

It is not uncommon for Aboriginal law students to experience discomfort in studying the law. The discomfort is not unique to legal studies, but the law provides a venue where the effects of the imposition of colonial norms are starkly revealed. In law school the author had to confront how Canadian law has attempted to control Aboriginal identity, at first through legislation and then through the courts. While the locus and style of controlling Aboriginal identity has changed over time, the practice of controlling Aboriginal identity is ever present. This process of control dehumanizes individuals and peoples and continues into the present. This paper examines the ways in which colonial law and legal process attempt to define Aboriginal identity.

Il n'est pas rare que des étudiants autochtones éprouvent un malaise face à l'étude du droit. Un tel malaise n'est pas exclusif à l'étude du droit, mais c'est un domaine où les conséquences de l'imposition de normes coloniales sont mises à nu. À la faculté de droit, l'auteur a dû s'attaquer à la question de déterminer comment le droit canadien a tenté de contrôler l'identité autochtone, d'abord par des lois, puis par l'intermédiaire des tribunaux. Même si le style de contrôle de l'identité autochtone et le lieu où il s'exerce ont changé au fil du temps, la pratique reste omniprésente. Ce processus de contrôle déshumanise les individus et les peuples, et il est toujours pratiqué. L'article examine les méthodes appliquées par le droit colonial et le processus juridique pour tenter de définir l'identité autochtone.

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Prologue

Introduction

- I. *A population to dehumanize*
- II. *Painting with a single brush*
- III. *Pre-Confederation legislation, haphazard definitions*
Colonial authority defines Aboriginal people
Civilization and assimilation
- IV. *Guilty as charged: He's an "Indian"*
Voice and colonial authority
Appearance and cultural markers
- V. *The Constitution and the Supreme Court*
Re Eskimos and section 91(24)
"Indian" in the Natural Resources Transfer Agreement
R. v. Blais and the Manitoba Act
R. v. Powley and section 35(2)

Conclusion

Prologue

When I graduated from law school it was a strangely unfulfilling moment. I wasn't sure if I had really accomplished anything, what I had learned, or what I was missing.¹ During the vast majority of my time at law school I felt that I lacked the opportunity to express myself. I felt dislocated from class discussion and curriculum, and the idea of speaking in class made me uncomfortable. I couldn't imagine where I would begin talking. Looking back on it now, it is easy to see that part of the problem was that I was unable to deal with the law on its own terms. This is because the law, as I saw it, was an exclusionary and oppressive force. Specifically, I was having trouble finding Aboriginal people in the law. I saw them in the case law when they were charged with a crime, or when they were trying to defend their way of life and autonomy in Aboriginal rights cases, but

1. Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 97 [*Thunder*] where she writes: "In first year, I internalized this characteristic of colonialism and oppression, believing if I could only change, perhaps fit in a little better, my law school experience would be rewarding...."

In speaking with other Aboriginal law students, it is easy to recognize this 'something missing' feeling in their personal stories. The feeling that 'something' is missing is knowing that you *are* an outsider."

Aboriginal scholarship was not a factor even in the most recent case law or in much of the reading material. Aboriginal people certainly weren't deciding the cases, and we weren't seeing Aboriginal peoples' laws reflected in "Aboriginal law." How was I supposed to speak up in class, or in my writing assignments, about something that wasn't even part of the analysis? It was frustrating and my time in law school was largely consumed with trying to figure out how to make Aboriginal people's concerns the centre of my legal education.

In an effort to bring some meaning to my law degree I decided to build upon it by completing a Master's degree. I felt burdened by the way the law talked about, or failed to talk about, Aboriginal people. I wanted to resist the tendency of legal discourse to be limited to only that which is "doctrinal." That is to say, "the law" is often discussed in such a way that we can forget that it is a human undertaking involving human actions and decisions. Doctrinal analysis involves deconstructing problems. Legal scholars, students and judges are expected to break down cases and disputes until all we see are the legal principles, encapsulated by fancy words like *sui generis*. With this approach we lose sight of the larger picture. In an effort to refocus on that larger picture, my Master's thesis examined the colonization and oppression of Aboriginal people. I wanted to show the many varying ways in which the law encompasses these themes. When I was done writing my Master's thesis I realized that the problem I had in law school was that I found the act of undertaking a doctrinal analysis to be, in itself, colonizing.

My thesis—and this paper which grew out of one its chapters—is an expression of my Aboriginal voice. Writing about the themes that I couldn't find a way to address while in law school provides an accurate, simple and direct way of identifying my approach to legal analysis. When I say I am writing with my Aboriginal voice, I do not mean that I am expressing myself in a traditional manner or speaking of traditional laws and customs. I mean that I am sharing my view of colonial law with full consciousness of my Aboriginal self. My Aboriginal self has been colonized in ways which continue to make me deeply uncomfortable. Perhaps that is why I am not prepared to peel back any layers of myself in order to fit my expression into legal doctrine.² Mari Matsuda explains that

2. Mari J. Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Boston: Beacon Press, 1996) at 5 writes: "This student, as she has become older, has learned to peel away layers of consciousness like layers of an onion."

The students who excel in law schools – and the best lawyers – are the ones who are able to detach law and to see it as a system that makes sense only from a particular viewpoint. Those lawyers can operate within that view and then shift out of it for purposes of critique, analysis, and strategy.³

I am unable to detach law easily or consistently. Perhaps I did not excel in law school because the law's construction of Aboriginal people constantly weighed upon my mind and I could not find relief by calling upon a different viewpoint. Also, I felt a responsibility not to make such a shift. Gordon Christie explains why it is a responsibility for Aboriginal people to remain conscious of our Aboriginal identity:

One responsibility incumbent on all Aboriginal people is that set by the need to resist attempts by others to undercut Aboriginal peoples' senses of identity, ... In a sense, then, Aboriginal people can only continue to be Aboriginal people to the extent they can maintain within them a deep sense of responsibility to their ancestors and their descendants.⁴

I use my writing as a form of resistance. By maintaining my Aboriginal identity and focus in my writing, I am able to discuss the law in a way that I find meaningful. Still, the fragmentation that legal scholarship demands remains a barrier to my writing.⁵

In this paper I will talk about the law, the colonizer, and oppression. On the one hand, the use of the term "the colonizer" is, of course, entirely non-descriptive. Because of its breadth, "the colonizer" does not work well in capturing specific colonizing actions, policies, or participants. But such a broad term can be useful when describing the culmination of those actions, policies and participants. That is to say that if you are an Aboriginal person having your lifestyle attacked in the Canadian courts, or an Aboriginal student reading the judgment which that same Canadian court has imposed upon Aboriginal peoples, it is not hard to identify the court as being "the colonizer." But why not simply refer to the court as "the Court"? Because that Court, and the government, legislation, and belief systems which support it are actively involved in colonizing Aboriginal people and it is important to keep that reality to the fore. Such

3. *Ibid.* at 7, 8.

4. Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous L.J.* 67 at 113.

5. See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999) at 28 writes that "Fragmentation is not a phenomenon of postmodernism as many might claim. For indigenous peoples fragmentation has been the consequence of imperialism." She continues at 29: "many indigenous scholars who work in the social and other sciences struggle to write, theorize and research as indigenous scholars."

language also helps illustrate that Canadian courts are situated differently for Aboriginal people. Patricia Monture-Angus explains:

In my opinion, Canadian law can only bind Canadians. Canadian courts are more appropriately suited to defining Canadian duties than Aboriginal rights. Courts have demonstrated a tremendous difficulty in understanding two significant components of these rights, namely Aboriginal history(s) and Aboriginal culture(s). Aboriginal Peoples are bound only by their traditional laws until such a time that they freely consent to the application of Canadian laws.⁶

It is equally important to keep in mind that colonial action spans various venues. In that regard, "the colonizer" is an appropriate way to characterize the imposition of foreign values, power, and judgements upon Aboriginal people and nations regardless of the specific venue that captures the expression of this imposition.

Introduction

Twenty-five years after the introduction of constitutional protection for Aboriginal rights, the law continues to construct a landscape where people, as objects, as words, are created and recreated, defined and redefined. They become "word clay" to be molded and recast as the situation presents. The law attacks Aboriginal people's identity in the most direct way when these definitions are applied to Aboriginal people's very existence as people(s). Colonial legal traditions have built upon colonial myths of superiority by casting definitions upon Aboriginal people. We all have the capacity to define the world around us in various ways. The most direct and personal way to define our world might be to declare who we are. But in Canadian courts, the power to define the world is something that rests squarely in the hands of the colonizer. For the colonizer, the process of defining the world for others has, historically, served to legitimize colonial endeavours.

In this paper I will explore the practice of defining Aboriginal people in colonial law. I believe that the current undertakings of the Supreme Court of Canada represent a continuation of the same process of labelling and defining that embodied earlier attacks on Aboriginal people and their identity. To show this pattern I will provide the reader with a brief overview of some of the dehumanizing ways Aboriginal people have been labelled in the past. I will begin by looking at popular views which helped support the civilization policies found in pre-Confederation legislation. I will then review the ways in which Aboriginal people were defined in early

6. Patricia Monture-Angus, *Journeying Forward: dreaming First Nations' independence* (Halifax, NS: Fernwood Publishing, 1999) at 80 [Monture-Angus, *Independence*].

legislation, followed by a look at the early court cases involving definitions of Aboriginal people. While some of the discussions at the beginning of this paper are about earlier times, they give context to the actions of Canadian courts. Finally, I will look at the more recent decisions of the Supreme Court of Canada involving definitions of Aboriginal people. In each of these examples, the wrappings may change but a common theme is shared throughout: the dehumanization of Aboriginal peoples.

The dehumanization of Aboriginal peoples is both a result of and justification for colonizing actions. The imposition of colonial institutions, laws, and values stifles dialogue and prescribes answers to Aboriginal peoples. Such colonial action "attempts to control thinking and action, leads women and men to adjust to the world, and inhibits their creative power."⁷ In order to avoid dehumanizing an oppressed population, it is essential to allow them to define their own world:

It is not our role to speak to the people about our own view of the world, nor to attempt to impose that view on them, but rather to dialogue with the people about their view and ours. We must realize that their view of the world, manifested variously in their action, reflects their *situation* in the world. Educational and political action which is not critically aware of this situation runs the risk either of "banking" or of preaching in the desert.⁸

This paper will provide examples of how the law does not allow the room necessary to have true dialogue with Aboriginal peoples; instead, in both the past and the present, colonial law has set out to define Aboriginal peoples.

I. *A population to dehumanize*

The elimination of Aboriginal peoples was long a primary objective of colonial policy. Whether this objective was carried out through relocation, assimilation, or armed conflict, Aboriginal residents of the land were to be removed. Serving this ultimate purpose were the pejorative views which colonizers held about Aboriginal people. These characterizations contributed to the perception that Aboriginal people were worthless and thus supported the mission of conquest that is colonialism. It is easy to justify the extermination of a worthless thing, and so Aboriginal people

7. Paolo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1995) at 58. Here Freire is discussing the "Banking" concept of education. Banking involves depositing answers to students and withdrawing those answers at exam time. This process lacks true dialogue. It serves as an apt description of relations between Aboriginal peoples and colonial law.

8. *Ibid.* at 77.

were painted as worthless. In speaking of the experience of the United States of America, Troy Duster writes:

The fifth condition [for a guilt free massacre] is the existence of what we can literally call a target population. There has to be a population to massacre, a vulnerable population, a population that has inferior firepower (or better, no firepower at all)...Does anyone need to be reminded that this nation massacred so many native American Indians that only a fraction remain?⁹

During the eighteenth and nineteenth centuries the costs of expansionism were borne by Aboriginal peoples. The colonial project expanded while Aboriginal nations were undermined. The popular thought of the time facilitated the decimation and oppression of Aboriginal peoples:

Oliver Wendell Holmes claimed that Indians were nothing more than a 'half-filled outline of humanity' whose 'extermination' was the necessary 'solution to the problem of [their] relation to the white race.' Similarly, William Dean Howells took 'patriotic pride' in advocating 'the extermination of the red savages of the plains.' And Theodore Roosevelt maintained that the extermination of the American Indians and the expropriation of their lands 'was as ultimately beneficial as it was inevitable.'¹⁰

There are no set figures for the number of deaths resulting from European colonization of Aboriginal peoples in the Americas. However, some historians have placed the total number of deaths at close to one hundred million for all of the Americas.¹¹

Although dehumanization was central to justifying the "Indian Wars" in the United States, Canada's experience was not so directly violent. Within the borders of what is now Canada, full frontal armed attack on Aboriginal communities was not the practice of choice.¹² Instead, Canada's

9. Troy Duster, "Conditions for a Guilt-Free Massacre" in William E. Henry & Nevitt Sanford, eds., *Sanctions For Evil* (San Francisco: Jossey-Bass, Inc., 1971) 25 at 32.

10. James P. Sterba, "Understanding Evil: American Slavery, the Holocaust, and the Conquest of the American Indians" (1996) 106 *Ethics* 424 at 430.

11. Mark Cocker, *Rivers of Blood, Rivers of Gold: Europe's Conquest of Indigenous Peoples* (New York: Grove Press, 1998) at 5. Cocker notes that, as compared to pre-contact population estimates, only ten percent of Aboriginal peoples north of Mexico survived contact up to the end of the nineteenth century.

12. See L.F.S. Upton, "The Extermination of the Beothucks of Newfoundland" in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 68. Upton describes the extermination of the Beothucks as resulting from a three-stage process centring on the competition for resources. This tragic episode in the colonization of North America was characterized by smaller skirmishes, murders and disease. The extermination of the Beothucks was complete in 1829.

Indian policy was focused on "protection, civilization and assimilation."¹³ The exercise of protection was in regards to Aboriginal people's physical bodies and came at the expense of Aboriginal culture. The intention was to eradicate Aboriginal culture and identity through assimilation into non-Aboriginal culture. Once assimilated, Aboriginal people would no longer be in need of special status and would be able to look after their own interests according to colonial norms. So, although different methods were used, eradication was the goal in both Canada and the United States. The major difference was that where the United States carried out this goal by removing Aboriginal people physically through massacres, Canadian officials chose to focus on eradicating the "Aboriginal" from the people.¹⁴ The intention was to save Aboriginal people from what was perceived as their own dying culture.

In James Sterba's comparative analysis of American slavery, the Jewish Holocaust, and the conquest of American Indians, he establishes that the dehumanization of each of these groups was accomplished by attribution of a particularly deplorable trait. For example, blacks were characterized as "moral simpletons"¹⁵ which, he explains, allowed them to be looked upon as children, and Jews were viewed as "irredeemably evil"¹⁶ for rejecting God and killing Jesus. By comparison, American Indians were viewed as being "backward" and "heathen."¹⁷ Sterba states that such factors enabled both the British and the Americans to commit atrocities upon Aboriginal people. The dehumanization of Aboriginal people embodied perceptions of the superiority of the colonizers. Once the myths of "backward" and "heathen" are established, both the death of a people and the death of a culture seem justified. This dehumanization was brought into early legislation which defined Aboriginal people. This legislation often had as its goal the extermination of Aboriginal culture. Indeed, if these "backward," "animal," "savage," and "primitive" people were to be "civilized," then it would be necessary to be able to identify who they were, not only as communities but also as individuals.

13. John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Miller, *ibid.*, 127 at 127.

14. On the differences between American and Canadian treatment of Aboriginal people, see Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 7 where he writes: "The result, however, was very much the same, with Indians killed by disease, impoverished, and deprived of their lands in both countries."

15. Sterba, *supra* note 10 at 432.

16. *Ibid.* at 433.

17. *Ibid.* at 434-35.

II. *Painting with a single brush*

Aboriginal peoples' diversity is something that is not captured by words like "Aboriginal" or "Indian." As discussed below, however, this did not hinder colonial governments from enacting various pieces of legislation defining these words and, as a consequence, defining Aboriginal peoples themselves. Still, given the cultural diversity of Aboriginal peoples in North America, why was it necessary to have a common label for all of them? Frideres suggests that it was the result of European confusion and a search for simplicity. He writes that even when Europeans did acknowledge Aboriginal peoples' differences "they were considered minor attributes and were subsumed under the master trait of 'Indian.'" ¹⁸

Beyond the obviously offensive words and notions discussed earlier, using words like "Indian" (and "Aboriginal") promotes thinking that denies the autonomy of individual Aboriginal nations. It is a problem that follows changes in terminology. Whether you prefer using "Indian," "First Nations," "Indigenous," or "Aboriginal," you will encounter problems finding a fit. Patricia Monture-Angus has expressed this problem in her writing: "I hesitated when I saw the word Aboriginal or Native or First Nations or Indian...I was not comfortable with them but I used them... None of these words feel right or fit right (like shoes a size too small)." ¹⁹ Indeed, it is a cruel irony that in this paper, I can at once resist the imposition of colonial legal assumptions and at the same time cannot escape colonial labels, if I want to communicate effectively. ²⁰ As Frideres noted above, striving for universality in terminology led to the widespread use of "Indian." And so, nations were lost in the shuffle of colonial words. Indeed, as we will see below, the word "Indian" was legislatively defined with a focus more on individuals than on nations.

III. *Pre-Confederation legislation, haphazard definitions*

Confusion has not only surrounded colonial terminology describing Aboriginal people, it has also pervaded legal definitions as well. In this section I will review the pre-Confederation legislation defining Indians. Two themes are apparent in this legislation: one, colonial authority applies definitions to both "Indians" and Indian lands; and two, there is a continuation of efforts to "civilize" and assimilate Aboriginal people with the ultimate goal of cultural extermination. It is also apparent through

18. James S. Frideres & René R. Gadacz, *Aboriginal Peoples in Canada: Contemporary Conflicts*, 6th ed. (Toronto: Prentice Hall, 2001) at 24.

19. Monture-Angus, *Thunder*, *supra* note 1 at 2.

20. For an examination of the contradictions that Aboriginal people can face in academia see, *ibid.* at 53-76.

the legislation that the full scope of "Indian" is hard to determine. For example, at times the legislation appears to craft the term "Indian" in a way which is inclusive of the Métis.²¹

Colonial authority defines Aboriginal people

Early legislation dealing with Aboriginal people seemed to neglect the problem of definition altogether. For example, 1821 legislation refers to "native Indians"²² but does not offer a definition of this term. Still, this did not leave open the possibility that First Nations would be able to define themselves. Certainly the crafters of such legislation would have had some meaning in mind when they used the term "Indian." In the absence of such clarification it would be up to colonial courts, not a First Nation, to decide the scope of terminology used. Aboriginal people would soon find that their legal identity could be changed along with the whims of colonial politics.

More complete definitions would be helpful to colonial legal analysis because legal outcomes often turn on the definitions of words. In that regard, other pre-Confederation legislation explicitly defined who was an Indian. *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*²³ defines Indian in the following way:

V. And for the purpose of determining any right of property, possession or occupation in or to any lands belonging or appropriated to any Tribe or Body of Indians in Lower Canada, Be it declared and enacted: That the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:

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

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

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

Fourthly. - All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.²⁴

21. For a more recent treatment of this issue, see *Daniels v. Canada (Minister of Indian and Northern Affairs)*, [2002] 4 F.C. 550 (T.D.) [*Daniels*].

22. *An Act for regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within certain Parts of North America*, 1821 (U.K.), 1 & 2 Geo. IV, c.66.

23. S. Prov. C. 1850 (13 & 14 Vict.), c. 42.

24. *Ibid.*

Blood, intermarriage, and ancestry are central to the first three categories. It is interesting to note that the first and second categories clearly include those of mixed blood. While the first category uses "their descendants" without any limitations, the second category explicitly takes into account those of mixed blood. As well, the third category of Indians would also include those of mixed blood by stating "whose parents on either side were or are Indians." The fourth category raises the possibility that a person's genetic heritage is irrelevant to being "Indian" and allows for the possibility that being "Indian" is more about lived culture, rather than genetics.

Although the preceding legislation is not well refined, other legislation is even less clear. For example, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*²⁵ enacted in Upper Canada in 1857 outlines the following:

II. The term "Indian" in the following enactments shall mean any person to whom under the foregoing provisions, the third section of the Act therein cited shall continue to apply; and the term "enfranchised Indian" shall mean any person to whom the said section would have been applicable, but for the operation of the provisions hereinafter made in that behalf: and the term "Tribe" shall include any Band or other *recognized* community of Indians.²⁶

While this Act does not provide detailed criteria for the term "Indian," as the 1850 Act did, it does raise another interesting issue: the idea of community. The second, third and fourth sections of the 1850 Act mentioned residency. The 1875 Act uses the term a "*recognized* community of Indians." This recognition was undoubtedly left to the "Visiting Superintendent of each Tribe of Indians" as this would have corresponded with the Superintendent's identified duties and responsibilities.²⁷ Again, the colonizer does not see Aboriginal people as responsible for crafting their own identity.

Similarly, the 1859 Act entitled *An Act respecting the Civilization and Enfranchisement of certain Indians*²⁸ does not alleviate any confusion or

25. S. Prov. C. 1857 (20 Vict.), c. 26 [*Gradual Civilization*].

26. *Ibid.*, s. II [emphasis added].

27. *Ibid.*, s. III where it reads: "The Visiting Superintendent of each Tribe of Indians, for the time being, the Missionary to such Tribe for the time being, and such other person as the Governor shall appoint from time to time for that purpose, shall be Commissioners of examining Indians, being members of such Tribe, who may desire to avail themselves of this Act."

28. C.S.C. 1859 (22 Vict.), c.9.

inconsistency found in pre-Confederation legislation.²⁹ In this Act, the term "Indian blood" seems to have taken into account people of mixed ancestry. However, there exists a limitation upon all these understandings of Indian that the person must be "acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown." The *residence* or *community* requirement does remain consistent but also remains undefined. Both of these factors would later be seen in section 91(24) of the *British North America Act, 1867*³⁰ which takes into account "Indians" and "Lands reserved for the Indians," and shows the consistent intention of the colonizer to exert vast control over Aboriginal people.

Finally, a piece of 1861 legislation entitled *An Act respecting Indians and Indian Lands*³¹ offers a definition of Indian that is similar to, but modified from, the definition used in 1850 and discussed earlier. It provides:

11. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes or bodies of Indians in Lower Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe or body of Indians interested in any such lands or immoveable property:

Firstly. All persons of Indian blood, reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.³²

29. *Ibid.* s. I, which reads, in part, as follows:

In the following enactments, the term "Indian" means only Indians or persons of Indian blood or intermarried with Indians, acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or are then reserved for the use of any Tribe or Band of Indians in common), and who themselves reside upon such lands, and have not been exempted from the operation of the next section under the other provisions of this Act.

30. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5 [B.N.A. Act].

31. C.S.L.C. 1861 (23 Vict.), c. 14.

32. *Ibid.*, s. XI.

All aspects of this definition appear quite broad. This is especially true in regard to the second category outlined. The descendants of those descended from Indians are explicitly accounted for in this section, bringing individuals of mixed ancestry into the Act if they resided on unsurrendered lands or lived among Indians. Again, this Act also imposes a residency requirement on the definition of "Indian." Overall, the pre-Confederation legislation shows inconsistency but establishes that the colonizer intended to exert control over both Indians and Indian lands. While the definition of "Indian" was imprecise, it is clear that being "Indian" involved embodying particular cultural attributes. A failure to keep these attributes could bring about enfranchisement.

Civilization and assimilation

Legislation is enacted for the purpose of defining responsibilities, jurisdiction or control. The Act of 1857 was enacted not just to control Indians but to define Indians on an individual basis. Section III of this Act grants the Visiting Superintendent the power to enfranchise Indians and examine Indians for such purposes. Enfranchisement would prevent Indian people from falling under the provisions of the Act. Indeed, they would cease, for legal purposes, to be Indian. Once an Indian is declared enfranchised "the legal rights and habilities of Indians...shall cease to apply to any Indian so declared to be enfranchised, *who shall no longer be deemed an Indian.*"³³ If an Indian examined was male, over twenty-one years of age, able to read, write, and speak English or French, have sufficient elementary education, possess "good moral character," and carry no debt, then that person held all the qualities to no longer be considered Indian.³⁴ It is strange to think that an Aboriginal person could cease to exist as Aboriginal if they embodied enough superficial characteristics of non-Aboriginal people.

The preamble of this Act helps to capture the full arrogance it embodies:

WHEREAS it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it.³⁵

33. *Gradual Civilization*, *supra* note 25, s. III [emphasis added].

34. *Ibid.*

35. *Ibid.*, Preamble.

Since the aim of the Act was civilization of the Indians, it was directed at eliminating Aboriginal people as a race, culture and distinct community. In this sense it also embodied the idea that being Indian was about political association. This is confirmed by provisions in the Act declaring that an enfranchised Indian will "cease to have a voice in the proceedings [of his community]."³⁶ Fortunately, the enfranchisement policies in this Act were voluntary; however, where Indian men had a choice to enfranchise, their spouse and children were forced to accept the decision of the husband and father. This Act proved to be a huge failure, since only one Indian accepted enfranchisement.³⁷ As we will see below, similar criteria as those used for enfranchisement were later used by the courts to determine Aboriginal identity.

Overall, the legislative definitions covered above pose a couple of problems. First, they are incorrectly based on a notion of race, rather than political autonomy. The political affiliation of the 1857 Act is the exception to this trend. This is, perhaps, a side effect of the popularization of the word "Indian."³⁸ The easiest way to refer universally to Aboriginal people would be through race. Indeed, if "Indian" was to be defined on a community by community basis, it would no longer function as a universal term. The legislation above fails to differentiate among not only Aboriginal peoples' "linguistic, ethnic and cultural differences" but also among their histories and relations with the Crown.

36. *Ibid.*, s. VII.

37. Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at c. 9, online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/sg23_e.html#76> [RCAP], where it is written:

The voluntary enfranchisement policy was a failure. Only one Indian, Elias Hill, was enfranchised between 1857 and the passage of the Indian Act in 1876. His story was told in Chapter 6. Indians protested the provisions of the Gradual Civilization Act and petitioned for its repeal. In addition, Indian bands individually refused to fund schools whose goals were assimilative, refused to participate in the annual band census conducted by colonial officials, and even refused to permit their reserves to be surveyed for purposes of the 50-acre allotment that was to be the incentive for enfranchisement.

38. There were several pieces of legislation that run contrary to the application of a general identifier like "Indian." This legislation is directed at specific nations. See, e.g., *An Act to prevent the sale of spirituous liquors and strong waters in the tract occupied by the Moravian Indians on the river Thames* S.Prov. C. 1801 (41 Geo. III), c. 8; *An Act the better to protect the Mississauga tribes living on the Indian reserve of the river Credit*, S.Prov. C.. 1829 (10 Geo. IV), c. 3; and *An Act to enable the Huron Indians of La Jeune Lorette to regulate the cutting of wood in their Reserve*, S.Prov. C.. 1864 (27 & 28 Vict.), c. 69. For a summary of early statutes from colonial America see Mark D. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785.

None of the examples of pre-Confederation legislation allows any role for Aboriginal nations to determine their own membership.³⁹ This is not surprising since, as stated earlier, the universal notion of Indian removes the debate from Aboriginal nations. This debate is a debate about words, rather than a debate about needs, desires and intents of Aboriginal peoples. The legislated debate removes Aboriginal peoples' rights and responsibilities as the first inhabitants of this land and from a nation-to-nation relationship to an imposed discussion of the definition of words. These words are taken from the language of the colonizer and defined according to colonial norms. For example, in the case of the Métis, instead of talking about their rights and responsibilities vis-à-vis the Crown, they have to first talk about the definition of "Indian." If Métis are "Indian" then they fall under section 91(24) and thus under federal jurisdiction. If they are not Indian then they must negotiate with the provinces. Instead of discussing rights and responsibilities outright, the debate once again becomes preoccupied with definitions. Such legislative definitions are given content through legal decisions. These early pieces of legislation were precursors to the *Indian Act*. The first *Indian Act* appeared in 1876 and it embodied many of the provisions from earlier legislation. But it also incorporated criminal offences which required courts to identify and define those who appeared in such criminal proceedings. So, from here we change venues and follow colonial definitions into the courts.

IV. *Guilty as charged: He's an "Indian"*

Several *Indian Act* provisions have included offences in which one of the elements rests upon an individual being an Indian. In most of the cases below, the *Indian Act* made it illegal for Indians to purchase, make, possess, or consume intoxicants. The *Indian Act* is a perverse piece of colonial legislation that has governed most aspects of First Nations people's lives.⁴⁰ For the most part, I have chosen the cases below because one of the requisite elements of the offence was that the person in question was, in fact, an Indian. Here again we can draw upon two themes. The first theme involves the power to speak and be heard. The colonizer values colonial authority over Aboriginal expression. The second theme involves colonial expectations concerning appearance and cultural identifiers. The same style

39. It is worth noting that in 1985 amendments to the *Indian Act* made it possible for Bands to develop their own citizenship codes. Such membership does not confer Indian status. For a review of these citizenship powers see Shin Imai, *Aboriginal Law Handbook*, 2d ed. (Scarborough: Carswell, 1999) at 155-63.

40. For an account of the divisive consequences of definitions, including *Indian Act* definitions, see Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969) at 18-26.

of superficial criteria which were used to invoke enfranchisement policy are used in the reasoning of the courts in order to identify "Indians."

Voice and colonial authority

A good example of Indian identity being incorporated into the offence is found in *R. v. Modeste*.⁴¹ Modeste was charged for contravening section 94(b) of the *Indian Act* which stated:

94. An Indian who
- (a) has intoxicants in his possession,
 - (b) is intoxicated, or
 - (c) makes or manufactures intoxicants
- off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.⁴²

The Court went on to state the elements of the offence: "(1) That the accused is an Indian; (2) That he was intoxicated; and (3) That he was intoxicated off a reserve, and each of these must be established beyond a reasonable doubt."⁴³ It is the first element that I am concerned with here.

In *Modeste* the father and mother of the accused were both called to testify. They indicated that the accused was a Loucheux Indian, as they were. However, they stated that their son was trying "to get out of Treaty."⁴⁴ Counsel for the accused was willing to admit that his client was an Indian. However, the Court disallowed the admission citing a common law rule which prevents an accused from admitting to the court elements of a crime.⁴⁵ Granted, such an admission would have been to Modeste's detriment, but this was his opportunity to say "this is who I am" and it was denied. While this might seem like a minor problem in the context of one criminal trial, it is really a much broader issue because it reveals the dizzying levels of the colonial imposition. Although Modeste had accepted the term "Indian," and was facing the imposed oppression of the *Indian Act* and the authority assumed under the *B.N.A. Act*, he was denied the ability to declare "I am an Indian." Instead, another layer of

41. *R. v. Modeste (alias Simon)* (1959), 127 C.C.C. 197, 31 W.W.R. 84 [*Modeste*].

42. *Ibid.* at 198.

43. *Ibid.*

44. *Ibid.* "Taking Treaty" means accepting the benefits of a treaty and acquiring status of band members. Getting "out of treaty" would involve a relinquishing of such benefits through enfranchisement.

45. *Ibid.* On this point Sissons J. stated: "Counsel for the accused stated that he was prepared to admit that his client was an Indian within the meaning of the Act. Counsel could not make such an admission in these proceedings. At common law nothing could be taken as admitted on a criminal trial."

colonialism was placed in his path where the common law was used to deny his expression of identity.

In response to the above, one could argue that legal rules exist within a specific legal context and should not be given effect outside the courtroom. I agree, but this doesn't change the relationship within law and society. This goes back to the earlier point about words. The law, being largely about the definition of words, can have the effect of placing those who study and work with it in a state of tunnel vision. Specifically, it is very easy to get so caught up in definitions and legal rules that the context is entirely discarded. A huge part of the context in regards to Aboriginal people is a constant and it should be a necessary part of any legal analysis on Aboriginal issues. That context is one of colonialism and oppression and, as Monture-Angus recognizes, "[o]nly by understanding the history of the Canadian legal system can we then understand why the result of this system is not justice but exclusion and force."⁴⁶ That is why parts of this paper are devoted to that history. One doesn't have to step too far back from the nuts and bolts of the case to realize that the core of the offence in the cases I am discussing is *being an Indian*. If the colonizer is attempting to control the behaviour of the colonized it will be a responsibility of the colonial courts to identify the colonized people. To this end, judges may rely on what they have learned "Indians" are in popular opinion or they may search for a definition in legislation. But the court's responsibility in identifying Aboriginal people is helped a great deal if colonial authority, such as an Indian agent, has an opinion on the matter. In *R. v. Pickard*⁴⁷ the court relied upon both the outward appearance of the "Indians," and the word of the Indian agent: "Mr. Blach, the Indian agent, and Mr. Foley, the Indian interpreter, both stated that both Ward and Bonenose were Indian, 'took treaty,' belonged to Enoch's band, and lived in the Indian reserve at Stony Plain."⁴⁸ Part of the blind adherence to colonial authority obviously stems from the rule of law. This principle values the colonial party over those who are to be colonized because it is the colonizer who makes the law.

Another way in which colonial authority goes unquestioned is the lack of recognition that is given to Aboriginal voice. Without such recognition it is difficult to imagine a court questioning its position and its functioning as an agent of colonialism. In *R. v. Tronson*,⁴⁹ George Tronson was convicted

46. Monture-Angus, *Thunder*, *supra* note 1 at 35.

47. *R. v. Pickard* (1908), 14 C.C.C. 33, 7 W.L.R. 797 [*Pickard*].

48. *Ibid.* at 34.

49. (1931), 57 C.C.C. 383, (1932), 1 W.W.R. 537 [*Tronson*].

for unlawfully residing on Okanagan Indian Reserve No. 1. Tronson was an unlawful resident because he did not belong to the particular band and he was not a child of a band member. It is important to note that Tronson was asked by the Indian agent⁵⁰ to remove himself from the reserve, but there is no mention in the case of the reserve community asking Tronson to remove himself. Despite not being a band member, Tronson still claimed to be Indian. In refutation of Tronson's claim, the Crown produced an application that Tronson had made for a land grant under the *Land Act, 1924*.⁵¹ Under that Act, no Indian was permitted, except with special permission, which Tronson did not receive, to obtain a grant. On this point, the Court stated the following:

Tronson cannot now blow hot and blow cold. He cannot in one breath say in effect that he is a white man, and in the next say that he is an Indian. Similarly, Mr. McGusty produced the original application of the appellant to be registered as a provincial voter for N. Okanagan Electoral District. No Indian is permitted to so apply. Tronson had his name placed on the voters' list... This is absolutely fatal to the position Tronson now takes before this Court, that he is entitled to the rights and privileges of an Indian under the *Indian Act*.⁵²

The Court assumes that Tronson was, through applying for land and the ability to vote, asserting that he was white. Why can an Indian not do these things? Because, as the Court would say, the legislation forbade it. Even if a mistake was made in letting an Indian get on the voters list, it appears that the mere fact that Tronson applied was detrimental to his case. The Court saw Tronson's application as a declaration of his whiteness, effectively incorporating an enfranchisement provision into the *Land Act*. Tronson's defence produced two witnesses who had knowledge of Tronson's Indian ancestry. However, with Tronson "blowing both hot and cold" such information was not overly compelling.⁵³

50. The Indian agent had earlier granted permission for Tronson's wife to come on the reserve to take care of her dying mother. After the mother passed away, the permission to reside on the reserve expired. As a child of a band member, Tronson's wife would have been entitled to reside on the reserve. However, at that time Indian status passed through males and therefore, Tronson's status, or lack of it, overrode his wife's. The Indian agent was empowered to carry out various duties as provided in the *Indian Act*. The position no longer exists. A review of the responsibilities of the Indian agent can be found in *RCAP, supra* note 37.

51. *Tronson, supra* note 49 at 390.

52. *Ibid.* at 390-91.

53. Even if the Court decided that Tronson was "Indian" there remained little doubt that Tronson was not "an Indian of the band in question." *Ibid.* at 391.

Appearance and cultural markers

Appearance has played a large factor in determining Indian identity. In *R. v. Martin*⁵⁴ Appellate Court judge Meredith recounted one of the findings of the trier of fact: "I gather, from the report of the proceedings before him, that he was satisfied from the man's appearance that he was an Indian, and that he asked the question, 'Are you an Indian?' only to have that which was apparent confirmed by the man's oath."⁵⁵ This case, in contrast to *Modeste*, saw the Court give some weight to the oath of the Aboriginal accused. Nonetheless, this oath was only used to confirm that which was obvious from observing the appearance of the accused. Aboriginal people did not have to be in the position of the accused to have their identity challenged.

Even when an Indian is not the one charged with the crime, the judgment of the court can appear as if the Aboriginal person's identity is exactly what is on trial. In dealing with the illegal sale of liquor to an Indian, the courts often found it necessary to put the alleged Indian on trial, in the sense that their status as an Indian needed to be confirmed. Indeed, the presence of an Indian buying liquor was absolutely necessary to the commission of the crime. So, some of these decisions look as if it is the alleged Indian that is being tried and not the person who sold the liquor. For example, in *R. v. Mellon*⁵⁶ Charles Pepin, a 'half-breed,' purchased liquor from Mellon. It is interesting to note that the name of the accused never appears in full in the body of the decision, although the name of the "Indian" appears several times. Such detail helps emphasize that this trial was really about the Indian attributes of the "half-breed," rather than the actions of the accused. In determining Pepin's Indian identity the court wrote:

Charles Pepin himself was examined before me, and he swore that he never dressed like an Indian; that he had worked for one Donald McLeod freighting between Calgary and Edmonton for two summers; that he never wore moccasins; that he was driving a pair of horses and selling posts the day he got the liquor. In fact, Pepin speaks English fluently and dresses better than many ordinary white men; there is no indication whatsoever in his appearance, in his language or in his general demeanour, that he does not belong to the better class of half-breeds. It is a fact, though, that he 'took treaty' about fifteen years ago, and according to *Regina v. Howson* . . . a half-breed having taken treaty is an Indian within the meaning of the Indian Act.⁵⁷

54. (1917), 29 C.C.C. 189, 39 D.L.R. 635 [*Martin*].

55. *Ibid.* at 190.

56. (1900), 5 Terr. L.R. 301, 7 C.C.C. 179 [*Mellon*]. For a similar case see: *R. v. Verdi* (1914), 23 C.C.C. 47.

57. *Ibid.* at 301-02.

And so, the court made Pepin an Indian despite the fact that he "never wore moccasins," had a job, spoke English, and wore nice clothes. All of these identifiers were used to establish that Pepin belonged to the "better class of half-breeds." However, even though he had taken treaty, Pepin did not look enough like an Indian to be considered an Indian for the purposes of the offence. And once again I must stress that this is not merely a turn of legal reasoning. Specifically, it was not just the *Indian Act* legislation which set out that Pepin should be considered an Indian. Instead, he was found to be an Indian because the colonial power has confiscated the human right⁵⁸ of Aboriginal people to define, for themselves, who they are. That, as much as anything else, is what these cases represent.

This case also illustrates the courts' reliance on similar cultural markers which were used in the enfranchisement provisions of pre-Confederation legislation. Indian regalia serves as an interesting identifier, the assumption being that if you remove your regalia then you must not be Indian. In *Pickard*, Ward and Bonenose, two Indians, purchased intoxicant and business calendars from Pickard. In establishing that Ward and Bonenose were Indians the court stated:

Each knew only a few words of English. Pickard asked them no questions whatever. They got the calendars by pointing to them and asking for them in Cree. They wore moccasins. Both belonged to Enoch's band and lived in an Indian reserve, and both took treaty.⁵⁹

After reviewing *Mellon Taylor J.*, stated:

Compare this with the present case. Ward was fairly dark, wore moccasins, could speak little or no English, and looks a good deal like an Indian. Bonenose, who accompanied Ward, was rather darker than Ward, wore moccasins, could speak no English, excepting a few words, and is, so far as I can tell, very much like an Indian, in appearance, even

58. This right was recognized in the 1994 United Nations Draft Declaration on the Rights of Indigenous Peoples; Part I, art. 3 states: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"; Part II, art. 8 states: "Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such"; and Part VII, art. 32 states: "Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live." Online: United Nations High Commissioner for Human Rights <<http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument>>. No longer a draft declaration, the United Nations adopted the Declaration on the Rights of Indigenous Peoples with 144 votes in favour, eleven abstentions and four votes against. Canada, United States, Australia, and New Zealand all voted against. The declaration can be found online at: <<http://www2.ohchr.org/english/issues/indigenous/declaration.htm>>.

59. *Pickard*, *supra* note 47 at 34.

more so than Ward.⁶⁰

Rather than just trying to establish whether Bonenose and Ward were Indians, the court found that Bonenose appeared to be an Indian "even more so" than Ward. Was it just his appearance? If it was just his appearance, then was it his hair? Darker? Longer? Braided? Did he wear regalia? A feather? Mocassins? Beaded animal skins? The problem of regalia is not limited to the expectations the colonizers hold of Aboriginal people. At times, Aboriginal articles of clothing and regalia have become relics for Aboriginal people too because wearing them risks affirming their identity to the colonizer. Harold Cardinal explains:

When I attended a white school, there were a very few Indians there. None ever wore articles of Indian apparel. When winter came, I put on my mukluks. Some of the other Indian students came to me and suggested I shouldn't wear them. My mukluks called attention to the fact that I was an Indian. But I continued to wear them, not as any sort of hollow protest and not feeling particularly self-righteous – just warm.⁶¹

Why not wear a pair of "modern" winter boots to stay warm? The problem with this question is that it assumes that the products of the colonizer are intrinsically superior to Aboriginal wares. The suggestion by other Indian students that mukluks shouldn't be worn to school is a result of their learned inferiority:

the Canadian non-Indian society puts its own peer group at the centre of all things desirable and rates all other cultures accordingly. It is an assumption, quite often becoming a conviction, that the values, the ways of life, the whole culture of one's own group must be superior to those of others. Tell a person long enough and often enough that he is inferior, and likely he will eventually accept the false image you thrust upon him.⁶²

Aboriginal people have been taught that they are both incapable and worthless. This can be accomplished very simply by making certain people feel like they don't belong. In such an environment why would you want your Aboriginal identity to show?

Let us consider that regalia when not used becomes a relic. Harold Cardinal was wearing his mukluks. Similarly, I use my sash. Regalia, in everyday life as in the courtroom, become symbols of resistance if only because they don't look like the types of regalia that the majority wears.

60. *Ibid.*

61. Cardinal, *supra* note 40 at 22.

62. *Ibid.* at 4-5.

Most of the time I wear my sash on those days when, for one reason or another, I feel vulnerable because it gives me strength through the pride that I feel towards my people and our history. My sash also makes a comfortable belt and a warm winter scarf. Does the fact that I use my sash make me more Métis in the eyes of the law? Do I have to wear it everyday to be considered Métis?

Beyond the continuing offensive nature of deliberating over one's identity (is there a non-offensive way to do this?) the court clearly establishes itself as a colonial participant. This is done by reference to stereotypes about "Indianness" and also by accepting the evidence of non-Indian colonial agents about Ward and Bonenose's identity. Both of these methods involve prescribing attributes to Aboriginal people.

There are several things to keep in mind about the cases above. One should note the superficial way that Aboriginal people were defined by the courts.⁶³ What I find most disturbing about these cases is that at no point is an Aboriginal person or community empowered to freely decide such important issues. At the first instance, membership in the band is not controlled by Aboriginal people, the right to reside on the reserve is not controlled by Aboriginal people, and certainly neither is the ability to define your community. Further on, we see that the decision and ability to remove people from the Reserve rests in the hands of non-Aboriginal people, as does the power to press charges. Finally, in the decision of the court we see that the ability to define oneself as Indian, however faulty that term is, does not reside with Aboriginal people. It is the court and colonial officials that assume that responsibility. And, in Tronson's case, the colonial court was arrogant enough to proceed on the assumption that if Tronson was acting in contradictory ways by blowing both hot and cold, it is the non-Aboriginal acts that override the Indian.⁶⁴

63. See Constance Backhouse, "Race' definition run amuck: 'slaying the dragon of Eskimo status' before the Supreme Court of Canada, 1939" in Dianne Kirkby & Catharine Coleborne, eds., *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001) 65 at 71.

64. Although being made for a different purpose, a modern manifestation of these criteria of identity can be found in Binnie J.'s decision in *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] 1 S.C.R. 911 [*Mitchell*] at para. 131 where Binnie writes:

[Grand Chief Mitchell] lives with a foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities. As Kanentakeron he describes learning from his grandfather the spiritual practices of the People of the Longhouse, whose roots in North America go back perhaps 10,000 years. Yet the name Michael Mitchell announces that he is also part of modern Canada who watches television from time to time and went to high school in Cornwall. As much as anyone else in this country, he is a part of our collective sovereignty.

It is not just that Aboriginal people "lose" cases like this which makes them offensive. Mary Ellen Turpel explains that it is the imposition of the colonial state which is problematic for Aboriginal interests:

Whether aboriginal peoples win or lose their particular cases in Canadian courts, or whether the law seems appropriately situated as a guardian of aboriginal interests, there is certainly much to lose by using colonial legal structures. To win may simply mean to more fully situate yourselves as a subordinate to a paternal guardian state...[I]t is others (the Canadian colonial legal regime) who officially have the power to define aboriginal existence, experience and even aboriginal struggles against it when legal doctrine is utilized.⁶⁵

Placing Aboriginal people in a subordinate position in relation to the law necessarily dehumanizes them. It assumes that their definitions of the world are inadequate, unofficial, or otherwise untenable. It makes colonial law the official voice and Aboriginal people just another litigant.

*R. v. Drybones*⁶⁶ illustrates how Aboriginal people become irrelevant in the shuffle of colonial law. *Drybones* was another case dealing with the intoxicant and intoxication provisions of the *Indian Act*. *Drybones* challenged these provisions based on guarantees in the *Canadian Bill of Rights*, which reads in part:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

* * *

(b) the right of the individual to equality before the law and the protection of the law;⁶⁷

The Supreme Court found section 94(b) of the *Indian Act* was inoperative because it denied *Drybones* equality before the law. Ritchie J., for the majority, explained:

I think that the word "law" as used in s. 1(b) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in s. 5(2) (i.e., Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that

65. Mary Ellen Turpel, "Home/Land" (1991) 10 Can. J. Fam. L. 17 at 19-20.

66. *R. v. Drybones*, [1970] S.C.R. 282 [*Drybones*].

67. *Canadian Bill of Rights*, S.C. 1960, c. 44 as cited in *ibid*.

law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.⁶⁸

It is evident from this reasoning that the decisions of colonial courts remain problematic even when Aboriginals "win." Here we see "the law of Canada" doing as it pleases with Aboriginal people. At the whim of the colonizer, Aboriginal people were given a reprieve from one tentacle of colonialism. However, it is readily apparent that Aboriginal agency is wholly disregarded in such matters. Drybones was not given an acquittal because the laws of Canada did not apply or because Aboriginal jurisdiction prevailed over Aboriginal people or even because of some overriding principles of justice. Instead, Drybones was acquitted because one "Act of the Parliament of Canada and any orders, rules or regulations thereunder" was in contravention of another "Act of the Parliament of Canada and any orders, rules or regulations thereunder." Colonial authority remained intact and was wholly relied upon in formulating the outcome.⁶⁹ In this way, the broader picture of Aboriginal people's relations with the courts is mirrored in how Aboriginal identity is determined within the courts. And this process has continued under constitutional, rather than legislative, authority.

V. *The Constitution and the Supreme Court*

Colonialism has deep roots. These roots give life to both the case law and the constitutional tree which cast a large shadow over Aboriginal people. I will discuss four constitutional documents which demand a definition of Aboriginal people in one way or another. The first of these constitutional provisions is section 91(24) of the *B.N.A. Act* which gives the Parliament of Canada legislative jurisdiction over "Indians, and Lands reserved for the Indians."⁷⁰ Second, the *Natural Resource Transfer Agreement* provides that Indians will have the right to hunt, trap or fish for food on all unoccupied Crown lands during all seasons of the year subject to provincial laws that do not infringe these rights.⁷¹ Third, the *Manitoba Act, 1870* refers to

68. Drybones, *ibid.*

69. Also see *Lavell v. Canada (Attorney General)*, [1974] 2 S.C.R. 1349 where colonial authority over Indians is affirmed.

70. *B.N.A. Act*, *supra* note 30.

71. *Natural Resource Transfer Agreement, 1930*, being Schedule I to the *Constitution Act, 1930*, (U.K.) 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II [NRTA].

both "half-breed residents" and "Indian Title."⁷² Fourth, 'section 35 of the *Constitution Act, 1982* reads in part:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.⁷³

I will introduce these constitutional provisions through the case law that has developed around them. In this section I hope to show that the Supreme Court of Canada has developed methods of defining Aboriginal people which are both colonial and dehumanizing. I will show that these methods are still being used in recent cases.

Re Eskimos and section 91(24)

Re Eskimos was the result of a controversy between the federal government and the province of Quebec. The issue was one of financial responsibility for the "Eskimo" inhabitants in the province of Quebec. The federal government was denying responsibility on the grounds that section 91(24) did not contemplate the inclusion of the "Eskimo" under that section. However, the province of Quebec put forth a broader understanding of that section and argued that the federal government had to foot the bill since the "Eskimo" were "Indians" under section 91(24). The issue was, therefore, brought to the Supreme Court of Canada as a reference case. The justices of the Court released three judgments, all of them concurring in the result that the "Eskimo" were "Indian" under section 91(24).

The majority decision, written by Chief Justice Duff, set out the problem as a standard question of statutory interpretation.⁷⁴ The resolution of this

72. *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 31 reprinted in R.S.C. 1985, App. II, No. 8 [*Manitoba Act*].

73. *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Also see s. 25 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

74. *Reference As to Whether the term "Indians" in S. 91(24) of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] S.C.R. 104 at 105 [*Re Eskimos*] where the Court writes:

The reference with which we are concerned arises out of a controversy between the Dominion and the province of Quebec touching the question whether the Eskimo inhabitants of that province are 'Indians' within the contemplation of head no. 24 of section 91 of the *British North America Act* which is in these words, 'Indians and Lands Reserved for Indians'; and under the reference we are to pronounce upon that question.

question turns on defining the word "Indian."⁷⁵ Of foremost consideration by the Court was census data collected by the Hudson's Bay Company which lumped the "Esquimaux" in with the other "Indian Races."⁷⁶ Other historical documents referenced the "Eskimo" as "Esquimaux Indians"⁷⁷ and "Esquimaux savages."⁷⁸ The Court also referred back to a report of 1798 where a reference is again made to "Esquimaux Indians."⁷⁹ Basing his decision on the balance of the historical evidence before him Chief Justice Duff concluded that section 91(24) did indeed include the "Eskimo." Similarly, Justice Kerwin's judgment engaged a select list of dictionaries to establish a link that the "Eskimo" were considered "as one of the Indian tribes."⁸⁰ Both decisions illustrate how legal decisions are often about no more than the turn of words.

The most interesting of the three judgments was delivered by Justice Cannon. In his reasons, Justice Cannon compared the English and French texts of section 91(24) and concluded that "the English word 'Indians' was equivalent to or equated the French word 'Sauvages' and included all the present and future aborigines native subjects of the proposed Confederation of British North America."⁸¹ I say that this judgment is the most interesting because it engaged two languages and histories into the analysis, thus broadening the debate. However, all the judgments issued by the Court were lacking in general guidance:

The court made no attempt to sort through the profuse, rambling list of factors, nor to offer guidance on matters of racial designation for the future. It simply declared as a matter of Canadian law, because the framers of the British North America Act had done so, that Inuit would be equated part of the 'Indian race' forever.⁸²

Being a possession automatically implies that, on some level, even the most progressive looking law is going to treat one as an object. In the case of section 91(24), "[a]s long as [it] remains a part of Canada's constitution,

75. *Ibid.* at 106 where Duff, CJ. writes: "in determining the meaning of the words 'Indians' in the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America....It is, therefore, important to consult the reliable sources of information as to the use of the term 'Indian' in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Company itself."

76. *Ibid.* at 107.

77. *Ibid.* at 110.

78. *Ibid.* at 111.

79. *Ibid.* at 112.

80. *Ibid.* at 119.

81. *Ibid.* at 118.

82. Backhouse, *supra* note 63 at 74.

Indian people will never be free of our subordinated position.”⁸³ Backhouse sees this case as a continuation of the “conundrum” that was the definition of “Indian.”⁸⁴ At the outset Aboriginal peoples were excluded from contributing to the original definition of “Indian.” This is not surprising since it was a term created and imposed by Europeans. Then this word, and the peoples it covers, was placed into an equally exclusive legal process. Therefore, court decisions will undoubtedly produce a definition that has no meaning for those being defined.

It can be argued that section 91(24) serves as a protection for Aboriginal people. It protects them from direct attacks from unchecked provincial powers. And, seen in its best light, section 91(24) does not make Aboriginal people objects but, instead, imposes duties on the federal government to defend Aboriginal people and rights. There are two problems with this approach. First, section 91(24) has historically been used to justify the federal legislative incursions on Aboriginal people as seen in cases discussed previously in this paper.⁸⁵ Second, as the Court in *Campbell* notes, this division of powers (or responsibilities) is an internal division to the Crown. This means that the division of powers cannot affect Aboriginal rights against the Crown as a whole. So, to say that section 91(24) protects Aboriginal people from the exercise of provincial Crown authority is a misguided view of the issue. This is especially true considering that provincial laws of general application apply to Indians.⁸⁶

Re Eskimos involved identity, at least legal identity, in that it was not only interpreting a particular section of the Constitution but was, in so doing, actually defining a people. It is clear that legal “status” such as that

83. Monture-Angus, *Independence*, *supra* note 6 at 34.

84. Backhouse, *supra* note 63 at 71 where she writes, “The full arrogance of government authorities was transparently obvious in the 1876 Indian Act, which contained the rather startling statement that the word ‘person’ did not include ‘Indian’.”

85. Perhaps the *Campbell* decision symbolizes a renewed emphasis on federal responsibilities in section 91(24). *Campbell v. British Columbia (Attorney General)* [2000] B.C.J. No. 1524 at para. 82 [*Campbell*] where Williamson J. states: “Thus, in 1867 it became the Crown in right of Canada, rather than the British Crown, which assumed responsibility for the obligations of the Crown towards aboriginal peoples, a responsibility which amounted to a fiduciary duty.” Also, see the dissenting opinion of Gwynne J. in *St. Catharines Milling and Lumber Co. v. Ontario (Attorney General)* (1887), 13 S.C.R. 577.

86. See *R. v. Shade* (1952), 102 C.C.C. 316 at 317 where s. 87 (now s. 88) of the *Indian Act* reads: Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

under the *Indian Act* has divisive consequences among Aboriginal people.⁸⁷ However, while Indian status provisions confer “privileges” directly upon those who carry it, federal jurisdiction does not, on its own, guarantee any more rights or privileges for those groups that fall under section 91(24).⁸⁸ Yet, there is a danger in writing off the process in *Re Eskimos* as mere legal speak. Colonialism isn’t only about confiscating lands; it is also about controlling mind and spirit. This is accomplished by controlling the rules, venue, issues, and decision-makers in the debates.

The impact of the law is evident in every case that brings Aboriginal people before the courts. In each instance, the law demands that Aboriginal people respond in the language of the law. Backhouse has noted that there are serious consequences in applying definitions of race to people.⁸⁹ Since *Re Eskimos* decided that “Eskimo” are “Indians” under the *B.N.A. Act*, so too is this true for Aboriginal people speaking the language of the law in future cases. This process results in cultural invasion where the oppressed are forced to find legitimacy in wider society by adopting the norms of the oppressor. Freire states this in the following way:

Cultural conquest leads to the cultural inauthenticity of those who are invaded; they begin to respond to the values, the standards, and the goals of the invaders...In cultural invasion it is essential that those who are invaded come to see their reality with the outlook of the invaders rather than their own; for the more they mimic the invaders, the more stable the position of the latter becomes.⁹⁰

87. For more discussion on this divisiveness, see Cardinal, *supra* note 40. Also see *RCAP*, *supra* note 37 where the impact of Bill-C31, which was meant to return Indian status to women who had lost it by marrying out, produced a type of status math which would see the elimination of Indian status altogether:

Actually the whole section in Bill C-31 on status has affected all Bands in Canada. The Bill was written to eliminate discrimination in the Indian Act. What it has really done is found a way to eliminate status Indians all together.

Thus, it can be predicted that in future there may be bands on reserves with no status Indian members. They will have effectively have been assimilated for legal purposes into provincial populations. Historical assimilation goals will have been reached, and the federal government will have been relieved of its constitutional obligation of protection, since there will no longer be any legal ‘Indians’ left to protect.

Online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/sg26_c.html#93>.

88. The Congress of Aboriginal Peoples believes that rights flow from the fiduciary duty that the Crown owes to Aboriginal people. See *Daniels*, *supra* note 21.

89. Backhouse, *supra* note 63 at 74 where she states, “Racial categorization is not a minor matter: despite the appalling emptiness of racial categories, and the artificiality and impermanence of such terminology, racial concepts have had important economic, social and political consequences for those affected by them. The legal system has played a major part in this process.”

90. Freire, *supra* note 7 at 134.

Along with presenting another obvious barrier to Aboriginal peoples' self-definition, decisions such as *Re Eskimos* reinforce the paternalism of section 91(24) which in turn hinders the sovereignty aspirations of Aboriginal nations. This does not exhaust the problems that section 91(24) created. There is a renewed scholarly focus on whether section 91(24), in addition to including "Indians" and "Eskimo," includes the Métis or "Half-breeds."⁹¹ No doubt such a debate will also ask who the Métis are. The colonial judiciary has already provided some statements on Métis identity.

*"Indian" in the Natural Resources Transfer Agreement*⁹²

The *Natural Resource Transfer Agreements* have enjoyed much consideration in the courts. In *R. v. Blais*,⁹³ the Supreme Court of Canada finally addressed the definition of "Indian" in the *NRTAs*. The decision of the Supreme Court of Canada in *Blais* was preceded by several lower court decisions on the *NRTAs*. Two examples of such decisions are *R. v. Grumbo*⁹⁴ and *R. v. Laprise*.⁹⁵ Both Laprise and Grumbo were charged with unlawfully possessing wildlife in contravention of provincial legislation and both sought protection as "Indians" under colonial legislation.

Laprise and *Grumbo* were both cases involving unlawful hunting. The difference between the cases was that George Laprise was held to be a non-treaty Indian, whereas Grumbo was Métis. *Laprise* is useful in illustrating the problem with definitions. The Court in *Laprise* referred to a constitutional document, federal legislation, and provincial legislation and each of them led to a different interpretation of "Indian." The Court was left in a predicament that no canvassing of dictionaries, as Justice Kerwin had done in *Re Eskimos*, would solve. With the colonizer using so many legal avenues to exert control over "Indians" it is not surprising that the Court had trouble making sense of which definition to apply. Ultimately, the Court erred in finding that the definition of "Indian" that was contained in the *Indian Act* could be inserted into the *Game Act 1967*. The *Game*

91. For further discussion on the scope of section 91(24), see Paul L.A.H. Chartrand, ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing Ltd., 2002). See also, Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis" (2002) 1 Indigenous L.J. 237, and Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" (1978-79) 43 Sask. L. Rev. 37. Contra Brian Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986).

92. *Natural Resources Transfer Agreement*, being Schedule 1 to the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V, c. 26 [*NRTA*].

93. 2003 SCC 44, [2003] 2 S.C.R. 236.

94. [1999] 1 W.W.R. 9 [*Grumbo*].

95. [1977] 3 W.W.R. 379 [*Laprise*].

Act was intended to implement section 12 of the *NRTA*.⁹⁶ Rather than deferring to the definition of "Indian" in the *NRTA*, the Court effectively used the *Indian Act* to define "Indian" for *NRTA* purposes. Indeed, no distinction was made between the legislated definition of "Indian" and the constitutional use of the term "Indian."⁹⁷ This fault in the Court's reasoning was spotted years later in *Grumbo* where the *Laprise* decision was then considered bad law.

John Grumbo (Métis) was charged with unlawfully possessing wildlife under the Saskatchewan wildlife provisions then in force. After an initial conviction in Provincial Court, Grumbo was acquitted on an appeal to the Court of Queen's Bench. The Crown then appealed to the Saskatchewan Court of Appeal where Grumbo's fate rested upon the interpretation of the word "Indian" in section 12 of the *NRTA*. The decision of the majority in *Grumbo*, after ruling that *Laprise* was bad law, found that the court below should have ordered a new trial rather than quashing the conviction. The reasoning for this brought the Court of Appeal back to the word play in the law:

But a more important matter is that the court, after deciding that *Laprise*, and the definition of Indian found in it, upon which the Crown based its entire case, should not be followed, then decided the case without defining the word Indian, as used in the *Natural Resources Transfer Agreement*, or at least deciding whether it included a Metis such as Mr. Grumbo. This left the Crown in the position of having the conviction quashed on the basis that the authority upon which it relied, *Laprise*, was no longer good law, and on its consequent failure to prove that Grumbo was not an Indian without the court having defined what or who an Indian was for the purposes of *The Natural Resources Transfer Agreement* or, at least, whether the word Indian included a Metis such as Mr. Grumbo. In these circumstances, the judge was obliged to either decide the question of whether the word Indian in *The Natural Resources Transfer Agreement* included a Metis such as Mr. Grumbo or to order a new trial to determine the question if the evidence before the court did not provide an adequate factual basis for a decision. He failed to do either.⁹⁸

96. Section 12 of the Saskatchewan *NRTA*, as reproduced in *Grumbo*, *supra* note 94 at 14, reads as follows:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

97. *Laprise*, *supra* note 95 at 382.

98. *Grumbo*, *supra* note 94 at 20-21.

Here the Court of Appeal is explaining the rules of the legal game to the Court of Queen's Bench. It is absolutely absurd to think that issues such as the right to hunt for food can come down to the turn of a definition of a single word, because the Court is defining a people who continue to be almost completely excluded from this game.⁹⁹ Perhaps this speaks more to the inappropriateness of having Aboriginal/Crown disputes decided in the courts, rather than to the methods that the courts use in deciding disputes. The Supreme Court dealt with the scope of the word "Indian" in the *NRTAs* in the *Blais* decision. However, as discussed below, the Court went beyond the *NRTA* and defined the "half-breeds" in the *Manitoba Act* as well.

R. v. Blais and the Manitoba Act

Canada's top court ruled on Métis rights twice in 2003. These cases saw the Court define the Métis for the purposes of three different constitutional provisions. *R. v. Powley*¹⁰⁰ dealt with section 35(2), and the *Blais* decision sought to determine if the Métis were "Indians" for the purposes of the *NRTA*. Despite both parties agreeing that Mr. Blais was Métis, and that the issue at hand was interpretation of the *NRTA*, the Supreme Court also attempted to undermine the wording of another constitutional document.

In seeking extrinsic evidence to help determine the meaning of the *NRTA*, the Supreme Court looked at the *Manitoba Act*, which contains a reference to "half-breed" and squarely connects that word to "Indian Title."¹⁰¹ In analyzing the *Manitoba Act*, the Supreme Court of Canada went beyond the mistakes of the court in *Laprise*. In *Blais*, instead of placing legislation above the interpretation of the constitution, the Supreme Court of Canada placed the statements of an opposition MP ahead of a constitutional document. Specifically, ignoring the obvious connection between "half-breed" and "Indian Title," the court chose to rely upon a statement of the former Prime Minister some fifteen years after the passing

99. While this is absurd it is not unusual. See for example, *Edwards v. AG Canada*, [1929] 3 W.W.R. 479, [1930] A.C. 124, also known as the "persons" case where "qualified persons" in section 24 of the *B.N.A. Act* was interpreted as including women. The result was that both men and women were eligible to become members of the Senate.

100. [2003] S.C.R. 43.

101. Section 31 of the *Manitoba Act*, *supra* note 72 reads in part as follows:

And whereas, it is expedient, towards the extinguishment of the Indian Title to lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada.

of the *Manitoba Act*. In that statement, which was given near the time of the North-West Resistance, John. A. Macdonald, sitting as a member of the opposition, said:

Whether they [the Métis] had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the Province.... 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishments of Indian title. That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians.¹⁰²

Instead of being suspicious of the politically loaded situation in which this statement was made, the Supreme Court used it to effectively dismiss any influence that the *Manitoba Act* would have in the interpretation of the *NRTAs*. The will of Parliament which established that, at least in certain circumstances, the “half-breeds” were “Indians” or, at the very least, had Indian title, was effectively overridden by the words of one MP. The fact of the matter is that even if, generally speaking, the “half-breeds did not allow themselves to be Indians,” the Parliament of Canada, the Métis negotiators to the *Manitoba Act*, and the Provisional Government in Manitoba sanctioned the language in the *Manitoba Act*. These official acts by both Canada and the Métis made this obvious connection, but the Supreme Court of Canada chose to rely on the words of one parliamentarian, who had previously approved the language in the Act.

This reasoning was later followed by the Manitoba Court of Queen’s Bench and applied directly to the interpretation of the *Manitoba Act*, 1870.¹⁰³ In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, the Court asserted that when the Métis sent delegates to Ottawa to negotiate entrance into the Dominion of Canada, these negotiations resulted in “neither a treaty nor an agreement. Moreover, it certainly was not a treaty or an agreement with aboriginals. Rather, it was an Act of Parliament recognized as a constitutional document.”¹⁰⁴ Further, the Court points out that the Métis were well aware that the will of parliament would determine the nature of any act which was to be passed:

102. *House of Commons Debates*, vol. II (6 July 1885) at 3113.

103. *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2008] 4 W.W.R. 402 at paras. 596-97 [MMF].

104. *Ibid.* at para. 464. Also, at para. 467 the Court does not see the delegates as “Métis” representatives: “the Provisional Government operated in a manner akin to a Legislature or Parliament and represented all of the residents of Red River, not just the Métis, notwithstanding that the Métis comprised an overwhelming majority of residents in the Settlement.” Moreover, at para. 468, the Court discusses the delegates specifically: “Ritchot and Black certainly were intelligent, educated people. Neither they nor Scott were Métis, nor did they represent the Métis *per se*, but rather all residents of the Settlement.”

If there were any doubt about this going into the negotiations, which there should not have been, it certainly would have become clear to the delegates from the debates in Parliament, including the speeches of Macdonald and Cartier, and the comments of Macdonald and Cartier to the delegates as recorded in Ritchot's diary.¹⁰⁵

With this in mind, it is startling that the Court spent a large amount of time focused on showing that the Métis of Red River "did not consider themselves to be Indians. They saw themselves, and wanted to be seen, as civilized and fully enfranchised citizens."¹⁰⁶ If, on the one hand, the *Manitoba Act* is representative of the will of Parliament then why are Métis conceptions of identity relevant? It is odd that the *Manitoba Act* has been interpreted in a manner which is inconsistent with its plain wording. It is contrary to the principles governing a constitutional democracy that the will of Parliament takes a back seat to the words of unelected representatives.

Of course, such reasoning is consistent only in the sphere of the courtroom and in the context of this paper it might seem that I am advocating that the Aboriginal voice be disregarded in certain circumstances. Rather, I am asking for some consistency. The court cannot respect the rule of law and, in the next breath, disregard the will of Parliament. To do so would be akin to "blowing both hot and cold." It is a complexity of colonial law that forces a complete reexamination of how such historical issues are dealt with in contemporary colonial courts.

R. v. Powley and section 35(2)

In *Powley* the court once again engages in defining peoples. This time the definition is carried out under section 35(2). The realization that legal decisions often revolve around definitions does not operate as a justification for the law's oppression of Aboriginal people. Indeed, the Métis, as a legal object were defined by the Court in the following way:

The term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.¹⁰⁷

105. *Ibid.* at para. 473.

106. *Ibid.* at para. 600. See generally paras. 600-11.

107. *Powley*, *supra* note 100 at para. 10.

Turning identity into legalese is problematic in itself, however, the Court reaches further and imposes the definitions of the law upon Métis communities as well:

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.¹⁰⁸

The rigid requirements of “continuity and stability,” “distinctive collective identity” and “sharing a common way of life” are not reactive to the historic or contemporary reality of many Métis people’s lives. Certainly, Métis history cannot in general be described as meeting the requirements of “continuity and stability.”¹⁰⁹ The latter two requirements do not recognize the destructive impact that colonial expansion has brought to the Métis. This type of reasoning by the Court is indicative of oppressive action.

Controlling definitions, history, and culture through rights litigation plays an important role in maintaining the oppressive reality. Freire discusses this process in the following way:

Within an objective situation of oppression, antialogue is necessary to the oppressor as a means of further oppression – not only economic, but cultural: the vanquished are dispossessed of their word, their expressiveness, their culture. Further, once a situation of oppression has been initiated, antialogue becomes indispensable to its preservation.¹¹⁰

By placing Aboriginal identifiers in the historical past rather than the present or recent past, the Court denies that Aboriginal people act in the world. They merely *were* rather than *are*. Aboriginal people are denied the luxury of adaptation and change that the oppressor society takes for granted. The result is that Aboriginal people today are not heard. Instead, Aboriginal peoples and cultures of the historical past are speculated upon, defined, and judged in contemplation of the present.

108. *Ibid.* at para. 12.

109. A thorough account of the Métis “uprisings” can be found in D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo: Wilfred Laurier University Press, 1988). Also see, George F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961).

110. Freire, *supra* note 7 at 119.

Conclusion

Canadians worry about their identity. Are they too English? Are they too American? Are they French Canadians or some other kind of hybrid? Indians worry about their identity, too... There are towns and cities in Canada where simply being an Indian means getting a beating... In such cases an Indian foolish enough to attempt to bring charges finds *himself* charged with creating a disturbance. No citizen is likely to forget his identity under such circumstances.¹¹¹

In the context of colonial law Aboriginal people certainly aren't able to forget their identity. Indeed, after their arrest they have to appear before the colonizer and *prove* that they are an Aboriginal person. Worse, they have to do this based on criteria laid out by the colonial courts. They cannot forget their identity because in so many cases, and in many different ways, it is exactly that which is being put on trial. Of course, it is Aboriginal people who bring the defence of an Aboriginal right to the court when they are charged. This too is a function of the law. What the 1982 conferral of constitutional status upon Aboriginal rights has brought to Aboriginal people is the further imposition of colonial definitions. Aboriginal livelihood can be a defence against Crown aggression as long as it is brought to the court for a full assessment on the colonizer's terms. I am sure that when constitutional entrenchment of Aboriginal rights was being debated, Aboriginal people did not anticipate that their identity as individuals and communities would continue to be placed in jeopardy through rights discourse.

Even if you see Aboriginal rights discourse as fundamentally improving the approach of the court in cases involving Aboriginal people, two things are clear. One, Aboriginal rights discourse has increased the scope of the intrusion the colonizer's courts take into the realm of Aboriginality. This represents a shift in focus. Aboriginal people used to be brought before the courts for violations of *Indian Act* provisions; now they are being brought before the courts for living in a traditionally Aboriginal way. Two, Aboriginal rights litigation has kept Aboriginal people in the historic past and prevents them from fully participating in the present. This includes their identity, which continues to be put on trial each time they attempt to avoid being found guilty of acting Aboriginal. The colonizer appears to be saying, "if you want to act like an Aboriginal you need to prove, to us, that you are an Aboriginal. But 'Aboriginal' is our word and we will interpret it as we see fit."

111. Cardinal, *supra* note 40 at 18.

The failure of courts to find a way to respect Aboriginal conceptions of self, is a reflection of the courts' allegiance to colonial values, norms and authority. This legal mindset continues to form a barrier to a meaningful effort at decolonization. Canadian law remains firmly planted in the continuing colonial project which Aboriginal people continue to resist. The words of Linda Tuhiwai Smith capture this broader struggle:

Indigenous attempts to reclaim land, language, knowledge and sovereignty have usually involved contested accounts of the past by colonizers and colonized. These have occurred in the courts, before various commissions, tribunals and official enquiries, in the media, in Parliament, in bars and on talkback radio. In these situations contested histories do not exist in the same cultural framework as they do when tribal or clan histories, for example, are being debated within the indigenous community itself. They are not simply struggles over 'facts' and 'truth'; the rules by which these struggles take place are never clear (other than that we as the indigenous community know they are going to be stacked against us); and we are not the final arbiters of what really counts as the truth.¹¹²

This paper which was written out of my frustration with the law, legal discourse, and legal education lacks suggestions on how to move beyond the imposition of colonial law. This is partly a reflection of the emptiness that I felt after finishing my law degree. It is one thing to say that negotiations and dialogue are better than having the colonizer dictate outcomes to the colonized. It is quite another thing to have negotiations result in something other than another avenue of colonial imposition. After all, it is not uncommon to see treaty disputes end up in Canadian courts. Further, the problem isn't limited to preventing colonial courts from casting judgment upon the very nature of who Aboriginal people are. But the extent to which colonial imposition is accepted, adapted to, or resisted is very much dependent upon the needs of particular communities. Resistance can be cultivated on a broad level, but in order to move beyond resistance and find ways to actively meet the needs of Aboriginal communities, more locally generated strategies are necessary. In some circumstances the most direct route to finding concrete solutions may very well be through the colonial courts. But as we have seen above, this always comes at a cost.

112. Smith, *supra* note 5 at 33-34.