripts) as well as key informant interviews. The key informant interviews were to be with people who had been involved in the matrimonial real property on reserve issue over the past decade, namely, a representative from NWAC, AFN and INAC. I considered employing a snowball strategy for identifying other key informants, such as leaders of First Nations operating under the *First Nations Land Management Act* (FNLMA) or representatives from other organizations that had been involved in the 2006 “consultation” process. With these plans in mind, I developed an interview guide and obtained ethics approval from Simon Fraser University (SFU). I then approached NWAC, AFN and INAC, and was able to make contact with an individual in each organization who was willing to help me. I started making plans to interview the representatives from NWAC and AFN; the INAC representative was not permitted to participate in an interview, but offered instead to provide written responses to my interview questions.

I was extremely appreciative of the support these three representatives gave me. They all provided me with additional information that they thought would be useful to my work, and attempted to find time to schedule interviews with me. However, these individuals were all extremely busy with their professional obligations (particularly those from NWAC and AFN). Despite what I believe were best intentions to assist me by participating in key informant interviews, finding time to communicate with me by email was challenging enough for them; ultimately, scheduling interviews proved too difficult and our communication dropped off.

When it became evident that scheduling and completing interviews would require that I become more assertive than I felt comfortable being, I seriously questioned whether the value of interviewing these individuals would be worth the demand on their time. They had all already provided me with additional information that was extremely useful, and they communicated to me that the information they were sending me

reflected their organization's position, research, and involvement in the issue. I began to wonder what additional information an interview would elicit. I realized that the key informants were unlikely to express views that differed from their organization's official position, or to provide any information that they had not already shared via email. Indeed, key informant interviews were likely to reiterate what was already in the publicly available discourse. I concluded that further imposing on these individuals' time would be unjustifiable.

4.2. Data Analysis

S. Smith (2000) argues, "[t]exts need to be interpreted because what we read and what we see are representations rather than realities" (p. 661). In other words, texts are not examples of reality awaiting discovery; "textual representations create rather than reflect the world of experiences" (S. Smith, 2000, p. 661). My engagement with my dataset, the national dialogue, drew on approaches to textual analysis that involve carefully and critically reading in order to interrogate, (re)interpret, deconstruct and situate the textual data in question. Often described as discourse analysis or close reading, this method is anchored in literary theory, and was traditionally a way of quantifying qualitative data through counting words. For example, discourse analysis has been described as a technique for counting words/phrases in order to calculate frequency of usage, as well as an empirical method for identifying phenomenon through the systematic application of coding frameworks. Currently, more common understandings of discourse analysis and close reading draw on Foucault (1972) and Derrida (1978; 1997), and refer to multiple readings of texts to uncover hidden meanings, values, contexts, politics and power. "Your aim may be to notice all striking features of the text, including rhetorical features of the text – for instance oppositions and correspondences, or particular historical references" (Kain, 1998). It is a subjective, but rigorous method in which the individual researcher observes details about the text, bringing to bear his/her experience and expertise on the subject matter, and situating the text in historical, political and social contexts. This more contemporary approach to discourse analysis accepts Foucault's (1972) position that language and power are contiguous, and that the act of producing text is tantamount to materially inscribing hierarchies of power.

During the national dialogue, different understandings, perspectives and conceptualizations of MRP were expressed through various means (e.g., dialogue, debate, parliamentary speeches, reports and press releases). According to Bialasiewicz et al. (2007), discourse involves both representations and practices that produce meanings, identities and social relations; it is heterogeneous, not confined to a single author or mode of communication. Indeed, as Gregory (2000b) points out, discourses "travel through different domains and registers and carry multiple meanings and implications"; they are regulated, embedded and situated, meaning that they are contradictory, "materially implicated in the conduct of social life," and "always characterized by particular constellations of power and knowledge that are always open to contestation and negotiation" (p. 180). S. Smith (2000) states:

> Ways of seeing, ways of speaking, ways of writing and ways of hearing are culturally coded and contain important clues to the political and economic circumstances of the societies that produced them. Methods for interpreting images, words, writings and sounds provide a gateway into these cultural codes and into the political economies they permeate. (p. 661)

Discourse analysis is a useful method for interpreting culturally coded ways of seeing, speaking, writing and hearing; it provides important insight into the "regimes of truth" that mark such discourses (Gregory, 2000b, p. 180) as they often reflect a "…shared common sense about the ordering of society and space – a common sense which powerful groups have an interest in manipulating" (S. Smith, 2000, p. 661). The notion of the "common-sensical" is important, as it is bound up in the maintenance of hegemony (Waterstone & de Leeuw, 2010). Gramsci (1985) wrote about common sense as a kind of popular knowledge, as ideas that "have entered into common circulation" (p. 421). Such ideas are both malleable and powerful; they evolve, but as taken-for-granted, they seem to need no explanation or critical questioning. Such "knowledge" becomes stable, and therefore, appears legitimate. Common sense often serves the powerful in society, "since it is on the basis of prevailing common-sensical notions that the governed come to see their interests as legitimately represented in the rhetoric (if not the actions) of elites" (Waterstone & de Leeuw, 2010, p. 2).

In analyzing the textual data in my project (e.g., final reports and parliamentary speeches), I drew on this more recent approach to understanding discourse analysis and close reading. The main goal was to make observations of the text (e.g., to note

terminology, phraseology, etc.) and to then interpret these observations (e.g., how certain ideas were being cited and reiterated in the text, and with what potential consequence). I based my analysis around the organizing ideas constituting the ownership model, such as private property, individual ownership, the association of property with material "things," and limited government regulation. In addition, I looked for cultural norms and values that, according to the ownership model, are associated with private property, such as the right to exclude. I observed all references to topics raised in my research questions such as ownership, individual and collective property interests, governance of property, and categories of property (i.e., legal definitions), as well as all discussions of consequences related to these things. I made use of tables to keep my findings organized; relevant quotations, page numbers and other observations were entered in the appropriate columns. This method facilitated analysis because it helped to make visible patterns and themes that emerged. I relied on my knowledge and experience to identify places in the text where specific terms were used, but also where participants in the national dialogue discussed property more implicitly. I also looked at the silences within the discourse, "spaces" where property might have been defined or discussed more explicitly, but was not. In this way, I was able to identify the taken-for-grantedness of property within the national dialogue. My approach to the discourse on matrimonial real property on reserve, then, was to look at how the ownership model operated through legal and spatial bracketing, through the drawing of distinctions, and to carefully trace how understandings about property and space were organized and, thus, performative.

4.2.1. Discourse and performativity

My research is focused on the relationship between representation and reality. In my data analysis, I attempted to go beyond simply describing different and competing conceptualizations of MRP to uncover the "interweaving of 'words' and 'actions' – of representations and interventions" that constituted the performances of MRP, and to determine "*how* these strategies produce the effect they name" (Bialasiewicz et al., 2007, p. 411, emphasis added). Specifically, I looked for representations and actions, descriptions and prescriptions (Bialasiewicz et al., 2007), and citational practices that enlisted already-established models of property (e.g., theories, laws, academic works), as well as for slippages and disruptions in these citations. I examined the *Family Homes*

on Reserves and Matrimonial Interests or Rights Act, as well as to the parliamentary speeches made about this Act, to try and determine if performances of MRP *constituted* MRP. In other words, I asked whether the "representations and interventions" that made up the national dialogue managed to (re)produce a stable understanding of MRP or whether they destabilized and transformed the dominant conceptualization of MRP? I sought to determine the effects of the ownership model by identifying practical tactics, such as bracketing, to explain property's power. Implicit in my approach, then, is the assumption that performativity in the national dialogue was consequential. I attempted to move beyond the more abstract questions of *what* and *why* to more practical questions of *how*. In many respects, then, my research was an interrogation of "the how" of the power of property, and, in particular, of the ownership model of property.

Discourses are performative, meaning that they actively produce or constitute the objects and ideas to which they refer (Bialasiewicz et al., 2007, p. 406). Given this understanding of discourse as potentially performative, it is not possible to make observations about property, for example, as some "thing" that can be objectively described; people (whether academics, lawyers or lay people) "perform, shape and format" such concepts (Mackenzie et al., 2007, p. 4). In this particular project, I focused on the particular site of the national dialogue, and I was not able to trace the performativity of property through broader networks. Nonetheless, matrimonial real property, a sub-category of property, may well have developed a stable meaning informed by the ownership model of property whereby property is equivalent to a particular understanding of private property; performativity theory suggests that, although its effect is naturalized, the national dialogue may well be an instance in which reinscription of this stability is demanded as, at the same time, destabilizing counter-performances challenge it. Indeed, the national dialogue on MRP certainly included "MRP talk" and "MRP politics" that could be usefully examined to determine whether MRP norms were being naturalized and stabilized as governmental strategies that were simultaneously maintained and contested through reiterative processes (Kaiser & Nikiforova, 2008), and whether there were challenges to these MRP norms that sought to destabilize and put in their place alternative conceptualizations.

Gregson and Rose (2000) warn researchers against separating performance and performativity. They argue that "performance – what individual subjects do, say, 'act-out' – and performativity – the citational practices which reproduce and/or subvert discourse

and which enable and discipline subjects and their performances – are intrinsically connected, through the saturation of performers with power" (p. 434). They continue by pointing out that "to see performances simply as the theatrical products of knowing, intentional agents at some remove from their other selves, other performers, audiences, and power is misplaced" (Gregson & Rose, 2000, p. 445). Rather, they argue, performances are interrelational and bound up with the already-established knowledges they cite (Gregson & Rose, 2000). From this perspective, MRP is not confined to one form of power, one dominant discourse; rather slippages occur in different directions and open up spaces "in which, and from which" power relations (of property, for example) might be questioned (Gregson & Rose, 2000, p. 446). Performances of MRP "rely on the affirmation of certain understandings of the world within the context of which the strategies and understandings advanced by them are rendered believable" (Bialasiewicz et al., 2007, p. 417). As a researcher, I tried to determine whether, in these performances, power was assumed to be concentrated in a dominant model of property, and, in addition, whether this model was strengthened through the performance of its dominance. If, as Bialasiewicz et al. (2007) assert, "[d]iscourse refers to a specific series of representations and practices through which […] political and ethical outcomes [are] made more or less possible" (p. 406), then these articulations of MRP surely "provide the conditions of possibility for current – and future – action" (p. 417).

4.3. Ethical Considerations

The discipline of geography is implicated in the troubling history of colonialism that has unfolded around the world (Brealey, 1995; Shaw et al., 2006). Human geographers interested in Indigenous geographies and postcolonialism must come to terms with their discipline's collusion with colonialism, and, in order to avoid reproducing colonialism in the present, must remain critical of themselves and their discipline's accepted methodologies and theories. To do research is to participate in relations of power (L. T. Smith, 2006), and although there may be the "best of intentions" (see, for example, Hare & Barman, 2006; Regan, 2010), the risk of reproducing uneven power dynamics (for example, by (re)inscribing ideas about Indigenous identity and "otherness") is always imminent (Shaw et al., 2006; Weaver, 2005). Knowledge and research are all deeply entangled with colonial ideology and practice; research is "not an

innocent or distant academic exercise but an activity that has something at stake and that occurs in a set of political and social conditions" (L. T. Smith, 2006, p. 5).

At some point, earlier in my academic career, I was what Ahmed (2004) and Srivastava (2005; 2006) may have called emotionally attached to my good intentions. I believed that research could have decolonizing effects and promote social justice, and I wanted to be engaged in this work. Nonetheless, I was also aware that when it comes to ethnocentrism and racism, things are not quite so straightforward. Even though I wish to be completely *not* racist, and to act only in anti-racist ways, I know I likely have internalized assumptions that I am quite unconscious of. To give in to my discomfort and deny the possibility of internalized racism/ethnocentrism would make dealing with it impossible. Certainly, racism is unpleasant to acknowledge, which makes it easy to buy into the vision of a multicultural Canada, a postcolonial and post-racist nation – not to mention, the promise of the perfectly self-reflexive, activist-ally researcher. However, to do so would be to ignore the call to be alert, questioning, and critical, especially of myself.

Critical reflection on power, positionality, representation and interpretation, as well as attention to complexity, heterogeneity, history, context, locality and scale are essential to the decolonization of knowledge and research involving Indigenous people(s) and spaces. For example, Shaw et al. (2006) argue that researchers need to be aware of the politics of their positionality as well as the political potential of their research. It is important, then, to "be mindful of how research can be used, and by whom" because "meaning easily escapes the intention" (Shaw et al., 2006, p. 273). Similarly, Jacobs (2001) reminds us of the need to watch out for the power relations inherent in interpretation, representation, and "truth." Research can address the political in its subject matter, but can also be a political activity itself. Nash (2002) warns researchers not to focus solely on the immaterial and discursive, but to pay attention to the material legacies of colonialism, which is an inherently political activity. In this vein, Jacobs (2001) calls for postcolonial research that has an "anticolonial effect," which means, in part, avoiding the urge to simplify history and instead embrace the nuance, messiness and unpredictability that characterizes colonialism (p. 730). A critical aspect of this involves attention to and acknowledgement of different forms of resistance, as well as recognition of the agency and power wielded by Indigenous peoples (de Leeuw, 2007; C. Harris, 2002; Morris & Fondahl, 2002). Indeed, Jacobs (2001) argues, "[i]f they

[researchers] become connected with contemporary political claims for reparation and recognition, they may even produce postcolonialisms of some material weight" (p. 731).

The decolonization of geography as a discipline, according to Shaw et al. (2006), requires a broader "understanding of indigenous perspectives and epistemologies" and a coming to terms with "cultural politics of 'knowledge,' its production, and the recognition that knowledge is a cultural artefact which reinforces social, political and economic norms" (p. 272). However, it is crucial to remain alert to the politics of generalization and essentialization; researchers should avoid uncritically equating indigeneity with such notions as traditional, ecological, land-based, rural and cultural, and instead be attuned to the modern, urban, economic and political concerns of Indigenous peoples. Contradictions are inherent in many common assumptions around Indigenous authenticity. For example, it is a signal of persistent colonial attitudes that Indigenous peoples may face greater challenges in gaining recognition of their rights as modern, urban, economic and political, than they do as traditional, ecological, land-based, rural, and cultural. Indeed, researchers too often depoliticize Indigenous experiences and "romanticize indigeneity" (Shaw et al., 2006, p. 267).

Academic discourse is inherently tied up with relations of power (Jacobs, 2001; Shaw et al., 2006; L. T. Smith, 2006), and there is, claim Shaw et al. (2006), a politics to the production of academic knowledges, objects and texts. For example, Gibson-Graham (2008) challenge researchers to acknowledge the performativity of our research; thus, in doing my analysis, I had to ask myself: How am I being enrolled in performing MRP? Will my research bring marginalized property conceptualizations forward and make them potentially "more real and credible as objects of policy and activism" (Gibson-Graham, 2008, p. 613)? Or will my research serve to sustain the hegemonic models of property? Gibson-Graham (2008) warn against "[s]trong theory [which] has produced our powerlessness by positing unfolding logics and structures that limit politics" (p. 619). Instead, they prescribe weak theory as an ethical approach to research. "The practice of weak theorizing involves refusing to extend explanation too widely or deeply, refusing to know too much" (Gregson & Rose, 2000, p. 619). For Gibson-Graham (2008), developing weak theory is a "political/ethical decision that influences what kind of worlds we can imagine and create, ones in which we enact and construct rather than resist (or succumb to) economic realities" (p. 619). I am drawn to

this notion of weak theory, as it seems to account for the inability of research projects such as this one to resolve problems or draw tidy conclusions.

Geographers are well positioned to engage in ethical and appropriate research that acknowledges difference over time and across different geographies. Theoretical tools such as “scale” and “place” allow researchers to focus on local contexts and lived experiences, and ultimately, to grapple with their heterogeneity and interconnectedness (de Leeuw, 2007; C. Harris, 2002; C. Harris, 2004; Jacobs, 2001; Kobayashi & de Leeuw, 2010). Blomley (1996) suggests that geography’s contribution is its interest in power and space, and the “importance of space in the regulation and organization of dominated populations” (p. 7). Thus, geographical methodologies and theories are contextual and allow researchers to examine the particularities of the local and how they interrelate with broader processes at various times. Moreover, they encourage consideration of materiality, or lived experiences, and their heterogeneity. I agree that geographical methodologies and theories have great potential for encouraging ethical and politically engaged research. However, I no longer rely on earnest promises to be self-reflective/reflexive; the more I have learned (which isn’t very much), the more I have come to realize the unresolvability of my positionality. I am a white woman of privilege, and my academic pursuits – and my career – unfold within a settler institution, and within a context of support and advantage. I am a settler; my great-grandfathers pioneered and built their fortunes upon unceded native lands, and I have benefited. As a researcher, I do my best to identify appropriate methodologies and employ nuanced and sensitive methods, but it will never be enough to change the hugely problematic institutions (with all of their very ethnocentric/racist systems and processes) within which I (and most researchers) work, and with which I must necessarily collude (if only to keep working and pay the bills). Over time, my “self-consciousness about whiteness, racism and colonialism” (de Leeuw, Cameron, & Greenwood, 2012, p. 185) has increased, and I have lost faith in the idea that good intentions connote ethical research. As I near the end of this research project, I find that I am not comfortable. I am not certain that I do not take my position and my politics for granted, or that I do not seek grand theories and wide-reaching “solutions” (if only subconsciously). I am not certain that I am justified in choosing to do this research, or that the potential consequences of it will be positive, or even neutral. In many respects, this uncertainty – and remaining uncertain – represents my approach to ethics in this project.

4.4. Limitations

Research is inherently limited. I was obliged to work with textual data only. The use of transcripts from hearings I did not attend means I missed out on inflections, emphases, and body language that might have usefully informed my interpretation. I was, therefore, unable to analyze the embodied performances that constituted the hearings, and the emotions and expressions of the speakers that, no doubt, influenced the performativity of their discourses, were not accounted for in this work. I relied entirely on the people who transcribed the dialogue for providing a complete and accurate dataset. Indeed, I do not know the precise process that is followed when producing a transcript of a Committee hearing or a speech made in the legislature. Access to supplementary materials submitted or referred to at Committee hearings by witnesses were not available, and therefore were not part of my analysis, nor was public rhetoric, such as blog posts or news articles. I did not triangulate my interpretations by interviewing any representatives of INAC, NWAC or AFN, nor did I interview any of the witnesses who participated. Despite acknowledging that these factors may have potentially limited my research, I would argue that the dataset was rich and that references made to supplementary materials were sufficient for understanding their significance. Interviews (even for the purpose of triangulation) were not possible, but even the brief phone and email discussions I did participate in made me confident that I adequately grasp the situation, complex though it may be, and that my awareness and understanding of the various stakeholders' positions is acceptable.

In addition, I do not ask what Aboriginal property is in this project. The very topic of my research – the discourse around matrimonial real property on reserve – took for granted Western perspectives of property. "Property" was central to this discourse, as was the non-Indigenous, settler legislation around which the discourse revolved. Therefore, I was constrained to an interrogation of property that employs property terms of reference. I could examine the discourse for evidence that Indigenous perspectives responded to and resisted the ownership model, but I could not fully describe or define an Indigenous property model based on this dataset. This is, I think, appropriate. After all, my focus is on colonial discourse, on what Regan (2010) might call "the settler problem" (p. 11). I am interested in highlighting the work of this discourse, as well as the ways in which it was challenged and countered.

5. The Ownership Model: A Dominant Conceptualization of Property in the National Dialogue

5.1. Introduction

The national dialogue was an example in which the "right to property" was employed in "diverse and often conflicting contemporary legal claims and political movements" (Underkuffler, 2003, p. 11). In this chapter, I demonstrate that the ownership model informed both the issue of matrimonial real property on reserve, and its solution. My analysis shows that the federal government identified a "legislative gap" and developed a legislative solution based on a set of organizing ideas about property that constitute the ownership model: 1) property is perceived as some "thing" owned by an individual; 2) the individual owner can use his/her property freely and exclusively; 3) property is a transferrable and dividable asset; and, 4) a regulatory framework exists that protects property ownership. In this chapter, I argue that the ownership model represented the dominant conceptualization of property because of its central position in the proposed legislation, and in the language used by persons in power, namely Members of Parliament (MPs) and Senators. I assert that the federal government viewed the "legislative gap" as an absence of an ownership model of property on reserve with ethical implications. From the federal government's perspective, its proposed *Family Homes on Reserves and Matrimonial Interests or Rights Act*[16] would apply the ownership model of property to MRP on reserve to correct inequality and injustice.

The challenge in undertaking this analysis was that the ownership model, by definition, takes the conceptualization of property as private property for granted. A first

[16] For the purpose of this thesis, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* includes Bill C-47 (2008), Bill C-8 (2009), and Bill S-4 (2010). Throughout this thesis, I shorten the *Family Homes on Reserves and Matrimonial Interests or Rights Act* to "the Act."

reading of the national dialogue did not immediately produce ample and obvious evidence of property discourse; the conceptualization of property as private property upon which the Act was based was not often explicitly discussed or debated. Indeed, property had the effect of near invisibility. Further readings and close analyses, however, brought to light subtle but solid evidence of the presence, and dominance, of the ownership model. I start this chapter by providing an overview of the moments in which matrimonial real property on reserve was explicitly defined by the Act's sponsors and critics, and in the final reports. I argue that these definitions were largely informed by provincial/territorial (i.e., off-reserve) definitions of MRP, definitions which reflect the ownership model. I then turn to the more implicit ways in which the ownership model was made evident in a conceptualization of MRP. Here, I draw on the discourse around the differences between property on reserve and off reserve including cultural norms and assumptions. In making these distinctions, participants in the national dialogue effectively "narrowed" the concept of property as space that is privately owned establishing Western, off-reserve property as the dominant model and Indigenous, on-reserve property as the different and limited (or even problematic) form of ownership. Next, I show how statements about "what property is not" worked to further bracket property from "messy" geographical and historical contexts, further positioning the ownership model as the dominant conceptualization against which everything "else" was compared and measured. Finally, I show how this dominant model of property gave rise to the phrase "legislative gap" in the national dialogue to describe the issue of matrimonial real property on reserve, the proposed legislative solution, and its justifications. I look at the ways in which proponents defended their conceptualization of property, and I interrogate the second part of the Act, which appears to be an alternative to the ownership model within the legislative solution. I argue that the ownership model was put to "work" in the national dialogue: it was deployed as having an ethical dimension and the power to create an environment in which social justice might flourish.

5.2. The Ownership Model of Matrimonial Real Property

The ownership model was evident throughout the national dialogue. Even the ministerial representative, who was critical of the federal government's approach to defining the "legislative gap" and its solution, defined property in ownership model terms and without qualification as "things that individuals can own" (Grant-John, 2007, p. 17).

The ownership model was also evident when explicit definitions of matrimonial real property on reserve were provided by key speakers on the three bills (i.e., the sponsors and critics), as well as in several of the final reports. Table 3 lists the definitions of matrimonial real property on reserve given in each report and by each bill's sponsor and (where applicable) critic. These moments in which MRP on reserve was explicitly defined are remarkably cursory – indeed, more attention was paid to explaining the MRP legislative gap, than to defining MRP – which seemed to signal a taken-for-grantedness regarding what property is as well as what it should be. It was notable that participants in the national dialogue frequently cited the general definition for MRP off reserve – land and anything permanently attached to the land – and employed the language of private property, drawing on such concepts as "property," "ownership," and "fixed assets" to define MRP on reserve. This was a strong indication of the influence of the ownership model within the discourse.

Table 3 Definitions of Matrimonial Real Property

Origin	Definition
Final Report of the Ministerial Representative	"…includes land and things permanently attached to the land" (2007, p. 17).
Final Report of the AFN	"…land and objects attached to the land like the family home or business" (2007, p. 9).
Final Report of INAC	"…property owned by one or both spouses and used for a family purpose" and "…includes the land and anything permanently attached to the land such as the family home" (2007, p. 3).
Final Report of NWAC	"…includes a couple's home or land that they live on, or benefit from, during their marriage or marital relationship" (2007, p. 5).
S-4 sponsor, Senator Nancy Ruth	Did not define MRP, but did mention that MRP is defined by provincial / territorial law (April 13, 2010, p. 11).
S-4 critic, Senator Mobina Jaffer	"…matrimonial property is normally owned by one or both spouses, and used for a family purpose." "Matrimonial real property […] includes land and anything permanently attached to the land, such as a home for the family" (May 5, 2010, p. 18).
C-8 sponsor, Hon. Chuck Strahl	MRP "typically refers to the family home where both spouses in a marriage or common law relationship live on reserve" (May 11, 2009, p. 122)
C-47 sponsor, Hon. Chuck Strahl	"Matrimonial real property is a term for a relatively simple legal concept. It refers to the fixed assets owned by one or both spouses and used for family purposes. For most Canadians, MRP includes a house and the property on which it sits" (May 13, 2008, p. 32)
C-47 Hon. Anita Neville (response)	"Matrimonial real property refers to the house or the land that a couple lives on while they are married or in a common law relationship" (May 13, 2008, p. 37)
C-47 Paul Szabo	"Matrimonial property refers to the house and the land that the couple lives on while they are married or in a common law relationship" (May 15, 2008, p. 52)

The centrality of the ownership model was not only evident in the definitions of MRP; it was also confirmed by participants who stated that the bills tabled between 2008 and 2010 were defined or informed by current provincial and territorial laws dealing with matrimonial property. For example, Senator Nancy Ruth (speaking on Bill S-4) referred to MRP being defined by provincial/territorial law and Derek Lee (Scarborough-Rough River, Lib.) stated: "This law has been developed using current existing legislative norms and matrimonial law norms from across the country" (May 13, 2008, p. 115). There was general agreement among participants in the national dialogue that the provincial/territorial approach to matrimonial real property was as follows:

> Laws currently exist in Quebec and the provinces and territories of Canada on matrimonial property that recognize the general principle of equality between spouses. These laws govern spousal rights during the marriage and in the case of marital breakdown. They help define the personal and real matrimonial property of the spouses. They also allow for a system of mandatory rights and protections when it comes to matrimonial property and, in the event of a marital breakdown, the establishment of legal presumption in the equal division of matrimonial property. The laws also include various protection measures for each spouse, for example, in the case of the sale of the family home, where the signature of both spouses would be required. (Levesque, May 14, 2008, p. 55)

The provincial/territorial approach to matrimonial real property reflects the ownership model because it relies on individuals owning things (land and home) so that the division of property and exclusive occupation orders can be executed. As in provincial/territorial MRP law, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* included provisions for granting exclusive occupation of the family home to one spouse, as well as the right of each spouse to half the proceeds of the sale of a family home. For example, key elements of Bill S-4 included the following:

> …one spouse can apply for *exclusive occupation* of the matrimonial home. Another element is that a person can apply for an order for compensation on *sale of the home* and, if there is an assault by one spouse, the other spouse can apply for an immediate order that the offending spouse vacate the home for up to 90 days. In addition, the court can order the transfer of certain rights and interests in the reserve lands to either spouse. (Jaffer, May 5, 2010, p. 19, emphasis added)

These concepts – exclusive occupation and the home as a fungible asset – not only reflect provincial/territorial (i.e., off-reserve) models; they are key organizing ideas constituting the ownership model of property (Macpherson, 1978; Waldron, 1988). The

Act was premised on a notion of private property where a parcel of land and the house built upon it are privately owned, and where the couple who owns it has the right to exclusive occupation and to half the value of the asset. As Joe Comartin (Windsor-Tecumseh, NDP) confirmed, the Act "accepts the concept of private ownership" (May 15, 2008, p. 57).

The presence of the ownership model in the national dialogue was also evident when participants discussed the differences between people's rights to land on reserve versus off reserve. In some instances, MRP on reserve was defined without the use of terms such as "property," "ownership," and "fixed assets," and without reference to "land and anything permanently attached to the land" (see Table 3: NWAC's final report; Hon. Chuck Strahl as C-8 sponsor; Hon. Anita Neville and Paul Szabo in response to C-47). In these cases, MRP was defined as a couple's or family's home in which they live together, and from which they benefit (as opposed to land and fixed assets that they own). These were examples in which consideration was given the difference in property rights on reserve. As a comparison, Grant John (2007) described off-reserve property as follows:

> Off reserves, the pre-dominant symbol of individual home ownership in common law systems is fee simple title. The essence of the legal character of the fee simple interest is its unrestricted alienability. This means the holder of a fee simple interest possesses an unrestricted power to sell or otherwise transfer their interest to someone else. Off reserves, fee-simple title is a powerful symbol of financial security and is regarded as a flexible instrument controlled by individuals that promotes wealth creation. In non-native systems, the ability of individuals to create and build their own wealth is considered the most suitable and practical way to ensure the collective wealth of society. (p. 27)

First Nation people living on reserves, on the other hand, may "own" their home (the actual structure) without owning the land upon which it sits. Minister Strahl differentiated between on-reserve and off-reserve types of ownership with the adjectives "private" and "communal": "*Private* ownership on most First Nation lands, for instance, is expressly prohibited. Most reserve lands are *communally* owned" (May 31, 2010, p. 8, emphasis added). Senator Jaffer made a similar point when she drew on the concept of "fee simple" to explain the difference between the property rights of individuals (i.e., not collectives) on and off reserve: "Most Canadians who own land have *full* – fee simple – ownership of land itself. Reserve land is not 'owned' in the *usual meaning* of the word by

the people of the First Nation" (May 5, 2010, p. 19, emphasis added). There are two key points to be made here: the first is that "full" ownership was equated with "fee simple" or private ownership, and the second is that the "usual meaning" of the word ownership was explicitly linked to "fee simple" or private ownership. Senator Jaffer's comments implied that the notion of property ownership referred specifically to a private ownership model, and that property rights on reserve were therefore incomplete (i.e., not fee-simple). In other words, reserve lands were understood to be collectively "owned," but the rights individuals held to plots of reserve land were not considered to be ownership "in the usual meaning of the word."

First Nations' collective rights to their reserve lands were considered to be a form of ownership, albeit, a limited, one, and the rights individuals held to parcels of reserve land (e.g., the lot upon which a family home is located) were explicitly differentiated from the rights individuals held to parcels of off-reserve land. Participants in the national dialogue grappled with how to explain these individual rights to collectively held lands, and different terms and explanations were used. For example, Senator Jaffer distinguished between "possession" and "ownership," noting "Aboriginal people can obtain *possession* of land on which they would be able to erect buildings and buildings will belong to them, but in most cases, they will never have *full* fee simple ownership of the land itself" (May 5, 2010, p. 19, emphasis added). Here, again, the meaning of property brackets out anything "other" than private ownership. This narrow ownership model conceptualization was so dominant that participants appeared to lack any consistent or agreed upon language for describing "other" forms of property rights. For example, in an exchange between Senator Stratton and Karl Jacques (Senior Counsel, Department of Justice Canada), the use of the term possession was questioned: "What do you mean by possession?" The reply: "Occupation of the family home" (May 10, 2010, p. 7). Yet another term used for individual property rights on reserve was "possessory interest" (Murphy, May 14, 2008, p. 61). It was apparent that, while general agreement with respect to the dominant conceptualization of property (i.e., the ownership model) existed, there was limited understanding of, or language for describing, different forms of property. This implies that there was a higher level of comfort with the ownership model than with other conceptualizations of property and underscored the sense that property was taken-for granted to always mean private property. The terms and concepts related to the ownership model were readily and

easily used, whereas there was a lack of preparation and awareness with respect to how to talk about non-private property.

What emerged from these discussions, then, was a narrative in which "real" property was narrowly defined as private ownership of things by an individual. "Other" types of interests, on the other hand, were "not quite property," and different from the norm, i.e., the ownership model. This discourse, which situated the ownership model as the norm against which "other," unusual conceptualizations of property were compared and measured, also contributed to the construction of the "always other" Aboriginal subject. As participants in the national dialogue categorized the differences between property rights on and off reserve, a demarcation, or "boundary," between properties was drawn. There was a physical dimension to it – "proper" property and ownership were *located*. But there was also a non-physical element to it. The Act reflected Western (non-Indigenous) cultural norms about property (individual; private), and an "us and them" narrative emerged in which First Nation concepts or understandings of property and ownership were identified as culturally different, or "other" than "mainstream," "dominant," or "European" ones. Hon. Larry Bagnell explicates difference as follows:

> Aboriginal culture is a different type of culture. Aboriginal people have a different way of thinking, a different way of organizing themselves, and a different social organization than European culture and other cultures in Canada. One of the primary differences is the sense of collective responsibility, collective management, collective rights, and collective culture, as opposed to some of our individual rights and how those supersede other rights in the European culture. (May 13, 2008, p. 95)

Here, Bagnell groups all Aboriginal peoples together: there is one Aboriginal culture, one Aboriginal people. Bagnell also uses the singular when referring to European culture, but does acknowledge "other cultures in Canada." He sets up a simple dichotomy in which Aboriginal culture is collective, and European culture is individual, thus emphasizing collectivity as being at the root of the difference between Aboriginal and European cultures. Hon. Chuck Strahl similarly polarizes cultural difference, stating that First Nations place importance on "collective property interests" while "our laws tend to focus on individual rights" (May 31, 2010, p. 8). Irene Mathyssen described an Aboriginal "reality," as being a "communal kind of reality" because of the existence of communal property; she drew a distinct line around this "reality" when she pronounced individual property rights to be "alien" with respect to First Nation reserves (May 13, 2008, p. 91).

Joe Comartin likewise stated “private ownership” was “alien to them” just as “collective ownership” was “alien to the European experience” (May 15, 2008, p. 57). These statements worked to split property into two categories – individual and collective – with each category being representative of one of two distinct cultural groups: European and Aboriginal. The two properties, and the two cultures, were made to seem completely distinct; no overlap appeared possible, and the potential for internal diversity or variation within each group was not accounted for. It was an essentialist, static account that ignored the diversity and dynamic evolution of First Nations’ cultures. These kinds of statements also underscore the centrality of the ownership model against which “other” and different conceptualizations of property were compared. The Act reflected mainstream or dominant Canadian (i.e., Eurocentric) legal principles: “Each policy objective the bill tries to achieve is rooted in Canadian law” (Devlin, May 31, 2010, p. 2). As Pat Martin (Winnipeg Centre, NDP) argued, Bill C-47 took “a fairly narrow Eurocentric, simplistic notion of matrimonial real property” (May 15, 2008, p. 53). Matrimonial real property in the proposed legislation largely replicated a Eurocentric perspective of property and ownership, while non-Western (i.e., First Nations) conceptualizations of property were absent.

5.3. What MRP is Not: Bracketing Property

The national dialogue was largely characterized by a central tension: what *belongs* in a discussion (or debate) about property? For the sponsors and proponents of the Act, property – and matrimonial real property – was a straightforward issue about legally sanctioned individual rights to own “things,” in this case, land and home. From this perspective, colonial history, and the material, social, political, economic and cultural manifestations of that history as they currently exist, should not be considered. This aspiration to *bracket* property – and by extension, the issue of MRP on reserve – involved insisting that matrimonial real property could be (and should be) distanced from spatial and temporal contexts. From this perspective, property was an abstract theoretical notion, an ideal, and should not be “distracted” by such concerns as colonialism; instead, it should be kept cordoned off from the “messiness” of place and history because property required only technical treatment to do its emancipatory work. This position, taken by many proponents of the Act, attempted to keep the colonial context – and all of the social, cultural, political and economic complexities that were

implicated in it – out of the discussion as much as possible. In an effort to bracket property in this way, many proponents of the Act argued that the geographical context of First Nation reserves (e.g., limited land bases, housing shortages and remoteness) were "off topic" in discussions of MRP on reserve. Likewise, proponents asserted that temporal context – specifically, the history of colonialism in Canada – could not (and should not) be dealt with by property legislation.

Evidence in the national dialogue of bracketing property effectively signalled the presence of the ownership model. For supporters of the Act, the legislation represented a full and accurate description of matrimonial real property. Senator Nancy Ruth stated "bill S-4 addresses *the full range of matrimonial interests and rights* associated with family homes on reserves" (April 13, 2010, p. 11, emphasis added). In other words, the Act was thought by its supporters to represent a full and accurate description of MRP, and this full and accurate description was (properly) limited to the property rights and interests held in the family home, including the right to exclude (exclusive occupation) and the right to half the asset. The Act was about property, and more specifically, about the division of property – no more, and no less. And because property in the Act was based on the ownership model, this kind of statement worked to bracket property by excluding any notions about property that fell outside of the ownership model. For example, according to many participants (mainly supporters of the proposed legislation) the Act was not about violence, socioeconomic issues or housing, and therefore, property could not and should not be defined by or implicated in violence, socioeconomic issues or housing. These moments in the national dialogue all served to disentangle, even "close," property, and keep it separated from what might be considered more messy problems.

While not every supporter of the proposed legislative solution put property to work in this way, it was not uncommon to hear assertions that socioeconomic issues were not related to matrimonial real property and therefore had no place in the Act. For example, Line Paré (Director General, External Relations and Gender Issues Branch, Indian and Northern Affairs Canada) asserted that socioeconomic issues were "outside the scope of this proposed legislation" and John Duncan (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC) agreed, stating (referring generally to bills dealing with First Nations issues): "We cannot have every bill become an omnibus bill" (May 10, 2010, p. 5). In other words, legislation should target a single

issue and not be accountable to other, interrelated issues. Senator Brazeau concurred, and included violence against Aboriginal women in asserting the Act's limits:

> Earlier, we heard a lot of talk about lack of capacity with socio-economic problems, but I feel we are moving away from *the true intent of this bill*. No one said it was to protect Aboriginal women against violence. I think that is secondary, because the violence will usually occur before any division of matrimonial property. […] That is what this is really about. *It is women being treated equitably in the division of property*. (June 7, 2010, p. 18, emphasis added)

The assumption here is that "the division of property" is separate from concerns around family violence. The only way this assumption can be made is if property is conceptualized in such a way as to exclude such notions as safety.

Proponents of the Act also separated property from the issue of housing supply. For example: "I fail to see how a matrimonial real property regime to protect the interests of women and their children in the case of marriage breakdown has anything to do with housing" (Brazeau, July 6, 2010, p. 18). Concerns that matrimonial real property rights may be related to rights to First Nation lands were also met with the argument that property should be bracketed: "…this [the Act] has nothing to do with lands; it has to do with matrimonial real property" (Brazeau, July 6, 2010, p. 16). Property, the Act's proponents asserted, should also be bracketed from political issues such as governance and the relationship between First Nations and the state. For example, "[t]he current piece of legislation is about matrimonial real property" and not "inherent right to self-government", "problems that exist in the *Indian Act"* or "this nation-to-nation relationship" (Brazeau, May 31, 2010, p. 8). Thus, the Act was about property and property was too narrowly conceptualized to include socioeconomic issues, violence, or anything else (see also, Mitchell, June 14, 2010, p. 7; Paré, May 10, 2010, p. 5; Ruth, June 7, 2010, p. 19).

Singer (2000a) has pointed out that problems of distribution (wealth, fairness, justice) are regularly segregated from efficiency concerns related to property. Property – that is, private property – is considered an effective vehicle for a particular social vision (a free enterprise society made up of autonomous individuals) that supposedly provides for human freedom (Hayek, 1973) and socioeconomic development (de Soto, 2000).

> The ownership model envisioned a society of equal individuals, widespread ownership of property, decentralization of power, and a particular mixture of freedom of action and limits on freedom of action to promote security of persons and property. It was associated with a laissez-faire economic philosophy and was the backbone of the so-called classical legal thought that was prevalent around the end of the nineteenth century and in the first decades of the twentieth century. (Singer, 2000a, pp. 11-12)

This perspective – which remains prevalent – assumes that "the meaning of property is clear" and that "property rights have a built-in structure and content" (Singer, 2000a, p. 7). It advises that the more entangled property becomes in distributive concerns, the less effective it will be, as such entanglements interfere with the "market solutions to social problems" (Singer, 2000a, p. 1). Therefore, despite the reasonable critique that the ownership model does not actually reflect property – in all its complexity and controversy – accurately, there has been a persistent drive to maintain property's closure. The national dialogue reflects this aim; almost all non-First Nations participants (whether in favour of or opposed to the Act) took for granted "…the absolutist conception of property [which] expresses strong and widely shared claims about the power of individuals to shape their own lives" (Singer, 2000a, pp. 12-13). Thus, the only reasonable expectation one could have of the Act was to establish a legal framework for matrimonial real property on reserve, which was limited to the *proper* concerns of property ownership, i.e., the rights to exclude, occupy, and divide/transfer the asset.

Bracketing matrimonial real property on reserve from the messy, unpleasant context of settler colonialism worked to relegate colonialism to the past. The issue of property on reserve in the present was separated from this "dark" history, and proponents of the Act characterized the relationship between First Nations and the federal government as a renewed and respectful one. For example, much was made about the "consultation" process that ultimately informed and resulted in the Act. Hon. Janis G. Johnson noted the "lengthy process of research, consultation and engagement" (June 16, 2010, p. 26). Hon. Chuck Strahl (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians and Minister of the Canadian Northern Economic Development Agency, CPC) described an "extensive process of consulting" involving "more than 100 meetings" in "every corner of the country and on a website" (May 31, 2010, pp. 9-10). He described it as an "honest effort to listen" (Strahl, May 31, 2010, pp. 9-10) resulting in 30 of the ministerial representative's

33 recommendations being taken up and included in the legislative solution. According to John Duncan (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC), "[t]his [consultation] process was not frivolous or poorly thought-out. It was long-standing; I think it went on for several months and there were many sessions. This consultation all went to inform the eventual legislative package, and significant amendments were made to the bill" (May 10, 2010, p. 2). This narrative about "good relations" with First Nations bolstered the sense of the Act's legitimacy, and was used to encourage wider support for the Act, and by extension, for the conceptualization of property represented by it.

5.4. A Legislative Gap Demands a Legislative Solution

> That is the purpose of this legislation; to close a legal gap. (Paré, May 31, 2010, p. 14)

The phrase "legislative gap" was widely used to describe the issue of matrimonial real property on reserve. NWAC, the AFN, INAC and the ministerial representative all employed this terminology in their final reports. MPs and Senators, regardless of whether they were Conservatives and supported the Act or members of other parties and opposed to it, also relied heavily on "legislative gap" to define the issue at the heart of the national dialogue. The gap referred to the lack of formal provincial and federal legislation dealing with matrimonial real property on reserve. As Senator Jaffer put it, "[t]here is a legislative gap. The courts have no authority to protect the matrimonial real property interests of spouses on reserve" (May 5, 2010, p. 18). The legislative gap made it impossible to "stop a spouse from selling their house; order that one spouse – normally the spouse who has sole custody of the children – have possession of the house; order the partition and sale of the family home; order one spouse to receive compensation from the sale of the house; or order that the spouse who has the house in his or her name not further encumber the property" (Jaffer, May 5, 2010, p. 19). These concerns, and the language in which they were expressed, were strongly linked to the ownership model of property – it was only because matrimonial real property on reserve was conceptualized according to provincial/territorial law (i.e., the ownership model) was it possible to identify the lack of this form of matrimonial real property on reserve. Certainly

it was true that the provincial/territorial laws that applied to MRP off reserve did not apply on reserve, and that no federal regime existed for MRP on reserve.[17] However, First Nation participants frequently attested to their communities having methods for dealing with matrimonial real property disputes.[18] Therefore, the term "legislative gap" could not have referred to a gap in First Nations law; indeed, it specifically referred to the absence of the same kind of government sanctioned legislative regime found off reserve and was based on a comparison of the on-reserve situation with the MRP law applied off reserve. If the analysis of the MRP on-reserve situation was not founded on "non-aboriginal notions of individual property ownership and the relationships of property, family and the proper role of law in regulating relationships to land and family relations" (Grant-John, 2007, p. 19) – in other words, on an ownership model conceptualization of property – and instead was rooted in First Nation perspectives, perhaps a legislative gap would not have been identified at all. There may have been agreement that ample First Nation law and tradition was already present to deal with the matter, and so a gap (if any) would not have referred to a lack of applicable law. Thus, I argue, the issue of MRP on reserve (i.e., the legislative gap) and its solution (i.e., the proposed legislation) was always defined by and contained within the dominant settler culture and its property norms (i.e., the ownership model).

The Act – the proposed legislative solution to the legislative gap – was a technical solution to a technical problem that would theoretically "eliminate the gap" (Ruth, April 13, 2010, p. 11), "close a legal gap" (Paré, May 31, 2010, p. 14), and "fill this void" (MacKinnon, May 31, 2010, p. 14). It was a "legislative approach" (Gabriel, June 7, 2010, p. 2) and a "legislative solution" (Strahl, May 31, 2010, p. 9) that would protect MRP interests on reserve by giving the courts authority over the matter. The Act was characterized as having two parts: first, it aimed to provide immediate protection through "the implementation of a federal regime"; and second, it provided a process (albeit always constrained within colonial powers) through which First Nations could have their own laws recognized (Johnson, June 16, 2010, p. 26). The Act approached MRP on reserve from an ownership model perspective: because proponents of the Act were conceptualizing matrimonial real property on reserve issues and solutions through the

[17] This is because reserve lands are under federal jurisdiction. For more details, see Chapter 1.
[18] This point is discussed in detail in Chapter 6.

ownership model, their particular ideas about the benefits of the Act were closely linked to notions about the benefits of private property. In cases where the interim federal legislation would apply, the Act set out the terms by which individuals could make claims to their property. Individuals could apply for a court order for exclusive occupation in non-urgent situations, or, in the case of family violence, for emergency protection orders, which could be obtained from a judge. The Act also described the process for dividing the assets held in the matrimonial home, which included several different applications that could be made to the court (Tiedemann, 2011). The Act was seen as a legal "tool kit" that provided for due process and legal equality through the legislation itself, and through a system of support that included provincial courts and police officers (e.g., to enforce exclusive occupation orders). It stated who was allowed to be where, when, and included timeframes, forms and paperwork, legal processes and language. By making property on reserve more like property off reserve – and therefore more like the ownership model of property – individuals could put the power of private property to work to solve disputes respecting shared property interests.

For example, exclusive occupation is, according to the ownership model, an important aspect of individual property rights. The Act, informed by the ownership model, provided for exclusive occupation, and this was lauded as an important benefit:

> I have had a case where the single parent of two children died suddenly and the boyfriend kicked the two children out of the home. They were 14 and 18 years of age. It would be nice to know that in this legislation they, or someone on their behalf, would be able to apply to have exclusive possession of the home. (MacKinnon, May 31, 2010, p. 14)

Likewise, the ownership model designates private property as some "thing" that can be separated from its owner and sold: it is a fungible asset. The Act specifically dealt with providing spouses their rights to a fair share of their MRP. In this way, the Act would protect the property interests of spouses, and provide greater economic security. This was considered very important, as a serious "economic cost" was associated with the legislative gap (Paré, May 10, 2010, p. 3). Aboriginal individuals, it was argued, often faced situations of lower socioeconomic status and poverty. The power of the ownership model was in making property on reserve a more easily dividable asset – as such, it could arguably alleviate the economic risks and burdens associated with marital breakdown. According to scholars such as Flanagan et al. (2010), the types of property currently present on reserve are highly problematic, lacking formality and having only a

tenuous basis in law. The proposed Act would not equate to the implementation of a private property regime such as the one Flanagan et al. (2010) recommend; however, it did attempt to apply private property principles to alleviate uncertainty, and the proponents of this approach argued in favour of these benefits. This position effectively skirts the issue of the colonial state's responsibility for socio-economic conditions of poverty and marginalization on reserves, and asserts that implementing a private property-like MRP regime at the scale of the reserve could have an emancipatory effect. Thus, the characteristics of ownership model entrenched in the Act were frequently highlighted as "cures" for matrimonial real property "ills" on reserve – for CP holders, anyway.

5.4.1. A "good" Act: Asserting the ownership model's ethical dimensions

A good deal of the discourse around the "legislative gap" was related to rights. For example, David Langtry (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC) stated that "bill S-4 deals with fundamental human rights issues" (May 31, 2010, p. 1). Hon. Rona Ambrose asserted that because Aboriginal women "have not been able to access the Canadian legal system to resolve matters concerning their real property" they are "frankly being denied their very basic human rights" (November 1, 2012, p. 21). Christopher Devlin (Executive Member, National Aboriginal Law Section, Canadian Bar Association) asserted: "There is no question that this bill is about the children and that it provides enhanced legal rights for those children, whether they are Indian or non-Indian" (May 31, 2010, p. 6). According to Danalyn Mackinnon (Barrister and Solicitor), the legislative gap was "a void that represents a denial of rights for individual First Nation spouses, their families and for First Nation communities" (May 31, 2010, p. 14). For Betty Ann Lavallée (National Chief, Congress of Aboriginal People), and many others, this gap in both legislation and human rights was highly discriminatory:

> Aboriginal men and women living on reserve face unfair and unconstitutional discrimination when they are barred from exercising their right to a fair share of matrimonial real property after the breakup of a marriage or common law relationship. (May 31, 2010, p. 9)

Many speakers emphasized that the consequences of the legislative gap were very negative. For example:

> The consequences have been nothing less than *devastating*. Abuses of MRP rights in First Nations communities have left people *homeless, impoverished and ostracized*. Mothers and children are thrown out of their family homes and, often, they have to leave their communities. (Ruth, April 13, 2010, p. 11, emphasis added)

The legislative gap, then, was represented as a kind of rights gap that was said to have caused "terrible injustices" for some of Canada's "most vulnerable citizens" (Ruth, April 13, 2010, p. 11). According to John Duncan (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC) and other proponents of the Act, this "misery" could be ended through the implementation of the proposed legislation; this was the "work" that the ownership model could do. Indeed, for many of the participants, the Act had a moral agenda.

The proponents of the Act believed it would create equality by extending the same property rights that spouses living off reserve have, to spouses living on reserves. For example, Bill C-47 sponsor Hon. Chuck Strahl emphasized that "spouses and common law partners living on reserves would be able to access a range of MRP rights and remedies similar to those off reserve" (May 13, 2008, p. 33). Here, Strahl suggests that the norms and principles guiding matrimonial property law in the provinces and territories should be *extended* to (as opposed to different for) people living on reserve. James Moore (Parliamentary Secretary to the Minister of Public Works and Government Services and for the Pacific Gateway and the Vancouver-Whistler Olympics, CPC) asserted, "All Canadian women, including native women and indeed everyone *should* be governed by the same laws and enjoy the same protections. In this country, we must have equality before the law" (May 13, 2008, p. 103, emphasis added). For Moore, and others (e.g., Jaffer, May 5, 2010, p. 19; Langtry, May 31, 2010, p. 1), applying the same approach to property off reserve to on-reserve contexts would bring "equality before the law." Derek Lee pointed out that MRP law was similar among all provinces, a fact that he then leveraged to argue that the same laws should apply across the country, including to First Nations: "At the end of the day, it will not be fair if those decisions are made and are way out of keeping with prevailing legal norms" (May 13, 2008, p. 112). The Act reflected the formal regulatory structures and processes found in the provincial/territorial laws applied off reserve; according to its proponents, the Act would empower the Canadian justice system to intervene thus giving First Nation spouses access to the "rights and protections [that] are available to all other Canadians through provincial and territorial

law" (Ambrose, Nov. 1, 2012, p. 21). As a result, the Act (it was argued) would effectively "level the playing field" by treating property on reserve the same way it is treated off reserve. As Betty Ann Lavallée (National Chief, Congress of Aboriginal People) stated, "[l]et us have the courage to provide the legal tools for Aboriginal spouses and their children to use the rule of law on reserve as their brothers and sisters can now use it off reserve" (May 31, 2010, p. 10). Similarly, Senator Jaffer stated, "…there is a need for legislation so all Canadians have the same rights" (May 5, 2010, p. 19). From this perspective, a technical solution that imbued property on reserve with the attributes of the ownership model would make spouses (especially women) living on reserve *equal* to spouses living off reserve. And, once again, the state's role in inequality and socio-economic conditions of poverty and marginalization on reserve were bracketed.

In an ironic twist, given simultaneous efforts to bracket property from such concerns, some proponents of the Act asserted that, in addition to the power to address inequality, the Act was also capable of effectively protecting "vulnerable citizens" (Ruth, April 13, 2010, p. 11). This position relied on first establishing Aboriginal women and children as extremely vulnerable and in need of protection. John Duncan (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC) stated "spousal abuse and family breakdowns on reserve are significantly higher than in the rest of the population" (May 10, 2010, p. 3 citing statistics from the *Report of the Aboriginal Justice Inquiry of Manitoba*). David Langtry (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC) pointed out that "it is women who most often suffer disadvantage following marital breakup" (May 31, 2010, p. 2). Duncan linked these observations with the legislative gap, elaborating on the gap's victimization of Aboriginal women and children:

> The legislative gap has affected countless victims; many of these victims are women and children, often among the most impoverished and vulnerable of citizens. Members of the committee are familiar with the heart-wrenching stories of mothers and children forced to leave their family homes and communities due to family violence. Compounding this misery is the fact that Canada's justice system is powerless to intervene. (May 10, 2010, p. 1)

Duncan's statement implies that the legislative gap alone caused impoverishment, misery, and homelessness, and colonial history was excluded. The "heart-wrenching

stories" are made out to be the result of a lack of property law, which would quickly be resolved by the implementation of the Act:

> Until matrimonial real property laws are in place, aboriginal women who are living on reserve will continue to face the reality that in the event of spousal violence, separation, divorce or death, the law does not protect their property. It does not protect their interests. It does not protect their rights, but most fundamentally, it does not protect their safety. (Ambrose, Nov. 1, 2012, pp. 21-22)

Indeed, the Act would provide for "the protection of women and their children against violence" (Langtry, May 31, 2010, p. 1). The power of the Act to protect property rights, for example, though exclusive occupation orders, would in turn protect individuals from physical harm. The colonial history that led to the poverty, housing shortages, family violence, and marginalization that are often experienced on First Nation reserves was not mentioned. Also neglected in this narrative was the diversity, strength, intelligence and resilience displayed by First Nation women, children and, indeed, their communities when dealing with MRP on reserve, not to mention, living conditions on reserve and racism more broadly.

Blomley (2004) has argued that "[w]hat property *is*, and what it *ought* to be, are inseparable questions" (p. 104). Statements such as the ones outlined above expressed a largely gendered reading of the issue and accentuated "the cold, hard ugly facts" of vulnerability, and abuse that First Nation women and children on reserve "face day in and day out" (Ambrose, Nov. 1, 2012, p. 20). Such narratives also represented property legislation as being a powerful antidote able to correct the situation. "This legislation would finally eliminate the longstanding human rights gap" (Ambrose, Nov. 1, 2012, p. 22). Senator Nancy Ruth emphasized "the worthy purpose of Bill S-4 – protecting vulnerable Canadians" (Ruth, April 13, 2010, p. 12), and Hon Janis G. Johnson asserted, "this legislation is *necessary*" (June 16, 2010, p. 27, emphasis added). The Act would put an "end to this injustice" (Duncan, May 10, 2010, pp. 1-2), "save" more First Nation women, and "ensure" their "escape [from] violence" (Ambrose, Nov. 1, 2012, p. 21). Thus, the work of property – when conceptualized as per the ownership model and formalized in law – was to provide for the protection of individual rights, create equality, and put an end to "pain and suffering."

Here, I want to draw attention to the "individualistic nature of existing human rights discourse" (Holder & Corntassel, 2002, p. 126). Indeed, the discourse around MRP on reserve and the potential power of the Act reflected a liberal prioritizing of the individual that may not have reflected the aspirations of the First Nations affected by it. Indigenous peoples' views of their rights often emphasize collective interests, and tend not to be based solely on liberal philosophies. As Ivison (2003) has stated, "[f]rom the perspective of indigenous peoples, at least as I understand it, their [Indigenous] rights stem from their own collective lives, self-understandings, political philosophies and practices. And they are justified in light of them" (p. 321). Nonetheless, as Holder and Corntassel (2002) have argued, "[b]oth liberal-individualists and corporatists locate the importance of group interests in the personal psychology of individual group members. As a result, they treat group interests (such as cultural integrity) as not only different in kind from individualized interests such as freedom of expression but as potentially in competition with them" (p. 129). Individual and collective rights, then, are not dichotomous, yet individual rights are privileged. The individual has special status within the collectivity represented by the nation-state, but as Freeman (1995) points out, "[i]t is precisely collectivities systematically unrepresented by states that are anomalies in liberal-democratic theory" (p. 27).

Despite the tension between individual and collective rights, the "rights talk" in the national dialogue worked to give the Act the appearance of being morally good and ethically right. Todd Russell (Labrador, Lib.) pointed out that "[t]he government defends this bill by invoking the *language of rights*" (May 14, 2009, p. 42, emphasis added). Employing a "language of rights" to discuss matrimonial real property legislation served an important purpose. It was a very effective way to justify the identification of a problematic legislative gap demanding immediate attention. For example, John Duncan (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, CPC) claimed, "[t]he bill eliminates a form of legally sanctioned inequity against residents of First Nation communities, an inequity that serves to alienate many Aboriginal people" (May 10, 1010, pp. 1-2). Duncan used strong language that seemed to suggest that "good law" was needed to overcome "bad law." However, without highlighting the "injustices" and the "inequality in rights" the seriousness of the matter could be thrown into question, doubted. In this way, legislation related to property – property law – was represented as an ethical issue, and a very grave one at that. Once the MRP on reserve

issue was defined as a legislative gap characterized as severely negating human rights and having critically important ethical implications, the federal government's legislative solution would be "beyond reproach." Situating the issue in this way, in effect, equated questioning the Act's general "goodness" with criticizing the protection of vulnerable citizens' human rights.

In further defence of the proposed legislative solution's "goodness" and "rightness," various academic and other authorities were cited in support of it. The Act, it was stated, was informed by several authoritative reports and studies. According to Senator Nancy Ruth, there had been a "multitude of research studies and international calls for action" (April 13, 2010, p. 12), and Hon. Chuck Strahl stated that "domestic and international bodies have studied the issue and consistently recommended legislative action" (May 31, 2010, p. 8). Other examples of this narrative proliferated:

> A third reason to support Bill S-4 is that it is informed by multiple research studies, and engagement and consultation sessions. Independent groups, including national Aboriginal organizations and United Nations bodies, conducted much of this work. (Duncan, May 10, 2010, p. 2)
>
> …research that has been done over the years: standing committee reports, international recommendations, discussion papers and public education information sessions that were held by the departmental officials. (Paré, May 10, 2010, p. 3)

Not only could this grave problem be effectively resolved through the implementation of the proposed legislative solution, it was supported by research and numerous national, international and Aboriginal reports. Enrolling other resources in this way bolstered the Act's credibility; it was not only presented as a progressive and reconciliatory approach to matrimonial real property on reserve, but as a highly defensible one.

5.4.2. A legal mechanism for First Nation MRP laws

Proponents of the Act stated that the federal matrimonial property law (one part of the two part legislation) was intended as an interim measure to protect First Nations women and children while First Nations developed their own, culturally appropriate laws. The second part of the legislative solution, therefore, involved a legal mechanism through which First Nations could formally establish their own laws. According to its proponents the Act directly responded to Aboriginal people's concerns that MRP be

dealt with by Aboriginal people (Duncan, May 10, 2010, p. 2). Senator Nancy Ruth affirmed her party's position that "[t]he bill recognizes that First Nations are best placed to develop their own MRP laws" (April 13, 2010, p. 11). The federal government placed a good deal of emphasis on the provision for First Nation "customs," "cultures," and "traditions" (Duncan, May 10, 2010, pp. 1-2; Ruth, April 13, 2010, p. 11). "First Nations shall determine marital property according to their customs" (Andreychuk, June 14, 2010, p.6), and "the First Nation's own culture, knowledge and experience must be reflected" (Jaffer, May 5, 2010, p. 19).

The Act required certain standards be met in the passing of the First Nation's law. The 2008, 2009 and 2010 versions of the Act (Bills C-47, C-8 and S-4) were essentially the same. They required a "verification officer to monitor and certify the approval process" and the approval of 25% of eligible voters (Gay & Tiedemann, 2010; Tiedemann, 2008; Tiedemann, 2009). Thus, the Act demanded a democratic approach. For example, John Duncan (M.P. and Parliamentary Secretary to the Minister of Indian Affairs and Northern Development) stated: "Bill S-4 requires that these laws earn the support of a majority of First Nation members as expressed through a democratic vote" (May 10, 2010, p. 2), and as long as the process was democratic, a First Nation "can put anything in the regime they wish to put in" (May 10, 2010, p. 4).[19] Furthermore, Duncan emphasized that the Minister would not review First Nation laws or have any power to influence them: "[l]aws approved by a First Nations community are not subject to review by the minister or any other Government of Canada official" (Duncan, May 10, 2010, p. 2). Theoretically, First Nations could create MRP laws that completely reflected their priorities, values and cultures (i.e., the federal government was not prescriptive about what could be included in a First Nation's MRP law).

However, much was made about the inability of the Minister to *recognize* First Nations laws in the absence of the Act. Hon. Chuck Strahl (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians and Minister of the Canadian Northern Economic Development Agency) described the situation as follows:

[19] Amendments to this process were made in response to opposition; the most recent version of the Act (Bill S-2) states that at least 25% of eligible voters must participate in a vote on a proposed law, and that approval must be granted by the majority of those participating. The verification officer did not appear in this Act.

> Currently, without this bill, we would be left with a strange position. A First Nation can develop its own code, and that is wonderful, but I cannot recognize it, the courts cannot recognize it and no one can recognize it. This bill will allow us to move ahead with what I think is a perfect resolution. First Nations have developed a matrimonial property rights regime that will work for them and their people, and I want to be able to recognize it. Right now, I do not have the legal authority to recognize even that it exists, which is a shame. I would love to be able to say to those who have gone through a process and had it ratified that I am with them all the way. However, I have no authority under this bill to amend it, to change it or to put my stamp on it. It will be 100-per-cent Aboriginal, and I will be able to salute them for their good work. We will be able to recognize that work when this proposed legislation is in place. (May 31, 2010, p. 10)

This is a curious explanation of the situation. First, Strahl uses the term "strange" to describe his inability to recognize First Nation laws – "wonderful" though they may be. In doing so, he relegates his position to the realm of the mysterious, as if no reasonable explanation for the power imbalance could ever be identified. His responsibility, as Minister of Indian Affairs and Northern Development and as a member of the colonial state, for the status of First Nations within Canada was entirely side-stepped. History and geography were quashed. Second, he characterized himself as a victim of his mysterious position by emphasizing how much he would "love" to ratify First Nation law. If only he were able, Strahl would "salute" First Nations "for their good work." In effect, the Act would *allow* First Nations to create property laws *that could be recognized*, and therefore, that would have power. A "perfect resolution," according to Strahl.

This provision for First Nations to create their own laws was underscored repeatedly by proponents of the Act as both positive and respectful of First Nations culture and jurisdiction. In many respects, property "other" than the ownership model was being acknowledged. However, the dominant conceptualization of property as a formal regulation remained evident, as was the aspiration of harmonizing the process through which that formal regulation was implemented across the country. The process for enacting First Nation laws was entirely dictated by the status quo system of governance; it involved non-First Nations approaches to governance and law-making, and was therefore prescriptive. Furthermore, First Nations that had already created their own laws could not have those laws recognized until the Act was passed in parliament, and the "correct" process for establishing those laws had been followed. As Blomley (2004) notes, "[p]roperty relations acknowledged by the state are granted rights-status"

(Blomley, 2004, p. 4). Therefore, First Nations individuals who have custom-allotted property not registered with the federal government, and First Nations that do not subscribe to the Act's formulation of First Nation law, will not have their property rights recognized or protected.

The overall framing of the Act remained based on a non-First Nations conceptualization of property. As such, it only offered a token form of recognition of First Nations jurisdiction. Indeed, the Act provided an MRP regime based on the ownership model of property, and First Nations would be subject to an ownership model of matrimonial real property, and would have only non-First Nations regulatory frameworks and enforcement infrastructure available to them until such time that they developed laws reflecting their own cultures. Furthermore, the process through which First Nations could resurrect their customary legal systems (or establish new ones) by the terms of this Act was non-First Nations (e.g., referendum). Given the socioeconomic context of many reserves (see Chapter 2), insufficient financial and human resources would significantly undermine the timely development and implementation of First Nation MRP regimes, and overtures of recognition and respect for difference would easily give way to further subjugation of First Nations.

5.5. Conclusion

The proposed legislative approach reflected the off-reserve property regime defined by the ownership model of matrimonial real property in which property is uncritically equated with particular conceptualization of private property. Despite property on reserve being distinct and different (both legally and culturally) from off-reserve property, the ownership model that dominates off-reserve contexts would be applied on reserve through the *Family Homes on Reserve Act.* As Joe Comartin (Windsor-Tecumseh, NDP) observes, "This is the regime we expect you follow because that is what we follow in the rest of Canadian society" (May 15, 2008, p. 56). In many respects, the dominance of the private property concepts (and the absence of Indigenous property concepts) in the definitions of MRP presumed that it was the "normal" and best way to approach MRP on reserve. Numerous statements were made in the national dialogue that matrimonial real property rights on reserve should be the same as those applied off reserve. As Derek Lee (Scarborough-Rough River, Lib.) argued, "There needs to be

consistency across the country and if not across the country, at least within a province. What happens in a family breakup on a reserve can be roughly consistent with what happens in a breakup elsewhere" (May 13, 2008, p. 111).

This insistence on "consistency" across on and off reserve spaces was compelling. MRP, from this perspective, should be dealt with in a spatially unified way, implying that the spaces of First Nation reserves should be made consistent with, or similar to, the safer, more "lawful" spaces off reserve. To do otherwise would be unfair, unjust, and accentuate difference. This perspective reveals a certain level of anxiety around difference. Following Egan and Place (2013), I argue that the proponents of the Act were seeking to "smooth over or patch" the matrimonial real property gap, and to integrate it "more neatly with the political-economic forms of the settler state" (p. 136). In other words, the federal government, moved by liberal notions of equality across space, expected First Nations to adopt the approach taken to MRP off reserve and apply it to their family homes on reserves, or to come up with their own models subject to state approval. At the same time, the differences between on-reserve and off-reserve property could not be avoided, and participants in the national dialogue grappled with them. This narrative, while certainly an example of the ownership model's dominance, was also a moment in which this dominance was reflected upon, if only implicitly. The ownership model of private property, as I have argued, is largely a self-evident category; it is powerfully prevalent yet rarely acknowledged as such, and therefore taken-for-granted, unquestioned. However, as the differences between property on and off reserve were grappled with, private property was explicitly acknowledged in contrast to "other" property. Thus, at the property "gap," the hegemony of the ownership model – property as private property – was evident, yet its status as such became visible at the same time.

The ownership model of property served to bracket property within the MRP on reserve discourse, and reflected a Eurocentric perspective of property and governance. The technical approach to law tends to perceive legal issues as bracketed from contextual factors, such as socioeconomic conditions, housing shortages and band membership issues; the MRP "problem" was simply a gap in the law that could be fixed through the (relatively) straightforward process of creating a new law. However, it is critical to note that there could be many ways in which to describe the issues experienced by First Nations people around matrimonial real property. In other words,

the term “legislative gap” should not be taken-for-granted as the best or only way to understand or describe those issues. It is important to note – especially given the importance of these MRP definitions in laying the groundwork for the discussions that followed – that Indigenous perspectives of the family home, the land upon which it sits, and the rights that spouses may have in it, were absent from all of the moments in which MRP was explicitly defined. The next chapter provides some insight into what the presence of Indigenous perspectives in defining family property might have looked like, such as the inclusion of community interests, collective property rights, hereditary property rights, First Nation languages and traditional territories, and Indigenous legal concepts and practices. Indeed, First Nation participants criticized the dominant conceptualization in which important and consequential differences on reserve were overlooked. Here, it starts to become clear that the meaning of property, and matrimonial real property, is neither self-evident nor agreed upon. The approach taken to understanding and resolving the matrimonial real property on reserve issue was also largely dependent on the conceptualization of property informing it. In other words, while the ownership model’s central principles were deployed in defining the legislative gap and its solution, alternative visions of property yielded different perspectives on the issue, and how it should be resolved.

6. Counter-Conceptualizations: Property as "Something Else"

> The relevant standard in federal analysis is what the law provides off reserves, while for First Nations the relevant standard is the recognition of the validity of First Nation values and traditions in relation to land and family. (Grant-John, 2007, p. 19)

6.1. Introduction

In the previous chapter, I argued that the Act reflected a dominant conceptualization of property known as the ownership model. There was an implicit taken-for-grantedness whereby the ownership model defined both the problem and the solution, especially among the MPs and Senators who supported the Act. Regardless of how centrally and powerfully situated this conceptualization was within the national dialogue, it was not the only conceptualization evident, nor was it undisputed. There were many individuals and organizations with different interests and positions who emphasized that a broad range of issues were related to MRP on reserve, and who offered alternative analyses of the proposed Act. These perspectives were most evident in the Standing Senate Committee hearings that took place in 2010 on Bill S-4 and "witnesses" (mainly individuals who were not members of government) were given the opportunity to present their positions on the proposed legislation. Many First Nation individuals – people who would be affected by the proposed legislation – shared information about MRP on reserve and perspectives regarding the Act's feasibility and effectiveness. While some of the witnesses spoke in support of the Act during these hearings (e.g., representatives of the government), many more argued strongly that the Act was problematic on a number of levels. In making these arguments, "other" conceptualizations of property emerged which challenged the ownership model and its dominance.

In this chapter, I start by exploring conceptualizations of matrimonial real property defined by notions other than the ownership model. I argue that, while no single, unified

conceptualization of matrimonial real property emerged as an "alternative" to the ownership model, common themes were present that linked these perspectives into what might be called a "counter-conceptualization." For example, the importance of collective property rights and community well-being were frequently mentioned. Likewise, the entanglement (rather than separateness) of property with other issues (e.g., social contexts such as the prevalence of domestic violence, housing shortages and the effects of colonialism) was considered important. The result was a conceptualization that countered the work of the ownership model to disentangle property from various contexts; property was "broadened" and matrimonial real property was conceptualized as something comprehensive and relational. Finally, I show how this approach to property resulted in a different understanding of the "gap" and its solution.

6.2. First Nation Approaches to Matrimonial Real Property

Overstall (2004) suggests that the term property is problematic when applied to Indigenous peoples' perspectives on land tenure and the interconnectedness of the space of the family home with the social fabric of the community (Banner, 1999; Bryan, 2000; Overstall, 2004). For many First Nation witnesses, "property" and "ownership" were terms intimately bound up with a non-First Nation, settler culture; as such, they were not considered appropriate or accurate. For example, Chief Austin Bear (Muskoday First Nation) apologized for using the term property when he spoke during the Committee hearing: "…property – forgive me, I have to use this term" (May 31, 2010, p. 1). In doing so, he implied that the term property was not suitable for a discussion of First Nation approaches to land tenure and family matters. This served as a reminder that using non-Indigenous terms such as "property" and "ownership" to describe the First Nation land tenure systems can be contradictory and/or inaccurate. First Nations have been dealing with property rights related to the family home since time immemorial, and they continue to do so through the informal (i.e., not legally recognized by Canada) application of custom codes, or through the development of formal legal frameworks. Each First Nation had (and has) its own approach to property rights related to the family home. As Chief Noah Augustine (Co-chair, Atlantic Policy Congress of First Nations Chiefs) reminds us: "Our cultures are as different as the English are from the French. That is sometimes lost in Canada, but there are huge distinctions within our cultures" (June 7, 2010, p. 6). At the broader level of the counter-conceptualization, however,

some similarities emerged that I think are important to highlight. First, MRP was more than a thing, more than a fungible asset; it was the family home, and, as such, had implications for individual men, women and children, as well as for families and communities. Second, matrimonial real property was frequently conceptualized in the context of collective property rights; most First Nation witnesses did not give individual property as expressed by the ownership model the same level of priority or supremacy as it was given by proponents of the Act. In other words, matrimonial real property was not an individual matter and was seen as having important implications for community well-being.

During the 2010 Standing Senate Committee hearings, First Nation witnesses frequently asserted their conceptualizations of land tenure, and participants in the national dialogue began to distinguish "Indigenous laws" and "custom codes" from "federal law" and the "Westminster model" of property (Dyck, May 31, 2010, p. 7). However, as Chief Marie-Anne Day Walker-Pelletier (Chair of the Saskatchewan First Nations Women's Commission of the Federation of Saskatchewan Indian Nations) pointed out, "to put our traditional teachings and our traditional thinking into a legal viewpoint is often very hard to do" (June 7, 2010, p.8). Nonetheless, witnesses did their best to "translate" their conceptualizations of property into non-Indigenous terms. Witnesses reminded the Standing Senate Committee that First Nations all had their own legal frameworks for dealing with land tenure and family matters prior to colonization and the imposition of colonial laws that followed (see Meawasige, June 7, 2010, p. 13; Hillier, May 31, 2010, p. 11). As Mike Mitchell (Grand Chief of the Mohawk Council of Akwesasne) explained:

> When the Europeans first came upon our people, I want to tell you what they saw, what type of people were there. They encountered a people whose society, law making and governance comprised of women who would put up the leaders. If they were not good leaders, the women of the various clans would take the men out of office. (May 31, 2010, p. 20)

Here, Mitchell described a matriarchal system of governance. For many First Nations, women traditionally played powerful roles in land tenure and family law. Unlike in the patriarchal settler culture where property was firmly situated in the masculine realm, First Nation "property" represented a different gender construction. Jean Crowder (Nanaimo-Cowichan, NDP), who spoke as a representative of government and not on behalf of a

First Nation, shared her understanding of First Nation law and governance in pre-colonial times:

> Prior to colonization, First Nations' cultural norms, kinship systems and laws determined the outcomes of marriage breakdown. Matriarchal kinship systems and egalitarian values were common. We have a history where, prior to contact and colonialism, First Nations had their own rules and regulations when families disbanded. (May 14, 2009, p. 51)

Conceptualizations of property, then, are also conceptualizations of gender. As First Nation witnesses asserted their understandings of the family home, they spoke back against the gender conceptualization of many non-Aboriginal voices in the national dialogue that characterized First Nation women as victims who might be saved by the ownership model of property.

Participants in the national dialogue challenged the ownership model when they asserted a conceptualization of matrimonial real property that included relationships, in particular, relationship to land and family. Grant-John (2007) reported that, "throughout the consultation and dialogue process, First Nation people said the issue of matrimonial real property concerns relationship to land and family relations" (p. 27). Furthermore, as Chief Angus Toulouse (Ontario Regional Chief, Chiefs of Ontario) stated, "[l]and and family issues are so fundamental to First Nation societies and cultures" (May 31, 2010, p. 19). Chief Shining Turtle (Anishinabek Nation) described matrimonial real property as a "social framework" (June 7, 2010, p. 17). He explained that the home can either support or harm a family: "If I put you in an ant trap, you will have a family problem. If I squeeze your family into 500 square feet, there will be social turmoil" (Shining Turtle, June 7, 2010, p. 17). "The idea of absolute individual property protection and the security that it brings has pervasive and enduring power in our lives" (Underkuffler-Freund, 1995-96, p. 1047). But as Chief Shining Turtle and others have pointed out, security comes from much more than the protection of individual interests; instead, matrimonial real property really means the family home, which has the power to nurture harmony within a family, or to disrupt that harmony. In turn, the well-being of families was seen to have implications for the community overall. Thus, matrimonial real property was conceptualized much more broadly than a fungible commodity that could be owned to the exclusion of others; it had a central and interconnected role in First Nation society and culture (land tenure, family relations, community relations). Indeed, matrimonial real property could not be conceptualized as something limited to the interests of the

individual spouses, and only to the extent that the shared property was divided fairly; it was an essential thread in the social web of a Nation with unlimited potential impacts.

Several First Nation witnesses provided specific information about their traditional approaches to the family home (matrimonial property). Emma Meawasige (Elder, Serpent River First Nation, Anishinabek Nation), presented the following evidence in which she describes her Nation's approach to matrimonial real property:

> Most disputes are family related and resolved by family and other elders of the community, if needed. That is how our families have always resolved a problem. Therefore, it would not be a problem to resolve the MRP. *We do not call it MRP*. The elders that are there respect the care of the home and the children, because we have always looked after our own, and we still do, no matter what. If other elders are needed to support the families, they are always there. (June 7, 2010, p. 19, emphasis added)

Emma Meawasige insisted that "matrimonial real property" was not a term normally used in her community. Several witnesses from different Nations described a practice respecting matrimonial property rights in which the male spouse leaves the family home to the wife and children without contest. For example, Grand Chief Mike Mitchell (Mohawk Council of Akwesasne) stated:

> In a family situation, a man and a woman got together to raise a family, to become a family, and if at any time the marriage did not work out, the man left. He left the house, he left the property in good condition and it went to the wife and the family. In this society, it was incumbent upon him to look after his family, and he left, went back to his home community. In 1899, we had a representative from Canada come down and say, that is not democracy. We want to bring you the *Indian Act*; that is democracy. (May 31, 2010, p. 20)

According to Chief Noah Augustine (Co-chair, Atlantic Policy Congress of First Nations Chiefs):

> The practice in my community with respect to matrimonial issues is that the man would leave the house. In situations of domestic dispute, it has been the cultural practice of my community for as long as I have known that the man leaves the house. That is well accepted in my community. They should know themselves that they have to leave, but if they do not, they are assisted with their departure. (June 7, 2010, pp. 7 and 9)

Chief William K. Montour (Six Nations of the Grand River) illustrated the continuation of this practice with a personal anecdote:

> In my personal case, when my first wife and I parted, I took two suitcases and left. I still believe that women own the land, own the house and own the children. That is my belief. Several friends of mine have gone through the same thing. In fact, I drove one individual home one night, and his wife said, "Your stuff is in the garage; please leave." He left. It does still happen today. (May 31, 2010, p. 22)

Emma Meawasige echoed this perspective of property rights in the family home:

> Mothers are the caregivers in the home, with support from the men folk. The caregiver in the home always had the full entitlement of the home and belongings. This way, children were always secure for home and care. (June 7, 2010, p. 13)

Other witnesses made similar representations about traditional approaches to the family home (see, for example, Bear, May 31, 2010, p. 6). These accounts of traditional MRP laws or codes may not always be reflected in how disputes over the family home are resolved "on the ground." Nonetheless, they do provide some important insight into First Nation witnesses' perspectives of the Act's approach to MRP. These statements describe rights to the family home as belonging to the female spouse and the children, and not as a fungible asset as it is in the ownership model; it was a protected space set aside for the purpose of raising a family. Gender and property were linked. From this perspective, gender and role within the family (i.e., caregiver) were much more important to determining property rights than the notion of fee simple or private ownership, and indeed, it may even have been a rejection of the idea that the family home was "property" of any sort. As Chief Austin Bear (Muskoday First Nation) stated, "[i]n our community, decency and common sense prevailed" (May 31, 2010, p. 6) when determining rights to the family home in situations of marital breakdown, not ownership as per the ownership model. Thus, these witnesses rejected the proposed legislation because it was seen as an imposition of colonial approaches to land tenure and family law.

In addition to these examples of First Nations having codes prior to contact and colonization were examples of First Nations creating their own "modern" laws for dealing with matrimonial real property. An example of this was the *First Nations Land Management Act* (FNLMA), a framework for First Nations to opt out of the land sections of the *Indian Act*. It allows First Nations to "establish a community process in its land code to develop rules and procedures applicable on the breakdown of marriage to the use, occupancy and possession of its lands and the division of interests in the First

Nations land" (Bear, May 31, 2010, p. 1). Chief Austin Bear (Muskoday First Nation) stated that the FNMLA framework for MRP attended to the "four basic rights under family law": "the right to possession of the matrimonial home; the right to a division of family property; three, the equality of treatment between spouses; and, four, the right to compensation for spousal interest" (May 31, 2010, p. 2). These four basic rights reflect provincial/territorial (dominant) legal norms respecting matrimonial real property; thus, the FNLMA framework is an example of First Nation laws that adopt, at least to some extent, an ownership model conceptualization of property.

Some First Nations have developed MRP laws outside of the FNLMA framework that reflect First Nation conceptualizations of property. For example, Chief William K. Montour (Six Nations of the Grand River) describes the Six Nation law as "a comprehensive law that addresses the property as well as the best interests of the children and the nature of the family tenure in our community" (May 31, 2010, p.18). This modern First Nation MRP law differed from the dominant provincial/territorial approaches to the family home, and emphasized the importance of the law being context-specific as opposed to what he calls the "cookie cutter approach" (Montour, May 31, 2010, p.18). The Akwesasne First Nation likewise developed a modern MRP law that drew on their culture and values (as opposed to drawing only on provincial/territorial models). Chief Julie Phillips-Jacobs (Mohawk Council of Akwesasne) explained that the Akwesasne based their MRP law on the "principle that it is our responsibility to provide for the seven generations to come" (May 31, 2010, p. 21). Other witnesses also described modern approaches to MRP that were strongly linked to their First Nation traditional practices. Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University), for example, stated: Matrimonial property gets dealt with somewhat informally. Communities in my region have unwritten codes, whether it is the man leaves the house or whoever has the children gets the house, but there are processes in place" (June 7, 2010, p. 11). Furthermore, she asserted, "[t]here are just as many Aboriginal women who have resolved their matrimonial property issues informally on reserve, according to traditions and customs" (Palmater, June 7, 2010, p. 19).

When participants in the national dialogue talked about MRP and its power to protect individual rights, they were frequently referring to the property rights of Aboriginal women. Many First Nation (and even some non-First Nation) witnesses at the Senate

Committee hearings who opposed the proposed legislative solution challenged this assumption. From their perspectives, MRP involved individual men, women and children, as well as families and communities. The following quote sums up this perspective:

> A fundamental difference in world view is involved. The principle behind Bill S-4 is protecting Aboriginal women. Aboriginal people look at the entire community. We talk about a bill protecting individual rights. Aboriginal people talk about protecting community rights, which include individuals. The situation is not either/or. The ministerial representative specifically said this is a false dichotomy perpetrated repeatedly by Canada to push forward individual rights over collective rights. (Palmater, June 7, 2010, p. 12)

It is important to again note that this view was not universal. For example, NWAC was concerned with protecting the rights of individuals (i.e., First Nation women); however, it still situated women's well-being within a community context. In any case, this evidence "troubles" the dominant conceptualization in which property is connected to an individual, and MRP is associated with individual women. Instead, for many First Nation witnesses, the individual was situated within both family and community, and all were involved in a *relationship* with the family home.

While certainly not always the case, First Nations' conceptualizations of property tended to prioritize (or emphasize) collective interests (as opposed to individual interests). Chief Shining Turtle (Anishinabek Nation) stated: "We are not social societies like your norm. You are individual by nature. Wherever you come from in your world […] you are very individual. We are collective by nature" (June 7, 2010, p. 16). Many First Nation witnesses contrasted the notion of individual ownership (as per the ownership model of property) with their own perspectives, often describing a worldview in which "ownership" as a concept did not apply. For example, Emma Meawasige (Elder, Serpent River First Nation) explained:

> Our lives did not have monetary Value. We were taught that the Creator made his creation for all of us to respect and enjoy. *Ownership was never an issue*. (June 7, 2010, p. 13, emphasis added)

In a letter written by Chief Louise Hillier (Caldwell First Nation), she described the importance her Nation placed on collective interests: "At the heart of First Nations is kindness and sharing. We understand that we have always embraced the concept of collective rights. We have always shared together and together we care for all that the

creator has placed here" (May 31, 2010, p. 11). In the following statement, Chief Hillier essentially acknowledged the dominance of the ownership model, and called for the return of her Nation's conceptualization of property: "How many generations will it take to reinstate what we value over individual ownership?" (May 31, 2010, p. 11).

The notion of collective property is more than the federal government holding reserve lands "communally in trust for future generations" (Strahl, May 31, 2010, p. 10); the reserve is almost always a part of a larger traditional territory that has been occupied by the First Nation since time immemorial and so often represents a home land. The importance of retaining rights to the reserve for the whole First Nation was a priority that, for some, would be threatened by the legal protection of individual rights to land as per the Act. Although the Act did not create a right to sell property located on reserve lands to non-members, many witnesses in the 2010 Standing Senate Committee hearings expressed concern that Bill S-4 would nonetheless allow non-First Nations to acquire property rights to reserve lands (see, for example, Lovelace Nicholas, May 10, 2010, p. 3; Devlin, May 31, 2010, p. 2; Paul, June 7, 2010, p. 4; Palmater, June 7, 2010, p. 11). Grand Chief Randall Phillips (Association of Iroquois and Allied Indians) stated that "more people will have rights to First Nations housing and land base, which has deteriorated from 100 percent ownership at time of contact to less than 1 percent today" (May 31, 2010, p. 12).

The issue stemmed from the exclusive occupation orders that could be made under the Act. The court would be given the authority to grant exclusive occupation of the family home to one spouse and furthermore would have discretion with respect to the length of the order. Indeed, the Act even allowed "non-members or non-Indians" to "ask the court to stay in the house or to have possession for a limited time" (Jacques, May 10, 2010, p. 3). Therefore, when a couple separated, one spouse could apply for exclusive occupation of the family home, and could be granted it regardless of whether the spouse was a member of the First Nation or not. As Christopher Devlin (Executive Member, National Aboriginal Law Section, Canadian Bar Association) explained:

> If the spouse is not an Indian or a band member, and only members are allowed to reside on reserve, currently the spouses have to leave the reserve. They will be able to stay under Bill S-4. (May 31, 2010, p. 3)

As Devlin pointed out, the result of this could be "the creation of possible life interests on reserve to non-Aboriginal people" (May 31, 2010, p. 2). Devlin provided an example of how the lack of guidance in the Act regarding the length of exclusive occupation could create life interests for non-First Nation individuals on reserve.

> It is not unimaginable to consider a marriage breakdown of a young person – for example, 18 or 20 years old – whose non-Indian spouse lives until they are 80 years old. That situation can result in a 60 or 70 year life interest in the reserve. That land will not be in use by the band for that period of time. (May 31, 2010, p. 3)

Although the Parliamentary Secretary to the Minister of Indian Affairs and Northern Development stated that "this bill respects the fact that First Nations ownership on reserve is a requirement" (Duncan, May 10, 2010, p. 8), and although the Act's sponsor emphasized that the Act would not allow non-members to "acquire ownership" and did not threaten the collective status of reserve lands (Strahl, May 31, 2010, p. 9), there was a great deal of concern among the witnesses that the Act would give non-First Nations people access to First Nation collective lands (Augustine, June 7, 2010, p. 5; Palmater, June 7, 2010, p. 11; Paul, June 7, 2010, p. 4; Phillips, May 31, 2010, p. 12). Many of the participants who gave evidence to the Standing Senate Committee in 2010 considered this provision unconstitutional because it would allow property rights to reserve lands to be granted to non-First Nation individuals (Paul, June 7, 2010, p. 4).

The concerns of First Nation witnesses regarding the Act arose from the potential application of an Act based on off-reserve notions of property to on-reserve contexts. Clearly, ownership meant different things to different people. The challenge was to try and reconcile the collective interests – i.e., inalienability of reserve lands (as per the Constitution and the *Indian Act*) – with the *Family Homes on Reserve Act*, the objectives of which were "rooted in Canadian law" and focused on the "protection of individual rights of spouses and their children" (Devlin, May 31, 2010, p. 3). Property had to somehow address the individual right to own things (the family home) without interfering with the inalienability of reserve lands. Perhaps this is where scholars such as Flanagan et al. (2010) – who are great advocates of private property regimes for reserves – would highlight the importance of implementing a new property framework in which the underlying title rests with the First Nations. This would, theoretically, create more robust individual property rights while protecting collective interests. Nonetheless, despite evidence that the majority of participants (including MPs and Senators) shared an

understanding of First Nations as collectives, with many noting that it was important to balance individual rights with collective rights, the Act dichotomized the individual and the collective as if the two were in opposition. The individual was separated from the community, from the collective, which was evidence of the ownership model of property: private property was the priority, superior to – and separate from – collective property. The participants who had alternative conceptualizations of property challenged this dichotomy and expressed MRP as the property rights of *both* individuals and the collectives to which they belonged.

6.3. Entangling Property

The ownership model is "a narrow reading of property" (Egan & Place, 2013, p. 130) relying "on a particular spatial representation in which property rights are fully expressed and contained within a discrete parcel of land with clear and unambiguous boundaries" (Egan & Place, 2013, p. 130 citing Blomley, 2004). However, the family home was perceived as something much more complex, as a critical part of First Nation societies and cultures. More than a separate location, and more than the private property rights assigned to it, the family home was a space imbued with significance, a *place*. The idea of place invokes feelings of attachment, connection, meaning and experience, and, as Cresswell (2004) has pointed out, "[s]ometimes this was of seeing can seem to be an act of resistance against a rationalization of the world, a way of seeing that has more space than place. To think of an area of the world as rich and complicated interplay of people and the environment – as a place – is to free us from thinking of it as facts and figures" (p. 11). Witnesses challenged the "rationalization" of the ownership model (in which MRP was conceptualized as something universal and apolitical) by asserting a broader reading of property as inextricably interconnected with social, economic, political and gender relations (Macpherson, 1973; Underkuffler-Freund, 1995-96). As Ellen Gabriel (President, Quebec Native Women) asserted, "issues of poverty, violence, status and membership are *intricately related to MRP rights*" (June 7, 2010, p. 3, emphasis added). Likewise, in its final report, NWAC (2007) argued, "While MRP is sometimes narrowly defined as relating only to the matrimonial home, the situation of individuals experiencing this issue brings in a wide variety of related issues" (p. 22). First Nation approaches to MRP were as different and numerous as the First Nations who described them, and yet these counter-conceptualizations shared

something in common: they challenged the way the dominant conceptualization bracketed property, and instead sought to expand the concept of MRP. As Grant-John (2007) stated:

> Matrimonial real property issues do not exist in isolation. They affect and are impacted by issues of violence, poverty, child welfare, housing, governance, wills and estates, residency, membership, land registries, resources, capacity, access to social services and justice, and others. (p. 13)

In other words, the very *narrowness* of the ownership model was critiqued, and broader conceptualizations of property were championed. Thus, while First Nation participants sometimes acknowledged that matrimonial real property on reserve was, in part, a technical problem (a legal issue), it was also asserted that it could not be understood solely as such: "It is a holistic problem" (Walker-Pelletier, June 7, 2010, p. 6). From this perspective, property was contingent, contextual and fluid (Rose, 1994) – indeed, political – which illuminated the instability of the ownership model and revealed it as subject to "contestation and negotiation" (Egan & Place, 2013, p. 130). Specifically, participants argued that matrimonial real property was inextricably linked to Canada's history of colonialism, and could not be separated from such issues as land and housing, access to the justice system, Indian status and band membership, family violence, and self-governance and jurisdiction.

In its final report to the ministerial representative, NWAC (2007) concluded that "the issue of matrimonial property on reserve was not created by Aboriginal people" (p. 33). Many participants in the national dialogue concurred, firmly asserting that colonialism and, in particular, the *Indian Act* – a "piece of colonial legislation" (NWAC, 2007, p. 33) – had been central to the issue of MRP on reserve. According to Grant-John (2007), "[t]he dialogue and consultation sessions held by NWAC and AFN framed [MRP] issues within the history of rights recognition and the extremely negative experience with federal interference in gender relations and in property matters in general in First Nation societies" (p. 19). In contrast to the federal government's framing of the issue, Grant-John (2007) emphasized colonialism, particularly as it affected gender relations:

> The lack of protection First Nation women in particular experience in situations of marital breakdown and family violence is related to the history of gender-based discrimination under the *Indian Act*. The effects of the long

> history of discrimination under the *Indian Act* and other federal policies leading to the exclusion of First Nation women from leadership, land-holding and citizenship are still being felt today. (Grant-John, 2007, p. 9)

NWAC (2007) reported "there was general consensus amongst the Aboriginal women who participated in the [MRP Solutions] sessions that colonization was a causal factor for a number of related difficulties and issues on reserves" (p. 12). Again, the impact of colonialism on gender relations within First Nation communities was highlighted:

> The fundamental Indigenous teachings about relationships between women and men and the roles of each in society, as well as the responsibilities each had to the other, to their extended families, to their communities, and to Creation were replaced by notions which flowed from larger society where women were viewed very differently. (NWAC, 2007, p. 8)

In addition, many non-Aboriginal critics of the Act agreed that colonial processes that imposed European conceptualizations of land/property, governance and gender relations on First Nations led directly to the current issue of MRP on reserve:

> The notion of individual property rights and male domination in property and civil rights were introduced by colonial governments in an effort to assimilate First Nations people, with the hopes of ultimately eliminating reserves altogether. One sees this transition from laws that had been in place for thousands of years to a colonial period, where First Nations were severely impacted by a notion of male domination. Many of the kinship and matriarchal systems were disbanded. (Crowder, May 14, 2009, p. 51)

From this perspective, the MRP on reserve issue could not be understood or resolved without first acknowledging and then addressing the extremely complex historical context of colonialism. Proponents of the Act did not agree that property legislation had a role to play in this; for them, the problem of MRP on reserve was confined to a lack of property law and could be addressed by the Act without any additional provisions. Nonetheless, First Nation witnesses highlighted many ways in which the historical context of colonialism had important implications for the current issue. Many participants of the national dialogue pointed out that the Act did not adequately address the current and ongoing socioeconomic issues stemming from colonialism, such as chronic housing shortages and poor living conditions, issues related to home ownership and financing, remote geographies and access to justice, Indian status and band membership, family violence, and governance, and would therefore be ineffective.

6.3.1. Chronic housing shortages and poor living conditions

Participants of the national dialogue frequently mentioned the longstanding land and housing shortages faced by so many First Nation communities as being an important issue related to matrimonial real property on reserve. As Chief Wilson-Raybould stated, "[c]hronic housing shortages on most reserves must also be addressed" (May 31, 2010, p. 3; see also Augustine, June 7, 2010, p. 5; Jaffer, May 5, 2010, p. 20 citing Standing Senate Committee, November, 2003). Other witnesses cited housing as a key component of a viable MRP solution:

> [T]he MRP issue also relates directly to lack of available housing and land on reserve. The issue of MRP on reserve is further challenged by the chronic housing and land shortages on reserve. If there were sufficient housing and land to build homes, we strongly believe that the problem would not be as significant as it is today. (Augustine, June 7, 2010, p. 5)
>
> An obvious limitation […] is that the bill does not address the limited land base and inadequate housing on reserve. (Gabriel, June 7, 2010, p. 3)
>
> Addressing the longstanding housing shortage that is common to First Nation communities was considered a key factor in developing a viable solution to matrimonial real property issues. (Grant-John, 2007, p. 12)
>
> If there is a breakup in a relationship, particularly in smaller communities where there is already an acute lack of housing and the housing that is available and unsafe and frankly toxic, where would the person go? Where would the spouse and children go in that kind of environment? There is no other housing locally. Would they go to an urban centre? Would they go off reserve? The choices for them are quite bleak. That is one of the central problems with this piece of legislation. (Martin, May 13, 2008, p. 105)

In addition to housing shortages, some reserves have extremely poor living conditions, as described by Hon. Keith Martin (Esquimalt-Juan de Fuca, Lib.) during the 2008 debate in the House of Commons:

> I cannot impress enough on members the degree of tragedy and the horrible living conditions found on too many reserves. I worked as a physician in northern British Columbia and I remember flying into reserves. The houses are so poorly built that people are living in homes that are essentially a health hazard. They are boxes of disease. To see this level of housing in Canada is absolutely appalling. (Martin, May 13, 2008, p. 105)

He continued with an example from Vancouver Island in British Columbia:

> The roads are pock-marked and full of holes. None of them are paved. There is detritus and refuse everywhere on the reserve. Why? Because the band does not have any agreement to remove the waste on the reserve. It does not have the money nor the people to do it. As a result, there is waste everywhere. There are homes with the windowpanes smashed out. The windowpanes are not replaced because people do not have the money to replace them, so they cover the windows with plastic sheeting. […] Inside the houses people have put plywood over the flooring so people do not fall through the floorboards. […] That is the Canada we have. That is the trauma many aboriginal people are living in right now. Those are horrible third world conditions. (Martin, May 13, 2008, p. 105)

Martin's language was impassioned. He invoked an image of extreme poverty, of filth, and violence. The place of the specific reserve in his story was extended to the spaces of all reserves in order to underscore the importance, the centrality, of the socioeconomic status of First Nations to matrimonial real property on reserve. Martin's example comes across as extreme, and I infer that this was, in part, because he was making his point in a political setting. However, despite the broad range in conditions occurring on reserves today, it is unlikely that any reserves have entirely escaped the damaging effects of colonialism, even if only by virtue of being a reserve, and the geographical, social and economic realities resulting from colonialism remain challenging to at least some extent in almost all cases.

> Somehow we are trying to tag on a series of rules, regulations and acts to ensure that in this case aboriginal women have some protection and security under the law. But that deals with a much larger issue of a separate development that has occurred in our country between Aboriginal and non-Aboriginal people. (Martin, May 13, 2008, p. 104)

For Martin, colonial history marked a "separate development" that needed to be addressed, and legislation dealing with the technicalities of property law were too narrow to fully and adequately bring "protection and security under the law" to First Nation reserve communities and individuals. Indeed, witnesses commonly asserted that non-legislative solutions were needed to address the socioeconomic status of many First Nations. Chief Jody Wilson-Raybould (AFN) called it "social development work" (May 31, 2010, p. 6). Ellen Gabriel (President, Quebec Native Women) summed up the situation as follows:

> You must remember that you cannot address the issue of matrimonial real property in a vacuum; there are many related issues. How can bands create a matrimonial property code if we have no extended land base, no

access to lands and resources and are in land claims negotiations. (June 7, 2010, p.7)

6.3.2. Issues related to home ownership and financing

A key assumption in the Act was that individuals on reserve actually own their homes as opposed to bands owning then (Dyck, June 21, 2010, p. 13). While individuals may possess certain types of rights to parcels of land, and may own the structures, such as the family home, as Senator Ruth pointed out "few own their homes" (May 31, 2010, p. 14). Bands often own the houses (similar to social housing), so that individual First Nation members may have rights to occupy a dwelling without owning it. Therefore, the witnesses argued that matrimonial real property on reserve was not simply a matter of individual ownership and had to be conceptualized differently. In addition to these different social and housing situations (Grant-John, 2007, p. 28), the way in which financing occurred on reserve was different: "The Indian Land Registry established under the *Indian Act* does not provide the security of title available off reserves in provincial registry systems, and many of the landholding arrangements the First Nation people enter into on reserves with each other and with band councils are not registered there" (Grant-John, 2007, p. 27). This is important because the way in which housing is financed affects the "scope and nature of individual legal interests in a home" (Grant-John, 2007, p. 27). Indeed, the realities of property on reserve have important implications for the economic value of family homes on reserve. However, several witnesses pointed out that in failing to address the actual context of property on reserve, the Act failed to address the "economic cost" of the legislative gap. For example, in cases where a couple lives in social housing, the provincial court would be powerless to divide the property because the home in this case would not be considered a marital asset (Paul, June 7, 2010, p. 4; see also Gabriel, Walker-Pelletier and Dyck, June 7, 2010, p. 9).

Witnesses further argued that even in cases where the family home was owned by the spouses, property on reserve is not valued at the same price as off-reserve property. Chief Noah Augustine (Co-chair, Atlantic Policy Congress of First Nations Chiefs) pointed out that on-reserve homes have limited monetary value: "First Nation property assets are valued at less than half of what properties are valued off reserve" (June 7, 2010, p. 6). Chief Laurie Carr (Hiawatha First Nation) concurred, stating "First

Nations property assets are valued at less than half of what properties are valued off First Nations. Banking institutions will not extend loans and mortgages to First Nations, as they are unable to use our property as collateral" (May 31, 2010, p. 10). This means that the Act's aim of addressing the economic cost of the legislative gap by providing the same solution on reserve that is available off reserve would likely fall short of achieving its goal. Because of the prevailing property regime on reserve, itself a function of colonial policy, people do not own land in fee-simple, they often do not own their family home, and if they do, it is valued much lower than off-reserve property is, making the status of on-reserve property as an asset questionable.

According to Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University), there was a significant disconnect between theory (law) versus "what actually happens on the ground" (June 7, 2010, p. 11). The empirical evidence provided above underscores the "on the ground" context in which a counter-conceptualization of matrimonial real property becomes necessary. Many participants viewed the shortage of both homes, and land upon which to build additional homes, as central to matrimonial real property on reserve. From this perspective, matrimonial real property was not a theoretical construct; it was a practical matter that was fundamentally about material space, and, specifically, its location (i.e., on reserve) and availability. The (un)availability of potential family homes in one's community – or, as Turpel (1991) calls it, the "home land" – was the crux of the issue, and quite different from the off-reserve context where the family home is a commodity available to anyone who has the power to purchase it. Off reserve, the precise location is usually less important, as land base and housing availability are less frequently issues, and the concept of "home land" does not typically apply. Additionally, the specific ways in which individuals hold rights to their property was important to the conceptualization of MRP. Off reserve, the availability of matrimonial real property was a taken-for-granted aspect of an economic formula; on reserve, the standard formula failed.

6.3.3. Geographies of property on reserves: Technical problems

There were major concerns that a legislative solution to MRP was a flawed approach. From a legal standpoint, it was argued that because the Act was largely informed by off-reserve contexts it did not adequately address the particular legal

context of reserve lands and would result in many unresolved and problematic technical issues. First, the arbitrary boundaries around reserves that were imposed during colonialism were noted. For example, the Akwesasne community is split into several jurisdictions:

> Today, one half of the territory is in Canada, the other half is in the United States. Two thirds of what is in Canada is in Quebec and one third is in Ontario. It is very difficult because we are affected by the laws of Canada, the laws of Ontario, the laws of Quebec, the laws of New York state and the laws of the United States. (Mitchell, May 31, 2010, p. 20)

Mitchell's observation nicely illustrates the inseparability of law and space; geography had important legal ramifications for legislating MRP on reserve, and an analysis of applicable laws in adjacent jurisdictions, and how they might be harmonized, was called for. Second, there was concern around how the Act would function with other legislation. For example, Ellen Gabriel (President, Quebec Native Women) pointed out that there was a "lack of harmonization with Quebec's civil code" (June 7, 2010, p. 3). Mary Eberts (Barrister and Solicitor) argued that there would be problems with "meshing" the proposed legislation with the FNLMA (May 31, 2010, p. 15). Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University) expressed concern that no analysis had been done on the "interplay between section 35 and the different sections of the *Indian Act* in relation to land and treaties. How these interact with Bill S-4 makes the bill fatally flawed in my mind. No one can speak to how these measures impact land and Aboriginal treaty rights in the future. We focus only on matrimonial real property" (June 7, 2010, p. 12). Chief Shining Turtle (Anishinabek Nation) concurred, stating that "[t]here has to be a proper analysis of how all of these measures in these bills interrelate" (June 7, 2010, p. 15).

Third, participants argued that the Act did not address the actual legal circumstances related to the collective interests attached to reserve lands. As Nancy Karetak-Lindell (Nunavut, Lib.) asserted, in order to identify a legislative solution that would actually accomplish its goal, it would be necessary to take into account "these special situations," referring to the way in which property is collectively owned in Aboriginal communities (May 14, 2008, p. 51). Chief Lawrence Paul (Co-chair, Atlantic Policy Congress of First Nations Chiefs) likewise argued the following:

> Individual Indians or non-Indians cannot own fee simple title to reserve lands. Because of the *unique collective nature* of the land tenure system on reserve, it is impossible to replicate the same remedies for MRP issues as off reserve. (June 7, 2010, p. 4, emphasis added)

Beverly Jacobs, who was the president of NWAC in 2008 (and during much of the MRP on reserve national dialogue), likewise argued the following:

> Property on reserve is not held in the same way as it is held in the rest of the country. This is a reflection of the unique status of Aboriginal peoples in this county, which in 1982 was enshrined in Canada's constitution. Providing the same right as other Canadian women hold does not take account of our unique situation and actually creates inequality rather than protecting against it. (NWAC, March 4, 2008, para. 10)

In other words, the difference in on-reserve and off-reserve property reflected an important difference in status, and therefore, applying off-reserve, non-First Nations property law would not provide equality.

Finally, witnesses pointed out the difficulties that could arise due to the lack of established property laws on reserves. According to Chief Jody Wilson-Raybould of the AFN:

> There are not established property laws for most reserve lands in this country and for most communities. Consequently, there is not clarity with respect to a land tenure system on reserve. (May 31, 2010, p. 4)

This would undermine the intent of the Act, which relied on the presence of established property laws (as in off-reserve contexts). As Chief Wilson-Raybould explained:

> For example, today there is great confusion over what interests in land actually exist on the reserve, both under the *Indian Act* and under our customary practices. How can we start to divide up interests in property on-reserve in the case of matrimonial breakdown before first determining what those interests in land are? (May 31, 2010, p. 2)

To put this uncertainty into context, Chief Wilson-Raybould provided an example:

> My husband and I purchased a house on our reserve from the previous owner, filled out an offer to purchase, and completed the transaction. As a result of that transaction, the transfer was put into a filing cabinet at our band office. This is not to say that it is not a good filing cabinet, but the transaction was not registered anywhere, which created uncertainty with respect to our property. As I said before, to develop a law based upon uncertainty for most First Nations that have not established clear property laws or land tenure systems is problematic. (May 31, 2010, p. 4)

Marc Lemay (Abitibi-Témisacmingue, BQ) also spoke to the uncertainty with respect to property on reserve:

> The situation can be easily summarized. An aboriginal couple marries, has children and accumulates assets on reserve. They might, for instance, own a convenience store, a service station or some other business. The couple separates. The woman leaves the marital home, as usually happens, unfortunately, and leaves the reserve. She settles in town or somewhere else. Then comes the issue of who owns the convenience store, the garage or the business. They are located on the reserve and thus on federal territory. The situation is not clear. (May 14, 2009, p. 48)

Adding to this complexity and uncertainty is the fact that the *Indian Act* recognizes some individual interests, but not all (Grant-John, 2007, p. 27). Property interests held in the form of CPs are recognized, for example, while custom allotments are not (see Chapter 2 for more details). Indeed, "[f]ederal laws, provincial laws and First Nation laws, policies and customary practices collectively affect First Nation families on reserves and the homes in which they live in various ways" (Grant-John, 2007, p. 11). As a result, property on reserve takes multiple forms and lacks a consistent legal framework, making it different than property off reserve, and difficult to regulate with off-reserve laws. As Grant-John (2007) states,"[i]t is an understatement to say there is a complex interplay of interests and rights flowing from the current state of federal, provincial and First Nation law that affects matrimonial property on reserves" (p. 11). And so, property – and, in particular, matrimonial real property – on reserve was a complex legal-spatial puzzle for which there is no off-reserve parallel.

6.3.4. Remote geographies and access to justice

Participants frequently raised the issue of access to justice. According to many critics of the Act, the assumption that individuals on reserve would be able to find/access and afford lawyers was problematic (Dyck, June 21, 2010, p. 13). As witnesses pointed out, this would be very difficult for many First Nation spouses, especially those suffering in situations of domestic violence and/or living in remote locations. The geographic isolation of many reserve communities meant that lawyers and courts would often be at a significant distance from those individuals who were dealing with their matrimonial real property following a break-down of marriage. Danalyn MacKinnon (Barrister and Solicitor) summarized the issue as follows:

> It is difficult to see how an individual from a northern community who could be as much as 600 miles away from me, would be able to access this court system. It is costly; it is physically far away; there is no provision for the application to be heard electronically; and clients would not likely be able to attend in person regardless of the requirements of court under the Rules of Civil Procedures. In other words, there is a real problem with access to the justice system in our area. Part of that is, of course, compounded by the distances involved and also the lack of lawyers in our area. (May 31, 2010, p. 14)

Likewise, Chief Angus Toulouse (Ontario Regional Chief, Chiefs of Ontario) argued, "[i]n northern communities, courts are located in cities far from reserves. This will make it difficult for First Nations citizens to get to court proceedings" (May 31, 2010, p. 20). Many witnesses argued that these challenges of access and availability would effectively render the Act useless because as a solely legal solution, it relied heavily on access and availability of social and (especially) legal services (see, for example, Baker, May 31, 2010, p. 8; Devlin, May 31, 2010, p. 7). For example:

> Imagine a woman who comes home to find that her husband has changed the locks on their home, leaving her and her children with nowhere to go. In section 21 of Bill S-4, there exists an emergency protection clause that ensures that this woman must go to court, obtain a lawyer and obtain an order to re-enter her house. However, this order will protect her only for 90 days. After those 90 days, this woman is left in the same position she was in initially and she and her children once again have no place to go. What do we say to this woman? Do we assure her that within those 90 days, she can apply for an extension? *What happens is she does not have the money, the transportation or the ability to access justice and extend her order from remote area? What recourse does this woman have?* (Jaffer, June 21, 2010, p. 16, emphasis added)

As this quote indicates, matrimonial real property was, in part, conceptualized as a legal issue; however, Jaffer's statement underscores a frequently made point that, given the context on many reserves, the legal nature of matrimonial real property had to be conceptualized differently. From this perspective, the law had to be accessible and enforceable. This "entangled" conceptualization of matrimonial real property, then, included geographic location, the cost of travel and of legal processes, access to the legal aid program, the ability of individuals to know and understand their rights and to proceed confidently through a legal system that was both distant and foreign. Therefore, a solution to the MRP on reserve issue had to address the geographical context of remoteness.

6.3.5. Indian status and band membership

According to Grant-John (2007), "[a]nother layer of law affecting landholding and housing matters on reserves are the Indian status and band membership provisions of the *Indian Act* (past and present provisions have impacts today), band membership codes and band residency bylaws" (p. 57). As Ellen Gabriel (President, Quebec Native Women) stated:

> Aboriginal women's groups have been trying to say that status does not necessarily mean you have the right to live in the community. Many women have regained status as a result of Bill C-31, but they are not allowed to live in their communities or to own homes. (June 7, 2010, p. 9)

Of particular relevance to the topic of property (and MRP on reserve) is the fact that the *Indian Act* not only undermined women's traditional roles within their communities, it effectively nullified thousands of First Nation women's (and their descendants') property rights. As Grant-John (2007) argued, "the impact of past discriminatory provisions of the *Indian Act* relating to Indian status and band membership combined with policies of assimilation were said to have had extremely negative impacts on the position of First Nation women in their communities in relation to governance, property and civil rights" (p. 12). Matrimonial real property, then, cannot be separated from issues of membership and status. For many participants, MRP could not accurately be described through a tightly bracketed conceptualization of property as the legally defined right of an individual to own some thing; it had to also include provisions for membership and status.

6.3.6. Family violence

In the national dialogue NWAC (2007) asserted that "violence against Aboriginal women in all its forms is the single most important issue that confronts us" (p. 12). While many proponents of the Act argued that matrimonial real property had nothing to do with issues of violence and safety, other participants challenged this perspective, arguing that the notion of family safety and security was central to matrimonial real property. As Grant-John (2007) asserted, "[t]he issue of domestic violence is linked to matrimonial real property issues because of the need of victims for security in their own homes" (p. 8). According to NWAC (2007), "[t]oo often women have had to leave their communities to protect themselves and their families from violence" (p. 9). Thus, matrimonial real property was conceptualized as intimately and powerfully bound up with the lives of

those who occupied it. A sense of security to stay in one's home (and subsequently one's community), in part, defined property. This conceptualization of matrimonial real property embraced, to some extent, a technical reading of property; the owner of the property should be legally protected with the aid of effective law enforcement. However, it also included non-technical notions such as social support programs and systems (Wilson-Raybould, May 31, 2010, p. 3), and gender and colonialism (NWAC, 2007). In other words, matrimonial real property was not only affected by, it was defined by, the availability and accessibility of such things as prevention programs and emergency housing, the state of gender (in)equity, and the extent to which individuals felt safe and secure within their homes.

6.3.7. Governance

There was agreement among many who commented on the Act that First Nations possess inherent treaty and Aboriginal rights to be self-determining and self-governing, and that these rights to self-determination and self-governance include jurisdiction over property issues (see, for example, Gabriel, June 7, 2010, p. 2; Paul, June 7, 2010, p. 4; Phillips, May 31, 2010, p. 11; Walker-Pelletier, June 7, 2010, p. 1; Wilson-Raybould, May 31, 2010, p. 2). For example, Chief William K. Montour (Six Nations of the Grand River) stated, "Matrimonial property law is a right and a jurisdiction of First Nations" (May 31, 2010, p.18), and Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University) asserted that First Nations have "jurisdiction over property and civil rights in their communities" (June 7, 2010, p. 11). Palmater, along with many others, cited Section 35 of the *Constitution Act* to support the critical link between governance, jurisdiction, and family and property law (June 7, 2010, p. 11). Chief William K. Montour cited the Royal Commission on Aboriginal Peoples (RCAP) report when he asserted that family law is a "core jurisdiction of First Nations. Matrimonial property law is a right and a jurisdiction of First Nations" (May 31, 2010, p.18).

Many of the First Nation witnesses described in general terms their Nations' approaches to governance. For example, according to Councillor Ava Hill (Six Nations of the Grand River), many First Nations still practice "traditional forms of government, which use consensus decision making rather than voting" (May 31, 2010, p. 18; see also, Toulouse, May 31, 2010, p. 19). Matrimonial real property, from this perspective, was a

First Nation matter, to be dealt with by First Nation governments and employing First Nation values and principles. “We know what is best for us and creating our own law is what is best. Our law would be created with our own values and principles by the grassroots people, the elders; a law for which we know is fair, respectful and equitable to all women, children and men” (Carr, May 31, 2010, p. 11). Witnesses acknowledged traditional approaches, but also discussed matrimonial real property in the context of contemporary governance structures, such as the *First Nation Land Management Act*. For Chief Austin Bear (Muskoday First Nation) such an “agreement” would be preferable to legislation: “What is most favourable to First Nations, rather than legislation […] is to look to agreements” (May 31, 2010, p. 7).

Witnesses contrasted the dominant conceptualization (i.e., the ownership model) of MRP, in which MRP disputes are a formal legal matter to be taken care of through legislation and courts, with a conceptualization whereby MRP could be addressed through community-based, perhaps less formal (and more contextual) governance approaches. For example:

> The Canadian justice system takes an adversarial-based approach to resolving matters, which pits one party against the other. This is a system that we do not wish to replicate or install in our communities. We believe that due to the fact that family law matters are very sensitive and personal in nature, they demand more remedial, restorative-based solutions. (Paul, June 7, 2010, p. 4)

According to many participants, family-related disputes were often resolved within the community, for example, by family and other elders of the community (Meawasige, June 7, 2010, p. 19; Palmater, June 7, 2010, p. 19). Sherri Helgason (Director, National Aboriginal Initiative, Canadian Human Rights Commission) argued “community-based alternatives are the best, fastest and most respectful way of resolving such disputes” (May 31, 2010, p. 4). Most importantly, this conceptualization of matrimonial real property acknowledged that it was as diverse as the Nations who would each govern it: “We have answers, and those answers lie in the ability of our communal system to work” (Shining Turtle, June 7, 2010, pp. 17-18). For many First Nations, non-legislative approaches to the challenges related to MRP on reserve would likely involve elders (Walker-Pelletier, June 7, 2010, p. 6). As Grand Chief Randall Phillips (Association of Iroquois and Allied Indians) argued, “[t]raditional forms of mediation and alternative dispute resolutions such as elders’ councils and circles must be recognized and utilized”

(May 31, 2010, p. 12; see also, Eberts, May 31, 2010, p. 17; MacKinnon, May 31, 2010, p. 17). Chief Wilson-Raybould suggested that the Act should be more explicit with respect to dispute resolution powers for First Nations (May 31, 2010, p. 3).

Some witnesses provided specific examples of the relationship between governance and matrimonial real property. The Anishinabek Nation, which has 40 member Nations, developed a legal and social framework for addressing MRP. They obtained unanimous approval, as opposed to employing the kind of democratic system favoured by the federal government. Band council resolutions were passed that supported a community-based dispute resolution process. According to Chief Shining Turtle "disputes concerning matrimonial real property matters will be resolved by an Anishinabek Nation tribunal and commission" (June 7, 2010, p. 15). Again, these were different kinds of governance strategies and processes for property than found in the dominant conceptualization. It is interesting to note that there was importance placed in the sense of *ownership* the Anishinabek Nation felt for its matrimonial real property framework: "We owned it and we developed it, and that is a fundamental difference. You will own what you build" (Shining Turtle, June 7, 2010, p. 15). The Six Nations also described the approach they would take to matrimonial real property. Like the Anishinabek Nation, the Six Nations conceptualized matrimonial real property as a community issue that would be governed in a more informal way. Councillor Ava Hill (Six Nations of the Grand River) described the dispute resolution process that would be employed this way: "Six Nations envisions using an Iroquoian tribunal involving members from the seven Iroquoian communities operating much like a circuit court. It would use traditional and contemporary customs and processes to administer fairness in decision making" (May 31, 2010, pp. 18-19).

First Nation witnesses criticized the proposed legislative solution for not adequately addressing self-governance and jurisdiction of matrimonial real property on reserve. Ellen Gabriel stated that the Act "…does not recognize the inherent right of self-determination" (June 7, 2010, p. 2) and Chief Jody Wilson-Raybould said the Act "falls short of recognizing the jurisdiction of First Nations" (May 31, 2010, p. 2). Grand Chief Randall Phillips called the Act a "violation of inherent treaty and Aboriginal rights to be self-determined and self-governing" (May 31, 2010, p. 11), and Chief William K. Montour asserted the Act was unconstitutional because it "is inconsistent with the inherent right of self-government recognized in section 35(1) of the Constitution Act, 1982" (May 31,

2010, p.18). The AFN suggested that any approach to addressing MRP on reserve should include "The recognition of First Nations jurisdiction; access to justice; dispute resolution and remedies; and addressing underlying issues" (Wilson-Raybould, May 31, 2010, p. 2). Chief Wilson-Raybould (AFN) observed that MRP involved a number of jurisdictions (i.e., land, wills and estates, family relations, divorce etc.). She argued, therefore, "[i]f issues of matrimonial rights are to be fully resolved, it will require more of a *comprehensive approach to addressing governance issues* than is presented in Bill S-4" (May 31, 2010, p. 2 emphasis added). Representatives of both AFN and NWAC framed their suggestions in terms of the "nation" as a framework for a long-term solution (Corbiere Lavell, May 31, 2010, p. 5; Wilson-Raybould, May 31, 2010, p. 7). As Chief Wilson-Raybould explained, "[w]hat is required is support for First Nations to develop their own laws as part of a broader process of rebuilding our nations from the ground up, from the community up, in a manner that clearly respects First Nations jurisdiction" (May 31, 2010, p. 3).

6.4. Defining the Problem, Determining a Solution

6.4.1. The "so-called" gap

Many First Nation participants agreed that the gap was, at least in part, a legislative one (Corbiere Lavell, May 31, 2010, p. 3). However, for many of these participants the gap was not (solely) related to a lack of property law. For example:

> There is not only a legislative gap in substantive law respecting matrimonial real property in comparing the situation off reserves to the situation on reserves; there is an equally significant and disturbing gap in access to the court system, access to legal aid, adequate housing, policing, enforcement of laws, capacity and resources for land registry systems and many other areas. (Grant-John, 2007, p. 20)

Instead, it was also a "human rights gap" (Langtry, May 31, 2010, p. 6; see also, MacKinnon, May 31, 2010, p. 14), a "jurisdictional gap" (Wilson-Raybould, May 31, 2010, p. 5), a gender gap (Jaffer, June 21, 2010, p. 16 citing Grant-John, 2007), and even a "so-called gap" (Dyck, June 7, 2010, p. 9). As Grant-John (2007) explained: "Some First Nation people question the assumption of a legislative gap because they believe the matter is being addressed though traditional or other First Nation laws and policies" (p. 9). According to the AFN's (2007) final report, "[t]he terminology 'matrimonial

real property' and its definition are based upon a language and culture that is traditionally foreign to First Nations. As such, the values and cultural assumptions that might frame not only the problem but its solution are fundamentally different from Western culture and its legal traditions" (p. 19). The way in which First Nation witnesses conceptualized MRP informed their analysis of the issue. Their perspectives on the "gap" arose from conceptualizations of property that viewed it as something collective, broad and interconnected. They challenged the dominant perspective that the matrimonial real property on reserve issue was a straightforward one, and easily and appropriately confined or compartmentalized to property and law. Instead, this discourse situated matrimonial real property on reserve in a particular context that involved the history of colonialism and the ongoing socioeconomic, political and cultural impacts of that history. Therefore, the issue of MRP on reserve was not defined as solely a "legislative gap"; it also involved the imposition of settler culture (including its legal norms) onto First Nations' cultures, and a complex set of processes that entrenched the socioeconomic hardships experienced by so many First Nations today.

From this perspective, then, the gap could not be addressed by simply putting a law where no law previously existed; poverty, remoteness, gender dynamics (e.g., women's diminished roles), and colonial political and legal structures came together to create issues of family violence, housing shortages, lack of capacity and lack of access to the judicial system. All of these impacted, and were impacted by, MRP on reserve. Furthermore, all of these interrelated issues were political, as First Nations consistently asserted that their right to be self-governing included jurisdiction over family law and MRP. The solution, then, needed to address the underlying issue of the colonial relationship and allow First Nation conceptualizations of MRP (legal and cultural) to be reflected in their laws and practices.

6.4.2. A comprehensive solution

While no single, unified "alternative" solution to the matrimonial real property on reserve issue was proposed, the general consensus among witnesses seemed to be that a more comprehensive approach be taken. Witnesses demanded a solution that acknowledged the colonial history and its continuing challenges and impacts, First Nations' right to self-govern and have jurisdiction over family matters (including property), and First Nation approaches to property (which is to say, approaches to their

societies as a whole including the role of property in that). This idea that property has possibilities beyond the security provided by individual property protection was reflected in the counter-conceptualization; property was "broadened" beyond the ownership model, and expressed as inextricably linked to a range of issues (i.e., not just exclusive occupation and fair division of an asset). Matrimonial real property was conceptualized through law and individual ownership, but in addition, as something fundamentally related to collective ownership, family and community well-being, residency rights, adequate housing supply, safety, and as a key component of a society's overall function. Singer (2000a) claims that the way in which people conceptualize property, and the choices they make regarding their property regimes, reflect their particular vision of social life and, indeed, work to shape it. "More than we realize, the shape and content of property law define a form of social life" (Singer, 2000a, p. 15). Underkuffler-Freund (1995-96), it seems, would agree when she argues that property should include "social needs, goals, *and* aspirations" (p. 1047).

The idea that property, as it was conceptualized off reserve, could and should be applied to reserves relied on "bracketing out" certain contexts. For example, the Act assumed that the people it would apply to would own their matrimonial homes (as opposed to the band owning it, for example) and have the capacity to use the "tool kit" it represented (i.e., find and afford lawyers) (Dyck, June 21, 2010, p. 13). However, as Senator McCoy reflected, these assumptions were unlikely to be realistic:

> It strikes me that we are trying to impose a solution that might suit me, as a middle-class, aging woman who has lived in urban areas all her life, has a law degree and is quite competent at accessing and becoming familiar with all sorts of Anglo-Saxon legal procedures. (July 6, 2010, p. 19)

Witnesses asserted that the conceptualization of property represented by the Act would not "fit" on-reserve contexts and would, moreover, contradict First Nations' conceptualizations. First Nation participants demanded acknowledgement of the things that complicated the ownership model, most of which were directly related to Canada's colonial relationship with First Nations: band membership and governance, Indian status, chronic housing shortages, socioeconomic conditions, gender relations, family violence, culture and tradition, and the complex nature of property on reserve are contexts. These contexts serve to highlight the diversity and complexity of reserve spaces, and First Nation participants argued that they were crucial to understanding matrimonial real

property on reserve. Therefore, while proponents argued that the Act would fill the MRP legislative gap, its opponents argued that without acknowledging context property law alone would be unable to bestow property rights with any effectiveness.

Most participants agreed that a solution to MRP on reserve would involve legislation of some sort, but it was repeatedly pointed out that non-legislative solutions were critical. The AFN emphasized that any approach to addressing MRP on reserve should include self-government. NWAC emphasized the rights and protection of First Nation women and called for violence against women to be addressed, the enforcement of exclusive possession orders, financial resources and access to legal council and services (Corbiere Lavell, May 31, 2010, p. 4). One Senator summed up what she was hearing from First Nation witnesses who overwhelmingly argued for non-legislative or comprehensive approaches to the issue:

> The chair posed a question about a legislative gap. We are assuming, therefore, that legislation alone will solve the problem. However, I think it has been clear from every presenter that a non-legislative solution is preferable. (Dyck, May 31, 2010, p. 7)

Because the witnesses conceptualized property more broadly than simply a legislative issue, and because they situated MRP on reserve within a context of colonialism, they tended to argue that a legislative solution was not an approach that would ultimately work. They argued that many issues were involved and recommended taking a “holistic perspective” to addressing MRP on reserve (Gabriel, June 7, 2010, p. 3). For example, Chief Jody Wilson-Raybould (AFN) stated that “legislative reform in itself cannot significantly improve the lives of our communities and our people” (May 31, 2010, p. 3) and called for a “comprehensive approach” (May 31, 2010, p. 2). Likewise, NWAC supported MRP legislation, but asserted that it had to be part of a holistic solution (Corbiere Lavell, May 31, 2010, p. 3). Thus, the general response to the legislative solution by many of the participants was to argue that the MRP issue was not confined to the fair division of an asset, but extended to impacting and affecting the entire community; therefore:

> Matrimonial real property issues affect the interests of men, women and children. Accordingly, First Nation citizens are concerned that any legislative and non-legislative responses should promote social cohesiveness while also providing fair and equitable treatment of spouses. (Grant-John, 2007, p. 7)

Such a comprehensive, First Nation-driven solution would reflect each First Nation's culture. According to Chief Marie-Anne Day Walker-Pelletier (Chief and Chair of the Saskatchewan First Nations Women's Commission of the Federation of Saskatchewan Indian Nations), a "blanket" approach would not fit the unique realities of all the different First Nations (June 7, 2010, p. 1). Chief Noah Augustine (Co-chair, Atlantic Policy Congress of First Nations Chiefs) likewise argued that a "cookie-cutter" approach would not work for the diverse First Nations affected by the Act, all of whom had their own MRP practices and approaches (June 7, 2010, p.7). In contrast to the narrower approach taken by the Act, it was argued that "[t]he use of a collective, culturally relevant approach to resolving conflict by communities will result in the fair and equitable treatment of both partners in finding solutions to MRP issues" (NWAC, 2007, p. 17).

For First Nation witnesses and critics of the Act, unless a comprehensive approach to property was taken, the Act would have no power at all to improve the circumstances of spouses undergoing separation on reserve. Indeed, witnesses and critics of the Act criticized it for not dealing with important contexts related to property on reserves, essentially arguing that bracketing property to exclude these contexts would make the Act powerless to improve or address MRP on reserve in any meaningful way. Grant-John (2007) summarized the issue as follows:

> The use of current provincial and territorial laws as a standard to measure what is happening on reserves seems to flow logically from the federal objective of wanting to place First Nation people on reserves in at least a comparable position to people off reserves in regard to matrimonial property rights. This objective is based on a human rights equality rationale and it is an objective and rationale shared with the Native Women's association of Canada. It is a policy objective that flows understandably from the considerable mass of domestic and international human rights reports calling for action. However, if this objective is to be taken as a genuine one, then the *other prerequisites for the enjoyment of matrimonial property rights also must be considered*. These involve more than just substantive law respecting matrimonial real property, but other determinants of access to matrimonial property rights in modern democracies such as access to the justice system and functioning land regimes reflective of the people they are intended to serve. (Grant-John, 2007, p. 20)

For Grant-John, failure to complicate and entangle property, to deal with the underlying contexts, would render the Act's stated objective dishonest. Indeed, the "disconnect" between the Act (which was based on off-reserve contexts) and the on-reserve contexts

where it would apply, was significant and problematic to the extent that it would actually create inequality. In many respects, then, there were conflicting views around the appropriate way to conceptualize property, and, indeed, the whole issue. This central tension about what should be included and excluded from MRP's brackets revolved around property itself: Does property have spatial and temporal context? Is it contingent? Does culture matter? For many witnesses and participants in the national dialogue, the answer to all of these questions was "yes!" and they asserted time and again that a disentangled, decontextualized approach would amount to no solution at all. Thus, a comprehensive approach was called for, one that included legislative and non-legislative solutions that would deal with the complicated contexts underlying the MRP on reserve issue, because as Grant-John (2007) pointed out, "a wholesale transfer of provincial-type rights and remedies to a reserve context would not work" because the legal, socioeconomic and cultural situation on reserve has no off-reserve parallel (p. 57).

First Nation witnesses argued that the legal difference between on-reserve and off-reserve property meant that legislation based on off-reserve property would be a poor fit and thus more likely to fail in its goal.[20] More importantly, however, opponents of the Act conceptualized property more broadly, and therefore, they conceptualized the gap and its possible solutions more broadly as well. They defined the "gap" in broader terms (i.e., it was not simply a legislative gap), and thus, the proposed Act was strongly critiqued for being solely focused on a legislative solution. For these participants, the complex and interrelated socioeconomic, political and cultural realities stemming from colonialism were considered inseparable from property issues and their solutions. They emphasized non-legislative measures that addressed the diversity among First Nations (e.g., Augustine, June 7, 2010, p. 7; Walker-Pelletier, June 7, 2010, p. 1) as well as the context (not just the theory) of MRP on reserve. As Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University) argued, "[t]here must be a better balance between what is happening in both policy and practice and what we are advocating in law" (June 7, 2010, p. 11). For many First Nation participants, then, a "solution" would not be a solution unless it included

[20] Proponents of the Act also note this spatial mismatch on and off reserve; however, they tended to think the spatial discrepancy could be smoothed out through the application of off-reserve approaches and applying them on reserve. First Nation witnesses argued that the outcome of this approach would not produce equality, and would hinder it instead. The difference between off- and on-reserve spaces demanded different approaches.

legislative and non-legislative components based on First Nation self-government and jurisdiction, or "nation-building," dealing with social development, capacity building, access to justice, increase in housing and measures to address family violence.

6.5. Conclusion

Culture is an important lens through which to understand differences in property conceptualizations, and relatedly, differences in perspectives on the MRP on reserve "problem" and its solutions. For Singer (2000a), our understandings of property "have their origins in culture, history, and law" (p. 10); indeed, Singer (2000a) argues "the cultural underpinnings of property cannot be overstated" (p. 10). Narratives around cultural difference were certainly present in the national dialogue and, in many respects, bracketing MRP involved fundamental cultural differences. For example, in mainstream (non-First Nations) culture in Canada property is largely taken-for-granted to be an individual right, and so the lack of matrimonial real property rights on reserve was often presented as an issue related to individual rights, i.e., Aboriginal women's rights. The Act was clearly not meant to be a solution for community rights or collective rights issues. However, many witnesses giving evidence at the Standing Senate Committee hearings challenged this perception that property was an individual right. During the Standing Senate Committee hearings in 2010, one Senator observed that the Act "is an imposed and unnatural solution according to their culture" and "we do not necessarily understand the culture we are dealing with because we were not raised in it and do not live it" (McCoy, July 6, 2010, p. 19). Not only did the Standing Senate Committee (generally) "not understand the culture" they were dealing with, they did not understand that they were dealing with *cultures* (plural). Nonetheless, statements such as these reflected some awareness that the Act may conflict with First Nation cultures, and thus, there was some acknowledgement of the different worldviews at play in the MRP on reserve discourse. The Senators involved in the 2010 hearings grappled with the "messiness" involved in recognizing difference, and how a plural approach might fit into the current system. For example:

> In terms of indigenous law we have had mention of sort of the custom codes and common sense. How do we then pump up the non-legislative measures? Do we then recognize indigenous laws and customary

> traditions as opposed to a new federal law based on the Westminster model rather than an indigenous model? (Dyck, May 31, 2010, p. 7)

The cultural context might well serve to encompass (or explain) the tensions and negotiations that took place around rights (e.g., individual human rights versus inherent collective rights), governance (e.g., Canadian governance, federal jurisdiction, and the justice system versus First Nation self-determination/self-governance, jurisdiction, and traditional modes of dispute resolution), and property law (e.g., Western versus Indigenous), and it certainly served to (re)entangle property in the national dialogue. That the Act failed to adequately represent First Nations' cultures with respect to property reflected its exclusion of the contextual, political, plural – and complicated – realities of the MRP on reserve issue.

7. Mending the Gap?: Property, Geography and State-First Nations Relations

In many respects, the "legislative gap" was understood to be a "property gap" – a perceived absence of matrimonial real property law. As I have argued, the property gap was born of the dominant conceptualization of property in the national dialogue since the gap and its proposed solution (the *Family Homes on Reserves and Matrimonial Interests or Rights Act*) relied on conceptualizing property according to the ownership model. In addition to grasping the prevalence of the ownership model, and the ways in which the potential "good work" ascribed to the ownership model was leveraged by proponents of the Act to justify their proposed legislative solution, it is important to explore the consequences of the ownership model more broadly. In this chapter, I extend the discussion of the "work" of property to think through the ways in which conceptualizations of property are, in fact, much broader statements about conceptualizations of Aboriginal people with implications for understanding state-First Nations relations. Here, the focus is on the "bracketing work" of the ownership model in the national dialogue that contributed to the production of property as an ideal, or absolute, unencumbered by such contexts as history, geography or culture. I discuss the powerful ways in which bracketing property also bracketed Indigenous subjects, subduing their differences, their colonial contingencies, and their "messy unfits" through the imposition of dominant Western ideas about property. I argue that the discourse around property worked to make "other" conceptualizations of property appear to not belong. In other words, the dominance of property as decontextualized and apolitical worked to erase "other" approaches and "other" conceptualizations of property. I then attend to the section in the Act that provides for First Nations to create their own MRP laws, and the assertion that this provision acknowledges, supports and makes visible "other" conceptualizations. I employ literature on "whiteness" and "recognition" to argue that while appearing to be progressive and postcolonial, the Act actually served to re-

entrench colonial hegemony and reproduce the power differential that Indigenous peoples experience in reference to the Canadian state.

Bracketing property (i.e., cordoning it off from place and history) as per the ownership model of property, coupled with the "beyond-reproach" provision for First Nation law and culture, worked in concert to obscure colonialism. It drew attention away from the colonially produced spaces of reserves, and indeed, from the nearly seamless genealogy of colonial law that the Act was part of. By making property decontextualized and apolitical, by elevating it above the "messy" realities of the reserve system and its colonial history, the Act aspired to also "erase" the colonial present. However, the national dialogue was also a site where Indigenous and Western ideas about property come into conflict, tension, and negotiation. The dialogue around the Act and the "work" (both positive and negative, depending on the perspective) it could do was evidence that property could not be easily corralled as a narrow concept; technical solutions became entangled in messy non-technical contexts. Thus, the property gap was an "opening" where property, to some extent, was being (re)generated and (re)created – *respliced*. In the final section of this chapter, I explore some opportunities presented in property theory to account for Indigenous geographies and conceptualizations of property, and in doing so, to move toward an agenda of decolonization.

7.1. The More Things Change…

As I have shown in the previous two chapters, participants in the national dialogue conceptualized property in a number of ways, but the ownership model of property was the most prevalent, the dominant conceptualization. The ownership model is constituted by a series of organizing ideas that originate with settler culture. To recap, property from this perspective is characterized by "full control by an owner" (Singer, 2000a, p. 4), including the right to use the property, the right to exclude others from the property, and the right to transfer one's rights to one's property to others. It is based on the idea that property represents some "thing," and that owners are the people who hold the rights to "things." Property rights are protected, meaning that they cannot be taken away without compensation, and, as a general principle, there has to be good reason to limit property rights. The broad understanding of property ownership is that "owners can

do whatever they want with their property" (Singer, 2000a, p. 3). Most importantly, the ownership model describes property as something simple, neutral, apolitical, and free of entanglements. As Singer (2000a) states, "[t]he ownership model is premised on the view that the meaning of property is clear and is not a matter of controversial political or moral judgements" (p. 7). Property – a melding of law and space – appears to be an autonomous and objective construct, an unemotional theory, and quite separate from society. The ownership model obscures the social, cultural and political contingencies, not to mention the "feelings" and affect that constitute daily enactments of property.

Singer (2000a) observes that this absolutist conceptualization of property does not accurately define property, nor does it adequately express social values or the choices society has about property. Property is far more complex, political and contingent than the ownership model grants. Indeed, the shortcomings inherent in the ownership model were evident in the dominant conceptualization of property in the national dialogue. Tensions arose and negotiations ensued with respect to how to reconcile the desire to maintain an absolutist conceptualization of property that quite clearly did not "fit" property on reserves. The counter-conceptualization of MRP challenged the ownership model's bracketing of property, and called for a broader, more entangled interpretation of the MRP on reserve issue and how it might be addressed. Property, it turned out, was not clear or simply defined, and defining property involved value judgements, political investments, ethical and moral dimensions, and controversy. Likewise, it was not clear what constituted a justifiable limit on property or what to do about conflicting property interests and rights (Singer, 2000a). Thus, the tension between the ideal represented by the ownership model and the muddled actualities of property that were evident in the national dialogue might be characterized by property theorists as a gap between ideology and practice, between rhetoric and reality (Singer, 2000a, p. 8).

Notwithstanding the broad understanding that the ownership model is not accurate, and despite the realization that many conceptualizations of property are possible and exist, the absolutist conceptualization of property remains pervasive (Blomley, 2004; Singer, 2000a). Indeed, academics and government officials alike continue to apply the ownership model to a variety of problems, for example market solutions and deregulation (Singer, 2000a). However, in the national dialogue, First

Nation participants opposed to the Act were not confident that the ownership model could solve the MRP on reserve issue, and instead asserted conceptualizations of property that reflected their own cultures. Many participants questioned the applicability (and/or appropriateness) of applying the dominant conceptualization of property on reserves. Nonetheless, the ownership model of property was the dominant view against which "other" property possibilities were measured and compared, and there was little doubt that this conceptualization of property represented the dominant view in law, in practice, and in culture. People (lay people, scholars, and judges alike) continue to rely on the ownership model and the organizing idea of individual ownership, and so, regardless of being admittedly problematic, the ownership model persisted in the national dialogue because it is both cultural and common-sensical, and has "strong intuitive appeal" (Singer, 2000a, p. 31).

According to Blomley (2004), the ownership model "shapes our understanding of what property […] actually *is* and how it *ought* to be structured" (p. 3). Property is considered to be a way in which social aspirations and values such as liberty, equality, autonomy and justice may be asserted, expressed, and ultimately achieved; therefore, the ownership model of property may be understood to be powerful, and to do "work." This consideration of power and property necessarily leads to a deeper consideration of "the ethics of property", and how different readings of property are imbued with a "moral evaluation", or an assertion of what property ought to be (Blomley, 2004, p. 75). The ownership model ascribes private property with the moral value to contribute to the creation of a favoured kind of social and economic organization that is taken-for-granted to be both neutral and "good" (Blomley, 2004). In the national dialogue, the ownership model was central in what was perceived by proponents of the Act to be an uncomplicated moral agenda to provide at least some of the benefits of private property to spouses on reserve (such as exclusive occupation rights). For some, the technical treatment of MRP on reserve would go so far as to elicit emancipatory results. It would bring equality to Aboriginal women and protect them from family violence. Others were more cautious, and considered the power of the Act to rest only in its ability to provide for the fair division of property between spouses. Nonetheless, for participants who supported the legislation and conceptualized matrimonial real property through the ownership model, property could do important (and "good") work: individuals on reserve

would gain increased protection of their property rights, their personal safety, and most significantly, they would become equal to their off-reserve counterparts. Power was located in the organizing ideas that constituted the ownership model, but also in the law that would formalize them; for the proponents of the Act, the creation of a property law could bring significant improvements to the lives of men, women and children living on reserves (despite the unchanging context in which the issue arose).

Property, as concept that is simultaneously legal and spatial, is usefully understood as a "splice" (Blomely, 2003). Both law and space have the appearance of being neutral and objective, and separate from social relations. When combined in a splice, as they are in property, the category seems "natural," fixed, "simply part of the order of things" (Blomley, 2003, p. 30). In many respects, property in the national dialogue exhibited this effect. When proponents of the Act asserted the ownership model of property, they concurrently asserted a particular understanding of law and space, one which bracketed out the messy, political, cultural things deemed not to apply. Moreover, this "splicing" of property made this bracketing work appear natural, normal, and non-negotiable. Here, I want to argue that this bracketing work was powerfully suggestive of the colonial power relations that ran through the national dialogue. First, by confining the property gap to the "neutral" and "objective" topic of ownership model-style property legislation, the federal government largely side-stepped the issue of colonialism. The gap was simply a matter of property, and property was simple: an apolitical, autonomous concept with all the objectivity of law inherent in it. Colonialism, replete with the imposition of settler laws and settler geographies, was not considered relevant. First Nation jurisdiction and right to be self-determining, struggles over geography, over who can control lands – over who can control matrimonial real property – were out of the question. Indeed, colonialism was a separate issue, political, emotional, and very much implicated in the stuff of social relations.

Second, the geographies of reserves – colonial geographies – were only partially addressed. Reserves are also splices, and as such, they are taken-for-granted to be "simply part of the order of things" (Blomley, 2003, p. 30). They are challenging spaces, to be sure; the federal government grappled with how to apply its matrimonial real property legislation to spaces quite unlike the provincial/territorial norm the legislation was largely based on. At times, participants discussed reserve geographies in terms of

their destitution and marginalization. In so doing, participants pathologized the spaces of reserves, describing them as filthy and unsafe, and inhabited by poor, uneducated, female, "victims" (e.g., Duncan, May 10, 2010, p. 1) and "vulnerable citizens" (Ruth, April 13, 2010, p. 11). The federal government did not question the presence of reserves, or take responsibility for the housing shortages, the issues around band membership and governance, or the prevalence of family violence on reserves. By staying focused on property, and because property was conceptualized as a neutral and narrow concept, "other" concerns related to matrimonial real property on reserve were bracketed out of the discussion. Instead, the pathology of reserves and, by extension, their residents, was implicitly connected to insecurity of property, and the Act was presented as an antidote. By securing matrimonial real property through the application of the dominant culture's conceptualization of property, the unruly reserve geographies could be subdued, brought to order, *civilized*. And so, the discourse around mending the property gap relied, to some extent, on this construction of reserves as nasty, brutish places that could be corrected – whitened – by the application of Western, "white" property. Political concerns related to reserve geographies were bracketed, and the focus of the problem was constrained to the unemotional, autonomous, objective question of property. Bracketing worked to obscure the role of colonialism in the creation of reserves and "Indians," in the MRP on reserve problem, and most importantly, in its proposed solution.

7.2. …The More They Stay The Same

Settler colonialism in Canada involved revoking Indigenous peoples' collective and individual rights (e.g., rights to land, to vote, to self-determine and self-identify). More recently, we have seen a process of renewing, returning or *recognizing* many of these rights (e.g., self-government agreements; section 35 of the Constitution Act). The Act epitomized an effort by the state to recognize First Nation laws respecting the family home. The ownership model of property, which did so much bracketing work in the national dialogue represented one part of the Act: substantive federal matrimonial real property law. The other main section of the Act was a legislative mechanism for granting authority to First Nations to create their own MRP laws. Proponents of the Act argued that this provision recognized First Nations' cultures and approaches to property and family law. For many, then, the "goodness" of the Act appeared obvious and beyond

critique – common-sensical, even. It was presented as a progressive, reconciliatory strategy developed in close consultation with First Nations individuals and organizations. The government appeared to be effectively addressing a legislative gap that put human rights and equality at risk, and to be doing so in a culturally sensitive way by *recognizing* First Nations as best positioned to make their own laws. Rights function, in many respects, to define the relationship between Indigenous peoples and the state; for example, the denial of rights causes a shift in the relationship, a power differential, while the recognition of Indigenous rights arguably re-balance power relations. For Senator Nancy Ruth (and other proponents of the Act), "…this approach would also strengthen relations between the federal government and First Nations communities" (April 13, 2010, p. 11).

Despite the apparent presence of recognition and reconciliation in the Act and the narratives communicated by its proponents, First Nation witnesses repeatedly highlighted the flaws and failures that, from their perspectives, were tantamount to the continuation of colonialism. The Act was perceived as "a continuation of colonial practices that have led First Nations to poverty and homelessness" (Phillips, May 31, 2010, p. 12). For Chief Louise Hillier (Caldwell First Nation), "[m]atrimonial real property is another government experiment that will, in my mind, equal the horrors of the residential schools" (May 31, 2010, p. 11). From this standpoint, the Act did not reflect the majority of First Nations' aspirations for MRP on reserve; whatever rights it granted First Nations to create their own laws were deemed incomplete and unacceptable, and the proposed legislation was considered colonial, patronizing, ineffective and imposed. Thus, the implementation of the proposed property legislation, despite recognizing Indigenous approaches to MRP and bestowing law-making powers on First Nations, would not shift the colonial power differential or improve state-First Nations relations. Indeed, the relationship would remain status quo, and I argue that despite any appearance to the contrary, hegemony was maintained.

Hegemony relies heavily on both legitimacy and consent, the former encouraging the latter. Waterstone and de Leeuw (2010) argue that state hegemony "depends crucially upon a widely shared, common-sensical view that elites are acting in the interests of those being governed, and this common sense underpins the legitimacy and authority of those in power" (p. 1). In other words, if the state is perceived as being well

intentioned and morally good, then it will be deemed legitimate and its dominance will more likely be consented to. According to Bhandar (2004), “closing off histories of the violence of colonial settlement and a refusal to call into question the legitimacy of the assertion of Crown sovereignty facilitate an understanding of Canada as a liberal-democratic advanced capitalist state, with its state-of-the-art Constitution and dominant ethos of pluralism and multiculturalism” (p. 831). In this case, the positive image of the state is protected by “closing off” and thus rendering “invisible” any challenge (e.g., the history of colonial violence) to the state’s legitimacy. Legitimacy can also be strengthened when “good,” “right,” and “moral” characteristics or actions are highlighted. The federal government defended its Act as being morally good, and evidence of this kind of justification can be found throughout the national dialogue; to have been successful in this endeavour may have resulted in wider consent (i.e., support for the Act). This point is crucial and provides a nuanced way of understanding the property narrative put forward by the federal government (i.e., the Act based on the ownership model of property and its justifications), because despite the best intentions of the Act’s proponents, it is essential to also acknowledge that the Act could, in effect, re-inscribe and reproduce the very colonial power relations it purported to overcome, in spite of all its so-called “goodness.”

In his critical analysis of “politics of recognition,” Coulthard (2007) defines it as “the now expansive range of recognition-based models of liberal pluralism that seek to reconcile Indigenous claims to nationhood with Crown sovereignty via the accommodation of Indigenous identities in some form of renewed relationship with the Canadian state” (p. 438). This politics of recognition includes language dealing with “recognition of cultural distinctiveness, recognition of an inherent right to self-government, recognition of treaty obligations, and so on” (Coulthard, 2007, p. 437). In many respects, the Act is an example of politics of recognition. One of the central ways in which the federal government defended the Act was to highlight how it recognized Indigenous rights by providing a mechanism through which First Nations could develop and implement their own MRP laws. In other words, the federal government sought to increase the legitimacy of the Act by emphasizing the ways in which it recognized First Nations’ cultures and rights, and by doing so, it hoped to win the consent of the people it would affect.

Coulthard (2007) argues that it is increasingly common for Indigenous rights to be sought (and granted) through politics of recognition. He provides the following example:

> …the right to be regarded by ourselves and the world as a nation. Our struggle is for the recognition of the Dene Nation by the Government and people of Canada and the peoples and governments of the world. (Dene Nation, 1977, pp. 3-4 in Coulthard, 2007, p. 437)

Likewise, Grant-John (2007) demands recognition when she states the following: "Delegated powers would not be acceptable and First Nations are looking for a clear recognition of First Nations' jurisdiction" (p. 2). In this model, the presence of Indigenous rights is directly connected to whether an external (colonial) body recognizes them. This tendency, asserts Coulthard (2007), amounts to the belief that "a liberal politics of recognition" can emancipate Indigenous peoples from colonialism and ring in an era of true post-colonialism (p. 437). Indeed, it would appear that for both colonizers and colonized, this language of recognition "has now come to occupy a central place in our efforts to comprehend what is at stake in contestations over identity and difference in colonial contexts more generally" (Coulthard, 2007, p. 437). I further propose that recognition of Indigenous rights is so broadly taken-for-granted to be the best, and most morally correct approach, it has itself achieved "common-sensical" status (see Waterstone & de Leeuw, 2010).

Coulthard (2007) challenges the notion that politics of recognition could significantly transform the colonial relationship between Indigenous peoples and the Canadian state (p. 438). Instead, he argues "the politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that Indigenous people's demands for recognition have historically sought to transcend" (Coulthard, 2007, p. 439). This is because the formation of identity relies on the recognition of another subject. As Hegel (1977) famously wrote: "Self-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged" (p. 178). Drawing on Fanon (2005), Coulthard (2007) explores identity formation in colonial contexts. He states, over time, colonized peoples can "develop 'psycho-affective' attachments to these master sanctioned forms of recognition", and that this attachment underlies the hegemonic dynamic between master

and slave (or colonizer and colonized) (Coulthard, 2007, p. 439 citing Fanon, 2005, p. 148). Coulthard (2007) goes on to argue that colonial hegemony is maintained by enticing "Indigenous peoples to come to identify, either implicitly or explicitly, with the profoundly asymmetrical and non-reciprocal forms of recognition either imposed on or granted to them by the colonial-state and society" (Coulthard, 2007, p. 439). For example, land claims, which rely heavily on the language of property, "are now threatening to produce a new breed of Aboriginal property owner, whose territories, and thus whose very identities, risk becoming subject to expropriation and alienation" (Coulthard, 2007, p. 452). Likewise, in the national dialogue Grand Chief Mike Mitchell (Mohawk Council of Akwesasne) implied that many First Nations have come to identify with the asymmetrical forms of rights and recognition granted through the *Indian Act:* "we got too acculturated to the *Indian Act*" (May 31, 2010, p. 22). On the other hand, there is the risk of making recognition conditional. Valverde (2012) makes the following argument:

> The legal architecture of aboriginal title claims has forced aboriginal peoples to pretend to be the "owners" of a timeless, essentialized culture authentically expressed in certain highly ritualized performances of elders, a "culture" that (to be legally effective) should not be contaminated by English literacy, commerce, or creative revisions. And yet, after duly performing authentic aboriginality in the alien environment of the courtroom, elders often find their legal claims rejected. (Valverde, 2012, pp. 18-19)

In any case, Coulthard (2007) argues, reliance on recognition in the process of determining Indigenous rights has, "over time, helped produce a class of Aboriginal 'citizens' whose rights and identities have become defined solely in relation to the colonial state and its legal apparatus" (p. 452), thereby reproducing colonial power dynamics.

Ultimately, the terms of recognition are determined by the colonial state, and are geared towards maintaining the advantage that the state has over Indigenous peoples. Following Waterstone and de Leeuw (2010), the combined taken-for-granted "goodness" of recognition, of "consultation," and of the ownership model of property rendered the Act common-sensical, and, therefore, "somewhat invisible, or at least unexamined" (p. 2). In other words, the "rightness" of employing an ownership model of property for the "interim solution", the "goodness" of addressing a critical human rights issue, the recognition of

cultural distinctiveness through provisions for First Nations to develop and implement their own laws…each of these were taken-for-granted to be well-intentioned, morally good, *legitimate,* and, most importantly, beyond critique. Indeed, the very common-sensical nature of the proposed MRP legislation put it at risk of rendering invisible and leaving unexamined the continuation of colonialism. Furthermore, regardless of how well-intentioned these approaches (e.g., the Act) might be, they threatened to erode Indigenous ways of life (Coulthard, 2007, p. 451).

The national dialogue, however, was an example of the common-sensical being contested and critiqued (albeit from inside the terms of recognition). The Act's "goodness" was disputed, and First Nation witnesses and other opponents of the Act made every effort to make visible its shortcomings, particularly with respect to its potential to transform the colonial relationship between Indigenous peoples and the Canadian state. Indeed, there was general agreement the Act was "more of the same," when what was demanded was change, i.e., real progress towards a nation-to-nation relationship. The following quote speaks to the significant shift in power relations required for such a relationship to emerge:

> It took a long time to create a paper Indian; it will take some time to replace the *Indian Act* manifestation with the real Aboriginal person within the Canadian fabric as part of the federation of the peoples of Canada. (Lavallée, May 31, 2010, p. 9)

In essence, Betty Ann Lavallée (National Chief, Congress of Aboriginal Peoples) is calling for deeper change than that represented by the Act. Something more was needed to make property legislation effective or to solve the MRP on reserve issue. Or, perhaps what was needed was property legislation that was *something more*. For Grant-John (2007), "something more" would be as follows:

> If First Nation governments are to be looked to, to provide rights and remedies comparable to those available under provincial and territorial laws, while taking into account the distinct nature of the land regime in First Nation communities, there must be a comparable scope of recognized jurisdiction, resources, capacity and institutional development. (p. 20)

Chief Jody Wilson-Raybould (AFN) agreed, highlighting that the Act – despite its well-intentioned moral goodness – did not represent real change (i.e., a shift in the colonial power dynamic):

> Whether or not the federal government and First Nations have the *political appetite* to support a comprehensive self-governance initiative is the question we all have to ask. In fact, it has been a question for some time, which is why I presume the minister continues to focus on *specific governance issues such as matrimonial property rights* and clean water in the absence of an agreed-upon or more comprehensive approach or process leading to true self-government for all First Nations. (May 31, 2010, p. 3, emphasis added)

The First Nation witnesses who spoke back against the Act took an opportunity to put Indigenous and anti-colonial voices on the record. The dominant conceptualization of property was frequently identified as a colonial conceptualization. The failure to address the colonial context of MRP would render the Act useless. The "consultation" process and provision in the Act for First Nation MRP law were called into question.

First, the representation of the issue as solely a property gap was contested, particularly the notion that problems around matrimonial real property on reserve could be understood from a narrow, Eurocentric, ownership model perspective and solved entirely with law. As discussed in Chapter 6, many witnesses argued strongly that the effectiveness of the Act relied on non-legislative measures, such as "ending violence and ensuring adequate policing, addressing poverty and the chronic shortage of housing, the lack of shelters and second stage housing" (Corbiere Lavell, May 31, 2010, p. 4). For NWAC, the Act did not adequately protect women's human rights because it did not address "the ongoing discrimination in the *Indian Act* and broader citizenship issues" (Corbiere Lavell, May 31, 2010, p. 4). Second, many First Nation witnesses argued that the Act failed to recognize First Nation rights to self-determination and jurisdiction over property law and family matters (another important aspect of property that also directly affects the relationship). There was general consensus among First Nation witnesses that the Act "delegates or purports to create First Nation authority to pass laws rather than recognizing our inherent jurisdiction" (Toulouse, May 31, 2010, p. 20). The Act does not "empower us to build legislation from a self-governing perspective" (Walker-Pelletier, June 7, 2010, p. 2).

Third, the representation of MRP on reserve as a human rights issue was contested. Many First Nation witnesses argued that without non-legislative solutions, the Act would amount to "empty rights" for women (Corbiere Lavell, May 31, 2010, p. 4; McKay, May 31, 2010, p. 7), or "inferior rights" (Jaffer and Eberts, May 31, 2010, p. 16). Many First Nation witnesses also expressed concern that not only would the Act fail to address individual rights, it pitted individual rights and interests against collective rights and interests. Legislative solutions should "complement the unique set of rights that Aboriginal women and their families hold, both as individuals and as members of collectives, referring back to our customs and traditions" (Corbiere Lavell, May 31, 2010, p. 4). For Ellen Gabriel (President, Quebec Native Women), the Act "disregards the issue of collective rights versus individual rights of Aboriginal peoples, as well as ignoring Aboriginal peoples' customary land use and title" (June 7, 2010, p. 2). There was wide agreement on these points among the Act's opponents, and some cited the UN Declaration on the Rights of Indigenous Peoples as evidence of the Act's violation of Indigenous rights (Hill, May 31, 2010, p. 19; Toulouse, May 31, 2010, p. 20). Senator Dyck quoted Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University) to argue that the Act "reduces them [inherent rights] to mere consideration for judges who must decide how to dispose of reserve property" (June 21, 2010, p. 12).

Fourth, many First Nation witnesses argued that the government failed to adequately consult with First Nations. For example, Chief Lawrence Paul (Co-chair, Atlantic Policy Congress of First Nations Chiefs) stated that Canada failed in its "legal obligation" to consult (June 7, 2010, p. 3). As Grand Chief Randall Phillips (Association of Iroquois and Allied Indians), citing the *Haida* case, argued, "[t]he duty to consult cannot be delegated to third parties such as AFN, the Native Women's Association or Indian Affairs" (May 31, 2010, p. 12). Chief Angus Toulouse (Ontario Regional Chief, Chiefs of Ontario) also opposed the government delegation of its consultation duties, and cited both *Haida* and *Sparrow* (May 31, 2010, p. 19). Not surprisingly, INAC did not debate whether the processes it undertook was consultation; however, NWAC and the AFN did. For example, Chief Jody Wilson-Raybould (AFN) used the term "dialogue sessions," stating that they did not constitute consultation and were "viewed more as information sessions" (May 31, 2010, p. 5). Moreover, the efforts made to engage First

Nations were considered insufficient (Palmater, June 7, 2010, p. 11). The time period was imposed and too short, and the funding insufficient (Toulouse, May 31, 2010, p. 19). Councillor Ava Hill (Six Nations of the Grand River) called for a "legitimate consultation process" with First Nations across Canada (May 31, 2010, p. 19), a statement echoed by Chief Louise Hillier (May 31, 2010, p. 11).

Finally, many First Nation witnesses stated that the Act reflected old colonial mechanisms (like the Indian Agent). The verification process,[21] in particular, was seen as problematic. Grand Chief Randall Phillips (Association of Iroquois and Allied Indians) argued that "[t]he use and authority of a verification officer is similar to that of the old Indian agent" (May 31, 2010, p. 12). Councillor Ava Hill (Six Nations of the Grand River) stated that the process "smacks of the days of the old Indian agent" (May 31, 2010, p. 18) and Chief Angus Toulouse called the verification officer the "current-day Indian agent" (May 31, 2010, p. 19). Likewise, Chief Shining Turtle (Anishinabek Nation) described the verification officer as "truly paternalistic and reminiscent of the old Indian agent who ran rough shod over many First Nations" (June 7, 2010, p. 14). The verification process was also deemed "racist" (Hill, May 31, 2010, p. 18; Toulouse, May 31, 2010, p. 19), "offensive" (Hill, Issue 3 Evidence, May 31, 2010, p. 18), and "colonial" (Toulouse, May 31, 2010, p. 19).

Mary Eberts (Barrister and Solicitor) distinguished between the verification process in the Act with the one found in the FNLMA. She stated that because the FNLMA was First Nations-driven, there was "an element of free will and agency on the part of the First Nations, whereas in this legislation, although the same terminology is used, the verification process is an imposition" (May 31, 2010, p. 15). She went on to say that there was general support for the FNLMA, but that the Act "cannot claim legitimacy because it uses the same language as the *First Nations Land Management Act* because that act is based on consensus" (Eberts, May 31, 2010, p. 15). Thus, while the Act seemed to draw on "best practices" found in other legislation, it would appear that its creators failed to understand why such practices were supported. The verification process was deemed an unprecedented requirement in contradiction to many First

[21] Details are provided in Chapter 1.

Nations' processes for decision-making, and the conditions put on First Nations with respect to passing their own MRP laws were called "onerous and paternalistic" (Shining Turtle, June 7, 2010, p. 14). Chief Shining Turtle (Anishinabek Nation) provided the following explanation:

> In summation, the federal government's statement that the bill "…also includes a mechanism for First Nations to develop their own matrimonial real property laws. The content and structure of community-specific matrimonial real property would be agreed upon by the citizens of a First Nation and the First Nation government with no federal government involvement," are *complete fallacies*. (June 7, 2010, p. 14, emphasis added)

Instead of achieving "buy-in" by providing a mechanism for First Nations to develop their own MRP laws that apparently drew on such well-supported processes as the FNLMA, the Act "imposes" processes on First Nations: "You force laws on us" (Montour, May 31, 2010, p.18). As Pamela Palmater (Chair, Centre for Indigenous Governance, Department of Politics and Public Administration, Ryerson University) stated, "*[r]amming these bills down First Nations' throats* will only engender bitterness" (June 7, 2010, p. 13, emphasis added). In a similar vein, Palmater spoke for many when she stated the following:

> What gives Canada the right or the moral superiority to say: We have to supervise you in what you do to ensure human rights for Aboriginal women are protected. I only have to point senators to the *Lavell*, *Lovelace*, *Corbiere* and *McIvor* cases or the native child and family services discrimination complaint to illustrate that Canada does not have a good record in that regard. Why are we imposing a double standard? Canada's own ministerial representative concluded in her report that First Nations are no more likely to violate the human rights of their citizens than Canada is. If that is the case, the process of a verifier is more than simply *an insult*. (June 7, 2010, p. 12, emphasis added)

The opposition and outrage regarding the process through which First Nations could develop and enact their own laws were significantly negative and should not be overlooked. They reflected the perception that the proposed legislative solution was ignoring the broader issues related to colonialism, and indeed, that it served to reinforce the colonial relationship by imposing federal laws and mainstream perceptions of property. Ellen Gabriel (President, Quebec Native Women) expressed this when she said "the government refuses to hear our voices, refuses to look at this issue in a holistic

manner with all the related issues. You cannot simply apply what happens in the rest of Canada to on reserve" (June 7, 2010, p. 9). In its final report, NWAC (2007) argued that legislation was only part of the solution, and that the government was failing to "heal the wound"; in other words, "if the government can stop the bleeding that is all they want to do" (cited by Jaffer, May 5, 2010, p. 20). For some, the Act was seen as a kind of decoy or distraction from what might be a real solution. As Angus Toulouse (Ontario Regional Chief, Chiefs of Ontario) argued, "Bill S-4 creates the appearance of action while leaving unaddressed the underlying socio-economic problems […] inadequate housing, poor health, low education levels, undrinkable water, lack of employment, inadequate First Nations government tools and resources, and the list goes on" (May 31, 2010, p. 20).

And so it was that the Act was contested, despite purporting to recognize First Nations culture and jurisdiction. For all the Act's "goodness," it failed to represent any change in the issues underlying MRP on reserve. Whatever rights would be bestowed upon First Nations (i.e., property rights for spouses) would ultimately be undermined by the deeper problem – colonialism, its legacy and the power differential that continues to characterize the relationship between Indigenous peoples and the Canadian state. Coulthard (2007), drawing on Povinelli (2002), argues that "colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political and economic framework of the colonial relationship itself" (p. 452). Bhandar (2004) concurs, stating that "[i]n a society where the majority of the dominant, nonaboriginal community seem resolutely opposed to ceding little if any power to aboriginal communities the recognition of the 'truth' of Canada's colonial history and its ongoing legacies should not be underestimated" (p. 835). The conceptualization of property within the Act represented the dominant culture, and the proposed legislation relied on colonial systems and structures (government, courts, the ownership model of property) and reflected non-First Nation culture, resources, and *contexts.* The Canadian state was invested in maintaining its positive image "as a liberal-democratic advanced capitalist state, with its state-of-the-art Constitution and dominant ethos of pluralism" (Bhandar, 2004, p. 831) and so this image was asserted and defended in the national dialogue; to start acknowledging the colonial context involved in matrimonial real property on reserve would risk revealing what Bhandar (2004) calls "systematic forms of discrimination and exclusionary practices

and policies" (p. 831). This was the project that the Act was contributing to; the national dialogue was a scene in an ongoing performance of postcolonialism. The Act was taken-for-granted by many to be *beyond reproach*, but it was also highly contentious and strongly criticized. Its "goodness" was debated and denied. The unwillingness to "throw into question" all the things that underpin the colonial relationship would result in the Act failing to be effective, and moreover, the colonial power dynamic being reinforced despite all appearances of efforts to achieve the opposite results. Without acknowledgement of context, nothing would *really* change, and power would not *really* shift; the colonial status quo would continue and the relationship between Indigenous peoples and the state would not shift or improve.

7.3. Restoration

> The work of human life, the work of justice in human societies, is not to restore the world to a prior state of unity. It is to acknowledge that the world has been shattered, to remember how the shattering happened and what one's role in it was, and to act – to mend the damage and to rebuild human relationships. The repair of the world requires continuing engagement and responsibility. Satisfaction comes not with the knowledge that one has righted a wrong and put the past to rest but with the structuring and restructuring of life. (Singer, 2000a, p. 196)

Property (in the national dialogue) was not "settled" (Blomley, 2004). On the one hand, proponents of the Act attempted to keep property simple, and to adhere to the ownership model in absolute terms as much as possible. On the other hand, opponents emphasized the "complicating" contexts of history, geography, law and culture that, they argued, demanded reckoning with. It is not enough, however, to stop here. As Singer (2000a) points out, "[p]roperty is a form of power, and the distribution of power is a political problem of the highest order" (p. 9). Given Canada's history of colonialism, and the unacceptable circumstances that First Nations people in this country continue to struggle with as a result (Alfred & Corntassel, 2005; de Leeuw, 2007; C. Harris, 2002), there is an important moral theme running through the debate about how to first understand the issue of matrimonial real property on reserve and then to address or "solve" the problem. For example, it is difficult to think about MRP on reserve without facing the legal-spatial – and colonial – fact of reserves themselves. Property within the bounds of these legal-spatial colonial impositions is different than outside, off reserve.

This is because colonialism was a process through which the state denied recognition of First Nations' sovereignty and the property rights of First Nations were "stolen" (Singer, 2011), i.e., First Nations were bestowed limited property rights to use and occupy the spaces of reserves. The uncomfortable reality of colonialism is difficult (if not impossible) to ignore in discussions of property, because in many respects, colonization was largely about property – it is a history of acquisition (Rosser, 2013), a process through which Aboriginal title was "transferred" to settlers, through which "[o]ne human geography was […] superseded by another" (C. Harris, 2002, p.xvii).

Singer (2011) analyzed settler colonial property law to determine whether colonial property rights were acquired justly. He states that "European colonizers invaded America and seized the land of Indian nations" and "used many arguments to justify [this] conquest as legitimate, just, honourable, and compatible with the wishes of God" (p. 766). Singer (2011) goes on to argue that "[f]rom a moral point of view, conquest puts all current land titles in doubt" (p. 766). Indeed, it appears that settler beliefs about property cast doubt on its legitimacy, and certainly on its justness. It would not be surprising if the facts of colonialism lead to feelings of discomfort and the desire to avoid history altogether. Although writing about the United States, I believe Singer's (2011) analysis applies in large part to Canada; he states that settlers deal with their/our discomfort around conquest by engaging in "the time-honored practice of repression; we deny this part of our history" (p. 766). He goes on to say that "[w]e ignore it or we acknowledge it only to marginalize it" (p. 766). I agree with this assessment, and believe that this may well partially explain the aspiration to bracket property in the national dialogue. Keeping the question of MRP on reserve as simple and context-free as possible was a way to minimize or avoid dealing with the uncomfortable truth about colonialism's role in the problem, and more importantly, in how the solution might be formulated.

Thus, there is a moral imperative involved in property questions (such as MRP on reserve). As Singer (2011) asserts, society must ask: How does, or could, property affect social goals around liberty, autonomy, equality and social justice? Scholars and lay people alike tend to approach this question using the ownership model, but (as Singer and others have argued) this conceptualization is flawed; it does not accurately capture the technical or the practical aspects of property, nor does it adequately explain "the

tensions within the concept of property itself" (Singer, 2000a, p. 7). Society needs alternatives to the ownership model, but the ownership model tends to obscure other possibilities for property. "A way of seeing, " state Cohen and Hutchinson (1990), "is also a way of not seeing" (p. 23); indeed, the reliance on the ownership model is so pervasive that it is even present in efforts to develop alternative models. Blomley (2004) argues, however, that "other forms of property are by no means ignored" (p. 75); instead, he explains, "they provide a vital foil, both in the sense that dominant understandings of property rely upon them as a constitutive outside, against which to justify private ownership, and […] because dominant forms of ownership are subject to creative critique by those interested in sustaining alternatives" (pp. 75-76). Nonetheless, the ownership model, along with its moral vantage point, remains common-sensical and hegemonic. As such, it influences the extent to which "other" forms of property may be taken seriously, and which property claims are considered legitimate. As Singer (2000a) has pointed out, ownership "hides from our view consideration of the systemic consequences of alternative property regimes, and it takes our attention away from considering which relationships can be characterized as just and which ones should be seen as oppressive" (p. 13).

Consideration of how First Nation jurisdiction over property rights might be restored must be central in the discussion of matrimonial real property on reserve. As Singer (2000a) states: "Restoration makes those who committed the wrong treat those they harmed as people, as human beings with rights, including the right to own property and to have their property restored to them when it is wrongfully expropriated" (p. 191). Clearly this is not a straightforward undertaking. New property rights have been established on Aboriginal lands, and compensation for this loss is unlikely to be sufficient. Despite feeling overwhelmed by the "scale of the harm" (Singer, 2000a, p. 195), settler society must make every attempt to make "[a]ccommodations between the wrongs of the past and the needs of the present" (Singer, 2000a, p. 192). While proponents of the Act, as well as a number of scholars (e.g., Flanagan; de Soto), assert that part of the solution is to extend the ownership model, it is critical that property be opened up to include non-Western, non-ownership model conceptualizations because it is not ethical to continue to deal with property issues using only established (dominant) conceptualizations of property.

Explicit attention must be paid to the possibility of property pluralism. Bryan (2000), comparing English and Aboriginal conceptions of property, states: “Where the foundations of English conceptions of property are highly rationalistic, Aboriginal conceptions eschew categorization and are indicative of a highly nuanced and different way of understanding the worldliness of a human being” (p. 3). It is critical that such fundamental differences are not ignored; for example, a more ethical response to the matrimonial real property on reserve issue might have involved a very open conceptualization of property that focused on social relations, acknowledged complexity and contradiction inherent in bundles of property rights, but that also allowed First Nations to define (or abandon) the concept of property and to govern it according to their own principles and values (their own vision of social life). As Borrows (2002) argues, “it is unnecessary for courts to approach the interpretation of Aboriginal rights as though each source of law [First Nation versus Canadian] was in competition with each other” (pp. 4-5). For Borrows (2002), Canada’s legal traditions are imbued with “constitutionally mandated, intersocietal pluralism” (p. 143); however, fulfilment of his vision of citizenship requires that “Aboriginal people, institutions, and ideologies” – which includes conceptualizations of such things as property – begin to permeate various sites of power within Canada (p. 140). We need to move, then, from a place in which we give a nod to Aboriginal perspectives on property but leave them relegated to the margins of “Aboriginal affairs,” to a place where Aboriginal people have control over property in the broader context of “Canadian affairs” (Borrows, 2002, p. 140). In support of this goal, property scholarship must make a similar shift to not only include Indigenous conceptualizations, but to also be driven by Indigenous scholarship on the matter.

8. Conclusion

The national dialogue was a discursive site in which meanings about property were produced, legitimized and contested through a series of representations and performances (Gregory, 2000b, p. 180). This discourse took place at the national scale and in a political arena where legislation is created, debated and ultimately accepted or rejected; it provided me a "way in" to the power-laden discussion and debate that influences policy and law where I could interrogate the tensions, negotiations and power struggles that shaped how the issue of MRP on reserve was represented within Canada's governmental legislative system (S. Smith, 2000, p. 661). In this chapter, I start by discussing the usefulness of employing property theory to my analysis of matrimonial real property on reserve. Here, I consider how property theory complemented other scholarship, such as law and colonialism, critical legal geography and Indigenous geographies, and I suggest that property theory offered important insights into the matrimonial real property on reserve issue. I also assert that my research contributes to property scholarship by analyzing non-juridical data to look at issues of law, property and power. I then propose additional ways in which property theory could be applied to topics concerning Indigenous peoples, geographies, and colonialism. In the final section of this chapter, I argue that property theory – despite being only one of many possible and appropriate theoretical approaches to the topic of matrimonial real property on reserve – opened up possibilities of multiple and competing (or perhaps hybridized) conceptualizations of property and interrogated them to uncover their ethical potential.

8.1. The Importance of Considering Property

Blomley (2005b) reminds geographers to "remember property" (p. 125); likewise, property scholars have much to gain when they heed geography. Property frequently has a spatial dimension, but this does not mean that property can be simply defined as a

bounded space, or a specific object. Geographers have long argued that space is not merely a backdrop or container for (more important) actors, concepts and events; rather, space itself is consequential, imbued with meaning and power. This understanding of space alerts researchers to, for example, the possibilities of matrimonial real property as particular, localized sites of personal and collective significance. Rather than an abstract and universal concept, geographical theories of place move researchers toward context, culture, and relations; indeed, they unsettle seemingly stable notions such as boundary (e.g., between on and off reserve spaces) and property, and reveal them to be contingent, fluid and political.

As a geographer, I recognize that space is deeply implicated in social power, and that spatial categories such as property do considerable "work" in producing relations of power. The matrimonial real property on reserve issue was complex and involved a number of interrelated issues and concerns. Property theory was central to my examination of matrimonial real property on First Nation reserves as I chose to focus my analysis on problematizing property in the national dialogue. My aim was to uncover the various ways in which property was conceptualized as well as some potential consequences of these conceptualizations. Property theory (see, for example, Singer, 2000a; Blomley, 2004) proved useful in explicating the pervasiveness of the ownership model, and how it remains largely taken-for-granted to be neutral, normal and apolitical. As I found to be the case in the national dialogue, the organizing ideas constituting the ownership model are so taken-for-granted they have achieved common sense status. Literature on property, law and colonialism identify the values inherent in the ownership model as largely Western. Considering these ideas together, I was able to theorize how the dominant conceptualization of property in the national dialogue reflected colonial legal-spatial orderings and how it has been and continues to be implicated in race- and gender-based discrimination (Borrows & Rotman, 2003b; Cornet & Lendor, 2002; NWAC, 2007).

Property scholarship related to the ownership model has revealed it to be an inaccurate depiction of reality that fails to capture the complexity and multiplicity of property relations. These critiques were particularly useful in guiding my interpretation of the potential outcomes associated with applying a problematic (yet taken-for-granted) model to practical property problems such as MRP on reserve. Drawing on theories of

property and law and geography scholarship, I was able to identify and understand the tensions and paradoxes that existed within the national dialogue on matrimonial real property on reserve. Furthermore, by employing performativity theory and the concept of bracketing, I was able to explore the idea that property does "work," that dominant conceptualizations of property have the potential to be performative. In the case of the ownership model's work within the national dialogue, I showed how this dominant conceptualization relied on drawing certain lines that bracketed out the "messy" colonial context underlying matrimonial real property on reserve. This "work" of keeping the discussion around the MRP property gap narrow and focused nonetheless remained inseparable from the Western, cultural context – or whiteness. The dominant conceptualization of property at work in the Act bracketed the history of assimilative processes backed by colonial laws and ideologies of white superiority; yet, arguably, the Act suggested that "white" property was superior, and so it drew on resources – implicit, cultural assumptions – outside the bracket.

Progressive property theory suggested alternatives to the ownership model and pointed to better ways forward. The bundle of rights model, for example, though not a new framework, offers a conceptualization of property that holds some promise because of its acceptance of complexity and focus on relationships. The progressive property model, however, goes the furthest in terms of interrogating the assumptions in both the ownership and bundle of rights models. "By rejecting the idea that the scope of concern should be limited to efficiency and utility maximization, scholars create more space to contest values" (Rosser, 2013, p. 110). Property from this perspective is a political and moral undertaking bound inextricably to social relationships and reliant on a vision of social life. Progressive property theory holds great potential for analyzing property "problems" in an ethical, socially just manner, and is, therefore, particularly well-suited to questions related to property, colonialism, and Indigenous geographies. Research addressing these topics must take into account questions and concerns around acquisition and distribution. As Rosser (2013) aptly reflects, "As a consequence of ignoring acquisition and distribution, the race-based property advantages enjoyed by whites will remain and will continue to undermine the possibility that society will realize a robust version of progressive property" (p. 112). First Nation witnesses in the national dialogue would concur, as they called for the matrimonial real property solution to

account for Canada's colonial past and present. Any efforts to address issues around matrimonial real property – or any other concerns around First Nation rights and interests in their lands – must include this aspiration, difficult though it may be to do so. As Rosser (2013) states: "The history of race-related acquisition and distribution of property cannot be simply written off as an area that will be covered in the future, because such neglect or choice of emphasis suggests that property's troubling history is a secondary concern" (p. 109).

Further to this call for distributive justice, property scholars should be attuned to the ways in which singular, Eurocentric conceptualization of property frame their research. Even progressive property theory is a Eurocentric critique of other Eurocentric property models, and therefore reflects the settler colonial culture and norms. Rosser (2013) describes the work of progressive property as "efforts to change property from the inside – through the use of property concepts alone" (p. 111). In other words, progressive property deliberately and strategically draws on liberal language and concepts to push the progressive property agenda forward while mitigating potential controversy. Nonetheless, while progressive property theory focuses on where the idea of ownership breaks down among owners (e.g., when ownership rights conflict), it could be extended to deal with the kinds of property tensions and paradoxes that come up, for example, in the national dialogue, which was a multi-cultural, multi-political, multi-economic and colonial context. In the case of MRP on reserve, concepts such as private property and ownership were only taken-for-granted by certain speakers; for many others, ownership was described as a foreign concept. Indeed, ownership - strictly speaking as per the ownership model – is not even available within the geographical bounds of reserves. In order to make any advancement, then, a stop must be put on trying to solve the problems of settler colonialism with settler colonial property models.

Property theory has largely been examined by scholars and lawyers using cases. Singer (2000a) states that "[t]he focus on cases directs our attention to the social world, where owners interact and come into conflict with one another" (p. 31). This is important work and serves to highlight the internal tensions and contradictions within the concept of property, as well as within social and legal practices dealing with property. For example, this kind of analysis makes apparent that the rights within the bundle of rights can be in conflict with one another. However, Rosser (2013) critiques progressive

property scholars for applying most of their effort to theory development and limiting "practical explorations to a few carefully selected cases" (p. 111). An even more basic critique is that property is not only conceptualized and enacted in legal arenas; much of what makes property "real" is what happens between neighbours (Blomley, 2004; Blomley, 2005a). More to the point, matrimonial real property on reserve was a *gap* in property law, and, therefore, attempting to analyze it through property case law alone would be futile. Indeed, very few cases even exist that deal with this important property issue. If we are to take seriously the call for progressive property, one that takes into account complexity and contradiction, one that expresses a vision of social life guided by political and moral values that include distributive concerns (i.e., social justice), then we have to take into account the voices outside of court rooms.

My research is an example of an exploration of property using non-juridical data, that is, data that was produced outside of courtrooms. Therefore, it did not include representations by lawyers or the decisions of judges in a formal legal setting. There were lawyers who participated in the national dialogue, as well as politicians with various disciplinary backgrounds (including law and economics). Lay people also participated, including Aboriginal leaders and elders, and Aboriginal community members and individuals participated in the dialogue/"consultation" sessions that contributed to the final reports. Aboriginal and non-Aboriginal proponents and opponents contributed their views during the national dialogue and so a variety of voices, many of which were First Nation, were part of this data set. This is an important contribution my research makes to property scholarship. In a colonial context, courtrooms, lawyers, and the justice system itself represent a settler vision of social relations, and of the power of settler law. Court cases representing disputes between owners reflect disputes about settler conceptualizations of property. Moreover, the individuals contributing to the vision of property (and of social relations/social life) tend to be positioned in places of power, and steeped in a particular cultural mode that reflects particular values and assumptions. Juridical data, therefore, are part of a Eurocentric system (of law, of scholarship and knowledge production, of politics, and of social relations) and, more importantly, a colonial one.

Singer (2000a) has argued that researchers should move beyond trying to work out the "different constructions of property" and the "core tensions within our property system and within the concept of property itself" (p. 182); however, when researchers

limit their explorations of property to juridical data, they miss out on other rich sources of data that represent "other," non-Western, non-settler conceptualizations, enactments and materializations of property. There are a many different kinds of values that relate to property that "cannot be measured or valued according to a single metric" and therefore, property "exhibits inevitable tensions among the values that justify and shape it" (Singer, 2000a, p. 32). If researchers are to take seriously the call to find a new model of property, and likewise a new vision of social life, that deals with the complexity of property "on the ground" and has as a core value social justice, then they must broaden their scope as academics to include a variety of voices. As Rosser (2013) points out, for progressive property theory to be successful in bringing about positive change will require "destabilizing" common understandings about what property is, and yet progressive property scholars remain limited to working with "property law's available material" (p. 114).

8.2. Potential Applications for Property Theory

The notion of property opens the door to a number of theoretically robust and interesting analyses and approaches, and I want to suggest two additional ways in which property theory might be applied to extend this work on matrimonial real property on reserve. First, drawing on performativity theory, the *how* of property conceptualization could be explored. This study largely focused on *what* conceptualizations were present in the national dialogue, and these findings were largely descriptive. I also suggested *how* these conceptualizations might be consequential. This latter interpretive work drew on scholarship in progressive property theory to trace *how* the ownership model organizes the world, and specifically with respect to the discourse on matrimonial real property. For example, I was able to identify and describe an ownership model of property narrative, and suggest *why* it might be dominant as well as *how* it might be consequential (i.e., the potential "work" such a narrative might do). However, it is important to move property theory related to the ownership model beyond, for example, the observation that it is not accurate to seek deeper understanding into why it nonetheless persists. Therefore, future research might consider the ways in which property becomes ingrained by gathering and analyzing empirical data that might explain whether and to what extent the ownership model achieved its performative effect. Such

an endeavour would entail further tracing the enactment (or performance) of property beyond the national dialogue. It would involve elaborating on how property was framed (cordoned off), i.e., what "tools" were used, what ideas were cited, and what materializations were evident. It would be extremely useful to trace this performativity in order to better understand the process through which the ownership model maintains its common-sensical status.

There would also be scholarly merit in examining how the broader rights-oriented ethos of pluralism and reconciliation was performed while, at the same time, functioned to legitimize the status quo colonial structures, processes and relationships. Following Valverde (2012), this might entail careful tracing of the "vagueness" around self-evident categories, and asking: What was left unexplained, mysterious? In such an analysis, the focus could be on governance, jurisdiction, and the process through which MRP legislation becomes law. Property, then, would be analyzed as part of a larger legal-governmental apparatus. Such a project would aim to map the specific knowledge-power moves that make things like property seem real and determine how such performativity "…serves to foreclose more radical challenges to the sovereign epistemological power" (Valverde, 2012, p. 12). An important expansion of this work would be to engage more extensively on the technicalities of matrimonial real property on reserve. Valverde (2006) calls on researchers to update their conceptual tools to account for dynamism and unpredictability. She warns us of our "weakness for abstract thought" and our tendency to "render the world static" (p. 593), and she reminds us that "the ultimate aim of our intellectual endeavours is to understand what's going on" (p. 594). This is an important challenge regarding the *how* of things. "In order to avoid sociological reductionism and better understand the 'how' of legal mechanisms, analyses need to be simultaneously inside and outside law, simultaneously technical and theoretical, legal and socio-legal" (Valverde, 2009, p. 153). This means that legal technicalities and social relations of power are critical lines of analyses.

Second, it would be useful to undertake property analyses of matrimonial real property on reserve at other scales (e.g., community). This research addressed property discourse at a national scale; however, matrimonial real property on reserve is an issue that is of importance at other scales. For example, it has implications for the "local," the smaller, and the "real" or material places where the MRP legislation will be applied.

Therefore, research addressing the inter- and intra-scalar effects of matrimonial real property on reserve discourse and of matrimonial real property on reserve law would be very valuable. Here, such theories as “nested place” (de Leeuw, 2007) or actor network theory (Latour, 2005) could be usefully applied to explore how property law and/or conceptualizations of property at these different scales converge, diverge, interact and intersect. Such a project would include the voices and experiences of individuals living on reserve and would be a useful approach to determining the material effects of the MRP legislative gap.

Valverde (2009) suggests that the interlegality of law and governance means that they are “not necessarily tethered to any particular scale” (p. 139); indeed, they can just as well be defined by function as they can by space. This complicates questions around matrimonial real property on reserve because it reminds us that law and governance are not easily mapped to lines on the ground. For example, “highly local […] scales of governance persist alongside, and are intertwined with, national and international scales of governance” (Valverde, 2009, p. 143). Drawing on Valverde’s (2009) important insights on jurisdiction and scale, I suggest that an analysis of matrimonial real property on reserve that uses theory of jurisdiction and scale to analyze property would be very interesting. Jurisdiction (particularly with respect to family law and property law) was a common theme in the national dialogue. Valverde (2009) argues that “focusing on sovereignty (who governs where) prevents us from asking interesting, novel questions about how we might govern and be governed” (p. 145). This would be especially pertinent in questions concerning Indigenous legal and political geographies; it would interrogate the silent and efficient work of scale and jurisdiction and ask “how claims that seek to upset the system came to be made in the first place” (Valverde, 2009, p. 154).

8.3. Entangling Property: An Ethical Imperative

This project was a critical legal geography of matrimonial real property on reserve; as such, it could not be divorced from Canada’s colonial history in which colonial legal systems were imposed on First Nation people(s) resulting in transformed geographies and ideologies. A key assumption of this research was that “Canadian family law affecting matrimonial real property (statute law and case law) predominately

reflects the cultural values of non-Aboriginal people and European-sourced legal traditions" (Cornet & Lendor, 2002, p. 2). In my analysis, I identified and described competing conceptualizations of property and their potential consequences, and I "unsettled" current classifications and categorizations of property. This work also made visible the very consequential implications of these different conceptualizations for matrimonial real property on reserve. In doing so, I hope to inform matrimonial real property on reserve discussions and contribute to the creation of more equitable and socially just realities. If, as Blomley (2003) suggests, the world is "actively made through orderings which offer powerful 'maps' of the social world, classifying, coding, and categorizing", and if "[i]n doing so, a particular reality is created" (p. 29), then the current classifications and categorizations of property sustain a colonial reality for First Nations people across Canada, and particularly for First Nations women and children.

Property, in the national dialogue was "a site for moral conflict and struggle" (Blomley, 2004, p. 103). Singer (2000b) argues that "[c]hoices of property rules ineluctably entail choices about the quality and character of human relationships and myriad choices about the kind of society we will collectively create" (p. 13). The ownership model, with its emphasis on individual rights, reflects a liberal democratic ethic, and assigns moral value to private property. Therefore, the arguments made about the "goodness" of the Act and the power inherent in its attributes were arguments about what property *should* be from the proponents' perspective; they were assertions of a particular moral agenda related to property, and its role in creating a particular kind of society. For many of the participants, however, the ownership model represented a threat to First Nation property rights. Indeed, for the majority of First Nations participants, the Act was neither postcolonial nor "good," and their responses to it made visible important contingencies and contexts, and asserted a reading of property in which social, economic and political relations were central. Opponents of the Act gave voice to their experiences of the colonial relationship between the Canadian state and Indigenous peoples, of which matrimonial real property was a part. The national dialogue became a discursive site in which different material conditions and historical narratives were evoked to express different understandings of property on reserve, to justify and defend the Act, and the work it might accomplish, as well as to critique and protest it. "Different readings of rights, property, time, and space," Blomley (2004) explains,

“combine to create opposing constellations of arguments […and…] opposing moral visions of property (p. 79). Maintaining property’s closure avoids such complications as temporal and geographical contexts; however, opening property up to such entanglements as Indigenous conceptualizations or distributive concerns could, at the very least, be a more effective approach to MRP on reserve. At most, it might even work to disrupt the status quo (colonial) relationship between Indigenous peoples and the Canadian state, and perhaps open up the possibility for positive change.

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Appendix

Appendix A. List of Reports, 2003 – 2004

Four reports by three Parliamentary Committees:

1. Standing Senate Committee on Human Rights, *A Hard Bed to Lie in: Matrimonial Real Property On-Reserve*, November 4, 2003.
2. Standing Senate Committee on Human Rights, *On-Reserve Matrimonial Real Property: Still Waiting*, December 14, 2004.
3. House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*, June 8, 2005.
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