University of Alberta

Canada's Indians (sic): (Re)racializing Canadian Sovereign Contours Through Juridical Constructions of Indianness in *McIvor v. Canada*

by

Jessica Kolopenuk

A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Arts

Department of Political Science

Fall 2012
Edmonton, Alberta

Dedication

For Coach.

Abstract

While scholarship has recognized the role that sex discrimination has played in the naming of "Indians" in Canada, one aspect of this depiction has been minimized. In addition to the gendering of Indigenous subjectivities, Canada has consistently racialized us/them through practices of juridical categorization. The latest court case dealing with Indian registration, *McIvor v. Canada*, (re)produced this practice. This thesis explores *McIvor* to understand the relational struggles, limitations, and authority the courts engender when existing constructions of Indigenous legal recognition are challenged. I use Bourdieu's (1987) *juridical field* to position "law" as a dynamic arena whereby hierarchical struggles generate social realities. I also utilize Moreton-Robinson's (2000, 2001, 2004a) theory of *patriarchal white sovereignty* to understand the ways in which, through its juridical system, Canada is a racialized and racializing state. I seek to demonstrate *how* Canadian sovereignty is (re)produced through racialized constructions of Indigenous legal recognition in *McIvor*.

Acknowledgements

The amount of support that is needed for the successful completion of a thesis is truly amazing. I would like to take this opportunity to show my gratitude to all of those that helped me along this ride.

I would like to thank the Social Sciences and Humanities Research Council, the University of Alberta, the Department of Political Science, the Faculty of Native Studies, and the Government of Alberta for providing me with financial support. Additionally, I would like to send thanks to Jane, Caroline, Lori, Bev, and Reg for their work in administering this funding and keeping my program on track. A massive appreciation is sent out to Val Napoleon, Sharon McIvor, Gwen Brodsky, and *especially* Robert Janes and his legal assistant Nicole Fobert for providing me with court documents that were invaluable to making this thesis possible.

During my MA program I was incredibly fortunate enough to travel to Queensland, Australia to study with Dr. Aileen Moreton-Robinson. I would like to thank her entire team at the Indigenous Studies Research Network at the Queensland University of Technology for making my stay as comfortable and enriching as possible. I express a very sincere and special thank you to 'Prof' for her mentorship. She is an amazing warrior woman and an inspiring role model for scholars everywhere.

I feel as if the completion of a thesis is an early right of passage in a long life of academia. As I grow into the adolescence of my academic self, there is a village of people without whom I would have remained a proverbial child that I must thank. To Dr. Judy Garber for generously offering your time and expertise as a member of my examining committee, thank you. To Dr. Lois Harder, I would like to thank you for enthusiastically supporting my entrance into the Department of Political Science. Thank you for encouraging me to be critical, disruptive, and unwavering in my opinions. I would also like to thank you for writing reference letters and spending hours editing my work. Thank you.

To Dr. Chris Andersen, where do I even begin? I suppose I can start by thanking you for all of the obvious ways that, as a supervisor, you have supported me. Thanks for all of the letter writing, the editing, the research and teacher training, the job opportunities, and the conference support. Thank you for the hours of discussion and forcing me to think through so many difficult ideas. Thank you for teaching me. Your standing in your field coupled with your passion for teaching makes you an exemplary academic. Second, I want to thank you for all of the ways that you went above and beyond as a supervisor. I want to thank you for being my mentor. Thanks for sharing your stories and experiences, listening to my not so well-articulated rants, pushing me to answer, "what is symbolic power!?", and being there during my hardest and proudest moments. Thank you for caring, for putting up with my tears, but most importantly, thank you for believing in me. You have not only taught me to be a better academic, but a better person. For the last three years you have been a consistent supportive presence in my life and I will be forever grateful for the kindness and generosity you have shown me.

Lastly, I would like to thank my friends and family. Thank you to my roommates, Jordan and Meika, for accepting me for exactly who I am – even if that is a "pit-bull". Your laughter and caring attitudes have helped me more than you know. Of course I would like to thank my parents who have supported me tirelessly for the past 25 years.

To Adam, thank you for loving me and putting up with the bouts of "craziness" that ensue from countless solitary hours spent reading and writing.

I would also like to thank the women in my family - my mom, "cookie" grandma, aunties, and cousins whose hardships, relentless hard work, and love inspire me. You are the foundation of our community, thank you.

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Introduction

In the territories that have become known as Canada over a period of centuries, colonial rule has rested heavily on racialization. Scholars have documented more generally the central role that 'race' has played in the production of colonial projects (Moreton-Robinson 2000, 2001, 2004a, 2004b; Hall 1995; Said 1978, 1993). While conceptually this truism holds strong, processes of racialization, like colonial projects, are empirically complex and uniquely subject to spatial and temporal contexts (Andersen 2011, 37). As a result, 'race', while very much still alive in contemporary struggles within (and over) settler colonial countries, looks different than it did over five hundred years ago when Columbus mistakenly dubbed the Indigenous people(s) [1] of North America as 'Indians'. While romantic images of the 'Indian race', in their various forms (limited and limiting as they are), have captured the imaginations of people the world over, in Canada, Indianness has taken on substantive meaning for Indigenous legal recognition.

'Indian' as defined in the *Indian Act*, is a legislated category that has been created to decipher who Indians are as well as, to some degree, who Métis and Inuit peoples are in comparison. The definition of 'Indian' has been legislatively and judicially fashioned on various occasions since the mid-1800s. The category has acted as a denotation of Indians as the Indigenous 'other' in the development of Canada. In this way, meanings of Indianness have contributed to defining the content of Canadian citizenship. Although its specific meaning has changed over time, generally, it has become a powerful symbol representing authentic Indigeneity extending beyond any perceived limits of the juridical world into the common parlance of both Indigenous and non-Indigenous people(s)

(Palmater 2011, 39; Green 2007, 150). Characterizations of Indigeneity in Canada have thus been impacted by the ways in which the *Indian Act* has constructed Indianness.

On December 15, 2010 Indian status was re-established as a category of legalized Indigeneity. The Canadian legislature passed Bill C-3, *An Act to promote gender equity in Indian registration*.[2] As an amendment to the *Indian Act*, Bill C-3 is the latest change to the Indian registration regime. However, there is prior juridical history to consider before analyzing this development in 'Indian naming'. The legislative amendment was prefaced by the British Columbia Court of Appeal decision in *McIvor v. The Registrar Indian and Northern Affairs Canada* (2009) (*McIvor v. Canada* hereafter) – a judicial decision that prompted the legislative amendment.

McIvor v. Canada is the most recent court case that has challenged *Indian Act* status registration through a critique of sex discrimination against Indian women and their descendants. First heard at the Supreme Court of British Columbia in 2007, Sharon McIvor and her son Jacob Grismer argued that the *Indian Act*, *1985* provided an advantage to the descendants of Indian men who married non-Indians over Indian women who married non-Indians prior to 1985. That is because the children of men who married non-Indian women have 6(1) Indian status while the children of women who married non-Indian men have 6(2) status.[3] As a result, women like McIvor have grandchildren with no Indian status because their children, like Grismer, had children with a non-Indian. Grismer's 6(2) status limits his ability to transmit the juridical category. Conversely, as 6(1)s, the children of men who married non-Indian women can pass Indian status to their children regardless of the juridical identity of the biological/legal mother.

At trial McIvor and Grismer were successful. The trial judge ruled that section 6 of the *Indian Act* violates the *Canadian Charter of Rights and Freedoms*, and was therefore without effect insofar as it is discriminatory. The judge issued an order that called for the immediate registration of all descendants of women who married non-Indians at any time prior to 1985. Claiming that this was too broad a remedy, the federal government appealed the decision to the British Columbia Court of Appeal.

In April 2009, McIvor and Grismer won the appeal based on the finding that the sex discrimination in section 6 of the *Indian Act* is unconstitutional. However, this finding was based on a much narrower logic than that which was used at trial. Therefore, while *McIvor* represents an important symbolic victory, this thesis will explore its limitedness. In particular, I will examine how the court case, explicitly dealing with issues of sex discrimination, is also strongly rooted in a *racialized* construction of Indian status. Through Indian status, Indigeneity is racialized through a discursive consistency with a logic rooted in nineteenth century scientific thought related to 'race' (Sturm 2002, 53). This logic maintains that Indigeneity is authentic when a notional level of biological purity, however arbitrary the criteria often are, can be proven.

In Canada, this racial logic has led to the construction of Indians as distinct from non-Indian Canadians. This broad distinction is the first layer of the racialized Indian categorization. Additionally, the contemporary version of the 'Indian', as defined in *McIvor*, increasingly racializes family connectedness. This occurs primarily through a logic that correlates one's status as an Indian to one's *degree* or *purity* of descent. Purity of descent is an expression of one's degree of perceived biological connection to his or her Indian family. In *McIvor* a construction of Indian descent that adhered to a threshold

of two generations of 'mixture' was made out to be most important in defining Indian status and Indian connection to family members. As Tallbear (2011) argues, the use of 'biology' in terms of descent does not indicate an objective method of deciphering identity; rather this use is based on a cultural understanding of relatedness within and between families (74).

Interestingly, this racialized logic occurs in the case even though *McIvor* advances a section 15 *Charter* challenge, which states that,

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on *race*, national or ethnic origin, colour, religion, *sex*, age or mental or physical disability. (Emphasis added)

The *Charter* rhetorically protects against sex *and* race discrimination, but in *McIvor*, these forms of discrimination were used to defend the sex rights of Indian women, rather than challenging the intersecting 'race' and sex discrimination that Indigenous women and their families experience in terms of Indian registration.

While the case exemplifies a historically rooted discursive continuity of 'race thinking' with regard to Indianness, it does so in a particular *juridical* context structured by historical events. These events, like Indigenous women's judicial use of Canada's *Bill of Rights* in the 1970's to the 1982 passing of the *Constitution Act* and its inclusion of the *Charter,* have contributed to shaping the Canadian juridical field's contemporary contours and have thus impacted the kinds of arguments that were thought possible in *McIvor*. They have also impacted the appearance, so to speak, of 'race' and how it operates in twenty first century Canada.

Hall (1997) maintains that racial meaning is often produced through the classification of groups and individuals according to various types and stereotypes (257). He suggests that stereotypes are types that become reduced to simplified essentialist characteristics that are considered to be fixed in nature and that it is through stereotypification where 'race' finds a home in the production of social meaning (249). According to Hall, then, 'race' is the result of categorizing practices based on perceived differences. Similarly, Memmi suggests that 'race' is the result of constructed biological and non-biological differences (2000, 93-4). Rattansi also suggests that 'race' is based on markers of difference in biology and/or culture (2007, 7). Racism then, can be defined and distinguished from 'race' as the investment in certain conceptions of 'race' (perceived differences in biology and/or culture) that result in inequality and subjugation of the constructed 'other' (Memmi 2000: 93-4). These theories of 'race' infer distinction between racism and racialization suggesting that the ascription of racial criteria is not *necessarily* discriminatory. Additionally, through attempts to denaturalize constructions of 'race', these theories remain consistent with discursive constructions of "Indigenous difference". They use 'race' to demonstrate the artificial constructs upon which Indigenous people(s) have been represented as different, however, they do not question the existence of Indigenous difference and as a result they do not question what Indigenous difference is constructed against. 'Race' therefore remains something that the 'other' has, not something that whites, for instance, possess. Whiteness, therefore, remains the unspoken norm in these theories of 'race'.

This thesis seeks to disrupt this common theorization of 'race'. By exploring Moreton-Robinson's theory of *patriarchal white sovereignty* (2001, 2004a), I will

demonstrate that in Indigenous contexts, there is not such a clear distinction between racialization and racism as both engender discrimination through dispossession.

In Canada, as in other settler colonial countries, the state maintains that it holds exclusive possession and governing control of its territories. Moreton-Robinson (2004a) suggests that this power, resulting in and from Indigenous dispossession, is exercised primarily through legal means (Moreton-Robinson 2004a, 6). Conceptually, *dispossession* refers to the Canadian state's acquisition of Indigenous lands and the manifestation of legal and juridical power, over those lands at the exclusion of Indigenous sovereignties. These forms of power are exercised through and reproduced by Canadian sovereignty whereby the Crown or state and its juridical system claim possession and governing authority over its specified boundaries (Moreton-Robinson 2004a, 6).

Connected to this possessive logic is the concept of *patriarchal white sovereignty* (Moreton-Robinson 2001, 2004a). Patriarchal white sovereignty conceptually guides my analysis of the connection between racialization and juridical practice. Moreton-Robinson (2004a) argues that settler colonial countries like Australia, New Zealand, the United States, and Canada are based on the possessive logic of patriarchal white sovereignty. She explains that,

> The possessive logic of patriarchal white sovereignty works ideologically, that is it operates at the level of beliefs, and discursively at the level of epistemology, to naturalise the nation as a white possession. The crown holds exclusive possession of its territory, which is the very foundation of the nation-state. The possessive logic of patriarchal white sovereignty is deployed to promote the idea of race neutrality through concepts attached to the ideals of democracy such as egalitarianism, equity and equal opportunity. This allows patriarchal white sovereignty to remain transparent and invisible - two key attributes of its power. (Moreton-Robinson 2004a, 5-6)

Without considering possession in theorizations of 'race' it becomes easy to take for granted the legitimacy of state 'ownership' over specified boundaries. Moreton-Robinson forces us to recognize that the way in which states possess certain territories does not result in rightful ownership of those territories. Rather, settler colonial countries like Canada possess stolen Indigenous lands by continually racializing Indigenous subjectivities in turn racializing the norm of state possession – that is, whiteness. Theories of racialized and racializing states that do not figure Indigenous dispossession into their equations therefore (re)legitimize the continued existence of what are described as racial states. In her elaboration of patriarchal white sovereignty Moreton-Robinson does not distinguish between 'race,' 'racism,' and 'racialization' because this discourse is produced by and a constitutive element of constructing Indigenous difference/dispossession. Instead, she points to the constructedness of statehood in settler colonial countries and their continued illegitimacy through racialized expressions of their sovereignty like 'law'. According to this theory, then, considering the extensive role that racialization has played in the construction of Canada, any act of racializing Indigenous subjectivities (ie. through Indian status) is equivalent to what Memmi and Rattansi describe as racism as it contributes to maintaining Indigenous dispossession.

With the use of the concept of patriarchal white sovereignty I will explore how, through specific juridical practices (ie. the struggles that made up *McIvor v. Canada*), the legitimacy of the Canadian nation-state reinforces the construction of the 'Indian' as a racialized category. Dominant constructions of Indian status as the racialized 'other' of Canadian citizenship have normalized white Canadianness as the racialized locus of power in the development of the nation-state. Considering the logic of patriarchal white

sovereignty, I argue that through juridical relations, structured by a logic of possession, Indian status in the *McIvor* court case and decision was defined in an implicitly racialized manner. It was defined as such through the argument that Indian status is the pinnacle of First Nations Indigenous cultural identity and through the assertion that Indian status is an issue concerning sex discrimination rather than an issue concerning sex *and* race discrimination.

There is nothing natural about juridical practices and the ways that they impose order on social life, but it is precisely in their representation as such that they are able to exert power in an unparalleled manner through the explicit or tacit belief in their legitimacy (Bourdieu, 1987). Furthermore, law in and of itself does not constitute social reality, but acts in privileged interaction with other social spheres to produce highly complex sets of social relations and realities. In other words, law is a shorthand for multiple and antagonistic practices and forms of knowledge production and power. It encompasses formal articulations like courts, the legislature, and legislation, while also including discourses that become dominant in terms of acceptable behaviour and legitimate knowledge that extend outside of the formal articulations of the Canadian legal system into the everydayness of life.

Pierre Bourdieu (1987) conceptualizes law in terms of a social field. He argues that in order to understand the social significance of law we need to see it as a social universe, or juridical field, that produces and exercises authority in a manner relatively independent of other arenas of social life (Bourdieu 1987, 816). His argument lies between dominant understandings of law and society in terms of *formalism*, which attributes absolute autonomy to juridical practices in their constitution of the social world through internal

dynamics, and *instrumentalism,* which situates law as a mere reflection of existing social realities, ultimately acting as a tool used by dominant groups to maintain those realities (Bourdieu 1987, 814).

For Bourdieu, the juridical field operates according to a logic that is determined by two factors: by specific power relations between social agents invested in their participation in the field and secondly, according to an internal logic of juridical functioning. Regarding the first, internal power relations give the field structure that orders competitive struggles between agents who are vying for legitimacy within the field (Bourdieu 1987, 816). Regarding the second, internal logics determine and limit the range of possible actions and knowledge deemed legitimate. This ensures that the field produces specifically juridical solutions (Bourdieu 1987, 816). Power generated through juridical practices, like the converging of agents in a court case, is therefore unparalleled in its ability to regulate social life because, in very practical ways, people buy into, and act in ways that reproduce, law's regulating method. A relational conceptualization of power with regard to juridical practice is, therefore, necessary for treating 'law' not as a monolithic object or as a subjective body, but as a dynamic field that encompasses the struggles between various individual and collective agents.

In Canada, Backhouse (1999) has demonstrated the prolific role that juridical practices, in various ways and to varying degrees, have played in establishing and enforcing racial inequalities under the jurisdiction of Canadian sovereignty (Backhouse 1999, 15). She suggests that, through the construction of rigid classificatory definitions of 'race,' the Canadian legal system has and does act as a systemic instrument of oppression (Backhouse 1999, 15). Indian status, created by and through Canadian

juridical practices, demonstrates the inextricable link between colonial possession of land, the creation of a legal system and its associated racialized categories, and the regulation of Indigenous (and non-Indigenous) subjectivities and sovereignties.

Considering the extensive role that juridical authority plays in regulating social life in general and Indigenous dispossession in particular, I examine *McIvor v. Canada* to understand how contemporary juridical practices, and the relations of power that shape them, assert racialized Canadian sovereign contours. In other words, I seek to gain insight into how the regulation of Indigenous subjectivities, through racialized naming, is foundational to Canada's sovereign existence, and which is, in this case, constituted by and constitutive of the ability to rule in the name of *Canadian law*. This thesis does not solely focus on the *McIvor* decision, but also on the factums of the interveners, respondents, and appellants to demonstrate how, through antagonistic struggles, each juridical agent respectively racialized Indian status and Indigeneity – the result being the same racialized conception in the decision. This will reveal how the converging of juridical actors has once again, albeit in a modified discourse, produced racialized meaning for Indigenous legal recognition in Canada.

In my discussion of the struggle surrounding Indian registration in *McIvor* I do not consider the construction of Indian status for the sake of interrogating Indigeneity, as Indianness provides some (but not complete) insight into the layered and multivariate existence of Indigenous identities.[4] Put differently, I am not examining the nature of Indigenous identity, especially through difference, itself. Instead, I am uncovering a process through which Indigenous identity and difference is constructed juridically in terms of Indian status. I specifically examine Indian status as a *juridical* identity in order

to focus on the collective power reproduced as a result of naming Indians through Canadian juridical acts. This naming is part of continual Indigenous dispossession as it legitimizes state power through the regenerative racializing of Indian status as an authoritative category marking notional Indigeneity. In other words, I seek to uncover the ways in which Indian status is defined in *McIvor v. Canada* in order to demonstrate one way in which Canadian sovereignty is reproduced by marking Indigeneity according to racial difference. This analysis will reveal that by racializing Indigenous people(s) through Indianness, Canadian sovereignty expresses its own racialized character as a sovereignty based on the *white* possession of the nation-state.

The thesis is organized into five chapters followed by a conclusion. The first chapter will conceptualize 'gender', 'race', and the 'juridical field' in the context of Indian status. I consider literature dealing with Indian registration specifically as well as literature rooted in Critical Race Theory (CRT) and Critical Whiteness Studies (CWS) in order to conceptualize 'race' in a way that prioritizes Indigenous dispossession. Additionally, this chapter will discuss Bourdieu's theorization of the juridical field to complicate and specify what 'the law' means. In particular, conceptualizing 'law' as a juridical field deviates from discursive theories of law often utilized in CRT and CWS literature that have tended to adhere to monolithic depictions of the concept. The second chapter will offer an empirically grounded elaboration of the Canadian juridical field through a discussion of important moments that have structured the field as it exists today and as such, shaped the kinds of outcomes likely in *McIvor*. The third chapter will examine the factums of the respondents, appellants, and interveners in order to identify the logics that circulated in the court. Here, I ask, how did each juridical agent define Indian status?

The fourth chapter will analyze the *McIvor* decision in order to identify how the eventual court logics conceptualized Indian status. This will reveal which logics, advanced in the factums, were incorporated into the decision. Additionally, a sketch of the power relations among the juridical agents begins to unfold. The final chapter will analyze what was left out in *McIvor*; what was missed due to the structure of the juridical field and why. In particular it will focus on two main themes: one based on what was outwardly discussed in the case, namely Indian status as an issue concerning sex discrimination, and one based on what was not explicitly stated but eluded to, namely the degree to which the case was influenced by racialization.

Ch. 1: Theorizing "Gender", "Race", and the "Juridical Field"

Patrick Wolfe (2006) argues that settler colonialism functions in accordance with a *logic of elimination* whereby the settler needs to eradicate Indigenous populations in the contest for land and control (388). The scholarly literature concurs that settler colonialism has operated according to eliminatory reasoning, although the language that is used often alludes to the connection between elimination and assimilation (See for instance, Denis 1997,153; Palmater 2011, 28; Watson 2002; Lawrence 2004). As Duncan Campbell Scott, Canada's Deputy Superintendent of Indian and Northern Affairs from 1913 to 1932 (in)famously articulated, "[o]ur objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question" (National Archives of Canada 1920). Exercised through various assimilatory policies like residential schooling, voluntary and involuntary enfranchisement, and of particular interest here, a progressively exclusive Indian registration scheme, eliminatory logics have played a significant role in Canada's creation as a nation-state. Although it may seem oxymoronic, Canada's *eliminatory* practices have been exercised through the *production* of "the Indian" as a category of which some Indigenous people have been included.

Through juridical categorizations of Indianness, Canadian attempts to eliminate Indigenous people(s) through assimilation have largely taken place through a logic of *race*. Beginning in the mid-nineteenth century, Indian status has largely been constructed according to 'Indian blood'. This *Indian Act* expression is consistent with the nineteenth century scientific idea that notional biological characteristics could indicate inherent human difference and as such were/are rational ways for determining identity and forms

of citizenship (Sturm 2002, 53). Blood has therefore become a symbol for measuring Indigeneity even though there is no practical way to "measure" degrees of Indian blood, as 'race' is not natural, but socially constructed. Furthermore, in Canada Indianness has been constructed as a racially fluid or mutable category that can be eliminated through perceived Indian and non-Indian intermixture. Therefore Indian status treats Indianness, and to some degree, Indigeneity, as terminable through the perceived dilution of one's Indian blood. Blood, and therefore, Indian status have been and continue to be used to determine degrees of relatedness between family members according to notionally biological, and no other, criteria. The constructed mutability of Indian blood means that juridical assimilation of Indian status is possible for Indigenous people(s) as one's juridical recognition as an 'Indian' can be dissolved in concert with the perceived dilution of his/her Indian blood.

More recently, scholars, like Tallbear (2003) and Hamilton (2009) have argued that there has been a discursive shift from public, scientific, and legal understandings of Indigeneity in terms of blood to one in which the predominant metaphor is genes (Hamilton 2009, 5; TallBear 2003). This discursive shift whereby 'blood' is replaced by 'genes' continues to racialize Indigenous (and non-Indigenous) subjectivities as recognition of one's connection to ancestral communities is contingent upon the perceived purity of one's genealogical descent line. Consequently, the rules of Indian status entitlement currently stipulate that within a family upon two generations of parentage between Indians and non-Indians, there is not a sufficient amount of genealogical connection left for the resulting children to be connected to the 'historic' group of Indians.

This biologically deterministic construction of status does not encompass the entirety of Indian registration criteria in Canada. The racialization of Indian status has also been facilitated, albeit secondarily, through intersecting sex discrimination as the category has been transmitted along patrilineal descent lines. Since 1868, legislation has treated the Indianness of women as more mutable than that of Indian men, reflecting, according to Eberts, the *Indian Act*'s adherence to a Victorian model of the family (2010, 18).[5] This model maintains that as heads of household, males determine the juridical identity (like Indian status) of their immediate families. Gender has thus become a centre of analysis for scholars who treat Indian status registration as a specifically Indigenous *women's* issue. Barker (2006), for example, discusses *Indian Act* status registration as a policy of gender discrimination that privileges Indian men, identifying how the 1876 *Indian Act* definitions promoted patrilineality. Barker fails to consider that Indian status was and is also based on racialized criteria as expressed through symbols like 'Indian blood' and more recently manifested in the second-generation cut-off rule [6] and a resulting hierarchy of status.

Deviating slightly from Barker, Eberts suggests that Canada has designed Indian registration with a two-pronged motivation in mind – the Victorian view of women and their proper place in society and the family, and the desire to assimilate Indigenous people(s) into Canada's body politic (2010, 17-18). In this way, Eberts, like Barker, identifies gender and heterosexual, monogamous marriage as mechanisms used to promote Indigenous assimilation (Barker 2006, 18). She does not, however, substantively connect Canada's practices geared at assimilating Indigenous people(s)

with the ways in which racialization is practiced to systemically eliminate their/our existence.

Palmater (2011) positions *Indian Act* registration as a tool through which assimilation has been operationalized in Canada. While Palmater and Eberts (and others, see for instance Grammond 2009) recognize that Indian status is a racial symbol, they fall short in their theoretical engagement with 'race'. In particular, there is a failure to figure 'race' into theoretical arguments concerning Indian registration. Racialization is used descriptively to stylize the image of Indian status, but 'race' does not act as a central lens through which arguments concerning Indian registration as an assimilatory practice have been made. In other words, most literature dealing with Indian registration does not theorize 'race' in order to examine how the juridical construction of Indian status results from racial knowledge upon which Indigenous people(s) have become known and how we have come to know ourselves. Instead, the literature tends to refer to 'race' as an empirical given, describing the current Indian registration scheme, for example, as a form of racial discrimination, but without noticing how the scheme (re)produces the racial contours of Canadian sovereignty. The racism of Indian registration in much of the literature is therefore treated as descriptive and ahistorical.

This treatment of Indian registration is also problematic in that it does not provide insight into *how* Indian status is racialized and gendered, and continually utilized to dispossess Indigenous people(s) while maintaining Canadian sovereign dominance. The sort of analysis that takes *how* into consideration is needed to reveal, first how the (re)production of Indian status maintains a highly exclusive image of Indigeneity, one that racializes and genders family relationships with very real consequences in terms of

legitimacy for Indigenous people(s); and second, it (re)produces Canadian patriarchal white sovereignty (Moreton-Robinson 2004a) through the juridical possession of Indigenous subjectivities.

Considering the scholarly treatment of *Indian Act* registration, my research looks at the intersection of gender *and* racialization within the specific context of *McIvor v. Canada*. I argue that a concentration on gender alone camouflages the racialized logic according to which the repression of Indigenous sovereignties and subjectivities occurs, and (re)produces Canada's colonial existence as a patriarchal white nation-state. I will now consider literature that deals with 'race' in broader contexts (as distinct from literature that examines Indian status in particular) in order to theorize 'race'.

In the 1990's, the field of Critical Whiteness Studies (CWS) emerged in conversation with Critical Race Theory (CRT). Critical Race Theory initially developed in the United States through critiques of the destructive and discriminatory ways in which law constituted 'race' in society. CRT also emerged through the rejection of liberal notions of racism that conceptualize race/racism as a personal, individual, and aberrational phenomenon. For example, in her extensive study of Canadian court cases and legislation, Backhouse (1999) points to the excesses of Canadian racism, suggesting that only on the rarest occasions have Canadian legal actors even attempted to challenge the systemic racism of law (Backhouse 1999, 15). Critical race theorists maintain that race thinking is a highly pervasive force in the structure and structuring of all social and political relations (Delgado and Stefancic 2001, 7). CRT approaches racism as a systemic and ingrained process that serves the interests of dominant groups (Delgado and Stefancic 2001, 7; Crenshaw et al. 1995, xiv).

Like CRT, Critical Whiteness Studies suggest that, through processes of racialization, groups of 'non-white' people are socially subordinated and marginalized, feeling the effects of this domination materially and symbolically in their everyday lives. However, CWS adds that it is equally important to examine the ways in which the creation of subordinate groups simultaneously produces privileged groups that also experience effects of racialization. These effects are, however, privileged in comparison to those experienced by 'non-white' counterparts. Razack (1998) expresses this addition when she states that "[c]olonization …achieves the status of a cultural characteristic, pre-given and involving Aboriginal people, not white colonizers. We may know how colonization changed Aboriginal people, but do we know how it changed, and continues to change, white people?" (Razack 1998, 10-11)

CWS literature is helpful in shedding some light on Razack's question. However, a careful sifting through the CWS literature is required to locate its relevance to this thesis as the literature contains differences in epistemological commitments according to region. In particular, these differences can be observed between the majority of North American Critical Race/Whiteness Studies literature, and that of a body of work emerging from Australia.

North American Critical Race/Whiteness Studies literature has typically situated the construction of 'race' and whiteness with the development of slavery and immigration (see for instance Martinez 1997; Roediger 2005, Haney Lopez 2006). For example, Roediger (2005) suggests that the legal equating of whiteness with citizenship primarily shaped the way in which 'race' was created in the United States (Roediger 2005, 62). Roediger's stance does not consider processes of colonialism and the role they have

played in the construction of 'race' in the Americas. His argument, therefore, takes the legitimacy of the American state for granted. Conversely, analyses that utilize Indigenous dispossession as an epistemological starting point, question the institution of citizenship and state sovereignty altogether, rather than describing how state citizenship has been defined according to particular racialized parameters as Roediger does.

Other Critical Race and Whiteness Studies literature deviates from the positioning of 'race' and whiteness with slavery and immigration. While still limited, this body of literature recognizes Indigenous dispossession as being *part* of the creation of white settler nations, however, it fails to theorize the investments that non-white immigrants have in Indigenous dispossession (see for instance Dua 2007; Stasiulis 1997). In Canada the subject positioning in relation to racialization differs between Indigenous people(s) and non-white immigrants – a difference that requires careful consideration so as not to reproduce analyses of racialization that lump 'non-whites' together. For this consideration, I turn to a body of literature emerging from Australia that approaches the construction of white dominance through the prioritizing of Indigenous dispossession.

Primarily led by Aileen Moreton-Robinson (2000, 2001, 2004a, 2004b), Australian Critical Whiteness Studies literature interrogates racialization by utilizing Indigenous dispossession and colonialism as an epistemological a priori. With such a foundation, *patriarchal white sovereignty* becomes operationalized as a form of racialized power that is the direct result of Indigenous dispossession from land and more broadly, sovereignty. This concept is not limited to physiognomy; rather it refers collectively to those portions of the population who have assumed the legacy of power and possession of the nation state left by early colonial administrators. In Canada, it was

from those men, like Sir John A. MacDonald, Wilfred Laurier, William Lyon MacKenzie King, and Robert Borden, where the language of whiteness was first used to proclaim that the nation was to be a white man's country (Dua 2007; Roy 1989; Greer 1987).

According to Moreton-Robinson (2004a), white Anglo heterosexual, able-bodied and middle class patriarchs have been key actors in enacting laws, like the *Indian Act*, through which patriarchal white sovereignty operates (Moreton-Robinson 2004a, 6). As a result, men, who are disproportionately represented in government, legislatures, bureaucracies, the legal profession, and the judiciary "shape legislation, administration and judicial texts in their own image and to their own advantage" (Thornton 1995, 88). [7] By connecting the Australian CWS literature with Canadian contexts, my research specifically examines juridical practices of naming 'Indians' according to racialized and gendered knowledge as one component of maintaining Canada's patriarchal white sovereignty.

Demonstrating the racial character of Canadian sovereignty rather than simply identifying the racialization of single categories like Indian status provides insight into how Canada's legitimacy is supported through the divisional categorizations of *all* Indigenous people(s) that fall under its purview. In other words, arguments that fail to utilize 'race' conceptually with regard to Indian registration also fail to make theoretical connections between the ways in which all Indigenous people(s) in Canada (and beyond) become named and racialized through juridical categorizations.

Palmater (2011) states that, "[a]lthough 'Aboriginal' is a constitutional term, it includes Métis and Inuit, who are not the subject of this book" (Palmater 2011, 33). Palmater and Eberts (and others, see for instance Green 2007) narrowly focus on Indian

registration both in their empirical context and in their theoretical engagement concerning state power to name Indians, as if it is separate from the categorization of Inuit and Métis peoples. This separation is true empirically, but a theorization of patriarchal white sovereignty reveals the superficiality of separating Indian, Métis, and Inuit as distinct analytical categories without acknowledging the similar racialized logics involved in their juridical constructions.

By utilizing patriarchal white sovereignty to focus analyses of *McIvor* specifically and Indian registration generally, we may see how Indian status acts not only to de-legitimize Indigenous claims of First Nations people who do not possess Indian authenticity, but how it also acts to de-legitimize Métis peoples.[8] This is because Métis identities have been largely and incorrectly perceived as being rooted in a presumed ancestral *mixedness* (Andersen 2011, 2010, 2008). The notion that someone is somehow 'mixed' is consistent with *Indian Act* logics that internalize notional biology as a marker of authenticity. It is as if the Indigeneity of Métis peoples has become tainted by the whiteness that they are perceived to embody in a manner that status First Nations and Inuit people do not experience.

Having said that, Inuit peoples are also implicated in racialized logics. Perceived to live in comparative isolation from Western society and the possibilities of "inter-racial" parentage, Inuit are accorded an "upgraded" level of Indigeneity. Indigenous peoples who are believed to have a minimally-mixed biological makeup are believed to be more Indigenous than others. It is evident that within settler colonial countries, a racialized order that has largely been created through the production of patriarchal white

sovereignty impacts Indigenous peoples. I argue additionally, settler citizens are also impacted by this racial order.

Like the patriarchal white sovereign state that they occupy, settler citizens racialized as white often misrecognize[9] their own whiteness and the privileges that they enjoy because they are procured through racialization. Whiteness, while often silently registered by Indigenous and non-Indigenous people(s), is not often explicitly named. Instead, through whiteness, the racialized other (ie. Indian) is named, which then acts as a self-defining feature for whiteness whereby the logic goes, 'you are Indian, we are not that, we are 'normal' Canadians (ie. non-raced)'. Because 'race' is often perceived as something embodied by the 'other' or 'non-white', whiteness "remains the invisible omnipresent norm" (Moreton-Robinson 2000, xix) in the organization of society.

Settler colonialism, then, does not exist only with particular consequences for Indigenous people(s), but also for settler citizens. A racial framework continues to organize society through constructions of the Indigenous non-white Canadian: the 'Indian'. This racially hierarchical framework inclusively subsumes Indigenous people(s) into the nation while distributing privileges of citizenship unequally to Indigenous and non-Indigenous people(s).

Throughout Canadian history a distinction between Indians and white Canadians was made. In this way, white Canadianness became the desired norm through the naming of the racialized Indian 'other'. The distinction made between Indians and Canadians was followed-up with a litany of policies directed at rhetorically closing this constructed gap through Indian assimilation. Indeed, in 1869 Canada legislated an aggressive project of assimilation for Indians throughout the nation (Milloy 2008, 1). Juridically,

assimilation was to be achieved by turning Indians into citizens, thereby absorbing them/us into Canada's whiteness. This administrative regulation occurred through a sense of possessing the nation and the resulting entitlement to govern those residing within its boundaries.

Critical Race and Whiteness Studies literature has extensively examined the interactions between 'race' and law. However, these examinations have largely lapsed into discursive theories of law that unitarily treat 'it' as being wholly responsible for constituting the existence of 'race' in society. For instance, Hovenkamp (1997) discusses law by jumping between policy and courts in an interchangeable manner to explain how 'race' is constructed through legal means. Such a treatment fails to recognize the conceptual complexities in ascribing various components of law with the same degree of power in producing social realities.

Diverging from Hovenkamp, Haney Lopez (2006) recognizes the way in which what is represented as 'the law' is actually made up of various institutions, including, in his analysis, the courts and policing agencies. While this recognition is helpful in deciphering the empirical scope of his investigation, a simple recognition of the multiplicity of law does not provide extensive insight into how various juridical parties holding varying degrees of power struggle to determine what eventually becomes asserted as law.

In her analysis of the Yorta Yorta decision in Australia that dealt with native title, Moreton-Robinson (2004a) adheres to an instrumentalist approach to law. She analyzes the decision without considering how the interactions of the court contributed to forming the decisive logics. In a rather sophisticated elaboration, she points to the manner in

which white patriarchs have constituted 'race' in society through law without revealing the investments Indigenous people(s) have made in such processes and how their resistances have contributed to forming what the law is and has come to say. To critique the gaps in Critical Race and Whiteness Studies literature with regard to conceptualizations of law, I turn to Bourdieu's (1987) theorization of the juridical field.

'Fields' make up a central feature of Bourdieu's theory of practice. They are not natural categories or 'real' spaces, so to speak, rather, they are metaphorically constructed models used to identify and explain particular struggles or competitive interactions between social agents that produce social realities. These struggles result from agents' antagonistic interests in obtaining or controlling what they mutually perceive as something that is desirable (Bourdieu and Wacquant 1992, 94-114). Fields are therefore analytical tools utilized to examine series of struggles over valued resources.

When the social scientist can identify a relational struggle or series of contestations whereby agents are vying for control or legitimacy logically, there must be *something* that these agents are struggling over. Control over *capital* is the resource that is struggled over in fields. Resources are not inherently forms of capital, but become so if they are perceived, either consciously or pre-reflexively, as valuable enough to elicit struggle. Broadly, the form of capital struggled over in the juridical field is a monopoly over the authorized right to determine what becomes represented as law (Bourdieu 1987, 817). In this way, law refers to the knowledge that, as a result of specific struggles, becomes represented as accepted fact produced from intuitions of fairness, neutrality, objectivity, and justness (Bourdieu 1987, 817). When jurisprudential analysis refers

monolithically to 'the law' without consideration of its constructed relationality, it collapses all of the social practices and power relations that have contributed to determining what 'the law' means or more accurately, how 'the law' is produced and reproduced. Field analysis is a relational approach to understanding social practice as it has risen from the goal of exposing unseen power relations that shape social struggle and production (Swartz 1997, 119).

Fields emerge from dissident yet mutually reinforcing struggles between agents who hold, and are vying for, power within the field. Field analysis presupposes a conflictual characteristic to social life as struggles for power within a field result in degrees of domination and resistance between agents who occupy different positions within the field's stratified structure. Furthermore, the relationship between hierarchical positions suggests that a complicit acceptance and therefore mutual-dependence of one another is required for the field's maintenance. Put simply, there cannot be powerful juridical agents without the existence of less powerful, yet resistant agents struggling to gain legitimacy and influence while still buying into the "rules" of that field of struggle.

At the most general level, Bourdieu's conceptualization of the *juridical field* allows for an examination of interactions whereby agents compete to determine the substance of law (Bourdieu 1987, 816). The practices of the juridical field are not, however, simply the result of autonomous or free choice by agents who act them out, but are characterized by an internal structuring of positions, and from those positions predictable behaviours often ensue. This structure operates according to logics that are the result of combinations of common language internal to the field and elements of language that are foreign to the field (Bourdieu 1987, 819). Although internal dynamics

of the juridical field do not, then, exist independently of other social fields and therefore do not constitute social reality on their own, the juridical field nevertheless "refracts symbols, meanings, and identities already in circulation elsewhere" (Andersen 2011, 49) in a way irreducible to the way it happens in other contexts.

For instance, colloquial usages of Indianness may enter a court case and inform the judge in his or her decision concerning Indian status, but only upon being translated into juridically relevant language. The juridically produced meaning of Indian status may then get taken up and refracted back out to other fields. For instance, once Bill C-3 was passed as an amendment to the *Indian Act*, some bands have decided to consider the newly registered Indians (whose entitlement came as the result of *McIvor* and Bill C-3) for membership. With such a multi-directional relationship between fields, non-juridical knowledge often gets translated through juridical machinery (ie. through interactions within a court case) into relevant discourse that then gets sent back out into the social world and taken up by various other agents and fields because it carries with it legitimacy as juridical knowledge.

Theorizing the juridical field, therefore, allows me to explain why conflating 'courts' and 'legislation' more generally is unhelpful for understanding how the distinctive power of the courts operates. Additionally, a conceptualization of the juridical field is helpful in my analysis of *McIvor* because it requires consideration not only of the decision, but also of the divergent and intersecting positions of juridical agents who struggled over defining Indian status. My analysis will therefore go beyond a discourse analysis of the decision, but will also consider the competing interests of *McIvor*'s Indigenous and non-Indigenous agents.

The internal structuring of the juridical field conditions the production of what becomes represented as law. The structuring is made of various positions that are determined according to an unequal distribution of relevant capitals. In other words, agents struggling over the substance of law come from different positions in the field that hold varying degrees of power or legitimacy. The structuring that gives rise to production is reinforced through each agent's willingness to accept the pre-determined rules of legislation and judicial precedent that give way to the structure of legal decisions (Bourdieu 1987, 820). For instance, a socialized juridical agent must have "a minimal mastery of the legal resources…that is, the canon of texts and modes of thinking, of expression, and of action in which such a canon is reproduced and which reproduce it" (Bourdieu 1987, 820). McIvor, while requiring certain juridical competencies needed to invest in these predetermined aspects of the juridical field in order to advance her claims concerning her right to confer Indian status to her grandchildren. Investment in the field's regulating method is integral to its existence.

In the context of the Canadian juridical field, court decisions generate legal knowledge that produces both material and symbolic effects as they are often marked with a considerable amount of power through their recognition as legitimate derivations of juridical truth – and as such hold considerable amounts of symbolic power. Symbolic power refers to a wielding of an unequaled monopoly to define social realities and masks the possibility of alternative options (Grenfell 2008, 195-6). The symbolic power wielded through Canadian court decisions is exemplified in the way that the *McIvor* decision led to a legislative amendment. The power comes from the ability to impose this reality as legitimate knowledge and to hide the relations that allow for it to happen

(Bourdieu and Passeron 1977, 4). Power relations are concealed through their reproduction in cultural symbols and practices, like the juridical practices in *McIvor*. These practices stand in contrast to more obvious efforts by individuals or groups who reflexively act to reproduce particular social realities (Swartz 1997, 6).

The power or influence of juridical knowledge, then, does not come from the meaning of the knowledge itself, but in a belief in its legitimacy (Bourdieu and Passeron 1977, 5). Put differently, the meaning of symbolic systems are reproduced through the complicity of those within the system, as symbolically powerful knowledge and practice often go unnoticed and unquestioned because they represent what is perceived as natural, normal, and self-evident (Bourdieu 1977, 117). More specifically, Bourdieu (1987) suggests that symbolically powerful juridical authority comes largely from its adherence to "the positive logic of science and the normative logic of morality" (Bourdieu 1987, 818), which makes it capable of "compelling universal acceptance through an inevitability which is simultaneously logical and ethical" (Bourdieu 1987, 818). For instance, the degree to which Indianness as defined in the *Indian Act*, has become legitimate is evident in the ways in which band membership codes (constructed by First Nations themselves) mimic the same registration scheme. Bands do not *have* to reproduce the logic of the *Indian Act* and logically speaking, one would think that, considering the deleterious effects the *Indian Act* has had on Indigenous legal recognition, such logic would not be repeated. However, bands have and do choose to construct highly racialized codes. In this way, relational struggles for legitimacy within the juridical field contribute to the generation of symbolically powerful truths that get

taken up in ways that echo (the legitimacy of) juridical knowledge within and outside of the formally specified domain of its production.

Related to the concept of symbolic power and the coercive ways that social agents get drawn into the regulating method of various fields is symbolic violence – that is, the legitimately perceived imposition of a symbolically powerful social reality. Bourdieu suggests that this force wielded by the juridical field is made possible through the basic belief in the state's unrivalled power to hold the monopoly of legitimate symbolic violence throughout the society that it orders (Bourdieu 1987, 838). The juridical field has the ability to produce and name truths as performative utterances that impose universally recognized principles of knowledge of the social world (Bourdieu 1987, 837). Because of the symbolic power that juridical knowledge has, as a result of its representation as logically coherent, systematic, and objective, it becomes a form of knowledge in which "no one can refuse or ignore the point of view, the vision, which [it] imposes" (Bourdieu 1987, 838). For instance, even though an individual may believe that his or her Indigenous identity as a Blackfoot, Cree, or Dene, etc. person is not significantly tied to the state's construction of Indianness, he or she cannot escape the regulatory effects of Indian status in terms of how it impacts the material and symbolic practices of determining Indigeneity.

Furthermore, the operation of fields largely occurs through agents' misrecognition of that power. Misrecognition refers to induced misunderstanding whereby relations of power are not perceived as resulting from interested acts, but as normal and legitimate (Bourdieu and Wacquant 1992, 194-5). In other words, for the juridical field to operate agents must not see their participation in it only as a result of dominating power. Even if

they do understand that the field is a site of power, they may not see any alternative to the outcome they desire because symbolic systems mask the possibility of alternative social realities (Grenfell 2008: 195-6).

Misrecognition is created through structural means and reveals the advantage that holders of power have in their capacity to control the actions of those they dominate (because of the field's form or structure), in addition to the *language* through which those subjected comprehend their domination (Bourdieu 1987, 820). Thinking in terms of *McIvor*, in order for McIvor to fight for the ability to confer on her grandchildren what she referred to as her cultural identity, she not only had to do so in a Canadian court, but she had to engage the court in the language of Indian status as defined in juridical terms. The functioning logic of the juridical field is, therefore, the result of two factors. First, specific power relations order the struggles over legitimacy, competence, or capital within the field (Bourdieu 1987, 816). Second, an internal logic limits the range of possible practices and solutions that are deemed 'appropriately' juridical and therefore accepted as legally relevant (Bourdieu 1987, 816).

Within the juridical field whatever one's role may be (whether legal professional, criminal defendant, or civil litigant, for instance) one must accept the processes and rules of regulation that structure juridical decisions in order to seek resolution of a dispute. An analysis of law, therefore, should not only consider what law says in written form, but also the practices, interactions, and competitions that lead to what law comes to say. This sort of analysis offers a way to gain insight into how power operates and where, or with whom, it is concentrated (or not) within the juridical field. Utilizing Bourdieu's field analytic is useful for seeing law not as an instrument or tool of colonialism, but a series of

embodied investments that produce specific practices and relationships that regenerate colonial power in distinctive ways.

What Bourdieu is missing, however, is a consideration of the role of racialization in the structuring of the power relations within the juridical field. While on one hand Critical Race/Whiteness Studies literature concerning law has tended to adhere to variations of discursive theories of law and therefore lack a Bourdieuvian-like interrogation of the complexities with regard to how, *relationally*, racialization, in practice, gets reproduced, Bourdieu, does not conceptualize 'race', and in particular Indigenous dispossession, in his construction of the juridical field. To fill in this theoretical gap I return to my earlier conceptualization of patriarchal white sovereignty and in an interlocking manner, the *juridical field* and *patriarchal white sovereignty* will direct my analysis of *McIvor v. Canada*. Before this analysis though, a further mapping of the juridical field is necessary.

Bourdieu urges that in order to understand the ways in which juridical practices contribute to generating social realities, the social scientist must identify historical conditions that have given rise to the particular empirical form of a juridical field (Bourdieu 1987, 815). In order to analyze *McIvor* in terms of a juridical field, then, it is necessary to discuss it in relation to the *Canadian juridical field* and empirical events that have shaped the form of the field with regard to Indian status regulation.

Ch. 2: Mapping the Canadian Juridical Field: From "Indigenous" to "Indian"

Historically, criteria of birth have determined Indian status for those tracing their Indian status through paternal lines, while making vulnerable those who trace it maternally. Indian status, while having been explicitly transmitted in this gendered manner (ie. through the status of one's father and husband), has also been dependent on racialized conceptions of the Indian, most often expressed through the symbol of "Indian blood". Indian status regulation, through its promotion of patrilineality and racialization, has been a strategic way in which Britain and later, Canada have managed Indigenous subjectivities and severed them from land bases. Indeed, various feminist scholars have recognized the strategic way in which "gender" and "race" have been utilized throughout Canadian colonialism to control and limit Indigenous membership in order to control lands and resources originally held by Indigenous peoples (Barker 2006; Freeman 2005; Napoleon 2001; Palmater 2011).

On the surface juridical constructions of "race" and "gender" have been consistent in terms of their impacts on Indigenous women especially in terms of their dispossession through Indian regulation. Such is the case as far as it goes, but, it is also true that "race", "gender", and the juridical contexts out of which these concepts are generated have changed over time and, indeed, have taken different forms at different moments in Canada's history. Like all fields, the Canadian juridical field is deeply historical and thus contingent. It is within the context of its contingent character that "gender" and "race" have been legally operating and morphing alongside changes in the social landscape.

Freeman (2005) suggests that *Indian Act* registration has reduced the number of individuals recognized as eligible for status and thus, the need for reserve land and government spending on Indians (51). While Canada's attempt to dispossess Indigenous peoples in this manner is littered across legislation in the mid-nineteenth to late twentieth centuries, its contemporary effects, while existent, have become less apparent. Formally, the Canadian state is based on liberal democratic ideals of freedom, equality, and equal opportunity, but systemically, its gendered and racialized inequalities continue to impact the lives of Indigenous people(s) in dispossessing ways. The ideals of the state therefore interplay with the practical realities of racism and sexism that impact the forms of resistance possible for Indigenous women when it comes to challenging Indian status registration.

In this section I will trace some of the moments in Canada's history that have defined the context within which *McIvor v. Canada* is located. I will provide some insight into how the Canadian juridical field has changed in ways that have impacted struggles over Indian registration.

Prior to the actual emergence of the Canadian juridical field, legal precedents existed in international law that, based on the Doctrine of Discovery and *terra nullius*, European colonial powers could claim title to newly "discovered" territories (Dickason and McNab 2009, 146). Such claims would eventually lead to the construction of Canadian sovereignty as a British Commonwealth country. Canada's legal and political institutions were constructed in the facilitation of the development of this sovereignty and its relative independence from Britain.

In 1867 *The British North America Act* was passed in the British legislature to provide Canada with legislative power over "Indians and lands reserved for Indians" (s. 91(24)). In this way, the production of Canada was, in part, the result of the federal government's possession of authority to define Indigenous individuals and communities (Palmater 2011, 21). In addition to this possessive logic, the creation of Canada was about more than the summary liquidation of Indigenous people(s) (Wolfe 2006, 388). Negatively, Canada has sought to dissolve Indigenous societies and their political existences, but positively, it has produced a new colonial society in which (re)named Indigenous people(s) need to be subsumed (Wolfe 2006, 388). Canada, then, through its assertion of power over Indians, has been birthed in a productive manner. It has become a legitimately perceived "imagined political community" (Anderson 1991, 6) with a secure place in the world's "internationalist order" (Anderson 1991, 2). As Benedict Anderson (1991) has famously argued, nation-states are cultural artifacts whose meanings and legitimacy are constructed and supported through various symbols and institutions like the census, map, and museum, but also through "the mass media, the educational system, administrative regulations, and so forth" (Anderson 1991, 163). Canada is an imagined community in which the national imagination has relied on the dispossession of Indigenous territories aided, in part, by possessive logics enshrined legislatively. These processes have generated and been constitutive of continuously changing practices and effects of racialization.

In 1867 Canada did not define the term "Indian" constitutionally – this was left for Acts specifically dealing with Indians, which since the mid-nineteenth century, have been variations of what has become known as the *Indian Act*. Palmater (2011) argues

that, single handedly; the *Indian Act* and its related policies have had the most profound impact on Indigenous political, cultural, social, and legal identity (Palmater 2011, 32). It is therefore relevant to discuss the *Indian Act* development in some detail.

During the 1800s, the federal government's reserve policies required that the "Indian" must be defined *without* adhering to Indigenous criteria for collective identity (Napoleon 2001, 115). Instead, (some) Indigenous peoples were to adhere to the definitions provided by Canada. In 1850, *An Act for the better protection of the Lands and Property of the Indians in Lower Canada* defined Indians as individuals with "Indian blood" who belonged to an Indian collective, their descendants, individuals who married into the collective, and individuals who were adopted into the collective (s.5). This definition, while revealing emerging racialized logics, was seemingly indifferent to gendered transmission of Indianness. However, as Canada moved closer to Confederation, Indianness, for legislative purposes, became increasingly exclusive.

In 1868, *An Act providing for the organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance Lands* was passed. It was the first post-confederation statute defining entitlement to Indian status. According to this statute, Indians were those people who had "Indian blood" and who belonged to an Indian collective in addition to all of their descendants; people living among Indians who had at least one parent who had descended from an Indian and their descendants; and any woman who married an Indian and their children and descendants (s.15).

Not unlike the 1850 definition, this one is similarly racialized in its use of "Indian blood" as the primary marker for Indianness, but it differs in its attention to gender, as it

distinguished between the ability of an Indian man to confer status to a non-Indian wife and their children while not extending the same ability to Indian women who married non-Indian men. The gendering of Indian status, legislatively established here, remains in place and has intersected with the previously established racialized logic to disenfranchise many Indigenous women and their descendants. The 1868 criteria also connect Indianness with the collective identity of tribes, bands, or other bodies of Indians and it confers status to all of the descendants of those deemed Indians. While not as inclusive as the 1850 definition, this is still unlike the contemporary classification of Indian status as it does not delineate between "degrees of descent" that suggest that some individuals are more Indian than others based on the number of Indian parents and grandparents they have. The early legislation was therefore based on a combination of racialized and gendered attributes as well as on one's connection to community and family. This relatively inclusive definition of Indian status would not, however, remain in place for long.

In 1869, Canada legislated an aggressive eliminatory project of assimilation for all Indigenous people(s) throughout the nation (Milloy 2008, 1). Around the same time, as noted, a process of Canadian nation building gained pace with the passage of the *British North America Act*, 1867. Canada's first Prime Minister, John A. MacDonald, summarized this dual project of repressing Indigenous societies while simultaneously producing a Canadian nation when he stated that it was Canada's duty to "do away with the tribal system and assimilate the Indian peoples in all respects to the inhabitants of the Dominion" (qt. in Milloy 2008, 2). Progressing from this articulation of Canada's intentions, legislation was put into place that would attempt to exercise the assimilation

of Indians. One of the central ways it did this was through the legal regulation of whom the state would define as belonging to the category – a symbol that would incrementally infiltrate common perceptions of Indigeneity. Through assimilation, then, any problems that Indigenous existence posed to the building of Canadian sovereignty could be eradicated through Indian *inclusion* rather than *exclusion* from the Canadian body politic. Indigenous sovereignties were disavowed and Indigenous people(s) were possessively incorporated into Canada's nation building project.

When the first laws concerning Indians were passed in the nineteenth century, federal government officials lacked substantive knowledge about Indigenous people(s) in most of the territories that Canada was to subsequently claim. The laws which defined Indigeneity (although not in that language), in racialized and gendered terms, did not, therefore, necessarily have material effects on most Indigenous people(s) of the time. The laws did, however, establish the logics that would permeate juridical knowledge concerning Indigenous people(s) in Canada until the present day. In the development of what was to become Canada, then, nineteenth century colonial naming established discursive precedent according to a particular intersection of "race" and "gender" that has tended to favour Indian men while excluding Indian women, insofar as juridical status and the material and symbolic effects attached to that status are concerned. As a result, juridical definitions of Indian status have historically resulted in women's community inclusion or exclusion based on their relationships with men (i.e. first with one's father and then, if married, one's husband). Additionally, it inscribed "Indian blood" as the foremost attribute of Indigeneity. The intersection of these factors has regulated how Indian families were and are related and also how they relate to the state.

Research has shown that there is interconnectedness between the regulation of the family and the governance of the nation state (Harder 2010; Stevens 1999). The regulation of Indian families through Indian status is a means through which Indigenous people(s) have been brought into Canada's body politic, as "the specific criteria of kinship that constitute recognized families within a nation state are both the product of state law and definitive of the state itself" (Harder 2010, 205). Put more simply, without the regulation of kinship rules, there would be humans, but not states (Stevens 1999, 126-7). Indigenous people(s) have not been an exception to this rule in the context of the Canadian state.

Early attempts to define Indigenous people(s) gained pace into the late-nineteenth century. The Canadian state systematically entrenched juridical possession of Indigenous subjectivities through the 1876 *Indian Act.* [10] As the first *Indian Act* to amalgamate all previous legislation regarding Indians, the 1876 *Act* defined Indians as "[a]ny male person of Indian blood reputed to belong to a particular band…any child of such person…[or] any woman who is or was lawfully married to such person" (*Indian Act*, 1876, s. 3(3)). The primary characteristics for Indianness thus involved perceived racial legitimacy, as symbolically indicated by "Indian blood", along the patrilineal line of descent, or through marriage to a man who embodied this perceived racial legitimacy. It is obvious, then, that patrilineality and "Indian blood" have acted as the hallmarks of legislative Indianness for most of Canada's history. It forces the question, where did the meaning of these attributes come from?

While the meaning of the word "race" has changed substantially over the past several centuries, conceptually, its roots extend as far back as the Enlightenment, when it

was originally utilized to mark differences of class within European society (Backhouse 1999, 5). During this time science began to emerge and with it practices of knowledge abstraction, classification, and systematization. By the eighteenth and nineteenth centuries, imperialism was permeating the far reaches of the world and "Europeans began to exploit the idea of 'race' as a convenient justification for their right to rule over 'uncivilized' peoples, a rationale for the creation of colonial hierarchies" (Backhouse 1999, 5). Following the Industrial Revolution, scientific disciplines emerged, including ethnology, anthropology, eugenics, psychology, and sociology, which systematized and cemented the use of "race" as plausible means to define and explain human difference.

The expression of "Indian blood" in the *Indian Act* is consistent with nineteenth century scientific thought that promoted the idea that notional biological characteristics could indicate inherent human difference. As noted in Chapter 1, scholars have more recently argued that there has been a discursive shift from understandings of Indigeneity in terms of blood to understandings in terms of genes (Hamilton 2009, 5; TallBear 2003). Such racialized symbols do not only detach the meaning of Indianness from the existence of Indigenous sovereignties through their reliance on biological criteria alone, but they are also contrary to the supposed internal ideals of the Canadian state. For instance, Palmater (2011) maintains that the adherence to blood purity in Indian registration is in contradiction to modern democratic principles concerning freedom of identity and human dignity (Palmater 2011, 29). When it comes to racialization, then, Indigenous people(s) experience unique forms perpetrated by the Canadian state.

With regard to gender, the promotion of patrilineal determinations of juridical identity in the 1876 *Indian Act* was consistent with contemporary Canadian laws and

social norms that were rooted in Victorian models of gender and the family. It was not until 1918, after all, that Canadian (ie. non-Indian) women were able to vote in federal elections. In addition, in 1929 the Judicial Committee of the Privy Council (then the highest court of appeal) handed down the *Persons* decision, holding that Canadian (non-Indian) women were, in fact, legal persons for the purposes of the exercise of Canadian law. This decision, however, did not have the same consequences for Indian women as it did for non-Indian women, as Indians were not yet considered Canadian citizens. This reveals an intersection of "race" and "gender" whereby Canadian women were considered legal persons, while Indian women remained wards of the state.

Indians did not officially become Canadian citizens until 1947. Inclusion in the *Citizenship Act, 1947* did not guarantee Indians the same citizenship rights as other Canadians. Indians were treated as degenerate citizens, as the *Indian Act* continued to govern every aspect of their lives. Indians did not have, for instance, the right to vote in federal elections until 1960. Moreover, until their repeal in 1951, the government added sections to the *Indian Act* making it illegal for Indians to organize politically or to hire legal counsel to advance legal claims. The repealing of these laws in 1951 finally enabled Indians to pursue legal challenges in ways that had only been available to non-Indian Canadians.

While the 1951 *Act* removed certain structural limitations on Indians in terms of making legal claims, it also included numerous amendments that increased Canada's role in administering Indian and band identities (Palmater 2011, 42). In particular, it created the Indian Register whereby the administration of Indians was systematized to an unprecedented level. Individuals who were deemed entitled to Indian registration and

band membership were recorded on a band list, while those solely entitled to Indian registration were recorded on a General List (Palmater 2011, 42). The Indian Registrar, alone, had the power to add and delete names administered the lists. Because the charter list used to establish the Indian Register was based on whatever lists existed according to the government prior to the *Act* coming into effect, it entrenched the privileged position of male Indians with regard to registration and band membership. It did so because Indian status had been previously determined according to patrilineal descent (Palmater 2011, 42). The Indian Register in 1951 therefore formalized the discriminatory treatment of Indigenous men and women, although to varying degrees because of its adherence to Canadian gender norms. It also maintained, and therefore further solidified, "Indian blood" as the "true" marker of Indian status.

In addition, the 1951 *Indian Act* introduced the "double mother clause". This rule stated that a person registered at birth would lose status and band membership at age 21, if his/her parents had married after 1951 and his/her mother and paternal grandmother had acquired status through marriage to an Indian (subparagraph 12(1)(*a*)(iv)). This meant that for Indian women, one generation of Indian and non-Indian mixed parentage would produce children who were non-Indians, but for Indian men it would take two generations of mixed parentage for children to lose Indian status.

Because of this intersection of racialized and gendered logics, prior to 1985, Indian women who married non-Indian men were required to move off reserve (leaving their communities) as they not only lost Indian status, but also band membership through section 12 (1)(b) of the *Indian Act*. The *Act* of 1876 widely contributed to the legislative infrastructure that would not only repress Indigenous subjectivities, but would

productively generate "race" as an organizing category in the construction of Canadian citizenship and sovereignty. Indeed, while the *Act* of 1876 has been amended, its key provisions defining Indian status remained constant until 1985 (Palmater 2011, 42). In this way, whatever complexities concerning Indigenous identities have existed, their legislative "truth" has lain in a perceived notion of racial purity whereby Indigeneity could only be expressed through a "non-mixed" or, at least, "minimally mixed" biological makeup.[11]

Considering the multiple offences that the Canadian state has perpetrated against Indigenous people(s) through juridical means, it is not surprising that resistances made by Indigenous people(s) have also contributed to shaping the development of the Canadian juridical field. Comoroff (2001) argues that colonial legal regimes, while difficult to identify precisely, have acted as instruments of domination, but also as sites of resistance as Indigenous people(s) have talked back to the colonizer in the language of colonial law (Comoroff 2001, 306-7). While Indigenous people(s) have been utilizing North American settler courts since their establishment, there has been a significant increase in the advancement of Indigenous court claims since the 1960s (Hamilton 2009, 2). Hamilton (2009) suggests that this increase has been inspired by the civil rights movement in the US, and assisted by the formalization of multicultural policies in Canada, and the increase in Indigenous participation in mainstream legal systems as practitioners (2). I would add that in Canada there has also been an increased use of the courts because laws prohibiting Indian legal action have been repealed. Furthermore, since 1982 there has been a particular shift in the ways that Canadian citizens can argue for social change because of constitutional amendments.

Particularly, in 1982 the Constitution of Canada was amended to entrench the *Charter Rights and Freedoms*. Unlike the *Canadian Bill of Rights*, which existed prior to the *Charter* and which was a statutory document applicable only to the federal government that did not authorize judicial review, the *Constitution Act, 1982* and its inclusion of the *Charter* authorizes a more significant judicial role in the regulation of law and politics in Canada (Manfredi and Kelly 2009, 6). Manfredi and Kelly (2009) maintain that:

> The scope of judicial review, therefore, is significantly different from that which existed under the British North America Act, 1867, (BNA Act), where judicial review was confined to the division of powers and the Supreme Court of Canada articulated its role as the umpire of federalism. In this role, the Court evaluated government action for its consistency with the division of powers and whether the governments of Canadian federalism acted intra vires (within their power) or ultra vires (beyond their power). (6)

In today's juridical field, the *Constitution* and the *Charter* ensure that the Supreme Court of Canada maintains a role as the "guardian of the Constitution". This means that courts now play an important role in determining the validity of government action (Manfredi and Kelly 2009, 6). In particular, since 1982, the courts are constitutionally mandated to arbitrate struggles between government action and citizens' rights and freedoms (Green 2007, 142). In Canada, then, the judiciary has significant discretion in terms of determining remedies that are consistent with the human rights obligations of the government (Manfredi and Kelly 2009, 6).

The *Charter* protects the individual rights of each Canadian citizen regardless of one's sex or race (sec. 15). Indigenous people(s) are included in this rights-based regime. In addition to the rights guaranteed to all Canadian citizens, Aboriginal peoples, including, Indian, Inuit, and Métis peoples are guaranteed Aboriginal and Treaty rights

under section 35(1) of the *Constitution Act*. Section 4 of the *Act* states that these rights are to be equally guaranteed to male and female persons. Canada's First ministers have not produced a definition of Aboriginal rights. Instead, the courts have a major role in determining the parameters of this set of rights.

Because of this constitutional enumeration of "protected rights", courts have become a space for meaningful contestation of certain kinds of oppression especially for Indigenous people(s). However, Green (2007) asserts that the litigation remedy is most available to individuals with education, wealth, information, time and a sense of political efficacy (Green 2007, 147). These factors mean that the most likely litigants, marginalized Indigenous women, for example, are, on a general level, least likely to have "the money, confidence and expertise to pursue legal remedies" (Green 2007, 152). The advancement of legal grievances is circumscribed by tangible and intangible variables distributed unequally among citizens.

Petter (2009) argues that since the *Charter* came into force issues of rights in Canada have increasingly become understood as being legal rather than political in nature (Petter 2009, 33). Petter argues that as a result, 'the interpellation of political into legal questions' has become one of the principal ways in which Indigenous people(s) in Canada make political claims especially with regard to their "rights" as protected by the *Constitution* and *Charter* (Dirlik 2001, 182; Hamilton 2009, 2). While I find it problematic to separate what is political from what is legal in terms of the creation of law and policy as Petter advances, I find his analysis helpful for understanding how the judicialization of politics, has contributed to an increase in the authority of lawyers, legal

decisions, and juridical discourses within Canadian society more broadly (Petter 2009, 33).

It has been within this growing context that Indigenous women have made juridical claims in order to challenge the gendered ways, in particular, that Indian registration has been constructed. One of the first among these women to assert her right for the benefit of Indian status was Jeanette Corbiere Lavell. Her pre-*Charter* legal challenge ultimately failed at the Supreme Court of Canada. Corbiere Lavell's disappointing loss was not, however, in vain, as her efforts contributed to making political space for others to follow. In particular, and perhaps because of Corbiere Lavell's failed attempt under the Canadian Bill of Rights, Sandra Lovelace challenged *Indian Act* sex discrimination at the international level. Her successful challenge at the United Nations (International Human Rights Committee) resulted in a finding that Canada was in violation of article 27 of the *International Covenant on Civil and Political Rights,* and influenced Canada to amend the *Indian Act*. This amendment became known as Bill C-31, *An Act to Amend the Indian Act*.

While Indigenous women have had relative success in terms of advancing their rights judicially, the way in which Indigenous people(s) have turned to Canadian law to address their grievances, and the processes through which Canadian law requires individuals to bring their complaints before courts, have required that each issue be addressed separately (Palmater 2011, 31). As a result, Indigenous legal claims are often fought in isolation from the larger colonial contexts from which the issue stems (Palmater 2011, 31). For example, if we look at Bill C-31 in more detail the limits of the juridical challenge become apparent.

Bill C-31 was touted on the basis of the principles of non-sexual discrimination, restoration of rights lost through sexual discrimination, and band control of band membership (Silman 1987, 29). While the Bill eliminated the future practice of Indian status transmission through marriage, it reinstated status to those women and their children who had lost status as a result of marrying non-Indian men in a *hierarchical* fashion that entrenched unprecedented levels of racialization in the determination of Indian status. The introduction of a stratified section, section 6, maintains that an individual's *degree of status* (ie. 6(1), 6(2), or non-status) determines, and in many cases limits, one's ability to transmit status to his or her children. The stratification of status led to the creation of the second-generation cut-off rule. Similar to the logic of the double mother clause, this rule states that within a family upon two generations of producing children between Indians and non-Indians, the resulting children will have no claim to Indian status. This rule prioritizes a specific construction of biological descent in determinations of Indian status that is consistent with racialized logics (discussed in Chapter. 1).

The second-generation cut-off rule has disproportionately impacted Indian women and their descendants because Bill C-31 maintained the status privileges of men who, as *original* (6(1)(a)) status holders prior to 1985, were able to pass on status to their grandchildren – an ability not deemed possible for Indian women who were *reinstated* with status as a result of the 1985 amendment. Legislative amendment occurred largely because of Indigenous women's participation in the Canadian juridical field, and Indian status was changed to be more inclusive to Indian women who married non-Indians. However, the *Indian Act* was also changed to limit the ability to confer status to the

subsequent generations. In this way, the issue of gender discrimination in Indian registration was distilled from historically established, yet ongoing practices of racially circumscribing Indian recognition – practices tied to the Canadian nation-building project. Indigenous women's legal action has therefore been separated from larger colonial contexts in which assimilation has been the historical cornerstone of federal Indian governance.

The privilege and resulting discrimination against particular Indian women residually left from Bill C-31 became the target for Sharon McIvor and her son Jacob Grismer's challenge to the *Indian Act* first in 2007 at the British Columbia Supreme Court, then in 2009 at the British Columbia Court of Appeal.[12] McIvor's challenge was situated in the Canadian juridical field, which, in terms of Indian registration, has been shaped by processes of gendered and racialized state administration as well as by continued resistance by Indigenous people(s). Next I will discuss the factums of the interveners, respondents, and appellants in order to identify how each framed their arguments concerning Indian status registration.

Chapter 3: The Factums: What Does Indianness Mean?

Bourdieu maintains that "[t]he practical meaning of the law is really only determined in the confrontation between different bodies (e.g. judges, lawyers, solicitors) moved by divergent specific interests" (Bourdieu 1987, 821). In *McIvor,* the practical meaning of Indian status was not simply (re)produced in the decision, but through the interactions of the appellants, which included the Registrar, Indian and Northern Affairs Canada, and the Attorney General of Canada; the respondents, who were Sharon McIvor and Jacob Grismer; and the interveners, who included the Native Women's Association of Canada (NWAC), the Congress of Aboriginal Peoples (CAP), the First Nations Leadership Council (FNLC), the West Moberly First Nation, the T'Sou-ke Nation, the Grand Council of the Waban-Aki Nation, the Band Council of the Abenakis of Odanak and the Band Council of the Abenakis of Wôlinak (Abenaki intervener), and the Aboriginal Legal Services of Toronto (ALST). In this section I identify themes that emerged from their respective arguments in order to gain insight into the power relations that shaped the decision. It was, after all, the convergence of these differently situated juridical agents that (re)produced the meaning of Indian status and Indigeneity in *McIvor*.

The Interveners

The seven Indigenous groups that intervened all did so in support of McIvor and Grismer. No interveners argued against them. Despite the support McIvor and Grismer received from these Indigenous groups, the decision, which will be discussed in Chapter 4, proved to be very narrow. Considering the arguments of each intervener I will identify common themes among them.[13] The intervener factums reveal which arguments were

included, and, more significantly, were not included in the decision, illuminating the power relations between the judge and the interveners.

Recall that the juridical field is a structured and structuring set of positions and practices. The diverse scope of intervener concerns about Indian registration demonstrates the difficulty in translating lived experiences about the ways in which Indigenous people(s) in Canada have been named over hundreds of years into very specific sets of juridical relevance. As a result, when reading the intervener factums, it is not always clear what is meant by terms such as "rights," "Indians," "culture," "identity," or their various combinations. It is therefore useful to identify patterns or themes that emerge from the factums in order to come to a better understanding of their claims. There are four central themes that surface from the intervener factums. These themes are consistent with the literature discussed in Chapters 1 and 2 in so far as the factums like much of the literature concerning Indian status regulation, fail to properly address the racialization of Indigeneity in Canada.

Theme #1 – Sex Discrimination

The interveners all agreed that section 6 of the *Indian Act* is principally a matter of *sex discrimination*. This is not unlike the literature concerning *Indian Act* registration discussed in Chapter 1. It is not that the interveners were incorrect in their argument. Indian status *has* been administered in sex discriminatory ways. However, Indian status has always been constructed according to simultaneous and intersecting gendered *and* racialized logics.

On two occasions, racialization was indirectly discussed in the factums. The T'Sou-ke Nation and the Abenaki intervener spoke of blood quantum. They did not

challenge the legitimacy of this concept in and of itself. Rather, the interveners stated that blood quantum criteria should be applied equally to men and women and that it should not be the *sole* measure used to determine Indian status (Abenaki Intervener Factum 2008, iv; T'Sou-ke Intervener Factum 2008, par. 37-8). Because of the historical reliance on race thinking in the fashioning of Indian status criteria, it would be arguably impossible to participate in the case without engaging racialized criteria for Indian status. However, because Indianness has added significant meaning for Indigeneity (which will be discussed in the next theme), Indigeneity is also racialized according to blood quantum in the intervener factums. The interveners' failure to recognize and challenge the racialization of Indian status contributes to silencing and normalizing its construction allowing it "to remain transparent and invisible - two key attributes of its power" (Moreton-Robinson 2004a, 6). The result of the interveners' first theme, therefore, is the (re)production of naming Indians and Indigeneity according to racialized criteria.

Theme #2 – Indian Status as an Indigenous Identity

The interveners demonstrated the material and symbolic benefits procured through Indian status. While the ALST mentioned that there are material benefits of Indian status like access to health, education, and housing, for the most part, the interveners strongly emphasized the symbolic impacts that Indian status has on 'Aboriginal/Indian cultural identity' (ALST Intervener Factum 2008, par. 3, 21, 34). This demonstrates that Indian status has become a symbolically powerful category in terms of the ways in which Indigeneity is perceived in Canada. Through Indigenous internalization and formation of the category, Indian status has become imbued with notions of Indigenous cultural meaning. As a result, in practice, Indian status extends

beyond the limits of juridical categorization. It impacts the ways in which people see themselves and how they relate to others.

Indian status has significant meaning for many Indigenous people, but not because the state has ever defined Indian status in terms that have been consistent with Indigenous cultures. The state has not come to know Indigenous people(s) for who we/they objectively are, but for whom it has thought us/them to be according to its gendered and racialized (il)logics. It is also because of processes of Indigenous internalization of and contributions to these (il)logics that contemporarily, the state has also come to equate Indian status with Indigenous cultural identity. This is largely because many Indigenous people(s) have come to assert Indian status as an integral component of their Indigenous identity. The second intervener theme therefore demonstrates how non-juridical meaning was ascribed to Indian status ultimately adding Indigenous cultural meaning to the juridical category.

Theme #3 – Indian Status and Rights

The interveners discussed Indian status as an 'Aboriginal right', describing it in particular as a birthright and as a treaty right (ALST Intervener Factum 2009; CAP Intervener Factum 2009; NWAC Intervener Factum 2009; T'Sou-ke Intervener Factum 2009; West Moberly Intervener Factum 2009). By positioning Indian status as a birthright, the interveners legitimized a logic suggesting that biology, through descent, determines Indian status and, by association, Indigenous authenticity. This is a similar racialized logic according to which the *Indian Act* functions and which allows it to differentiate between degrees of Indian descent (ie. 6(1) vs. 6(2)). The argument that Indian status is a birthright contributes to racializing Indian status and Indigeneity

because notions of Indian status impact investments in Indigenous identity formations. However, taking the argument of the appellants into consideration makes it evident why the interveners positioned Indian status as a birthright.

The appellants argued that McIvor was challenging the pre-1985 *acquired rights* of Indian men and that this sort of challenge constituted an impermissible retrospective application of the *Charter*. As such, the appellants made a distinction between preserved acquired rights of Indian men (6(1)(a) status holders) and newly designated rights of Indian women and their descendants (6(1)(c) and 6(2) status holders). This division between preserved rights and newly designated rights is in contrast to what the interveners described as a 'birthright'. As a birthright, Indian status is implied as an inherent right and as such it cannot be regulated in the manner in which the Canadian state has and does delegate, revoke, and apply status unequally. It is, therefore, strategic to discuss Indian status in terms of an inherent Aboriginal birthright because it deviates from the appellants' argument that Indian status is a category that can be acquired and muted within a family depending on degrees of Indian purity within that family.

The interveners also described Indian status as a means of *accessing* constitutionally protected Aboriginal and Treaty rights. They pointed to the interconnectedness between the varied and complex ways that Indigenous legal recognition is regulated through Canadian law. For instance, in 1985, Bill C-31 allowed bands to determine their own membership codes. While this might suggest that bands now enjoy more self-determining authority, since 1985, 40 percent of bands have changed their codes. The rest have adhered to the *Indian Act* registration scheme. Additionally, many of the bands that did change their codes constructed membership

according to racially and sexually discriminatory criteria similar to the *Indian Act*. As a result, the regulation of Indian status continues to impact the membership of First Nations. Individuals who fail to fit into one or either of the categorizations (Indian status and band membership) have a difficult time accessing Aboriginal and Treaty rights as they are not, for example, able to live on reserve, access certain health and education benefits, participate politically in their First Nations communities, and receive treaty annuity payments. The interveners, therefore, argued that Indian status regulation is connected to other forms of Indigenous legal recognition and rights.

Theme #4 – Indian Status and Elimination

The interveners argued that the sex discrimination in section 6 of the *Indian Act* hastens Indigenous assimilation through the elimination of legally entitled Indians. Like their assertion that section 6 is primarily a gender issue, this argument does not recognize the intersecting role that racialization of Indian status plays in eliminating the legal recognition of Indigenous people(s) in Canada. It does so because without connecting assimilation with racialization, the eliminatory features of regulations like the second-generation cut-off rule and hierarchical division of status remain largely immune to criticism.

Instead of naming the functioning of racialization in Indian status regulation, the interveners utilized 'culture' to advance their arguments. For example, CAP argued that women who married non-status men have been treated as if they were less capable of passing on Aboriginal culture to their children than their male counterparts (CAP Intervener Factum 2009, par. 57). An argument that considered racialization would make this same argument by describing the gender discrimination of section 6 as a continued

assertion that the Indianness of women has been treated as more mutable than that of Indian men. This argument takes into consideration the fact that, through Indian status regulation, the Canadian state has not sought to assimilate the cultures of Indigenous people(s) per se, but has attempted to eliminate Indian status by constructing it as a racialized category that can perceptibly be eradicated through Indian and non-Indian intermixture. According to the intervener factums, then, unlike sex discrimination, 'race' remains unnamed and unchallenged.

The Respondents

McIvor and Grismer argued that the central issue at case was whether or not it is constitutionally permissible for Parliament to provide preferential treatment to men and their descendants over women and their descendants for the purposes of registration for Indian status under the *Indian Act*. McIvor and Grismer's factum explained that "[t]he Respondents' claim is not that s. 15(1) mandates that status be transmissible for a particular or even an indefinite number of generations. It is that s. 15(1) mandates that the ability to transmit status – however great or restricted it is – be accorded equally regardless of one's sex or the sex of one's parent" (Respondent Factum 2009, par. 103). Sex discrimination was the cornerstone of their judicial challenge.

In particular, their issues on appeal were that the *Charter* should be applied to Bill C-31, that section 6 of the *Indian Act* discriminates according to sex and marital status which is contrary to sections 15(1) and 28 of the *Charter*, and that Bill C-31 cannot be justified under section 1 of the *Charter*.[14] Furthermore, they argued that the sex equality rights of Aboriginal women are further affirmed by s. 35(4) of the *Constitution Act* (Respondent Factum 2009, par. 49). They requested a remedial order from court that

would ensure immediate government action with regard to changing *Indian Act* policy rather than a suspension of remedy that would allow the government 12 months to devise a legislative amendment.

In terms of their specific empirical argument the respondents stated that, "The *Act* confers status on Sharon McIvor pursuant to s. 6(1)(c), to her son, Jacob Grismer, pursuant to s. 6(2) and, by virtue of the second-generation cut-off, Jacob Grismer's children, who are Sharon McIvor's grandchildren, are not entitled to status" (Respondent Factum 2009, par. 25). They argued

> "[i]f the *Act* treated female Indians – including women who married out – the same as it treats male Indians who married out, Sharon McIvor and Jacob Grismer would both be entitled to registration under s. 6(1)(a). Further, Jacob Grismer's children (Sharon McIvor's grandchildren) would be entitled to registration under s. 6(2)." (Respondent Factum 2009, par. 26)

From these arguments, three central themes emerge.

Theme #1 – Sex Discrimination and Indian Registration

The respondents stressed that their issue at law concerned gender equality in Indian registration. They clearly stated that they were not challenging the second-generation cut-off rule, band membership, or any other aspect of Indian registration. They argued that it was because of gender alone that McIvor could not transmit full status to her son and that he, Grismer, could not transmit 6(2) status to his children. Because of their emphasis on sex discrimination, they did not challenge the second-generation cut-off rule, but argued that Bill C-31 applied the rule unequally to Indian men and women (Respondent Factum 2009, par. 21).

While the respondents stated that they were not challenging the second-generation cut-off rule, they simultaneously argued that with s. 6(1)(c) status, McIvor had "partial or

restricted status" (Respondent Factum 2009, par. 33). Therefore, the respondents challenged the existence of partial status by naming the sex discrimination McIvor experienced. They did not identify the ways in which the intersection of sex discrimination and racialization of Indian status make 'partial status' a possibility. Especially since 1985, racialization has disproportionately eliminated status along matrilineal lines because section 6 fractures the notion of Indigeneity with the inclusion of the 6(2) status category. Being a 6(2) has come to mean that one is a 'half Indian' because of his or her dual Indian and non-Indian parentage. This logic is deeply racialized because it operates according to the principle that someone's status is determined solely by his or her degree of perceived biological Indian purity. Like the intervener factums, the respondents' factum fails to identify 'race' as an issue concerning Indian status registration.

Theme #2 – Indian Status as an Indigenous Identity

McIvor and Grismer consistently connected Indian status to Indigenous cultural identity. In terms of their argument concerning gender, they stressed that the ability to transmit Indian status (as a cultural identity) should be a right that Indian women and men share equally. In particular, they stated that "Indian status is akin to citizenship. Since it was legislatively created in 1868, it has been central to the Federal government's relationship with Aboriginal people, and has become an important part of cultural identity for individuals of Aboriginal descent and Aboriginal communities" (Respondent factum 2009, vi). In essence, the respondents simply stated that men and women should be able to transmit cultural identity equally *within* the section 6 scheme instead of arguing that all Indigenous people(s) should have the right to transmit identity despite the degree of their

Indian ancestry.

Theme # 3 – Transmission of Indian Status

McIvor and Grismer emphasized that they were not seeking Indian status solely for their own sake, but for the ability to *confer* it to one's child. In particular they stated that "[i]t is about the benefit of being able to transmit status to one's children and grandchildren not, as the Appellant says, the benefit of having status for oneself" (Respondent Factum 2009, par.52). Their argument for the right to transmit status was limited. In order to argue for the ability to transmit Indian status in a substantive sense they would have needed to name the racialized manner in which Indian status is determined since it is the second-generation cut-off rule and 6(2) status category that significantly limit Indian status transmission – not the ongoing sex discrimination in Indian registration. Instead, McIvor and Grismer focused specifically on the role that gender played in the ability to transmit status instead of the role that gendered racialization continues to play.

The respondents argued that "[t]he Appellants' formalistic and minimalistic characterization of this benefit [of Indian status *transmission*] overlooks the fact that the concept of status was legislated to define those with Indian cultural identity, and that a central aspect of any cultural identity is its transmission to future generations" (Respondent Factum,2009, par. 59). The respondents misrecognize that Indian status has not been historically legislated to define Indigenous cultural identities. Rather, the category was legislated to define a non-white Indian 'race'. Indian status could not have been originally used to define Indigenous cultural identities because colonial legislators had little, if any knowledge about Indigenous cultures and they did not consult

Indigenous people(s) when crafting Indian definitions. Therefore, Indian status, band membership, and whatever sense of "Indian culture" that has emerged in the wake of the operation of the *Indian Act* have not been expressions of Indigenous identity *in toto*. Instead, they have been juridical categories largely defined according to racialized and gender discriminatory criteria contributing to the creation and maintenance of Canadian patriarchal white sovereignty (to be discussed in Chapter 5). It is largely Indigenous people(s) who have ascribed Indian status with Indigenous cultural meaning, not the federal government.

The Appellants

The appellants principally argued that in 1985 Parliament did not, according to the *Charter*, have to remove *all* differences in Indian status registration between male and female Indians. Instead, they maintained that the government at the time had to balance the competing interests of Aboriginal women who sought Indian status and of Aboriginal nations who sought more self-governing authority. As a result, according to the appellants, Parliament appropriately passed Bill C-31 and with it, section 6. It emphasized that band membership and Indian registration are strongly connected and that section 6 takes into consideration band opposition to reinstatement of women and their descendants.

Section 6 is constitutional, the appellants argued, because Bill C-31 created a new *prospective* gender-neutral registration system, which complies with ss. 15 and 28 of the *Charter*. The appellants then argued that if the court were to find that section 6 violated the equality provisions of sec. 15 of the *Charter*, it would be saved under section 1, since there is "continuing interplay" (Appellant Factum 2009, par. 85) between Indian

registration and band membership and that Parliament has had to balance the interests of *individuals* seeking status and the autonomy of *bands* to determine their own members. Lastly, the appellants requested a 12-month suspension to allow Parliament to create a *Charter*-compliant amendment if the court did find section 6 to be unconstitutional (Appellant Factum 2009, par.145). Four themes emerge from the appellants' factum.

Theme #1 – Indians are a Race of People

The first theme concerns the racialization of Indian status. In particular, the appellants racialize the category by featuring 'genealogical proximity' as its foundation. In their factum, McIvor and Grismer explicitly stated that the case was about gender discrimination and that they were not challenging any other aspect of *Indian Act* registration. The appellants recognized that the respondents took no issue with any other portion of the *Indian Act* (Appellant Factum 2009, par. 13). However, the appellants, in their factum, vehemently defended the stratified system of Indian registration including the second-generation cut-off rule.

The appellants stated that section 6 is designed according to degrees of descent in order to "retain registration as a means of continuing the federal government's relationship with individuals with *sufficient genealogical proximity* to the historical [Indian] population with whom the Crown treated or for whom reserves were set aside" (Appellant Factum 2009, par. 96, emphasis added). In this way, the appellants racialized Indian status by promoting the notion that there are fuller and lesser Indians because of notional degrees of biological connection to an historical Indian population. Furthermore, this logic suggests that in order for contemporary Indians to be connected to each other, perceived biologically pure relations, more than anything, are required.

The appellants maintained that in 1985 in order for the *Indian Act* to become constitutional all Parliament had to do was repeal the "*Indian Act* with its gender-biased descent provisions and replace it with a non-discriminatory (*gender neutral*) scheme on a prospective basis" (Appellant Factum 2009, par. 35, emphasis added). This, the appellants stated, is what Parliament did. However, there is a sharp contradiction in the appellants' arguments. The appellants recognized that section 6 should be constitutional – that is it should function without gender discrimination, but then it defended the racialized ways in which Indian status is constructed in such a way as to regulate degrees of Indian status. To exclude individuals from Indian status recognition based on their degree of racial purity (ie. if an individual is the product of 'mixed' parentage) constitutes racism. Racism, like sex discrimination is contrary to section 15 of the *Charter*. The appellants' argument suggests that gender equality should be in place for Indian registration, but racism, in the form of the second-generation cut-off rule and hierarchical division status (6(1), 6(2), and non-status) should not be acknowledged as such. Rather, according to the tone of the appellants' factum, such racism should be defended in order to preserve the supposed biological integrity of the historic group of Indians.

Theme #2 – Indian Status as a Right

The appellants discussed Indian status in terms of a discourse of rights. The appellants maintained that McIvor was challenging the pre-1985 *acquired rights* of Indian men and that this sort of challenge constituted a retrospective application of the *Charter*. Furthermore, the appellants stated that Bill C-31 preserved pre-1985 acquired rights (6(1)(a) status), while also delegating new rights to Aboriginal women and their descendants (6(1)(c) and 6(2) statuses). The appellants do not, however, recognize that

the new rights bestowed on Indian women post-1985 had more limitations on them than the acquired rights of Indian men pre-1985 where the conferring of status to children is concerned. This is therefore where the respondents' and appellants' factums centrally diverge.

In terms of the discourse of rights, the appellants also stated, in contrast to the respondents, that the issue at law was the right to *acquire* Indian status, not the right to *transmit* status. As a result, it argued that McIvor was claiming for her grandchildren "discrimination by association" (Appellant Factum 2009, par. 60) since she had already acquired Indian status, but they had not. Considering the structure of the appellants' juridical argument that an individual cannot claim a rights violation on behalf of a third party, an attachment to liberal conceptions of individualism opposed to connection becomes evident. McIvor conversely argued that the ability to transmit the right of Indian status to her children and grandchildren is an essential aspect of her cultural identity. Considering these two positions, an opposing vision of relatedness becomes evident. McIvor described Indian status as a means of connecting generations of family members through the transmission of a common identity. The appellants suggested that Indian status is about the individual and his or her right to acquire the legal status. However, the appellants' vision of Indian status is contradictory to their earlier assertion that Indian status is constructed in (a racialized) manner to ensure sufficient genealogical *connection* between historic and contemporary groups of Indians. The appellants, then strategically utilized the notion of relatedness in particular ways to restrict Indian status criteria, and then reverted to an individualized conception of rights when discussions of

relatedness went beyond the restrictive discourse of genealogical proximity or in other words, racial purity.

Theme #3 – Aboriginal Women vs. First Nations

The appellants argued that Bill C-31 is constitutional because it balances the co-existing and competing (therefore separate) interests of Aboriginal women and of Aboriginal bands. The appellants did not name any First Nations who opposed opening status and membership criteria nor did the appellants recognize how opposing perspectives since 1985 have shifted as evidenced by the First Nations that intervened in support of McIvor and Grismer. Conversely, the respondents and interveners recognized that it is precisely because there is a strong connection between Indian status and band membership that Indian women and their descendants deserve to be treated equally. This is because the denial of Indian status often results in the denial of community membership and belonging through the lack of band membership.

The appellants suggested that by allowing more Indian women and their descendants to be reinstated, band autonomy would be undermined. This logic is askew. If bands that utilize *Indian Act* criteria *wanted* to have previously disenfranchised women as formally recognized members of their bands they could not include them because the women are not eligible for band membership according to section 6 of the *Indian Act,* which is federally controlled. The appellants do not, however, see this reverse situation as an infringement on band autonomy. If the Government of Canada were sincerely concerned about band autonomy, it would fund bands according to the number of band members they have and not according to the number of registered status Indians they

have. This would allow bands more flexibility in creating inclusive membership codes by reducing the financial pressure of doing so.

Theme #4 – Decontextualizing Indian Status

The appellants largely decontextualized Indian status registration from the lived realities that Indigenous people(s) are confronted with because of Indian status regulation. For instance, they explained that in 1985 the *Indian Act* was amended to address gender biases because *Parliament* recognized that there was a need for change (Appellant Factum 2009, par. 9). The appellants did not acknowledge that for two decades Indigenous women had battled for an amendment to such an extent that Parliament could no longer refuse their demands. As a result, the appellants created a representation of the Canadian state that is benevolent in character. The emphasis on this benevolence decontextualized how the *Indian Act* has regulated Indian women's sexualities and domestic lives by making assertions that Indian women, not the Canadian state, have brought disenfranchisement upon themselves.

The appellants maintained that McIvor lost her status pre-1985 not because of her gender, but because of her personal decision to marry a non-Indian and that if she had married another Indian then her son, Grismer, would have full status. This, the appellants stated, was unfair, but not unconstitutional – it was after all McIvor's *choice*. Furthermore, the appellants argued that Grismer and all other 6(2)'s do have the right to transmit Indian status as long as they *choose* to parent with another Indian. A central theme emerging from the appellants' factum, therefore, is that Indian status can be discussed outside of the contexts of colonial power relations and the ways in which those

relations put pressures on the *choices* of those individuals living with the effects of Indian status regulation.

Upon examination of the factums it is apparent that there are overlapping themes. Despite the fact that each juridical agent comes from a divergent position relative to Indian status regulation they all discussed Indian status in terms of three themes. Firstly, the interveners, the respondents, and the appellants all discussed Indian status regulation in terms of sex discrimination. None of them explicitly named or challenged the racialization of Indian status and Indigeneity. Secondly, while differing in their conceptualization, they all discussed Indian status in terms of a discourse of rights – the interveners as a birthright, and Aboriginal and Treaty right, the respondents as an Aboriginal right, and the appellants as an individualized statutory right. Thirdly, they all asserted that Indian status has come to have significant meaning for the collective identities of First Nations.

By wading through the factums the reasons for which Indian status definitions have come to infiltrate Indigenous subjectivity formations become apparent. The degree to which the Indigenous and non-Indigenous agents in the case adhered to *Indian Act* - inspired logics for defining Indianness demonstrates the force of juridical relations in generating social realities. In this context, then, we could ask, what does Indian registration do? The answer as revealed by each agent in the case is that Indian registration does nothing on its own; however, people's investment in the category has profound impacts on Indigenous legal recognition, band membership, community belonging, perceptions of authenticity, and access to certain benefits. The ways in which investment in *Indian Act* definitions is practiced has framed a particular way of

deciphering relatedness – one that was, at one time, foreign to our Indigenous family members/ancestors. Considering the arguments made by the respondents, appellants, and interveners the next chapter will explore the case decision to decipher how the judge ultimately (re)constructed Indian status in *McIvor*.

Chapter 4: The Decision: What is 'The Truth' about Indianness?

In the juridical field judges enjoy partial autonomy in terms of authority when constructing a judgment (Bourdieu 1987, 826). It is partial because, in practical ways, the content of law that emerges from a judgment is produced through struggle between juridical professionals who have different, and sometimes, unequal technical competencies and social influence (Bourdieu 1987, 827). Equally important in the generation of law is the manner in which judges have been socialized to see decisions as 'correct' or 'truthful' (Bourdieu 1987, 827). Therefore, to understand the juridical production of Indian status in *McIvor*, it is necessary to analyze the decision in relation to the case's factums since such an analysis reveals the logics that were in competition with one another in the generation of the decision. The court case did not construct Indian status full stop, but demonstrates a struggle between various agents who brought with them certain conceptions of Indianness and Indigeneity from which the judge then made a decision about what to authorize as the juridical 'truth' about Indianness and Indian status.

In this chapter I will discuss the logics of the court decision in order to identify what knowledge about Indian status was prioritized. I will also discuss the impacts of the decision in terms of its "refraction" (Andersen 2011, 49) into the legislative position of the Canadian juridical field to demonstrate the force wielded by the *McIvor* decision with regard to the (re)production of Indian status as an authoritative category marking Indigenous juridical recognition.

Logics of the Decision: "The case is properly analyzed as one of discrimination on the basis of sex" (BC Court of Appeal 2009, par. 87)

McIvor and Grismer won the case based on the logic that the *sex discrimination* in section 6 of the *Indian Act* is unconstitutional. Because the respondents made a challenge concerning s. 15 sex discrimination, the judge's decision and reasoning only addressed this form of discrimination. The judge stated that "[t]he historical reliance on patrilineal descent to determine Indian status was based on stereotypical views of the role of a woman within a family. It had (in the words of Law) 'the effect of perpetuating or promoting the view that [women were]…less…worthy of recognition or value as a human being[s] or as a member[s] of Canadian society" (BC Court of Appeal 2009, par. 111). Groberman JA situated human dignity and worthiness of respect in relation to being Canadian. This highlights Canada's claim to authorized regulation of people within its boundaries. The judge also referred to the stereotyping of women as women without considering the intersecting effects of being an Indigenous woman. Groberman JA therefore advanced a subject positioning that all women in Canada supposedly share. At the outset of the decision then, the judge established that the case was appropriately about sex discrimination in Indian registration and that all female Canadians deserve gender equality.

After characterizing the type of discrimination at bar, Groberman JA went on to specify the limits of the *Charter* challenge. He stated "[i]t is not apparent to me that a person who is, for example, the fifth generation descendant of a woman who lost status in the 1870's can make a claim under s. 15 of the Charter…[as] such a remote descendant of a person who suffered discrimination would not appear to have standing to raise a claim" (BC Court of Appeal 2009, par. 97). Groberman JA concluded that it was necessary "to focus on the allegedly discriminatory treatment of the plaintiffs on the basis of Ms.

McIvor's sex, and not on the much broader argument apparently accepted by the trial judge based on historical lineage [matrilineality]" (BC Court of Appeal 2009, par. 101). His characterization of the scope of the *Charter* challenge was very similar to the appellants' arguments around juridical relevance based on Indian genealogical proximity. A fifth generation descendant of an Indian woman, for instance, is too far removed from the effects of sex discrimination to make any claim against it. This suggests that discriminatory effects of Indian status regulation that occurred five generations earlier are not still ongoing because of a gap in descent. The judge and appellants therefore displayed a similar logic of relatedness between Indians based on generational and genealogical closeness.

Groberman JA's approach to relatedness and the viability of a section 15 claim, invoked a normative conception of the family. For instance, concerning the right to transmit Indian status he stated "there is merit in Mr. Grismer's claim that the ability to transmit status to his children is a benefit of the law to which s. 15 applies. Ms. McIvor's claim is a more remote one. She does not, as a grandparent, have the same legal obligations to support and nurture her grandchildren that a parent has to his or her children" (BC Court of Appeal 2009, par. 72). Groberman JA denoted a particular conception of the family and familial responsibilities based on Canadian legal norms that would restrict McIvor and Grismer's claim to three specific generations (rather than matrilineal descent more generally). Moreover, he discussed the matter of Indian status transmission within the context of these three generations in a racial discourse to explain that transmission becomes even more complicated for those with, for instance, "partial Indian heritage" (BC Court of Appeal 2009, par. 13).

It is too simple to argue that Indian status is racialized in the decision, although it certainly is. But more precisely, the decision mobilizes certain epistemological understandings of descent, genealogy, and family connectedness as a racialized form of knowledge to define Indian status. The judge's focus on three generations ignores other forms of connectedness such as ancestral connectedness and connectedness to other forms of life that have been and are impacted by *Indian Act* registration. When added to the appellants' assertion that Indian status is in place to preserve connection between historic and contemporary Indians, a subtractive construction of descent and family connectedness is advanced. At the most simple level, this subtractive logic suggests that a child produced from an Indian and a non-Indian is half Indian and half non-Indian rather than being a multi-layered individual who is both completely and simultaneously Indian and non-Indian. Therefore, it is a construction that fractures the self. This fractured subject can be discursively connected to the Cartesian subject whereby the self is seen as disembodied and autonomous (Moreton-Robinson 2004b, 76). The *McIvor* decision, therefore, articulated Indian status according to a construction of the self, signifying a cultural and racialized epistemological understanding of the human subject detached from nature and ancestral/spiritual beings.

Through his emphasis on a *Charter* challenge based on sex discrimination specifically in the context of three generations, Groberman JA dismissed the respondents' and interveners' arguments that Indian status is connected to ways in which Indigenous people(s) access what the respondents and interveners referred to as their Aboriginal, treaty, and birthrights. He stated, "[t]he interplay between statutory rights of Indians and constitutionally protected aboriginal rights is a complex matter that has not, to date, been

thoroughly canvassed in the case law…We have neither an evidentiary foundation nor reasoned argument as to the extent to which Indian status should be seen as an aboriginal right rather than a matter for statutory enactment." (BC Court of Appeal 2009, par. 66). As a result, Indian status was strictly dealt with in terms of a statutory category flowing out of Canadian citizenship that delegates equality rights based on the *Charter* rather than flowing out of inherent Aboriginal and treaty rights. This treatment skirted around the collective Indigenous interests that the interveners spoke of in their factums by denying an analysis of Indian status regulation in terms of its connection to section 35 of the *Constitution Act*, 1982, which recognizes and affirms Aboriginal and treaty rights. The decision therefore asserted that Indian status is a juridical category separate from Aboriginal and treaty rights, despite the fact that the Indigenous agents in the case stated that in practical ways Indian status impacts the degree to which people can access their inherent rights as Aboriginal people.

While Groberman opted to discuss status as an individualized legal category objectively removed from Aboriginal and treaty rights he also admitted that there are ways in which Indian status impacts people's lives in non-juridical ways. He stated "it seems to me that the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value" (BC Court of Appeal 2009, par. 71). As a result, he characterized Indian status as a benefit of law because its carries with it tangible and intangible benefits. However, because the factums did not question the second-generation cut-off rule and so neither did Groberman, his characterization of Indian status transmission as being culturally significant is only a right to be enjoyed if an individual is Indian enough (ie. 6(1)) to transmit status in their own right or if they choose to have a

child with another Indian. This claim implies that 6(2) Indians who do not parent with another Indian, do not find it culturally significant to pass on Indian status to their children. In this way Groberman's reference to 'culture' lays within the racialized parameters of Indian status regulation as degrees of Indian descent impact the benefit of law that Groberman describes as the right to transmit Indian status.

Because of Groberman's limited specification of the scope of section 6 sex discrimination, he characterized the discrimination as only applying "to a group caught in the transition between the old regime and the new one [Bill C-31]" (BC Court of Appeal 2009, par. 122). Therefore, his decision that section 6 was unconstitutional was based on the logic that: "the 1985 legislation did not merely preserve the rights of the comparator group [6(1)(a) Indians]….members of the comparator group were able, prior to 1985, to confer only limited Indian status on their children. Such children (who would have fallen under the Double Mother Rule) were given status as Indians only up until the age of 21. Under the 1985 legislation, persons who fell into the comparator group were given status under s. 6(1). Their children had status under s. 6(2), and the ability to transmit status to their own children as long as they married persons who had at least one Indian parent" (BC Court of Appeal 2009, par 137).

Groberman's logic was that it was not unconstitutional for Bill C-31 to preserve the rights of Indian men who married non-Indian women prior to 1985, but that it was unconstitutional that those who had become ineligible for status because of the double mother rule regained eligibility as 6(1)(a) Indians through Bill C-31, while people like McIvor (as a woman who married a non-Indian man) received 6(1)(c) status. Comparatively, 6(1)(a) status individuals who had regained status after being

disenfranchised through the double mother rule can pass full status to their children in their own right while people in Grismer's case (as descendants of Indian women who married a non-Indian) only received 6(2) status and are required to parent with another Indian for their children to be status Indians. This logic, which was not argued at trial or at appeal, was the discriminatory treatment that Groberman identified and the sole reason why he found section 6 of the *Indian Act*, *1985* to be unconstitutional.

In sum, Groberman concluded that "[t]he goal of the legislation [Bill C-31], therefore, was not to expand the right to Indian status *per se*, but rather to create a new , non-discriminatory regime which recognized the importance of Indian ancestry to Indian status" (BC Court of Appeal 2009, 129). Save for the differential treatment of those who fell under the double mother rule and those children of Indian women who married non-Indian men prior to 1985, Groberman agreed that Bill C-31 with its introduction of the second-generation cut-off rule and hierarchy of status was constitutional.

Considering Groberman's logics and their limited scope, the predominant theme of the entire case was mirrored in the decision – that is, the racialization of Indian status and Indigeneity. *McIvor v. Canada* has reproduced the typified practice of racializing Indigenous subjectivities even though, and not surprisingly, the decision never explicitly talked about 'race'. This omission made by all actors involved in *McIvor* has led to a juridical calcification of *Indian Act* status stratification. While there were no explicit references to 'race' in the decision, there were clues that pointed to its underlying influence. In describing Indian status the judge used language such as "partial Indian heritage" (BC Court of Appeal 2009, par. 13), "Indian blood" (BC Court of Appeal 2009, 24) and "Indian ancestry" (BC Court of Appeal 2009, par. 79). It became clear that while

Groberman was addressing sex discrimination, he discursively adhered to a racialized logic suggesting that Indianness and Indigeneity are and should be determined by one's 'degree' or 'amount' of notional biological connectedness to historic Indians. Groberman cited *Benner* relying on precedent concerning Canadian citizenship to decipher sex discrimination in Indian status transmission. In his reference to *Benner* Groberman spoke only of Canadian citizenship, not of Canadian ancestry, Canadian blood, or partial Canadianness. Conversely, with respect to Indian status his emphasis on Indian ancestry rather than on, for instance, Indian or Indigenous citizenship demonstrates that in the decision, Indian status was a category used to differentiate Indians as a 'race' of people in contrast to (white) Canadianness. Because the respondents did not challenge *Indian Act* racism, the judge, in the decision, was able to talk about discrimination in terms of sex alone. He, therefore, decontextualized the ways in which 'race' and sex intersect in defining Indian status thereby reaffirming the legitimacy of the category's racialization (and gender discrimination).

As noted, 'race' has taken on different guises as it shifts with changing social contexts. In *McIvor* the decision advanced a particular (empirical) construction of Indian status based on the racialization of family connectedness. Groberman JA legitimized the reasons for which the government at the time created Bill C-31 according to degrees of Indian parentage. He stated, "in fashioning the legislation, the government decided that having a single Indian grandparent should not be sufficient to accord Indian status to an individual" (BC Court of Appeal 2009, par. 130). The current legislative logic of Indian status regulation, which was legitimized in Groberman's decision, is that having one Indian grandparent does not produce sufficient genealogical connection between an

individual and the "historical [Indian] population" (Appellant's Factum 2009, par. 96) . This means, according to the logic, that having one Indian grandparent does not result in having one Indian parent. Rather it means that one Indian grandparent results in having a 'half' Indian parent. This logic denotes adherence to a reasoning of biological purity suggesting that two generations of Indian and non-Indian mixture equals not enough Indian in so far as legal recognition is concerned.

Additionally, by defending government objectives, Groberman, like the appellants created a picture of state benevolence with regard to Indian administration. Despite Canada's well documented history of acting in discriminatory ways toward those categorized as Indians (as discussed in Chapter 2), he stated "[i]t cannot be seriously suggested that the government acted other than in good faith in enacting legislation [Bill C-31]" (BC Court of Appeal 2009, par.124). Therefore, Groberman asserted that with the exception of one small discrepancy (concerning the double mother rule), the Government of Canada did an appropriate and virtuous job of fashioning Bill C-31.

Considering the limits of the logics deployed in the decision, specifically its emphasis on sex discrimination pertaining to three particular generations, the judge's subsequent racialization of Indian status, and his approval of government objectives and actions I will now discuss the effects that *McIvor* has caused within the Canadian juridical field. An examination of this sort is needed to reveal how the various positions of the Canadian juridical field relationally interact and the ways in which as a court decision, *McIvor* has generated symbolically powerful notions of Indian status and Indigeneity.

Refracting McIvor: From Judicial Decision to Legislative Amendment

In the generation of 'law' courts do not simply act as the right arm of the state, but neither do they operate completely independently from state power (Terdiman 1987, 808). Situating law as a juridical field allows for an analysis of the relations between the courts and the legislative branch of government in order to determine how, for instance, juridical capital gets translated into legislative power. The Canadian courts are based on the assumption that as the judicial branch of governance, they impersonally and neutrally interpret the Constitution – "the norm of norms from which lower ranked norms and deduced" (Bourdieu 1987, 819). As such, the courts in Canada (to varying degrees, as the courts are themselves hierarchically positioned) occupy a symbolically powerful position within the juridical field and are believed to produce legitimate truths in the regulation of social behaviour.

In *McIvor*, after finding section 6 of the *Indian Act* to be unconstitutional due to sex discrimination, Groberman JA offered a remedy that would allow a suspension of one year to allow Parliament time to amend the legislation. The case led to a legislative amendment because *McIvor* was a successful *Charter* challenge and because of the privileged position that the courts occupy in the context of the juridical field. The court did not, therefore, amend Indian status in a direct legislative way, but nonetheless altered the language of Indian status as an act of juridical construction through the struggles of all the actors involved in the case. The altered juridical language was then "refracted" (Andersen 2011, 49) into the legislative position of the Canadian juridical field because of the symbolic power that it generated.

On December 15, 2010 the Canadian legislature amended the *Indian Act* passing Bill C-3, *An Act to promote gender equity in Indian registration*. Bill C-3 is the latest change Indian registration has seen. The goal of the Bill is to entitle eligible grandchildren of women who lost status prior to 1985 as a result of marrying non-Indian men to registration in accordance with the *Indian Act*. This intention directly correlates to the *McIvor* decision logics in that they both narrowly address sex discrimination experienced by three particular generations that were caught within the transition into Bill C-31. Therefore, under Bill C-3 an eligible individual is one who can answer affirmatively to the following three questions:

• Did your grandmother lose her Indian status as a result of marrying a non-Indian?

• Is one of your parents registered, or entitled to be registered, under sub-section 6(2) of the *Indian Act*?

• Were you, or one of your siblings, born on or after September 4, 1951? (Indian and Northern Affairs Canada 2011)

While the language of the Bill makes it difficult to identify people excluded from eligibility, its reading in accordance with prior rules of registration helps to identify some of its limitations. For instance, for the first time in Indian registration an individual's status may be dependent on whether or not he or she has or adopts a child (Eberts 2010, 41). This is because Bill C-3 is only activated within a family upon the *birth of grandchildren* of women who lost status as a result of marrying a non-Indian prior to 1985. Again, this mirrors the court logics as Groberman JA made his decision about Indian status in relation to McIvor, her son, and her grandchildren. This has consequences for perceptions around Indigenous authenticity within and outside of the juridical field. Let me explain this assertion more thoroughly.

Because of the historical reliance on 'blood' to define Indianness, a conflation of Indian status with pure bloodedness has resulted (Lawrence 2004, 73). Consequentially, hierarchies of authenticity have been constructed within and outside of Indigenous communities where one's Indian status (ie. 6(1), 6(2), or non-status) may determine one's degree of perceived authenticity. For those individuals who have acquired 6(2) Indian status through Bill C-31 and who do not have children, a reevaluation of their status through Bill C-3 is not an option. These individuals will perceptibly remain 'half Indians' as 6(2) status holders. The same consequence is not true for those individuals who lost (and then regained) their status as a result of the 'double mother rule' – a rule that was specifically geared toward descendants of a status paternal line. These individuals are eligible for 6(1) status suggesting that the privileging of the paternal line of descent is still prevalent in the new legislation. 'Race' and sex therefore continue to intersect and influence determinations of Indian status although now, whether or not an individual has a child also contributes to determining his or her status. In this way, Indian status does not simply reflect historical usages of 'race' and sex, but denotes a contemporary refraction of them resulting in new regulatory practices that have never been seen before in Indian registration.

The next limitation with Bill C-3 relates to the second-generation cut-off rule and status hierarchy whereby it becomes even more evident that Indian registration not only remains reliant on gendered logics, but racialized ones as well. Bill C-3 juridically solidifies the existence of the second-generation cut-off rule and the status hierarchy created through Bill C-31, ensuring that in many instances, two Indian parents are required to produce an Indian child. This calcification comes as a result of the ongoing

assertion that one's Indigeneity can be expressed, first, through Indian status, and second, that Indian status can be diluted and eventually eliminated through miscegenation. With juridical authority, Indian status and Indigeneity are racialized with the effect of legitimizing Canada's role in regulating Indigenous subjectivities (a central aspect of Canada's patriarchal white sovereignty to be discussed in Chapter 5). Bill C-3 does not simply *reflect* historical constructions of 'race' in relation to Indian status, but marks a juridical refraction of Indian status that uniquely racializes family connectedness through the language of notional genealogical criteria (instead of 'blood'). The distinction between "genes" and "blood" reveals an empirical specificity that provides insight into how racialization is contemporarily used to articulate Indian and Indigenous identity categories.

In terms of *McIvor*'s refraction into fields beyond the juridical, the next step will be to identify how bands are altering (or not) their membership codes to account for newly registered Indians. There has not, to date, been any scholarly documentation of these changes. However, I can attest to one particular example from personal experience. On my maternal side, my family belongs to Peguis First Nation. With the largest population of any First Nation in Manitoba the Peguis Indian Reserve is located in central Manitoba, approximately 170 kilometers north of Winnipeg. The people of Peguis are predominantly of Ojibwa and to a lesser extent, Cree descent. Peguis First Nation is a section 10 *Indian Act* band meaning that it chose to construct its own membership code following 1985. The code that it has fashioned is highly racialized as it relies on a loosely applied version of blood quantum to determine its members. Following the

passing of Bill C-3 the band did not change its membership code, however, it did post a notice on its website that states the following:

> A number of persons received a letter from the Registrar of Indian Affairs confirming their reinstatement to Indian status. The letters also recommended that each person must apply to the Peguis First Nation for membership. Accordingly, if you wish to be a member of the Peguis First Nation you must submit your application for membership. (Peguis First Nation 2012)

While the notice does not guarantee that a newly entitled status Indian will gain band membership, it does seem as if *McIvor* and Bill C-3 have had an effect on membership considerations. More time and scholarly investigation (which are beyond the scope of this thesis) are required to thoroughly understand the long-term impacts of *McIvor* on band membership and community perceptions around this latest registration change. For the purpose of this thesis, however, it is important to note that knowledge produced in Canadian courts has far reaching effects at the legislative level and beyond.

Considering the logics of the court decision and the empirical details of the latest version of the *Indian Act* as amended by Bill C-3, the next and final chapter will abstract from the case to reveal what was missed by those involved in producing its logics. I seek to address what was *not* taken into consideration by any of the cases' actors including the respondents, appellants, interveners, and judge.

Chapter 5: *McIvor* and Bill C-3: (Re)producing Patriarchal White Sovereignty

In 1956, my grandmother, a Cree woman from the Red River, Manitoba region, received a letter from the Canadian Government, accompanied by a cheque for sixty-three dollars. In congratulatory language, the Registrar welcomed her to the white race.[15] At 21 years of age after growing up on the Peguis Indian reserve, attending residential school, and begrudgingly concealing her Cree identity from 'city folk', according to Canada, she became white, the result of her marriage to a non-status (and more specifically a white) man. Fifty-six years after my grandmother had been enfranchised into white Canadianness, I (her granddaughter) received another letter from the Indian Registrar. In a similarly congratulatory tone, the Indian Registrar (A. Tallman) stated that he is "pleased to confirm that [I am] now registered as an Indian" (A. Tallman 2012). While the content of our letters are opposite, they are two sides of the same coin: namely, the giving and taking of Indianness, a currency of inclusivity into Canada's sovereign jurisdiction to regulate our subjectivities in the manner in which it conceives of our Indigeneity.

While Indian status has come in and out the lives of the women in my family, in turn impacting just how Indigenous we are perceived to be and how we perceive ourselves, we have always lived as Cree women – a consideration not accounted for in the regulating power of colonial legislation. My family's experiences with Indian registration are not separate from *McIvor*. They are specific "refractions" (Andersen 2011, 49) of historic and recent juridical constructions of Indian status into and through our lived realities. Refractions such as these are the subject of this Chapter and, in

particular, I will discuss how the juridical (re)racializing of Indian status refracts patriarchal white sovereignty through *McIvor* and its resulting legislation, Bill C-3. This discussion is aimed at identifying and interrogating what considerations were left out in the court case. In particular, I will connect the ways in which what was left out contributed to the (re)racialization of Indigenous subjectivities and to the (re)production of Canada's authority to conduct such regulation. The previous two Chapters detailed what was explicitly stated in the case factums and the decision. This Chapter focuses on analyzing what was said, in relation to what was not stated but discursively exercised, providing a map of the power relations operating in *McIvor* as a result of the structured and structuring effects of the Canadian juridical field.

The key characteristic of patriarchal white sovereignty is what Moreton-Robinson (2004a) calls the possessive logic. The possessive logic operates discursively to naturalize the nation state as a white possession (Moreton-Robinson 2004a, 5). Moreton-Robinson (2004a) is deliberate in her use of the term 'possession' suggesting that something can be possessed without necessarily being owned. In this way, Indigenous people may experience dispossession, but they/we maintain a sort of proprietary claim as we have always and continue to live in this land. In *McIvor* the possessive logic of patriarchal white sovereignty was expressed through the Crown's *sense* of owning the nation and the resulting authority to name and govern those people residing within it. Indians, as non-white subjectivities, are managed or regulated through juridical practices rooted in Canadian sovereignty, which contributes to situating white Canadianness as the implicitly normative position within the nation-state.

While, theoretically, Parliament is able generate legislation without being compelled to do so by the courts, changes to Indian registration evident in Bill C-3 imitated the court logics in *McIvor*. Like the case decision, the Bill solely addresses matrilineal consequences of sex discrimination for three particular generations while (re)legitimizing the second-generation cut-off rule and hierarchical division of status. *McIvor* and Bill C-3 do not merely reflect the historicity around racialized colonial naming nor do they constitute racialized representations of Indigeneity full stop. Put differently, the construction of Indian status in *McIvor* and Bill C-3, does not simply replicate historical constructions of 'race', but reveals a complex set of struggles between particular juridical actors, including Indigenous and non-Indigenous people, who collectively and unequally (re)produced racialized meaning for Indian status in the court case.

While not explicitly acknowledged in *McIvor v. Canada,* racialization was omnipresent and was invisibly operationalized through juridical struggles to produce knowledge about Indian status. In the production of the *McIvor* decision and its influence on the crafting of Bill C-3, Canadian patriarchal white sovereignty was (re)produced. In *McIvor*, it was (re)produced through the *form* that the category 'Indian' took and through the *content* of the meaning of Indianness. Additionally, as it legitimizes the court logics through its strict adherence to them, Bill C-3 (re)produces patriarchal white sovereignty through its continued inclusion of racialized and eliminatory criteria for Indianness.

The case and decision did not discuss the eliminatory effects of the racialization of Indian status and Indigeneity through the second-generation cut-off rule and hierarchy

of status (BC Court of Appeal 2009). Additionally, the appellants, judge, and interveners (re)inscribed the use of 'race' to determine Indian status by utilizing racial language, like 'blood', 'birthright', and 'mixedness' to describe Indianness. In turn, the crafting of Bill C-3 played into the invisibility of 'race' and its historically entrenched use in defining Indianness. The second-generation cut-off rule and hierarchy of status were left unscathed in the new legislation, while the Canadian state could be seen as virtuously addressing sex discrimination against Indian women and their descendants by righting a historic wrong.

McIvor and Patriarchal White Sovereignty: Form and Content

With regard to form in *McIvor*, Canada's status as a settler colonial state has meant that its legal system has been implicated in operations to dispossess or juridically eliminate Indigenous peoples in order to establish itself as a legitimate nation-state (Moreton-Robinson 2004a, 6). The juridical field operates according to power relations that order struggles and potential struggles between agents. Struggles between juridical agents determine and reinforce the internal logic of juridical functioning by constraining the range of possible juridical solutions in the resolution of a conflict. Participating in juridical practices, therefore, reproduces the configuration of the field and its pre-established set of power relations (Bourdieu 1987, 816).

Throughout the establishment of the Canadian juridical field, a racialized logic was utilized to determine where and with whom power would be situated. This was largely accomplished through legislative distinctions between Indians and Canadian citizens. Because this distinction was made in a racial manner, Indians were marked as the racialized "other", while Canadian citizens were implicitly considered the white (non-

raced) norm. In this process, the possessive logic of patriarchal white sovereignty was operationalized to determine who was and was not Indian, and conferred legal entitlements to those categorized as white (Canadian) (Moreton-Robinson 2004a, 7). Harris (1995) suggests that, for example, "only white possession and occupation of land was validated and therefore privileged as a basis for property rights" (Harris 1995, 278). Through the articulation of person-hood through citizenship and property, the Canadian state has largely determined the form of juridical practices and categories that get authorized in the ordering of society.

Since the 1970's Indigenous women have submitted to the authorization of the Canadian juridical field through the court system to challenge the privileging of patrilineality in Indian registration (see for instance, *Lavell v. Canada*, 1971; *Bedard v. Isaac*, 1972; *Lovelace v. Canada*, 1981). In doing so, they have had to adhere to Canada's form of juridical functioning for articulating resolution and the categories utilized in such processes. This means that their efforts have been circumscribed and the racialized character of Canadian sovereignty remains obscured.

Just like the women who went before her, when McIvor decided to challenge *Indian Act* registration, she was required to enter the Canadian juridical field and acquiesce to its legislation, regulation, and judicial precedent (Bourdieu 1987, 823). This has occurred not because of a lack of agency or will on McIvor and Grismer's parts, but because positions within fields are in competition with one another, forcing a struggle to best adhere to the symbols within a system in order to achieve one's interests (Swartz 1997, 6-7). Put differently, the relational arrangement of the juridical field structures the forms of resistance possible for those who struggle for emancipation within it. Thus, to

resist is also to be structured in such a way as to reproduce the field's regulating method. Indeed, a central aspect of law's power is its ability to determine how a case or conflict will be decided. From within Canada's juridical field, then, McIvor and Grismer had no other choice but to challenge existing constructions of Indian status and Indigeneity through the court system. Furthermore, their choice about the type of discrimination (sex vs. race discrimination) they sought to challenge within the court system was also constrained.

While Indigenous women like McIvor have been successful in challenging gender discrimination in Indian registration, they have been less successful at challenging the racialized practices of naming Indians. Such a challenge would not only contest the foundational act of naming Indians according to racialized criteria that the *Indian Act* has performed for more than a century, but it would also challenge the legitimacy of Canadian sovereignty; that is, the Canadian state's ability to name Indians and to have such naming recognized as lawful and authoritative. The Canadian juridical field is not structured to enable such questioning. Rather, the structuring of the juridical field empowers racialized conceptions of Indian status since such racialization was instrumental in its creation and now, its maintenance.

The very cost of entering and struggling within the juridical field requires agents to concede to the racialized Indian. Therefore, in order for Indigenous women to challenge *Indian Act* sex discrimination they have had to, at least minimally, invest in the validity of defining Indians according to racial logics. Moreover, by "agreeing to play the game" (Andersen 2011, 5), Indigenous women (who have sought redress in the aforementioned court cases) have contributed to (re)producing the legitimacy of the

juridical field and between it and the non-juridical by participating in the reinforcement of specific juridical contours of Canadian sovereignty (Andersen 2011, 5).

The respondents' factum demonstrates how McIvor and Grismer invested in dominant constructions of Indian status where racialization is concerned. They specifically targeted gender discrimination instead of, or in addition to, challenging the second-generation cut-off rule and hierarchy of status. They did not deviate from what has become discursively common with regard to legal and scholarly discussions concerning Indianness, as criticisms of Indian registration have tended to focus almost exclusively on the ways in which Canada has asserted its sovereignty through the *gendered* construction of Indian status. As a result, while being everywhere in the case, 'race' was neither named nor challenged.

The principles of division that structure ways in which Indigenous (and non-Indigenous) people are differentiated have been imposed and to some degree internalized and accepted. Indigenous people(s) have, therefore, been formative in creating meaning for Indianness; however, this process has not been entirely on our/their own terms. These processes occur through an adherence to a logic of legitimacy grounding the Canadian state that has validated particular forms of law to the exclusion of others while determining and restricting the ways in which Indigenous people(s) can confront and resist such authorized imposition. While Indigenous women have courageously played crucial roles in the recognition of Indigenous women's rights with regard to gender equity, it becomes easy for an examination of their efforts to misrecognize the ways in which the success of their court cases have been constrained largely because of the racialized logic in which they were required to invest. Therefore, I argue that even

though McIvor was successful in her judicial challenge, the judge's decision was an act of symbolic violence (as was the entire case). The process through which Sharon McIvor was compelled to negotiate her Indigeneity was based on Canada's self-proclaimed authority to regulate aspects of her and other Indigenous people's subjectivities and the legal system's role in maintaining that sovereign assertion of possession.

Regarding the content of Indianness in *McIvor v. Canada*, McIvor's challenge to Indian status registration required her to translate her extremely complex (rich) self-conceptions of who she is as an Indigenous woman into narrow categories of juridical relevance. In other words, she was forced to abstract from her personal and intricate intuitions of Indigeneity in order to translate her experiences into an argument that would 'fit' the pre-established constructions of Indigenous legal recognition. She did so, seemingly, by distilling her experiences as a gendered and racialized person marked by her challenge of Indian status as a form of sex discrimination. In practice, though, racialization and gender are entwined (and embodied) realities. Because the court's treatment of Indigeneity separating lived experiences into categories of analysis – gender apart from 'race' or sex discrimination apart from race discrimination – it failed to engage with the messiness of layered subjectivity and subjection.

The scope of the interveners concerns about Indian registration and its connection to Aboriginal and treaty rights coupled by the judge's dismissal of them also demonstrates the difficulty in translating extremely intricate knowledge concerning the ways in which Indigenous people(s) have been named over hundreds of years into very specific sets of juridical relevance. The interveners discussed Indian status in terms of its connection to constitutionally protected Aboriginal and treaty rights; however, the judge

dismissed such a connection and opted to discuss status in terms of a statutory category impacting individuals alone rather than addressing the complex ways in which Indigenous people(s) are governed by the Canadian state through different juridical avenues (BC Court of Appeal 2009). The interveners attempted to grapple with the ways through which the multiplicity of Indigenous legal recognition impacts lived realities. An example of one such complexity includes the following: According to Aboriginal Affairs and Northern Development Canada, "[t]reaty annuity payments are paid annually on a national basis to registered Indians who are entitled to treaty annuities through *membership to bands* that have signed historic treaties with the Crown" (Aboriginal Affairs and Northern Development Canada 2010, emphasis added). However, I know from experience that band affiliation rather than formal membership is sufficient for collecting treaty annuities if one is a status Indian. It was these sorts of connections (and contradictions) that the interveners attempted to discuss in their factums. However, because there was no precedent on the matter and because the judge felt as if they did not sufficiently defend this connection in juridical terms, the judge deemed Aboriginal and treaty rights as irrelevant to the case (BC Court of Appeal 2009). As a result, Indian status remains juridically separate from Aboriginal and treaty rights even though they intersect in practical ways.

McIvor's focus on the gendered aspects of status regulation, and the judge's denial of the interconnectedness of Indian status and other forms of Indigenous legal recognition camouflaged the logic that legitimates racial dominance in Canada and regulates the expression of Indigenous sovereignties according to racial criteria.

Another significant layer of the content of Indianness in *McIvor* was the way in which Indigenous culture or Indigenous cultural identity was often correlated with degrees of Indian status (ie. 6(1), 6(2), or non-status). The respondents, appellants, interveners, and judge were all culpable in this conflation. This logic advanced syncretism between Indian status and Indigenous culture (a concept that was left undefined despite its use in the case). This conflation is consistent with 'race' thinking as it suggests that Indigenous culture and therefore group connectedness is transmitted biologically (in accordance with Indian status). Consequently, as the logic goes, the more biologically pure an Indian is, the more culture he or she likely has. Adherence to this logic fails to recognize the ways in which, firstly, Indian status has historically been produced to demarcate an Indigenous non-white 'race' rather than to reflect diverse Indigenous cultures, and secondly, that Indigenous cultures and identities, like all cultures and identities, are transmitted through socialization rather than through biology. In other words, our identities as Indigenous people(s) are learned rather than bred into us by virtue of birth.

Indigenous juridical actors have internalized Indian status (strategically or not) in attempts to have our 'selves' recognized as Indigenous people(s). This internalization reinforces the possessive logic of patriarchal white sovereignty by failing to name the racialized property of Indian categorization. This means that the Canadian state's conception of Indianness specifically, and of Aboriginality (Indian, Inuit, and Metis) generally, gains even more symbolic power through its increased juridical functioning, which ultimately adds to its relevance in administering Indigenous subjectivities.

By drawing the line of relation from Indian status to Indigenous cultural identity,

McIvor and the other juridical agents masked the interactive character of legal status and culture, and particularly, that Indian status is not only about Indigeneity, but also about the culture of the Canadian state. Therefore Indian status is about cultural identity, but not necessarily (only) about *Indigenous* cultural identities. It is about a categorization that tells us as much about the racialized culture of the Canadian juridical field as it does about the complexities of Indigenous identities and the richness of their/our cultures. If Indian status was eliminated, there would still be Indigenous people(s) and cultures. Indian status, is after all, a legal category rooted in Canada's sovereignty, but it has been internalized and thus assists in reinforcing a scheme for ordering peoples – Indigenous and otherwise. By accepting the legitimacy of the notion that Indian status correlates with Indigenous identities and cultures, each actor involved in *McIvor* took for granted the notion that Indian status equals Indigeneity. Yet for many Indigenous people, including myself, the sum of our identities is not completely dependent on our status categorization.

Through form and content the possessive logic of patriarchal white sovereignty, while being omnipresent in *McIvor*, remained "invisible, unnamed and unmarked in th[e] decision, appearing to be disinvested when protecting [Canada's] sovereignty" (Moreton-Robinson 2004a, 24). The case, in this way, did not generate knowledge concerning Indigenous people(s) according to Indigenous cultures or the thickness of our/their identities, rather it named 'Indians' according to a racialized logic of purity that pits itself as the sovereign locus of power in such determinations. Following a twelve-month suspension, Canada's Parliament followed the court's directive (and logics) and amended the *Indian Act* to remedy the sex discrimination in Indian registration identified in

McIvor. I will end by discussing this material effect in further detail.

Bill C-3 and Patriarchal White Sovereignty: (Re)racialization and Elimination

Like *McIvor*, Bill C-3 has hardened the legitimacy of Canada's racialized sovereign parameters. In particular, Bill C-3 reproduces Canadian patriarchal white sovereignty through its adherence to two logics of elimination: one relating to the collective existence of Indigenous nations and one relating to the individual juridical existence of Indians. Firstly, through the repression of the political nature of Indigenous collective identities as peoples and nations, the state, through Bill C-3, has again produced the racialized category 'Indian'. By homogenizing (some) Indigenous people(s) into a racial group, recognition of Indigenous nations or peoplehood is stripped away, or at the very least, demeaned. This practice has been foundational to the *Indian Act* as it reinforces the legitimacy of Canada through the repression of Indigenous claims to sovereignty and the inherent right to govern themselves/ourselves.

Bonita Lawrence (2004) expresses this link between colonial possession of land, the creation of a legal system and its associated racialized categories like Indian status, and the regulation of Indigenous subjectivities and sovereignties. She states,

> Of course the only way in which Indigenous peoples can be severed from their land base is when they no longer exist as peoples. The ongoing regulation of Indigenous peoples' identities is therefore no relic of a more openly colonial era - it is part of the way in which Canada and the United States continue to actively maintain physical control of the land base they claim, a claim which is still contested by the rightful owners of the land. (Lawrence 2004, 38)

Additionally, by eliminating the total number of registered Indians through the second-generation cut-off rule, Canada is progressively able to minimize the total number of status Indians. Clatworthy (2003) states that the provisions introduced by Bill C-31, namely, the second-generation cut-off rule and hierarchy of status, have the potential to

render the registered Indian population extinct (Clatworthy 2003, 87). Bill C-3, which accepted the new and restrictive rules of registration, has, therefore, not deviated from the logic of elimination discussed in Chapter 2, but has reinforced the practice through unique juridical practices and relations of power. The discursive longevity of the logic of elimination and the ways in which it currently exists through status rules instead of as explicit policies of assimilation becomes evident. Additive amendments to *Indian Act* registration, namely, Bill C-31 and Bill C-3, have attempted to resolve gender discrimination against Indigenous women, while contradictorily hardening the legitimacy of juridically naming Indians through racial and sexist logics.

As a juridical category then, Indian status tells us as much about Canadian patriarchal white sovereignty as it does about Indigeneity. This is a salient point to emphasize since "[a]s long as whiteness remains invisible in analyses 'race' is the prison reserved for the 'Other'" (Moreton-Robinson 2000, xix). Indian status has been constructed according to particular epistemological assumptions concerning 'race', gender, personhood, and citizenship and it denotes an expression of who 'whites' *are not* rather than the totality of who Indigenous people(s) are and how we know ourselves. Therefore, Indian status is embedded within processes of modern Western subjectivity-formation and Indigenous acceptance of the category marks our participation in such processes.

Bill C-3, resulting from *McIvor*, represents a racialized and deeply political force directed by the Canadian state to produce legible Indigenous people: 'Indians'. Therefore, I would add to Wolfe (2006) with regard to the eliminatory logic of settler colonialism. Indian registration is not only about elimination of Indigenous and Indian

people(s), but about *preserving* a particular construction of "the Indian". The logic of elimination in the context of Indian registration is therefore just as productive as it is eliminatory because of its creation of a particular representation of Indigeneity. In this representation, strict racial criteria for Indianness are required to preserve the existence of a *dying 'race'* of Indigenous people. It is crucial to recognize that the juridical logic in *McIvor* and Bill C-3 that expresses the need to preserve the racial integrity of Indians also acts in an eliminatory manner with regard to Indigenous legal recognition.

Palmater suggests that "[w]hile the goal of Indigenous Nations, however constructed, is to have their inherent jurisdiction to determine their own citizenship rules recognized, and while few may assert their inherent jurisdiction, practically speaking this will likely only come about in negotiated self-government agreements or modern treaties" (Palmater 2011, 30). Indian status and its significant impact on Indigenous collective identities and constructions of community belonging, then, is anything but a private issue relegated to Indigenous women alone, but remains an obstacle for all Indigenous people(s) whose lives *Indian Act* registration touches (through inclusion or exclusion).

Conclusion

There is no scholarly consensus concerning the benefits of Indigenous participation in the Canadian legal system. On one side scholars like Alfred suggest that,

> To enlist the intellectual force of rights-based arguments is to concede nationhood in the truest sense. 'Aboriginal rights' are in fact the benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state. After a while, indigenous freedoms become circumscribed and indigenous rights get defined not with respect to what exists in the minds and cultures of the Native people, but in relation to the demands, interests, and opinions of the millions of other people who are also members of that single-sovereign community, to which our leaders will have pledged allegiance. (2009, 176)

Others, like Burrows maintain that the Canadian court system provides a means of working toward regaining Indigenous self-determination by legitimizing Indigenous rights from within the Canadian legal system (2003, 223-62). It is not the goal of this thesis to advance one position over the other. Rather, the goal has been to dissect the limitations, constraints, and struggles that occur when Indigenous individuals do seek redress within the Canadian juridical field. Moreover, I selected to analyze *Indian Act* naming in the context of *McIvor v. Canada* so that I may elucidate an understanding of the limited foundation upon which Canada allows for the negotiation of Indigenous subjectivities to occur – primarily through the court system. This analysis was conducted in five stages.

In Chapter 1 I drew a conceptual map that would lead my analysis of *McIvor*. I discussed 'race' and gender in the context of Indian status registration in addition to scholarly treatments of 'law' and what is gained by conceptualizing 'it' instead as a dynamic field of struggle. This chapter established my theoretical framework by

engaging Bourdieu's (1987) *juridical field* and Moreton-Robinson's (2001, 2004a) *patriarchal white sovereignty*.

In Chapter 2 I discussed the key conditions that have shaped the Canadian juridical field and have thus impacted the kinds of arguments thought possible in *McIvor*. Canada's creation has been the product of repressing Indigenous societies, while producing a nation-state. A significant aspect of this project has been the development of the Canadian juridical field through which a possessive logic operates to naturalize state authority and law. Determinations of Indian status within the field have a long history dating back to the mid nineteenth century where racial and gender logics were used to define who Indians were and are. Being Indian, however, is not simply a reaction to state imposition or resistance to the state. Indigenous people(s) have participated in the development of the Canadian juridical field and have been formative (albeit from a subordinate position of power) in constructions of Indian status. Moreover, the field has developed a structure for determining law that, in turn, structures the kinds of arguments that Indigenous people(s) can make when challenging Indian status criteria.

In Chapter 3 I identified the arguments made by each juridical agent in *McIvor*. This was done in order to understand what knowledge about Indian status was either omitted or legitimized through the decision since it was through the interactions of the agents that the decision logics were produced. Knowing what each agent argued also made it possible to identify ways in which the Indigenous agents were restricted in terms of the kinds of arguments that were supported by the structuring of the juridical field.

In Chapter 4 I summarized the findings of the *McIvor* decision and explored its logics. Additionally, I used this chapter to reveal the empirical refractions of *McIvor* into

the legislative position of the Canadian juridical field through Bill C-3 and into the field of band membership.

In Chapter 5 I analyzed *McIvor* in terms of what was omitted from discussions in the court case. I then linked the logics operating in *McIvor* to the logics evident in Bill C-3. Through this analysis I demonstrated how *McIvor* (through form and content) and Bill C-3 (through eliminatory and productive logics) (re)produced patriarchal white sovereignty.

At this point I offer a brief summary of the findings pointing to the observations I hope to be taken away from my analysis. First, *McIvor* reveals how the Canadian legal system manifests Canada's racialized and gendered character. As such, the Canadian court represents a limited and limiting venue for negotiating Indigeneity, as notions of Indian status have shaped broader expressions of Indigeneity. This is because the struggle over defining Indianness is implicated in the ongoing struggle between the conflicting sovereignties of Indigenous nations and that of the Canadian state – both of which arguably have jurisdiction over defining the citizenship of 'Indians'.

Second, there are competing discourses of rights circulating in the case including discussions of, for instance, *Charter* rights, Constitutional rights, Treaty rights, Aboriginal rights, and birthrights. These discourses are used by the parties to the case to advance their respective claims concerning who has 'the right' to be an Indian. Contrary to the arguments of McIvor and the interveners that Indian status is a vehicle through which Indigenous people(s) may access many of their inherent sovereign rights, the judge's decision remains consistent with a liberal conception of individual legal rights flowing out of Canadian sovereignty (BC Court of Appeal 2009). Furthermore, the use

of the discourse of rights serves to further solidify the notion that there exists separation and competition between Indigenous women's 'individual rights' and the 'collective rights' of First Nations. This false dichotomy is detrimental to Indigenous women's inclusion in their communities, and also to specific discussions around multiple sovereignties. This is because with such a separation, the Canadian state can control Indigenous subjectivities by regulating *individual rights of status Indians* without obviously interfering with *collective rights of First Nations* who have, purportedly, the ability to determine their own band membership codes. In reality, though, the two, Indian status and band membership, remain integrally connected through symbolically powerful notions of Indigenous authenticity as well as through the ways in which federal funding is allocated to First Nations based on the number of registered Indians that band lists contain.

Third, the most significant feature of how the interactions in the court case define Indian status becomes evident in what is *not* said by anyone in the case – that is, the extent to which Indian status has become increasingly exclusive since the 1800's because of an increasingly aggressive racialization of Indigeneity, most recently, through the second-generation cut-off rule. This rule states that within a family, upon two generations of producing children between Indians and non-Indians, the resulting children will not have any claim to Indian status. This finding leads to an exploration of the limitations of the Canadian courts' capacity to answer broad questions of Indigenous identities and sovereignties. This capacity is limited because the courts are implicated in a particular colonial sovereignty that, on one hand formally strives to be democratic and just, while on the other, acts to protect its own boundaries from competing sovereignties.

The balancing of these objectives nonetheless maintains the authority of the Canadian juridical field, connecting the regulation of Indigenous subjectivities to the patriarchal white possession of the nation state. Moreover, this finding identifies ways in which Indigenous groups, can, at times, reinforce the racialized logic that the Canadian state uses to limit Indigenous legal recognition. The respondents' and the interveners' conflation of Indian status and Indigenous culture, as well as their insistence that Indian registration is chiefly an issue concerning sex discrimination and unaffected by racialization is indicative of this complicity.

I am hopeful that the analysis presented here brings awareness that when it comes to analyzing *Indian Act* registration, the type of questions we ask has major implications for producing critical rather than racially reproductive analyses. I have tried to move away from asking questions like, what does it mean to be an Indian? This sort of question leads to highly descriptive answers. For instance, in *McIvor* the Indigenous interveners attempted to answer this very question by *describing* Indian status as a cultural identity, a birthright, and a means of accessing Aboriginal and treaty rights. Alternatively, I have asked, what does Indian registration do? Or more accurately, what do our investments in Indian registration do and how? Positioning the effects of Indian registration actively instead of descriptively opens us to the possibility of more widely understanding the influence that Indian registration has on perceptions of Indigeneity, practices of inclusion/exclusion, and the racialized and racializing qualities of the state we live in. Asking 'how' our investments in Indian registration do what they do is important for presenting a critical depiction of racialization in Canada. By asking how, for instance, Indian status impacts the ways in which Indigenous people(s) are perceived

by themselves and others, we can gain empirically specific insight into the profound influence juridical practices have in terms of regulating Indigenous existence. This portrays a picture that differs from analyses of 'race' that position *it* as something the 'other' has and, thus, points to difference in an Indigenous context. Instead, my line of questioning inquires into the ways in which 'race' exists only because of people's investments in it (conscious or not) and practices that (re)produce it. In this thesis I wanted to place a mirror in front of dominant societal groups and institutions to reveal the widespread and unspoken complicity and investment in racialized and racializing knowledge that orders everyday struggles for Indigenous *and* non-Indigenous people. If our critiques of the *Indian Act* remain limited to *describing* Indian registration and its impacts, then we will be collapsing the empirically diverse ways that it infiltrates our means of relating to one another. We need to do more in order to facilitate change.

The other consideration that I hope can be gleaned from this thesis is in regard to how we think about what the law is and means. A substantial portion of the literature either objectifies it as a mere tool actively used to produce particular social realities or subjectifies it as a 'thing' that acts autonomously to fully constitute social reality. I have tried to demonstrate how it is through individual investments in law's regulating method (however constrained or coerced this investment may be) that produces and reproduces legally sanctioned social realities – a key aspect of Indigenous dispossession/Canadian possession.

At the broadest level I can say that *McIvor v. Canada* is yet another microcosmic instance of colonialism. So too is my earlier anecdote about my grandmother's experience with the *Indian Act*. From *McIvor* and from my grandmother I have learned

that often, the subtle violence and its empirical specificities are where colonial domination is felt. Where, then, does this lesson lead me? Both the literature on the matter, and more powerfully, my familial experiences tell me that Indian registration has profound impacts on many people's perceptions of who is and who is not a 'real' Indian. This thesis has demonstrated that Indian registration has and does still define Indians in racial terms. As a result, many individuals have become wedded to the idea that pure bloodedness means authenticity. This is not, however, the whole story.

I believe that the sorts of things that make us Indigenous are alive and well, having nothing to do with pure bloodedness. They are often not recognized because they represent the normalcy of every day life or they are misrecognized as being qualities that are not specifically Indigenous. For example, the normality of being Cree has been largely misrecognized in my own family as being connected to our degree of 'assimilation', rather than being seen as practices of adaptation, survival, or most generally what it means to be Cree. It is interesting to me how things that are explicitly recognized as tradition like powwow dancing, feathers, and purity of blood, etc., are seen (at least in my family) as being authentically Indigenous whereas the everydayness of being Cree (like learning certain strategies to support the family financially, performing whiteness, the passing of cultural values and responsibilities, etc.) is far more widely practiced, preserved, and more important to survival and well-being, but often seen as the result of assimilation instead of as Indigenous tradition. These observations raise serious questions about difference, representation, and misrecognition.

In some instances, then, as Indigenous people we are just as guilty of consuming 'tradition' (or more accurately, a representation of Indigeneity that does not necessarily

reflect the everydayness of being Indigenous) as non-Indigenous people are. This raises so many questions of interest for me. Why do we consume these symbols and representations of authenticity? What are more examples of the everydayness of being Indigenous? How, if at all, can these elements of Indigeneity inform citizenship rules? How do we step away from the trappings of Indian registration and think differently about who we are and how we determine members of our communities? My analysis of *McIvor* and my observations about the everydayness of being Indigenous have, evidently, led to more questions than answers. I see this as an opportunity to use this research as a platform for stepping into the future with a critical perspective and a renewed curiosity and sense of responsibility to share what I have learned and to take in what others, the 'experts' of the everyday, have to offer.

Notes

[1] All acts of categorization can be problematized. For the purpose of written scholarly work, however, analytical distinctions are required. In this thesis I will utilize 'Indigenous' to refer to those people(s) who lived on Turtle Island prior to the arrival of Europeans and their contemporary descendants. This may include for instance, those who are Cree, Anishinabe, Métis, Dene, Blackfoot, etc. When referring to 'Indians' or 'Indian status' I am specifically referring to the juridical identity category as constructed by the Canadian state. I recognize that "Indian" has come to be a part of the multiple layers of Indigenous identity formations and that it means more to some individuals than just being a juridical category. However, in the context of this thesis, it will be used to refer to the legality that has been created around the categorization of (some) Indigenous people(s) as 'Indians'. As a Canadian juridical category, "Indian", in contrast to Métis and Inuit, has come to be equated with First Nations, although the term First Nations may also refer to the collectivities of what the state considers bands of 'Indians'. Lastly, I will utilize 'Aboriginal' only when referring to the category including Indian, Inuit, and Métis as articulated in Canada's *Constitution Act, 1982*.

[2] While I anticipate conducting future research that includes an investigation into Bill C-3 and its material and symbolic effects, I have strategically selected *McIvor v. Canada* as my empirical point of origin in the present research. I have done so in order to gain a thorough theoretical and empirical grounding in the judicial events leading up to the passing of Bill C-3 so that I may approach future analyses with an enriched understanding of the distribution of power that translates knowledge into judicial relevance and decision; and further, judicial decision into legislative amendment.

[3] Section 6 of the *Indian Act* is divided into nine categories of possible Indian status. For the purpose of this thesis, three of these categories are of particular relevance. They are 6(1)(a), 6(1)(c), and 6(2) status. Generally, an individual who has 6(1) status can transmit that status to one's child regardless of the status of the other parent. 6(1)(a) Indians are considered those individuals who had status or were eligible to have status prior to 1985 – these are the *original* status holders who have had the ability to transmit Indian status to their grandchildren. On the other hand, 6(1)(c) Indians are those women who had married out and had regained status after 1985. These women, like McIvor, were only able to transmit 6(2) status to their children and as a result their grandchildren are more likely to be without Indian status. That is because a 6(2) Indian can only transmit status to his or her child if he or she parents with another status Indian.

[4] 'Identity', as examined across disciplines, continues to be an ambiguous term with a multitude of definitions. In my experiences with self-identification, I realized that in addition (and strongly attached to) self-understandings lays a complex system of power relations that contribute to the formation of 'identities'. Identity is both an analytical category that we use to talk about individual and collective particularities, as well as a category of practice in which self-hoods are not talked about but lived. Identities are often linked to social relatedness whereby a fundamental "sameness among members of a group" is demarcated (Brubaker and Cooper 2000, 7). The similarity may be perceived by members of the group or by individuals outside of the group (Brubaker and Cooper 2000, 7). As a result, it becomes impossible to precisely define 'Indigenous identity'. Conversely, Indian status is an identity that is the result of a legal categorization. By definition, then, Indian status is a construction that reflects certain power relations between those who define it and those who are defined. Kertzer and Arel maintain that politicized categorizations, like Indian status, are often defined along racial or ethnic lines (2002, 2). The purpose for such categorizing, they suggest, is reflected in the state's desire to administer society in terms that it constructs and therefore understands (Kertzer and Arel 2002, 2). In other words, the state constructs various categorizations in order to simplify complex social realities that exist. This allows the state to maintain power through the production of knowledge concerning the characteristics that makeup the 'Indian' without consideration of the complexities concerning Indigenous identities. Furthermore, knowledge defining Indian status has over time impacted Indigenous identities becoming formative of each other, especially where authenticity is concerned.

[5] Patriarchy and patrilineality have discursive genealogies, meaning, they did not originate in the Victorian era of the British Empire. Eberts collapses this history, however, her point is that Indian registration has

been institutionalized according to patriarchal and patrilineal assumptions concerning property and personhood that were consistent with Victorian law whereby a woman lost her civil rights upon marriage. The institution of heterosexual, monogamous marriage coupled with the privileging of patrilineality have served as mechanisms through which Indigenous people(s) have been brought into the regulating authority of Canadian nation-statehood. Because of the scope of this thesis, I take for granted the struggles whereby heterosexual monogamous marriage became institutionalized in Canada and enforced and resisted within (and outside of) Indigenous communities. For a history of these processes see Carter (2008).

[6] This rule, created by Bill C-31 in 1985 as an amendment to the *Indian Act*, stipulates that within a family, upon two generations of Indian and non-Indian mixed parentage, resulting children will not have any claim to Indian status.

[7] While there have been a disproportionate number of men in such positions law is the product of a series of struggles rather than an instrument of power. Therefore, legislation and judicial texts created by white men have also been met with resistance. See for instance, Carter (2008).

[8] In contrast to conceptualizations of 'Métis as mixed', Giokas and Chartrand (2002) describe the Métis Nation as having "form[ed] a provisional government, establish[ed] civil order, and defend[ed] their territory through arms, [and] the fact that they obtained diplomatic recognition from Canada and constitutional recognition in the Constitution Act, 1871, fuel[ed] the perception both inside and outside of the historic Red River and Rupert's Land Métis/Half-breed community that they were a…people" (Giokas and Chartrand 2002, 86).

[9] *Misrecognition* makes up one feature of Bourdieu's theory of practice. It refers to induced misunderstanding whereby social realities that result from structured relations of power are not perceived as resulting from interested acts, but as normal or legitimate realities (Bourdieu and Wacquant 1992, 194-5).

[10] The *Indian Act, 1876* was fully entitled *An Act to amend and consolidate the laws respecting Indians*.

[11] This construction of Indigeneity has had severe policy effects for Métis peoples whose legal identity has been constructed according to perceived racial mixedness (see Andersen 2011, 2010, 2008).

[12] *McIvor v. The Registrar, Indian and Northern Affairs Canada,* 2007 BCSC 827 and 2007 BCSC 1732, reversed in part by *McIvor v. Canada (Registrar of Indian and Northern Affairs) 2009* BCCA 153, leave to appeal denied 11.05.2009 (SCC)

[13] For a summary of each intervener's arguments see Appendix 1.

[14] Section 1 of the *Charter* states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[15] My grandmother shared the details of this letter with me anecdotally. She no longer has the letter in her possession. As a result, this evidence serves as a family history passed on orally. Despite the actual specificities of the language used in the original letter, the way in which my grandmother interpreted it reveals the symbolic power exercised by Indian registration and enfranchisement during the period of the mid-twentieth century. In other words, whatever the actual diction used in the letter, my grandmother perceived the meaning of the letter to be that she was no longer Indian, but white.

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West Moberly First Nation Intervener Factum (2009) *McIvor v. Canada*, British Columbia Court of Appeal (File no.: CA035223).

Appendix 1

Native Women's Association of Canada (NWAC): NWAC's precursor organization, Indian Rights for Indian Women, was founded in 1969 as the first national Aboriginal women's organization in Canada. Its primary goal at that time was to secure the repealing of section 12(1)(b) of the *Indian Act* – the marrying out rule, which disenfranchised Indian women who married non-Indian men. NWAC advanced that Bill C-31 severely impacted the identities of the respondents, and that sections 15 and 28 of the *Charter* emphasizes that Aboriginal rights, such as the right to identity transmission, are to be available equally to women and men, as do sections 35(1) and (4) of the *Constitution Act, 1982*. NWAC explained how the appellant had constructed an artificial division between what it perceived as Aboriginal women's individual rights to Indian status and Aboriginal group rights to band autonomy. NWAC stated that this is a false division since Aboriginal women's gender identity is indivisible from their national and cultural identities and, as such, the interests of Aboriginal women are in line with the interests of First Nations. Lastly, NWAC argued that the conferring of Indian status to one's child is a fundamental Aboriginal right, and that membership in a First Nation is a birthright – a birthright to belong. As a result, NWAC asserted that the continual discrimination against Aboriginal women and their descendants through Indian registration prolongs Canada's policy of assimilation as it eliminates Aboriginal peoples' access to their rights as Aboriginal peoples.

Congress of Aboriginal Peoples (CAP): Formerly the Native Council of Canada, the Congress of Aboriginal Peoples was created in response to the marginalization of Métis and non-status Indians, and other Aboriginal persons living off reserve. One of CAP's

early goals was to address the gender discrimination in the *Indian Act*. CAP argued that through gender discrimination, section 6 of the *Indian Act* denied Aboriginal persons their cultural, social, and economic birthrights procured through their recognition as Aboriginal persons. CAP maintained that the exclusion of women through section 12(1)(b) significantly impacted their Aboriginal identities. CAP went on to state that section 6 protected the status of Indian men for one generation more than for reinstated Indian women, and as a result, those descended from the matrilineal line, CAP argued, remain particularly vulnerable to cultural isolation and loss of identity. In line with the suggestion that Indian status and Aboriginal identity are intertwined, CAP argued that women who married non-status men were treated as if they were less capable of passing on Aboriginal culture and identity to their children than their male counterparts. In their argument, CAP emphasized the apparent sex discrimination in the *Act*, and the ways through which it negatively impacts access to Aboriginal culture for women and their descendants.

First Nations Leadership Council (FNLC): The First Nations Leadership Council is comprised of the executive of its member organizations, including the First Nations Summit, the Union of B.C. Indian Chiefs, and the B.C. Assembly of First Nations. The position of the FNLC advanced that section 6 of the *Indian Act* not only discriminated against McIvor and Grismer in a sexually discriminatory manner, but also against the basic interests and rights of all First Nations families and communities. The FNLC based this argument on the belief that section 6 pitted the interests of First Nations women and children against the interests of First Nations band governments. For this reason, the FNLC commented not only on Indian registration, but also on band membership, as it

suggested that the two are integrally connected. The FNLC went on to emphasize how Canada has stripped First Nations of the right to self-determination through the ways in which the *Indian Act* has replaced pre-colonial matrilineal systems of identity transmission with patrilineal schemes. It is through patrilineality, the FNLC argued, that the *Indian Act* has and does strip First Nations of self-determination. Lastly, the FNLC suggested that the current Indian registration system is set up in such a way that will eventually lead to the elimination of legally entitled Indians, and is therefore based on the attempt to assimilate Aboriginal peoples into the mainstream of Canadian society. The FNLC argued that Indian status is important to First Nations because the ability of First Nations to provide services and programs to their people is directly tied to the number of registered Indians living on reserve.

West Moberly First Nation: The West Moberly First Nation claimed that Bill C-31 perpetuates sex discrimination in Indian registration and detaches many Aboriginal women and their children from their treaty rights. The First Nation stated that the benefit at issue in the case was the right to transmit Indian status as a cultural identity to future generations as a benefit of law to which section 15 of the *Charter* applies. It asserted that the ability to access treaty rights links Indian status with cultural identity.

T'Sou-ke Nation: The T'Sou-ke Nation extensively focused on the existing sex discrimination of *Indian Act* registration. In particular, the T'Sou-ke made a correlation between Indian status and Aboriginal women's identities as Aboriginal people. It maintains that the Crown has an obligation to protect Aboriginal rights and lands and as a result, needs to administer Indian registration in non-sex discriminatory ways. The T'Sou-ke Nation touched on the loss of status as an assimilatory practice. It emphasized

the correlation between Indian status and band membership in the sense that, while someone can be a band member, they do not carry the same 'rights', such as the right to occupy and profit from reserve land, as a *status Indian* band member. In addition to this difference in material consequences for status and non-status band members, the T'Sou-ke Nation discussed the intangible benefits to having status such as a sense of belonging and acceptance in one's First Nation community. Lastly, the T'Sou-ke intervener suggested that the *Indian Act* regulates the identities of Aboriginal peoples in Canada based on blood quantum, but that it believed that identities should not be solely based on this criterion. The T'Sou-ke Nation did not challenge the legitimacy of blood quantum criteria, but stated that it should not be the *sole* measure for determining Indian status (T'Sou-ke Factum, 2009: 41).

Grand Council of the Waban-Aki Nation, the Band Council of the Abenakis of Odanak and the Band Council of the Abenakis of Wôlinak: Similarly to the T'Sou-ke Nation, the Abenaki intervener argued that section 6 of the *Indian Act* functions according to blood quantum. The Abenaki intervener did not criticize this method of classification in and of itself; rather, the intervener found issue with the way in which the blood quantum rules are unequally applied to Indian men and women. The Abenaki intervener focused nearly exclusively on sex discrimination, arguing that section 6 of the *Act* contravenes section 15 of the *Charter* on the grounds of sex discrimination. The Abenaki intervener also argued that the way in which the section is stratified (ie. 6(1) and 6(2)) will eventually lead to the elimination of status Indians and, therefore, will have serious implications for the well being of Indigenous communities.

Aboriginal Legal Services of Toronto (ALST): The Aboriginal Legal Services of Toronto is a non-profit 'status blind' legal organization which advocates on behalf of the large Aboriginal population of Toronto. The ALST advocated that Indian registration has always benefitted Indian men over Indian women and that Bill C-31 did not fully remedy this discrimination. Moreover, the ALST emphasized the importance of acquiring Indian status as it allows one to procure various benefits such as health, education, housing, a sense of belonging, pride, and cultural cohesion. The ALST was the only intervener that provided a possible remedy for the case. It suggested that contrary to the request by the appellant to a twelve-month suspension to allow Parliament to craft a *Charter*-compliant solution, the ALST demanded a more expedient response from government, although it did not specify a desired time limit.