

A Colonial Contradiction: Unchanging Settler Colonial Conceptions of Identity and Property and Shifting Neoliberal Rationalities

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Sioux scholar Vine Deloria Jr. suggests that the difference between colonial-western and Indigenous metaphysics is that colonial metaphysics privilege time and Indigenous metaphysics centre the land (1992). He suggests that western societies emphasize change, where progress through time is the measure of everything (1992). This paper examines how settler colonial understandings of land reinforce settler colonial domination through time. Nishnaabeg scholar Leanne Simpson defines settler colonialism as a “*structure made up of processes* [emphasis in original]” (2017, 46) which shift and morph through time. Oft quoted scholar Patrick Wolfe describes colonial invasion as a structure rather than merely an event (Stanley 2016), which reveals the territorial foundation of colonialism. If one were to examine colonialism as an event only, it would be easy to ignore the structural aspects of colonialism. Thus, a prominent theme in Indigenous scholarship is denial of these settler colonial realities (Coulthard 2014, Maracle 2017, Simpson 2017, Newcomb 2018, Starblanket 2018). How does denial relate to static conceptions of property (therefore land) and Indigeneity which reinforce settler colonial domination? In what ways do these unchanging conceptions reveal the specific territoriality of settler colonial domination which is denied via the colonial metaphysic of cultural progress through time?

To offer a partial analysis and a beginning place, I will trace the logics of what Brenna Bhandar (2018) calls the “identity-property nexus” based on John Locke’s conceptions of the self-possessive individual and his relation to land through the shifting colonial logics of the *Indian Act* and the BC Treaty Process (BCTP). I will argue that without this background, a neoliberal framing of the BCTP can be used to reinforce the “progress” narrative which privileges time over land while simultaneously reinforcing the logic of the “identity-property nexus.” In this, I point to the contradiction inherent to western colonial thought which denies the

ways that settler colonialism is necessarily and primarily based on understandings of land and the “modern” individual in order to reinforce continued colonial domination through time.

Part 1: Theoretical-Philosophical legal groundings of Colonialism

Before describing Bhandar’s identity-property nexus, I will define several key terms used in this paper to serve as a broad framework for conceptualizing colonialism. In international law, a “state” refers to an institution created through its (violent) imposition on a group. It then maintains its dominance, protecting “itself against insurrection from within and attack from without” to justify economic and territorial exploitation (Nock in Newcomb 2018, 19). In his incisive essay, Shawnee and Lenape scholar Steven Newcomb convincingly argues that “state” is shorthand for “state of domination” (2018, 21). The use of the word “state” implies temporal significance, the domination of a territory *through time*. He further argues that the meaning of “Indigenous peoples” is more accurately expressed as “dominated peoples” and suggests that anytime the passive language of “conquered” peoples is used, it should be “accurately re-expressed as *domination*” (2018, 22). He then suggests that a significant purpose of international law is not merely relations between states, but between “civilizations and peoples” (2018, 23), as the concepts state and nation always exclude Indigenous peoples and nations (2018, 31).

He convincingly shows how domination of Indigenous peoples can only be brought to mind by the specific phrase “the domination of Indigenous peoples by ‘states’” (2018, 21) because domination connotes invalidity and illegitimacy. He suggests phrases like “precolonial,” “pre-invasion,” and “distinct from other sectors of the societies now prevailing” do not bring domination to “the mind of the average English language speaker (2018, 29); only with reflection can this connection be made. I extend this argument to suggest that these phrases are based on temporal rather than territorial understandings which would, like Wolfe noted (in

Stanley 2016), portray colonialism as a singular event. This broad, place-based framing drastically challenges images of “civilized” and “modern” life in Canada today.

From Newcomb’s description, the denial of domination is clearly evident in the inception and language of international law. As Canada is a state, this domination and denial framework is necessarily present in Canada (Coulthard 2014, Maracle 2017, Simpson 2017, Newcomb 2018, Starblanket 2018). The context of denial is important for understanding current neoliberal policy because it normalizes domination while simultaneously hiding that domination from view. Dene scholar Glen Coulthard in his definition of settler colonialism, directly connects colonialism with the language of domination, calling it a “structure of domination” (in Stanley 2016, 2432) which is based on maintaining (through time) the dispossession of dominated peoples from their lands and political autonomy. Yet, how does a territorial framework of domination become so hidden and naturalized that we only think of it in terms of remaining through time?

It is here that Bhandar’s identity-property nexus is useful. Bhandar describes how “the figure of the self-possessive individual” is tied to modern property law to justify accumulation of land and resources (2018, 152). She describes the “racial and gendered ontology of the self-possessive subject as the ideal status against which the juridical category of the Indian was created” (2018, 152). Here, she emphasises the *dual* creation that is occurring: that of the self-possessive subject, the “Modern Man,” and the “Indian.” Newcomb’s context of domination then naturalizes this dichotomy through colonial structures and processes, through *acts* of domination on the land. Bhandar locates the naturalization of this dichotomy in European thought within the works of John Locke, as he views identity and property to be “formed through appropriation” which occurs differently for the self-possessive subject and the “Indian” (2018, 165).

Let us begin with the ideal type, the “Modern Man.” For Locke, appropriation has a “transcendental power” (Balibar in Bhandar 2018, 167) which literally creates an individual (man) through his labour and work; his property becomes the expression of himself.

Individuality is key to this duality because he must be able to “observe” his own thoughts and internal life: “the idea that every man has property in himself” (Bhandar 2018, 167). Evident in this conceptualization of self is the notion of “interior tools of ‘pure reason’” (da Silva in Bhandar 2018, 168) which puts racialized subjects outside of possessing rational capacities of individuality and therefore of property accumulation. Here we have one half of the duality, the “self-possessive subject.” Bhandar then turns to the Lockean “savage.”

As a “subject without a past” (Bhandar 2018, 170), the “Indian” or “savage” has no capacity for appropriation of a self or property. She describes how clear it is that the *Indian Act* and residential school system assumed the impossibility of Indigenous peoples to retain a sense of identity and memory. These mechanisms attempt to strip away all identity and memory while simultaneously reinforcing the distinctiveness of that person *from* the concept of the self-possessive subject, leaving the individual bare.¹ The “Indian,” in its bare timelessness, is unchanging (Bhandar 2018). The construction of the “Indian” is based on the denial of such a person to have rational, appropriating capacities (Bhandar 2018), and, as Starblanket shows, the inability of the “Indian” to even learn such capacities. Bhandar describes the *Indian Act* and private property relations to show that they “were premised on the denial of First Nations’ living memory of their relationships to land and place” (Bhandar 2018, 170). She connects this refusal

¹ For a comprehensive analysis of the residential school system analyzed as one of Goffman’s “total institutions,” see Néhiyaw scholar Tamara Starblanket (2018, 99-110) *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State*.

of memory and relationship to the dominated, colonial subject to “the theft of rights, to the theft of land” (2018, 171).

In a context of domination and power imbalance, it is evident that this dichotomy is necessary to maintain and normalize further domination of Indigenous peoples by states. Rationally naturalizing domination via “Indian status” continues to justify domination because the timelessness of the “Indian” is as timeless as the state of colonial domination. Yet, both are actually territorial, which is denied. Contrast this to the “doctrine of reception,” which maintains that British citizens carried their common law “as birthright, thus maintaining the personal jurisdiction of the Crown in the Colonies” (Pasternak 2014, 188). Evident here is a subject *with* a past, unlike the dominated, and carrying a birthright of territorial significance. This doctrine further upholds original colonial exploitation, which continues to be maintained in our settler colonial society today. I now turn to property law to show how the identity-property nexus has been maintained through time as a structure of domination.

Part 2: Property Law and the BC Treaty Process (BCTP)

Before describing the BCTP, it is necessary to describe several basics of property law and aspects of the *Indian Act*, through which Indigenous identity and property are regulated by the federal government into various “bands” and the “reserve” land set aside for Indigenous nations (Monchalin 2016). Reserve land is small tracts of land held “in good faith” for the band, though owned by the Canadian government (Blomley 2014). Reserve land, while it may overlap with ancestral territories, does not encompass the full expression of Indigenous title to their territory, which Canadian courts have acknowledged through the concept of *sui generis*, or special rights accompanying Aboriginal title (Blomley 2014). Individual pieces of land on reserves are not owned in the same way that property is owned off reserve because the land is held in “good

faith” by the government, due to racist and gendered constructions of what it means to be “Indian” versus the Lockean “Modern Man” (Bhandar 2018).

Non-reserve private ownership is held “fee simple” (Blomley 2014), which is considered legitimate according to Canadian property law because it is first based on the authority of Crown title to the land based on historic treaties with Indigenous nations (Blomely 2014). In theory, fee simple property can then be bought and sold with “certainty” between individuals (Blomley 2014), ensuring “secure” investments through time. In contrast, because of the *Royal Proclamation Act* of 1763, which influenced how the *Indian Act* was written, Indigenous peoples are not able to sell land that they own except to the Canadian government (Pasternak 2014). This is indicative of the collective nature of Indigenous title to land, that of a nation,² though this has also served to limit Indigenous economic activity, which Pasternak (2014) notes has long been important to Indigenous nations and societies. Bhandar concludes that “the land legislation enabling colonial settlement is the creation of two separate economies of land and identity, the Indian reserve and the private market of individual ownership” (2018, 60). This legislation is congruent with the identity-property nexus described above.

British Columbia’s context is unique to Canada because there were no historic treaties signed to designate title either to the Crown from Indigenous peoples, except for a very small number on Vancouver Island (Monchalin 2016, Pasternak 2014). Apart from BC, the country is quilted, pieced together by a series of treaties with contested origin stories of Crown coercion and starvation tactics (Monchalin 2016). A lawyer from the 1973 *Calder et al. v. Attorney-General of British Columbia* case, which was about the Nisga'a nation’s title, described to researcher Carole Blackburn that the 19th century treaties were not about certainty, rather that

² Newcomb (2018) notes that Canada is willing to use the language of “nations” only in a paternalistic manner, though International Law reserves “nation” to mean a “state.”

“there was no doubt about it aboriginal people had aboriginal title and you had to enter into a treaty before you could settle their lands. That’s what the Royal Proclamation of 1763 says. It wasn’t about certainty. It was about entering into a relationship under which settlement of the territory could proceed” (Doug quoted in Blackburn, 2005). And yet, the state views these treaties as extinguishment treaties in which Indigenous nations ceded their land to the Crown (Monchalin 2016). One might ask, when in time did this occur? The state reinforces and normalizes itself as capable of self-possession, writing history and denying history to suit its interests.

Interpreting the treaties either way, the co-working doctrines of reception and of *terra nullius*, which means “empty” land, ungoverned by a recognized authority³ (Monchalin 2016, 62), naturalized British domination in BC without even the façade of treaty agreements. The lack of treaties (and more broadly across Canada the contested understandings of treaties) means that there is significant “uncertainty” for the colonial state and businesses wishing to invest in projects because ownership is contested. Thus, establishing “certainty” over territorial ownership has become an essential part of the state’s “risk management” strategy (Stanley 2016) to ensure its continuity.

After the flurry of visible Indigenous resistance following changes to the *Indian Act* in the 1950s, which lifted the Potlatch ban and re-allowed Indigenous peoples to seek legal counsel (Manuel 2016), the Canadian government and soon after BC enacted legislation that was meant to bring “certainty” to land claims and title issues that were impinging on resource extraction processes and other forms of development in the 1990s (Manuel 2016). Various Canadian courts

³ Note the connotations of domination evident in *terra nullius*; while the land was peopled and indeed not empty, due to the racialized identity-property nexus, the land was not recognized as being governed by anything close to what could be or become a “state.”

through the 1970s and 1980s found that BC did indeed have a duty to acknowledge the Aboriginal title that it had been conveniently denying since the colony was established (Blomley 2014). This led to what has been called a “crisis of legitimacy” whereby economic investment dwindled in projects with contested land claims (Pasternak 2014, Blackburn 2005). Following federal government policy, BC enacted the BC Treaty Process (BCTP) in 1993, near the height of the neoliberal era.

Coulthard notes that “the reason the Crown agreed to get into the land-claims business in the first place was to ‘extinguish’ the broad and undefined rights and title claims of First Nations in exchange for a limited set of rights and benefits set out in the text of the agreement itself” (2014, 66). While early treaty processes at the Federal and provincial level required the explicit “cede, release, and surrender” (Coulthard 2014, 66) of collective title, this language changed to “transformed” or “modified” title, which is effectually the same as extinguishment (Manuel 2015, 90-91). It is important to note that the exchanged rights are specifically and exhaustively listed, and all other rights and benefits are excluded. These agreements are considered “final,” ensuring certainty for the future *on specific land*. I will now show how the neoliberal rationalities and the language of certainty are apparent in the BCTP.

Part 3: Neoliberal Rationalities Evident in the BCTP

While state attempts to privatize and individualize Indigenous title can be traced back to before Confederation (Bhandar 2018), the BCTP (and likely federal legislation as well) has an unsurprising neoliberal flavour in its emphases and contradictory rationalities. Wendy Brown (2014) describes neoliberalism as a “an order of normative reason that, when it becomes ascendant, takes shape as a governing rationality extending a specific formulation of economic values, practices, and metrics to every dimension of human life” (2014, 30). This rationality

marketizes all aspects of life “configure[ing] human beings exhaustively as market actors, always, only, and everywhere as *homo oeconomicus*” (2014, 31). Brown notes that the *homo oeconomicus*, the economic individual, as opposed to the *homo politicus*, the political individual, has changed⁴ through time, and in neoliberal times, “has been significantly reshaped as financialized human capital: its project is to self-invest in ways that enhance its value or to attract investors through constant attention to its actual or figurative credit rating, and to do this across every sphere of its existence” (Brown 2014, 33). Thus, the neoliberal normative and governing rationality is created and reinforced through the process of self-interested investment for future economic growth and value creation.

Coulthard (2014) suggests the clash of values between Indigenous societies and settler colonial society as being about individual or collective forms. While this is similar to what Brown describes as “undoing the demos” and the *homo politicus* via neoliberalism whereby civic society becomes purely economic, this clash is at the root of colonial domination, based on understandings of land and time. The civic society which Brown describes sits “on top” of the struggle Coulthard describes between Indigenous collective sovereignty and dominating state processes based on maintaining colonial domination through time. With this in mind, “transforming” Indigenous title can be seen as a further dominating, genocidal act of State control which simultaneously uses neoliberal rationalities while also reinforcing much older logics of colonial domination. These older logics then “hide” behind neoliberal rationalities of “certainty” and understandings of progress which conceptualize colonialism as an event.

Stanley (2016) describes how environmental resource governance in Canada uses the language of “risk management” when speaking of Indigenous sovereignty and Indigenous bodies

⁴ If we understand *homo oeconomicus* to be part of Locke’s self-possessive subject, it is important to note that the act of embodying the *homo oeconomicus* is viewed as inherently dynamic, not static, unlike the “Indian.”

on land. The BCTP can be seen as part of broader “risk management” policy which ensures the success of the dynamic modern settler *homo oeconomicus* through static understandings of Indigenous territorial boundaries and Indigeneity. According to the Crown, the BCTP is open to Indigenous nations wishing to disentangle themselves from the Indian Act, to “modernize” (Monchalin 2016). Evident here is the primacy of the *homo oeconomicus*, something which Indigenous peoples have little access to because of the state imposed “Indian status” and the dual property system of the Indian Act. *Homo oeconomicus* is not an open option for Indigenous peoples unless they are willing to “transform” their collective title via the BCTP to ensure crown certainty, which denies the diversity of continuing and changing Indigenous economies and economic activity since before domination began, while also denying the dynamism of expressions of Indigeneity.

Neoliberal thinker Hernando de Soto⁵ suggested specifically regarding BC’s context that land is a “trapped” commodity, and one needs to have the financial ability to then capitalize on the value of the land (Pasternak 2014). De Soto’s logic is clearly reminiscent of the Lockean property-identity nexus where one adds value to land through labour. It then follows via neoliberal development logic that Indigenous peoples need to be “brought out” of the reserve property system to be fully able to *become* rational economic actors by “transforming” (previously “extinguishing”) Aboriginal title, dividing it into individual fee simple property ownership. This is contradictory settler colonial logic which simultaneously reinforces the property-identity nexus while hiding behind the “benevolence” of dominant society, thereby denying the real and diverse expressions of embodied and territory-based Indigeneity while

⁵ See Bhandar 2018, “Chapter 2: Propertied Abstractions.”

further reinforcing the image of static landless and timeless “Indian” about which Bhandar (2018) writes.

Lastly, Andrew Woolford discusses how the BCTP framework is set up to deny the crown legislators the ability to discuss compensation for historical violence which often ends up clashing with Indigenous moral demands for recognition of colonial violence. Denial occurs because “governments feel unable to meet [this requirement] due to the risk of future liability and the impact this risk might have on their desire for ‘certainty’” (2004, 124). Here again, is evidence of the primacy of a progressive view of societies through time based on denying the territorial constancy of colonial domination. The narrowly delineated purpose of the BCTP is to be “political.” Agreements are not “required to acknowledge the historical existence of, or their post-contact infringement upon, Aboriginal title. As consequence, they are able to avoid discussions of the past and to direct the conversation toward issues of pragmatic importance to achieving certainty” (Woolford 2004, 130), further denying the “past” or “time” which is supposedly of prime metaphysical significance to society. He also effectively shows how *rational* reasoning is privileged, reinforcing economic and instrumental reasoning inherent to neoliberalism and the *homo oeconomicus* as top priority.

Part 4: Conclusion

Sto:lo author Lee Maracle suggests that Canadian culture is one predicated on the denial and forgetting of its colonial past and present (2016). This is a denial of occurrences in time, what we supposedly value most. Neoliberal rationalities reveal the privileging of time above land. Yet tracing the land-based logics of property, identity, and their intersections through a colonial state of domination reveals that land is also primary to logics and mechanisms of oppression and domination. I have shown how the BCTP mechanisms are reflective of much

deeper land and people logics of settler colonialism and domination which hide behind neoliberal tools of “certainty,” “risk management,” and “development” (Stanley 2016, 2426) By seeking to define permanently the parameters and limits of Indigeneity and land ownership, therein setting the parameters for our own development and progress, we also deny the primary importance of land to settler colonial metaphysics and daily life, too. Continued domination is denied in the face of the apparent benefits of full participation in the economic spheres, which paradoxically cannot continue without the land. Yet engaging with the land and ourselves, what we do with both, how we “make” ourselves, offers an alternative to continued denial (Simpson, 2017). We merely must choose to see through the patterns of domination and remember and embody what we have forgotten: ways to live that are not based on domination.

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