

# Intersectionality in the Canadian Courts: In Search of a Decolonial Politics of Possibility

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## Abstract

This critical examination of intersectionality in the context of Canadian anti-discrimination cases outlines the Lockean foundations of identity construction in the courts. By framing Jasbir Puar's articulation of intersectionality as an invitation to create more complex cartographies, the author challenges the hegemony of certain kinds of knowledge production in sites of institutional power.

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## Résumé

Cet examen critique de l'intersectionnalité dans le contexte des affaires de lutte contre la discrimination au Canada souligne les fondements lockiens de la construction de l'identité devant les tribunaux. En formulant l'articulation de l'intersectionnalité par Jasbir Puar comme une invitation à créer des cartographies plus complexes, l'auteure conteste l'hégémonie de certains types de production des connaissances dans les lieux de pouvoir institutionnel.

## Introduction

It has been over 25 years since Kimberlé Williams Crenshaw (1989) first put a name to intersectionality. Since then, intersectionality has become "an everyday metaphor that anyone can use" to interrogate, and intervene in, the ways that social life is experienced, discussed, represented, structured, and institutionalized. The central idea, however, was not new at the time and Crenshaw herself acknowledges that:

In every generation and in every intellectual sphere and in every political moment, there have been African American women who have articulated the need to think and talk about race through a lens that looks at gender, or think and talk about feminism through a lens that looks at race. (Adewumni 2014, n.p.)

Nevertheless, in those 25 years, unlike its preceding articulations, the specific term "intersectionality" has not only become foundational to feminist theory and praxis, it has crossed borders making appearances within and in-between multiple legal jurisdictions, theoretical planes, and geographic locations. By focussing my attention on the epistemological foundations of the rules that govern identity formation within Canadian anti-discrimination law, in this article, I examine issues that have received little attention in the literature on intersectionality. Following Jasbir Puar's (2012) pivotal insight that "many of the cherished categories of the intersectional mantra ... are the products of modernist, colonial agendas and regimes of epistemic violence" (54), I argue that, without carefully examining the Lockean foundations of the concept of identity itself, the use of intersectionality in the context of anti-discrimination law will continue to reproduce the essentialism and epistemic violence that intersectional resistance initially sought to disrupt.

Vrushali Patil (2013) maintains that, if cross-border dynamics are neglected and the nation's emergence via transnational processes remains unproblematized,

“our [intersectional] analyses will remain tethered to the spatialities and temporalities of colonial modernity” (863). This important insight bears out in the context of Canadian anti-discrimination law. Anti-discrimination claims are a primary site of nation building that, despite pretenses to geographic particularity, simultaneously borrow, exchange, assimilate, and disavow the terminologies and legal logics of other national jurisdictions. Despite previous articulations of the power relations at the heart of intersectional analyses in Black feminist thought in the U.S., intersectionality as a terminology is firmly rooted in the intellectual and institutional culture of 1980’s and 1990’s U.S. Critical Legal Studies (Cho, Crenshaw, and McCall 2013). Carol A. Aylward (2010) situates intersectionality as “an offshoot of Critical Race Theory which originated with Black and other scholars of colour who felt that existing legal discourse, including Critical Legal Studies discourse, was alienating to all people of colour (3). As such, the term intersectionality was forged in a geographically and methodologically specific site of institutional power: the U.S. legal academy. It also emerged in relation to a specific articulation of juridical power. As Crenshaw (2014) states:

...the term was used to capture the applicability of Black feminism to anti-discrimination law...anti-discrimination law looks at race and gender separately. The consequence of that is when African American women or any other women of colour experience either compound or overlapping discrimination, the law initially just was not there to come to their defence (n.p.).

U.S. anti-discrimination law, including its legitimating logics, its doctrinal obstacles, and its role in impeding or outright reversing modest law reforms was among the initial targets of intersectional resistance (Cho, Crenshaw, and McCall 2013). This context has, to a certain extent, shaped its possibilities, conditioned its emergence, and has created certain parameters of intelligibility around its future potential. Its genesis as a juridical concept has had a significant impact on the ways that intersectionality has been able to cross borders and inform the drafting and implementation of anti-discrimination and equality law in other parts of the world. This includes, but is not limited to, interpretations of both federal and provincial human rights codes in Canada and judicial interpretation of the equality

provisions in the *Canadian Charter of Rights and Freedoms*. In the context of Canadian public policy and anti-discrimination law, judges, lawyers, and legislators have historically and continue to borrow and codify the racial language and the invented taxonomies of the U.S. (Mawani 2011; Hodes 2013; *R v. Kapp* 2008).

Contrary to Crenshaw’s initial objectives, rather than appearing as a defence against discrimination, intersectionality as it appears on national, regional, and international legal and social policy landscapes often functions as “a tool of diversity management and a mantra of liberal multiculturalism” (Puar 2007, 212; Yuval-Davis 2006). As a result, intersectionality often colludes with the disciplinary apparatuses of states, re-centers universalizing liberal essentialist identity formations, seeks to harness mobility, and encases difference “within a structural container that simply wishes the messiness of identity into a formulaic grid” (Puar 2007, 212). In the context of Canadian anti-discrimination law, the grounds approach provides a structural container that disciplines identity into a formulaic grid that is populated by a series of fixed and unchanging characteristics. This is not, however, only the result of the narrow interpretive frameworks produced in Canadian anti-discrimination cases. It is also partly a result of Crenshaw’s (1989) use of the categories that appear in U.S. anti-discrimination law as descriptive features of experience in the early development of the concept.

The idea that race and gender, or race and sex as it would be articulated in the context of anti-discrimination claims, intersect to produce qualitatively different experiences of discrimination disrupts any singular or universalizing category of woman (Crenshaw 1991). It also disrupts any universalizing notions of racialized gender discrimination (Brah and Phoenix 2004). The intersecting categories, however, remain heuristic devices with juridical force that pre-exist and produce knowledge about the experiences that they purport to describe. The assumed transparency of identity categories has led to explorations of the multiple ways that they often impose both epistemological frameworks and ontological presumptions when they appear both independently and in the context of intersectional frameworks (Brah and Phoenix 2004; Joseph Massad in Boggio Éwanjé-Épée and Magliani-Belkacem 2013; Mawani 2011; McClintock 1995; Puar 2012; Yuval-Da-

vis 2006). In legal contexts, these identity categories are often used as discrete and static descriptive features of a presumed reality. As a result, whether intersectional or not, the use of identity categories in Canadian anti-discrimination law imposes both epistemological frameworks and ontological presumptions.

The problem is therefore simultaneously one of conceptualization and one of deployment. In its articulation as a response to U.S. anti-discrimination law, intersectionality takes for granted predetermined identity categories as they manifest in U.S. anti-discrimination doctrine. Similarly, when imported as a response to Canadian anti-discrimination law, intersectional analyses take for granted the supposed universality and transparency of the predetermined identity categories that are listed as grounds in human rights legislation and the *Canadian Charter of Rights and Freedoms*. A closer look at the methods of identity construction required by the grounds approach in Canadian anti-discrimination law, however, reveals that the grounds are neither transparent nor universal. The rules that establish the content and meaning of the grounds transform anti-discrimination claims into expressions of colonial modernity through the imposition of Lockean epistemological and ontological presumptions about the body, identity, diversity, and difference.

### **Intersectionality and The Grounds Approach in Canada**

One of the key features of feminist intersectional analyses is the desire to decenter the unified, self-referential subjects of modernity that often appear in feminist and other contexts (Brah and Phoenix 2004). Earlier articulations of intersectionality, such as the Combahee River Collective's (1977) advocacy for analyses that recognize interlocking systems of oppression, drew attention to what Avtar Brah and Ann Phoenix (2004) refer to as "the futility of privileging a single dimension of experience as if it constituted the whole of life" (78). Unfortunately, the rules that govern how identity is articulated in Canadian anti-discrimination law prevent the kinds of intersectional analyses that consider identity to be an experience that is mediated by agency, social relationships, and power relations. In this context, experience is not the focus. Instead, identity and the many categories used to describe it are the focus and they become sets of immutable physical characteristics

that reduce all experience to that which can be articulated through the grounds. Identity thereby becomes a concrete fact of being. A closer examination of the concept of identity reveals that each of the categories that make up the grounds carry many of the universalizing Euro-American ontological and epistemological presumptions that are reflective of John Locke's ideas about embodiment, difference, and diversity. It also reveals that identity itself is the vehicle through which the unified, self-referential subjects of colonial modernity become reified in anti-discrimination claims.

John Locke is the hinge that connects England's colonial aspirations in the Americas to contemporary discourses around identity in judicial decisions and the work of legal scholars that focus on constitutional anti-discrimination and equality law in both Canada and the United States. Locke, although never taking credit for the *Second Treatise of Government* in his lifetime, created within it an economic defense of English colonialism in the Americas (Arneil 1996). It was also John Locke who was among the first to suture the concept of identity to human and other living beings in his *Essay Concerning Human Understanding*.

Philip Gleason (1983) and Radhika Mohanram (1999) describe how the word identity derives from the terminologies of logic and algebra and that it was not until Locke came along in the 1680s and 1690s, emphasizing the "the importance of categorizing identity as somatic sameness" or as "encapsulated within the same body which functions as a bag or vessel to contain life," that the word identity was used to describe something trapped inside and/or on the body (Mohanram 1999, 31). Locke's texts emphasize the centrality of the body not only as "the scaffolding upon which identity and difference rest," but they also construct the body, its characteristics, and its consciousness as central to civil state formation (31). This body, its consciousness, and its characteristics is emblematic of the unified, self-referential subject of colonial modernity that feminist analyses of interlocking systems of oppression originally sought to decenter. This body is also epistemologically and ontologically presumed by the universalizing Euro-American identity categories that Puar (2012), Massad (Boggio Éwanjé-Épée and Magliani-Belkacem 2013), and Brah and Phoenix (2004) disrupt in their respective analyses of identity categories and intersectionality. This body, its categories, and its Lockean foun-

ation is also central to earlier articulations of intersectionality in Canadian law and public policy.

In 1989, the year that Crenshaw's pivotal piece appeared in the *University of Chicago Legal Forum*, the Canadian Advisory Council on the Status of Women articulated some of the same concerns that Crenshaw outlined in relation to U.S. anti-discrimination doctrine:

We would have liked to explore more fully the application of the *Charter* guarantees to the inequality of women who are discriminated against because of race, disability, or other grounds. Unfortunately, cases that challenge the particular complex of disadvantage experienced by women of colour or women with disabilities, for example, are virtually absent from the body of decisions. So far these cases are simply not reaching the courts. In the few cases that involve poor women and Lesbian women, sex equality arguments have not been advanced ... [this] means that judges are not being presented with women's unique experience of discrimination... (Brodsky and Day 1989, 4 and 5 quoted in Aylward 2010, 3)

Although more cases have been litigated and heard in the courts since then, the series of overarching problems outlined here has not changed significantly nor has the presumed universal content of the grounds or the singular, unified bodies that manifest them materially.

Kamini Steinberg (2009) shows that in practice the reliance on a list of discrete grounds of discrimination leads to either the privileging of one foundational ground as the root of the discrimination or to the creation of what a number of feminist scholars have referred to as an "additive approach" (Collins 1990; Caldwell 1999; Yuval-Davis 2006). The additive approach creates a hierarchy of oppression whereby the more grounds that are pleaded, the more kinds of discrimination are catalogued as having taken place. Claimants are then seen to be doubly or triply disadvantaged. In the context of cases that have been pleaded under the equality provisions of the *Charter*, when intersectional approaches have been attempted, they have either defaulted to a foundational ground (see *Canada (Attorney General) v. Mossop* 1993) or in the case of *Corbiere v. Canada*, the majority of the judges commented that Madame Justice Claire L'Heureux-Dubé's creation of an intersectional framework made her reasoning "unnec-

essarily complex" (Steinberg 2009 and *Corbiere* 1999, para. 72).

Both of these approaches to intersectionality maintain the discrete separability of universalizable identity categories. They also contradict Crenshaw's (2014) later description of compound discrimination or forms of discrimination that cannot be addressed through the separation of either identity categories or kinds of oppression. However, both additive approaches and approaches that privilege one ground, while contradicting Crenshaw's description of compound discrimination, are also simultaneously supported by her claim that different kinds of discrimination can somehow overlap, intersect, or interlock. The language of overlapping, intersecting, or interlocking presupposes that each ground or system of oppression pre-exists the discrimination as a discrete and identifiable entity or strand. When they come together, a new identity and experience is formed, but these are still dependent on the meanings associated with the parts that make up these new wholes.

Despite the problems of insufficient analyses and resistance to intersectional approaches that Steinberg (2009) has drawn attention to in her assessment of the practical application of intersectionality, legal scholars continue to advocate for the use of intersectional frameworks in the Canadian courts. Central to Steinberg's thesis is the need for a more nuanced and holistic analysis in the Canadian courts. More recently, Sébastien Grammond (2009) has criticized Sharon McIvor's challenge to Bill C-31's 1985 amendments to the *Indian Act* for its failure to include both sex and race as grounds of discrimination. Grammond's contention is that challenges to the rules of Indian status that do not consider discrimination at the intersection of sex and race will, and have in McIvor's case, invite "the courts to embrace a truncated vision of the shortcomings of the *Indian Act*" (425). It is important to consider this case in more detail here because it provides insight into identity formation in both Canadian courts and in public policy.

The reason that Sharon McIvor brought her claim forward is because the amendments to the *Indian Act* contained in Bill C-31 resulted in residual sex discrimination. The history of the rules of Indian status is long and complex, but after numerous challenges beginning with those brought forward by Jeannette Cor-

biere Lavell and Sandra Lovelace, the original rules were changed. Before Bill C-31, women with Indian status who married non-Indian men would lose their status whereas non-Indian women who married Indian men would gain status. The problem was that the Bill C-31 amendments still maintained different eligibility rules for men and women.

Under the new rules, women who had their status restored could pass that status on to their children if they married someone without status. Their grandchildren, however, would not be able to pass that status on to their children thereby granting status to only two generations. Men, on the other hand, who had previously been entitled to status would have their status confirmed under Bill C-31. If they were married to people without status, their partners would also have their status confirmed. If they had children, they too would be able to pass on their status as would their children's children. As a result, three generations would gain status: the men, their children, and their grandchildren (National Centre for First Nations Governance 2009).

Sharon McIvor challenged this in court because she was told that, while she was entitled to status under Bill C-31, her son, Jacob Grismer, was not because she traced her ancestry through the female, rather than the male, line. While the courts recognized the residual sex discrimination, the court of appeal and the federal government's legislative response to that judicial decision resulted in the continuation of the same kind of discrimination for future generations. As Mary Eberts (2010), who acted as council to the Native Women's Association of Canada in the *McIvor* (2009) appeal, has articulated:

...the Court of Appeal and Canada's response to its decision, perpetuate and exacerbate the sorry legacy of misogyny deeply embedded in the Indian Act. Indeed Canada's response to the *McIvor* case underlines, once again and with even more force, how inappropriate it is for the state to be usurping the indigenous right to determine identity, membership and belonging. (Eberts 2010, 16)

Cases like Sharon McIvor's show the multiple ways that anti-discrimination cases, even when they are considered to be partial victories, maintain the founding violences of settler colonialism, heteropatriarchy, and genocide. The racialized and gendered membership

criteria outlined in the *Indian Act* were historically and remain an assimilation strategy that promote inclusion through racialized and gendered legislative exclusion. Even if this had been a challenge to the *Indian Act* at the intersection of race and sex, it would have done little to remedy the discrimination due to the built in preference for patrilineal descent and the irremediable nature of a set of rules that were historically crafted as a way to assimilate Indigenous Peoples into the Canadian polity through dispossession (Stote 2015). In fact, using the language of race constitutes one of the many ways in which Canada shares the language and the invented taxonomies of the United States. Bonita Lawrence (2003) has outlined how race as a means of classification reduces "diverse nations to common experiences of subjugation" in both countries and that "to be defined as a race, is synonymous with having [Indigenous] nations dismembered" (5). In *McIvor's* case, rather than drawing attention to the homogenizing, gendered forms of racialization that are intrinsic to the *Indian Act*, a claim based on multiple grounds may have instead further entrenched the racism and sexism that it sought to rectify because of the rules that govern identity formation in Canadian anti-discrimination law.

The quest for fixity and immutability and the framing of rights claims as contingent on identity is an essential piece of anti-discrimination doctrine in Canadian law. If making a claim under section 15 of the *Charter* or under any of the human rights codes as a claimant or counsel for a claimant, you must establish a connection to one or more of the grounds listed or make a successful claim for an analogous ground to be created in order to have a case. These criteria are something that people who are clamoring for the inclusion of more and more grounds should not celebrate, but rather be wary of for the following reasons: in order to establish a ground, it must first be established that claimants are in possession of a condition of being that is either not capable of, or susceptible, to change or that can only be changed at cost to a singular, unified identity.

This legal ontology is very much in keeping with Lockean ideas of embodiment and identity. In Locke's formulation, human bodies are singular and unified self-aware entities separable from both other humans and living beings due to their capacity to reason through abstraction and both the real and the nominal essence.

es used to describe them. The real essences involve attributing an internal quality or structure to something when outwardly that quality would be invisible. The nominal essences are the names given to outwardly visible qualities. In the end, the real are also nominal to the extent that it is necessary to first perceive outward characteristics and on that basis attribute an internal structure. The nominal essences are therefore central to attributions of reason and to the denial of full humanity to those who are determined to be incapable of reason. The real are also nominal to the extent that human perception is limited. Because human perception of bodies leads to the naming of those bodies according to their qualities – black, white, male, female—to be a species of a certain kind or a certain kind of member of a species requires common qualities. But in Locke’s *Essay Concerning Human Understanding*, the essential qualities possessed by living beings are not entirely accessible via human perception (Locke 2008, 279-304).

While Locke may have doubted the capacity of human beings to perceive the essences of the body and doubted the existence of innate capacities of mind, he also argued that human perception created common characteristics. In this formulation, the body is what leads to the perception of the characteristics in question (Locke 2008, 279-302; Phemister 2008, xxx). For Locke, only observation and empirical evidence could lead to the removal of some qualities and substitute others in the refiguring of the nominal essence of any given living being. Therefore, living beings do not change, only our perceptions of them. This is something that scientists, such as Charles Darwin and his contemporaries, later challenged—the bodies of species do change in order to adapt (Wilkins 2009). Mohanram (1999) also challenges this assessment of the body insofar as the body ages and, in the process of growing older, changes considerably both internally and externally over the course of a single life span. Nevertheless, these nominal essences form the basis of Locke’s system of classification of species into groups and sub-groupings sharing common characteristics. The practice of representing nominal essences through language reifies these qualities, leading to their material manifestation and the perception of them as real, discrete, separable, natural, uncontested, and universal in the realm of meaning making. In Locke’s account of language, words stand in for ideas and ideas manifest materially as bodies and behaviors.

Locke names these groupings as applied to human beings: “identity and diversity” (Locke 2008, 203-218).

In Canadian anti-discrimination law, like in the works of John Locke, to be in excess of an identity or criteria becomes a fault or an exception that must be rigorously examined through scientific inquiry. Identity is not therefore a quality of the body or of being in the world. Rather, it becomes a prison for the body through the denial of potentiality. In this context, identity disciplines corporeal expression and representation and forces the repression of any excess that cannot be reproduced as consistent with the nominal essences that are described through empirical observation and the establishment of ontological facts or, in the context of Canadian anti-discrimination law, some connection to the grounds.

The contradictions inherent in Locke’s theories are consistently mirrored in judicial assessments of identity and in legal arguments that represent the identities of the people who are either party to or have an interest in the claim. In anti-discrimination cases, nominal essences are constructed as unchanging and potentially unchangeable reality. Yet, at the same time as the courts focus on the immovable fixity of identity, they often simultaneously question and fight over who will be fixed as what. As such, in this context the nominal are also real, frozen in and on the body as those things that both transcend time, context, and the body and as those things that enable individual claimants to stand in for groups. The 1999 Supreme Court decision in *Corbiere v. Canada* is the case where the Court chose to define what they meant by immutable characteristics thereby entrenching the Lockean foundations of identity as doctrine in Canadian anti-discrimination law. The *Corbiere* decision was also where Canadian Supreme Court justices created their first intersectional analysis.

In *Corbiere*, members of the Batchewana Indian Band challenged the section of the *Indian Act* that prohibited band members who lived off reserve from voting in band elections. In this case, the Supreme Court took it upon itself to define immutable personal characteristics as those things that “...are changeable only at unacceptable cost to personal identity...[or that] we cannot change or that the government has no legitimate interest in expecting us to change...” (*Corbiere* 1999, 5). They concluded that immutability could be actual, as in the case of race, or constructed, as in the case of reli-

gion. The Court's immutable characteristics, like Locke's nominal essences, are considered to be physical characteristics located in or on the body. In this case, the Court racialized non-resident members of the Batchewana Indian Band by creating out of them a "discrete and insular minority" defined by race, residence, and uniqueness, all of which were conceived to be immutable or unchangeable conditions of the body (*Corbiere* 1999, 9). Justice Claire L'Heureux-Dubé then proceeded to create the additive approach to intersectionality that Paulette Caldwell (1999), Patricia Hill Collins (1990), Kamini Steinberg (2010), and Nira Yuval-Davis (2006) have all criticized. This was done through the addition of sex to the analysis as opposed to a consideration of the inseparability or compound nature of structural factors that, while they affect bodies significantly, are actually external to them. In addition, instead of a consideration of shared histories and the role of current government-led racist and sexist legislation like the section of the *Indian Act* that was being challenged in the case, history as something intrinsic to them, "their history," also becomes affixed to the body as a marker of difference (See Justice Claire L'Heureux-Dubé in *Corbiere* 1999, 259).

In both this case and in subsequent cases, once this condition of somatic sameness has been established through actual or constructed immutable characteristics, it is applied to others who share like characteristics. This way of articulating the body freezes it in time, place, capability, and potential as part of a set of like kinds. In this context, the grounds play the social role of Lockean nominal essences and thereby, as Patil (2013) forewarns, tether judicial interpretation to the spatialities and temporalities of colonial modernity. But this is not everything that the grounds approach shares with Lockean systems of classification.

As I articulated above, Locke created a framework whereby nominal essences were open to being considered creatures of perception that could be changed through empirical challenges to the real. The body may remain fixed, unchanging, and endowed with both real and constructed immutable characteristics in *Corbiere v. Canada* (1999), but in the context of cases that are pre-occupied with the veracity of the litigant's immutable identity, this second feature of the Lockean schema plays out. This is often done by ignoring how the people involved in or affected by the case would choose to identify themselves.

Disputes over identity that rely on the grounds approach often result in analyses that locate the cause of the discrimination in the body. In these cases, the question periodically changes from what is the nature of the discrimination to what are you? This was particularly evident in Kimberley Nixon's challenge to Vancouver Rape Relief Society's policy whereby only women born women could volunteer for their organization. In August 1995, Kimberley Nixon filed a sex discrimination complaint against Vancouver Rape Relief Society for denying her the opportunity to volunteer for their organization. Vancouver Rape Relief defended their decision to reject her by arguing that because Nixon had been socialized as a boy growing up, she could not provide effective counseling to the cisgendered women that the shelter served. Nixon initially won her complaint at the tribunal level, but after a series of appeals, the Supreme Court of British Columbia reversed the tribunal's decision and ruled in favour of Vancouver Rape Relief. Nixon attempted to appeal to the Supreme Court of Canada, but they denied her leave to appeal. In the context of that case, at every level of court, Kimberley Nixon's body either began as, or eventually became, the object of inquiry. Experts were called on to explain gender continuums and Nixon's birth certificate, date of surgery, and awareness of her gender identity were all brought under scrutiny. Questions related to what it means to be a woman and to pass or not pass as a woman were also raised at multiple levels of court (*Nixon* 2000 and 2005).

In other cases, the question changes to: what are they and how do their immutable characteristics result in my exclusion? This occurred in the context of *R. v. Kapp* (2008), a BC Pacific salmon fisheries case. In this case, a group of commercial fishers argued that, because Aboriginal fisheries were "race-based" fisheries, the commercial fishers who had been denied access to these fisheries for a period of 24 hours were being discriminated against. In this case, not only were the bodies of the Indigenous Peoples who were the beneficiaries of the government programs framed as the problem that needed to be solved, but their identities were also contested and variously represented at different levels of court as a single race, as political organizations, and as nations. The Crown also consistently argued that the commercial fishers were too diverse a group to plead on any of the grounds in order to get the case thrown out of

court. In lieu of engaging in an intersectional analysis, the courts determined that the occupation of commercial fishing was an immutable characteristic analogous to race. Finally, due to the grounds requirement in s. 15 cases, the Indigenous beneficiaries of the government program were reduced to a singular race, meeting the criteria of actual immutability at the Supreme Court of Canada and thereby reproducing the settler colonial violence that Lawrence (2003) describes as the dismemberment of Indigenous nations.

The deployment of intersectionality and the way that identity and its many categories are understood in all of these cases reveals that the grounds approach limits the range of what is possible. The reliance on the grounds and their Lockean content in Canadian anti-discrimination cases thus maintains the modernist, colonial agendas and regimes of epistemic violence that Puar (2012) has identified as being central to the cherished categories of the intersectional mantra. If this is the case, then what new possibilities might emerge from this analysis?

### **Conclusion: In Search of a Politics of Possibility**

In tracing the Lockean foundations upon which identity and difference rest in a select group of pivotal Canadian anti-discrimination cases, I have partially mapped out what happens to intersectionality when it is incorporated into an institutional context that is tethered to the logic of inclusion as an expression of colonial modernity. Sumi Cho, Kimberlé Crenshaw, and Leslie McCall (2013), however, argue that critiques of intersectionality that claim that it reifies identity categories distort identity politics. They argue that such narrow interpretations of intersectionality are unnecessarily preoccupied with who people are as opposed to how things work (797). But, as I have demonstrated here, this is exactly what happens to intersectionality when it goes to court in Canada. This is done by reproducing the Lockean nominal essences in a way that ends up performing the same social role that biology plays in reductionist and deterministic accounts of both race and gender. In so doing, bodies become not only the objects of inquiry in these kinds of cases, but also the causes of the discrimination. Because the grounds were created to provide a framework through which to articulate difference, a politics of inclusion in this context is very much a kind of assimilation strategy whereby difference

becomes manageable through the production of what Benedict Anderson (1983) has referred to as a “human landscape of perfect visibility” (185).

So where does all this managing of difference get us if, as Jessica Yee (2011) has pointed out, just because we have fancy new language like intersectionality in our talk, it doesn’t mean that anything changes in our walk? In her analysis of feminist challenges to intersectionality, Puar (2012) articulates that “[d]ifference now precedes and defines identity” (55). In Canadian anti-discrimination law, this is, in fact, a doctrinal feature of the grounds approach. Following Rey Chow (2006), Puar (2012) also argues that the endless production of new subjects of inquiry through the creation of difference “has become a universalizing project that is always beholden to the self-referentiality of the centre” (55). In the context of Canadian anti-discrimination law, the centre that Puar is writing about is John Locke’s singular and unified self-aware human entity. This human is separable from other living beings due to its capacity to reason through abstraction and its ability to transcend those markings that remind it of its own bestial mortality. Every grievance that is articulated on the basis of difference, whether intersectional or not, is therefore beholden to this unarticulated centre through comparison to it as part of a process of inclusion. The body marked by identity in this institutional context is not a relation, a doing, or an event. It is an object. It is a thing that can stand in for others of like kind at the same time as it is rendered distinct from its ideal type.

Just as I have shown in the context of the *McIvor* (2009) and *Corbiere* (1999) cases, where litigants challenged the *Indian Act*, exclusion is multiplied infinitely “in order to promote inclusion” into the Canadian polity through dispossession (Puar 2012, 55; Stote 2015). This inclusion, however, is inherently asymmetrical and reproductive of racialized and gendered status hierarchies whereby those bodies marked by their difference exist on an additive continuum of problems that need to be solved. Here Brah and Phoenix’s (2004) insight that identities are not objects, but are rather “processes constituted in and through power relations” (277), is an apt description of the way that the Lockean legal ontology that is deployed through the grounds approach imposes presumptions about the body, identity, diversity, and difference that reify modernist, unified, self-referential subjects in anti-discrimination cases in Canada. But

this way of understanding identity is not unique to this setting.

These cases and this Lockean legal ontology raise many of the old feminist questions and debates around the category woman, the idea of “woman’s voice,” the concept of ‘sisterhood,’ and the existence of woman-only spaces. Recent critiques have pointed to connections between land dispossession and settler feminisms that “claim space and each others’ bodies” (Cruz 2011, 52). In relation to gendered space, Louis Esme Cruz (2011) argues that claiming men-only and women-only space reifies binary essentialist constructions of sex and gender (52). For Cruz, this “encourages invasion and conquest” through territorial claims and exclusions (53). Cruz argues that the creation of these spaces “seems a lot like how land is manhandled as a resource that only some get to benefit from” in settler colonial contexts (52).

In addition, the cases and the Lockean legal ontology examined here point to the value of feminist critiques of liberal and Marxist feminisms that remain rooted in the modernist theoretical and philosophical traditions of the European Enlightenment (Brah and Phoenix 2004, 82). John Locke is often hailed as the father of liberalism and was “a major influence on the rise of materialism in both Britain and France” (Locke 2008, xl). His theories set the stage for many different ways of thinking, including the English and Scottish theories of political economy that would later influence Marx and the social constructivist ideas of identity like those found in some feminist theories. So what possibilities might emerge in the liminal space that follows this disillusioned re-telling of what keeps returning?

Puar (2012) proposes that the concept of assemblage might help to “de-privilege the human body as a discrete organic thing” by rendering perfectly delimitable sociological objects like the body, identity, and its many categories hazy and indeterminate (57). But, given the Lockean calculus that is central to the law and policy frameworks I have examined here, is anti-discrimination law immovable? Would assemblage become yet another category in the proliferation of differences? Or perhaps the question ought to be reframed: if, as in Félix Guatarri’s (2009) elaboration of the category class or the class struggle, assemblage prevents clearly mapped out categories, how can assemblage transform epistemologies and ontologies that consider identity as perfectly

delimitable? That manage difference on the basis of immutable characteristics? I propose that it can inspire analytic moves that refuse all final closures. What Brah and Phoenix (2004), following Ngugi Wa Thiongo (1986), characterize as the skill of a “decolonized mind” (2004, 77).

In Puar’s (2012) assessment of intersectionality and assemblage, she creates a cartography that eludes reductionist formulations of intersectionality. She reformulates intersectionality in a way that is very much in keeping with Cho, Crenshaw, and McCall’s (2013) characterization of it as a way of interrogating how things work. Unlike the fixed and immovable objects that appear in Canadian anti-discrimination claims, following Crenshaw (1989), Puar (2012) situates intersectionality as an event, an encounter, an accident, in fact (59). Therefore, following her reading of assemblage and intersectionality together, the fusion of the two is not so much a solution to any of what might look like contradictions, inconsistencies, or colluding oppositions in the conceptualization and deployment of intersectionality examined here. Nor is it a resolution of the distortions that occur when intersectionality is institutionalized. It is rather an invitation to create more complex cartographies that are irreducible to identity that challenge how things work in sites of institutional power and beyond.

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