The Indefensibility of Post-Colonial Aboriginal Rights

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I. INTRODUCTION

1 In Canadian society and Canadian courts Aboriginal rights are theorized on the basis that they are sui generis rights that flow from the Aboriginal claimant's "Aboriginality".[1] In this sense Aboriginal rights are not simply minority rights, but rather demand that Aboriginal peoples be treated with special deference as "first peoples" and as "Citizens Plus".[2]

2 While Aboriginal peoples are entitled to collective recognition of their status, colonization and liberalism have shaped and misshaped the boundaries within which Aboriginal claimants must prove they are entitled to a particular right, and, in the process, have disentitled individuals and communities deserving of recognition. Furthermore, at an interpersonal level, "Aboriginality" and Aboriginal rights have been internalized by Aboriginal and non-Aboriginal Canadians, and rationalized as reparations or as a payback to those peoples who have been treated as "Citizens Minus"[3] by the non-Aboriginal community. This concept of Aboriginal rights as payback and reparations has had considerable consequences for Aboriginal communities.

3 "Aboriginality," as a cultural and racial category imposed on Aboriginal peoples, cannot sustain the type of rights sought by Aboriginal peoples as a collective, and only serves to derogate Aboriginal communities, fuelling internal and external conflict. An argument exists that in order for a more just application of Aboriginal rights, and less fragmented Aboriginal communities, the identity and "Aboriginality" of Aboriginal peoples must be defined from within the Aboriginal communities themselves.

4 While allowing communities to define membership and "Aboriginality," there are considerable complications dealing with who should be able to determine who the "Aboriginal peoples" are. In the end, one must conclude that the definition of "Aboriginality" has fundamentally changed Aboriginal societies, and recreated Aboriginal identities so as to make fair and just membership impossible to determine. The legislative redefinitions of "Aboriginality" have created a fragmentation and a rights-based approach that has left Aboriginal communities and interpersonal relationships within these communities in ruins. Furthermore, the judiciary, forced to define and categorize individuals and groups as "Aboriginal," and determine if those individuals or groups deserve Aboriginal rights, face a difficult and highly political task.

5 Our society, like our legal system, is not equipped to turn back the historical clock of collective recognition. While "Aboriginality" is said to exist in spite of legislative definitions, the "Aboriginality" that exists today is so confused and mistaken that Aboriginal rights and privileges in Canada serve to detract, rather than advance the very communities they are thought to help. It is this liberal approach to Aboriginal rights that makes such rights, in their current state, indefensible.

6 In this article, I will outline the concept of "Aboriginality" and the role legislative definitions had in defining Aboriginal peoples. After discussing the fragmentation within Aboriginal communities created by the concept of "Aboriginality," I will outline some interpersonal issues with Aboriginal communities, primarily focusing on disenfranchised Aboriginal women, followed by a discussion of the liberal concepts that have redefined Aboriginal peoples, their concept of Aboriginal identity, and the effect this redefinition will have on membership. Lastly, I will outline three different cases where courts and an administrative board attempted to define "Aboriginality" in the present day, and apply their definition of "Aboriginal" to a specific situation. I will conclude by suggesting that it is impossible and impractical to attempt to define a group concept of "Aboriginality" when the group that was first entitled to a right is no longer the same. The future approach to Aboriginal rights in Canada should focus on the needs of individual Aboriginal people, as opposed to the so-

called "inherent" rights of an Aboriginal peoples.

- II. A THEORY OF ABORIGINALITY

7 The concept of who is Aboriginal and the term "Aboriginality" is of foremost concern to the post-colonial,[4] liberally influenced Aboriginal person. "Aboriginality," in the view of the courts and Aboriginal communities, is a necessary requirement for government and non-government entitlements, as well as Aboriginal and constitutional rights.[5]

8 The current and past definitions upon which Aboriginal peoples are defined are not based on identity or historical, cultural, territorial, linguistic, or political origins, but rather on federal Indian policy with little recognition of the former considerations. The terms and categories that define Aboriginal rights are similarly influenced by federal Indian policy. By virtue of this, "Aboriginality" emerges from the relationship between the original inhabitants of Canada and the colonial government that has assumed jurisdiction over these inhabitants.[6] Thus, "Aboriginality" is not defined from an existing set of peoples with pre-existing rights,[7] but rather from a calculated, or more likely, a miscalculated set of categories for defining such peoples. The definition of "Aboriginality" evolved from both a failure to recognize the diversity between Aboriginal peoples and the social, political and territorial context within which Aboriginal peoples have defined themselves.

- III. ABORIGINAL ORIGINS AND THE COLONIAL DEFINITION OF "INDIANS"

9 The term "aboriginal" is derived from the Latin words "ab," or "from," and "origo," meaning "origin".[8] The idea behind "Aboriginality" is that Aboriginal peoples were on Canadian lands from "time immemorial"[9] and were "here first".[10] Although the literal meaning of "Aboriginal" is based on the idea of original inhabitancy, the practical application of the post-colonial principle of "Aboriginality" has failed to recognize the meaning behind being "here first".

10 The term "Indian" has had a significant impact on the concept of "Aboriginality" and the rights flowing from this concept. Furthermore, the concept of "Indian" has created significant changes in the "identities" of Aboriginal Canadians and their conception of what it means to be "Aboriginal". The 1850 An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada,[11] was the first legislative action to truly define "Indians," and arguably began the legal creation of "Aboriginality".[12] Under s. 5 of this Act, "Indians" were defined as having the following characteristics:

> - 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 such Indians and residing amongst them, and the descendent 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.[13]

11 Although this definition was the most inclusive definition of "Indian" adopted by the Canadian Legislature--a definition which was essentially based on kinship--it was repealed one year later.[14] The new legislation narrowed the definition of "Indian," and thus narrowed the concept of "Aboriginality" by creating a number of exceptions. Under s. 2 of An Act to Repeal in Part and to Amend an Act, entitled, An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada,[15] only women of non-Indian ancestry were permitted to acquire status through marriage to an Indian, and the children of women married to non-Indian men were excluded. Furthermore, under the 1851 amendments non-Indians who lived among Indians were excluded from the definition of Aboriginal.[16] Section 2 of the Act read as follows:

> - 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, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.[17]

The arbitrary nature of these changes fundamentally altered the societies of Aboriginal peoples. The redefinition and reclassification of "Indians" separated societies and marginalized some members of Aboriginal communities, a phenomenon which has had considerable practical consequences for Aboriginal rights claimants. As Magnet writes "The narrowed definition [of who is an Indian] was instrumental to decreas[ing] the Indian population and its property."[18] The decreases in population led to new societal formations and new forms of membership that have unfairly marginalized members of Aboriginal communities.

12 Canada's Indian Act was formally imposed on Canada's Aboriginal peoples in 1876 where "Indians" were again defined, and the previous laws in Canada dealing with Indians were consolidated.[19] The 1876 Indian Act definition excluded a number of people who were racially, culturally, and ethnically Aboriginal. As Magnet explains:

- The Act determined status patrilineally. The requirements of status are males of Indian blood, reputed to belong to a particular band, or the child or wife of such a person. Four categories of Aboriginal people were excluded from the 1876 definition: illegitimate children; Indians residing five or more years in a foreign country; enfranchised Indians, and Manitoba Métis who received entitlements under the Manitoba Act, 1870.[20]

13 The 1951 Indian Act[21] excluded Inuit and Aboriginal persons who had reached the age of twenty-one, and whose mother or father's mother had acquired Indian status through marriage.[22] This 1951 revision of the Indian Act was significant, and represented a fundamental shift in the self-determination of Aboriginal societies; prior to this revision the government "relied on membership lists of individual Indian communities, treaty paylists and agency records to identify Indians".[23] The 1951 revisions effectively removed the ability of Aboriginal groups to define their own membership. This is historically significant, in that defining "Aboriginality" in this sense effectively passed to the government. Magnet explains the 1951 revisions as:

- The 1951 Act introduced the Indian Register and the office of the Indian Registrar to supervise inclusion into and deletion from the Register. This centralized bureaucratic power to determine Indian status, and it also transferred a significant amount of power in that regard from Indian communities to a federal official.[24]

The discretion to add and delete members of the Aboriginal community was criticised by the Federal Court in the case of Canada (Registrar, Indian Register) v. Sinclair,[25] signifying the gross injustice such discretion can play. Despite criticisms, the concept of "who is Aboriginal?" has been forever changed by these policies.

14 The colonial agenda for enfranchisement further collapsed Aboriginal communities in an attempt to "civilize" Indians and remove their "Indianness".[26] This purported to force an Aboriginal person to exit the legal classification of an "Indian" and become a full citizen of Canada.[27] Legislation in the area of enfranchisement came in 1857, under the Gradual Civilization Act,[28] and focused on breaking up Aboriginal communities and fully integrating "Indians" into society. Under s. 3 of the Act, enfranchisement could occur if the "Indian" was twenty-one years of age, could speak, read and write English or French, a person of "good moral character," and had no debts.[29]

15 Certainly the most problematic enfranchisement provision was s. 12(1)(b) of the 1951 Indian Act. This provision automatically enfranchised women who married non-Indian men and was extremely successfully in destroying Aboriginal communities, as approximately five hundred women were enfranchised each year.[30] This remained in effect until 1985, when Bill C-31[31] reversed the effect of s. 12(1)(b) of the 1951 Act. Despite this reversal, considerable damage was already done to Aboriginal communities, and problems remain with the offspring of so-called "Bill C-31 Indians".[32]

16 Perhaps the most challenging aspect of Bill C-31 was the internalization of the legislative redefinitions by the Aboriginal communities. As Bonita Lawrence explains:

- After over a century of gender discrimination in the Indian Act, the idea that it is somehow acceptable for Native women to lose status for marrying non-status or non-Native men has become a normalized aspect of Native life in many communities...It has been the children of Native mothers and white or Métis fathers who have been forced through loss of Indian status to become urban Indians, and who, in their Native communities of origin, are often regarded as outsiders because they have been labelled as "not being Indian".[33]

Understanding Aboriginal rights as a concept derived from being "here first," and recognizing the right to self-definition of membership may have considerable consequences in liberal societies that value the rights and freedoms of individuals. Individuals who would, but for the government infractions, be entitled to membership and recognition, are not accepted into communities due to discriminatory membership policies and an internalization of previous regulations. In generations to come, how are such persons to be granted the Aboriginal rights they would otherwise deserve? How can Aboriginal rights exist when they knowingly exclude so many deserving recipients?

17 The historical effect of Bill C-31 will complicate Aboriginal rights in future generations.[34] As the post-Bill C-31 era gave Indian bands more control over their membership lists, they were capable of determining who was, and who was not, a member of their band. Magnet explains that there are still a number of problems with the new regime of membership control for Indian bands:

- The 1985 amendments to the Indian Act contain apparently conflicting provisions. On one hand, First Nations can assume control of membership. This implies a form of self-government in which bands alone decide their membership. On the other hand, under s. 10, certain categories of persons acquired the right to have their names placed on band lists maintained by the Department of Indian Affairs before these lists were transferred to the bands...This flies in the face of band control of membership, since the Department of Indian Affairs would still be making decisions about band membership, this time by restoring Indian status and band membership to those eligible under Bill C-31.[35]

While the Bill C-31 amendment combated against the sexual discrimination of the 1951 Indian Act, the "second generation cut-off rule" continued to disenfranchise and reclassify Aboriginal peoples. Cornet explains the new form of arbitrary disentitlement created by Bill C-31:

- The new rule applies equally to males and females born after 1985. Under s. 6 of the current Indian Act, status is denied to children born of two generations of status and non-status parents. This rule is sometimes popularly called "the second-generation cut-off rule". This is achieved through the operation of the Indian registration system. Entitlement to registration now is based only on descent from or adoption by registered Indians. Marriage can no longer result in the conferral or denial of Indian status.[36]

18 The final step in the legislative redefinition of "Aboriginality" for Aboriginal people came in the Constitution Act, 1982,[37] particularly with regard the recognition and affirmation of existing Aboriginal and treaty rights.[38] Although Aboriginal rights were affirmed and recognized by the Constitution Act, 1982, neither the substantive rights that were affirmed and recognized, nor the "Aboriginal peoples" that have such rights, were defined in the constitutional document. This has presumably passed the definitional assessment on to the Canadian courts; courts which are neither capable, nor entitled to make an assessment of membership as such an assessment is difficult and non-justiciable.[39]

- IV. FRAGMENTATION BY RACIALIZATION

19 The legal and legislative definition of who is Aboriginal has occurred through the legal concept of "Indian" and "Indians". These concepts do not accurately reflect the innate meaning behind being "ab-origo," nor do they reflect how Aboriginal peoples and nations organize and define themselves.[40] Rather, the concepts of "Indian" and "Indians" are part of a colonial process of racialization[41] and categorization.[42] Justice Turpel-Lafond comments:

- This expression, "Indian," is an alien one. It is a term imposed by the colonial governments. It is not a First Nations term. First Nations people, who have their own words for themselves in

> their various languages. We have names for our peoples, and for our territories. The word "Indian" denies and effaces the diversity of our peoples. Our peoples are culturally distinct and linguistically diverse. We are not "Indians". One must remember that there are many distinct indigenous peoples in Canada; there is no singular category named "Indian". We have been "Indianized" or classified by the government for administrative purposes. We are not a monolithic or homogeneous "race". We have been "racialized" as minorities by the state, and that is why equality-seeking has to be properly contextualized.[43]

20 The internalization of the concept of race can be seen in Aboriginal communities--the identification of authentic Aboriginal peoples based on appearance and social status. Colonization has left many light-skinned descendents of Aboriginal people; this is particularly so when Europeans parented Aboriginal offspring. Drew Hayden Taylor humorously exemplifies how this "mixing" of people has created interpersonal problems within Aboriginal communities and "second class Indianness":[44]

- The darker you are, the more you are embraced and the more Indian you are thought to be. The lighter your skin, the more difficult it sometimes is to be accepted by your Aboriginal peers (and the non-Native world). White is no longer right. And heaven forbid that a person from the dominant culture, who happens to have some barely-remembered ancestor who tickled toes and traded more than some furs and beads with a Native person, should let a conversation slip by without mentioning that at least four of the 24 chromosomes in his body don't burn in the summer sun.[45]

The categorization of peoples as racial beings forces members to focus on the differences that make them authentic and assess other's authenticity against this backdrop.

21 By creating a social category based on race,[46] Aboriginal policy in Canada has created social fragmentation within Aboriginal communities. Furthermore, "Aboriginality" has created a legal connotation that has manifested a feeling of individual entitlement based on what it means to be "Aboriginal".

22 Institutional creation of "Aboriginality" has created a myth that Aboriginal peoples and being "Aboriginal" is a race, rather than a social, political, or cultural concept.[47] The concepts of race and descent are more fitting for animal husbandry than to define a people, a nation, or a socio-political grouping.[48] Also troubling is the concept of Aboriginal identity. One often hears the phrase "Aboriginal identity," presumably contemplating that such an identity exists, or can exist, as a definable category.[49] It is the logic of identity, and the mantra that follows it, that helps define "Aboriginality" in present day Aboriginal communities.[50] Furthermore, it is this definition that helps redefine community rights and relationships between Aboriginal peoples.

23 In Canada, identity and identities are celebrated as a form of multiculturalism. This multiculturalism is defined, in the self-congratulatory concept of a "cultural mosaic," which Canada, its peoples, and its government celebrate as demonstrative of Canada's open-mindedness. Arguably, however, Aboriginal group identity, as historically defined and internalized, creates boundaries within which members of Aboriginal groups believe that they must define themselves.[51] In this sense, the collective group of Aboriginal peoples changes.

24 Identity has become "people's concepts of who they are, of what sort of people they are, and how they relate to others".[52] The practical implication of "Aboriginality" and Aboriginal identity is that the authenticity of persons associated with Aboriginal peoples is assessed on the basis of collective identity or identities. Those members of the ethnic class of "Aboriginal peoples" whose social milieu does not contain some elements of "Citizens Minus" lifestyles are seen as fakes, nicknamed by some as "crackers," a derogatory term used to describe Caucasians in the southern United States, or as "apples," red on the outside white on the inside, due to the popular defence of Aboriginal rights.[53] By virtue of this phenomenon, "Aboriginality" is defined at a community level, and those persons defined as "Aboriginal" begin to assess their claim to "additional rights" not held by other Canadians on the basis that "Aboriginality" means "Citizens Minus". I have seen and heard this phenomenon in my own province. "Authentic Aboriginals" see success, wealth, and "the easy road" as inauthentic.[54] This has lead to a conception that Aboriginal benefits are being reaped by "crackers," rather than the authentic, struggling "Aboriginals" who are in need of assistance. Given this conception of what "Aboriginal identity" ought to be, who can objectively define "Aboriginality"?

- V. ABORIGINALITY AS A LIBERAL INDIVIDUAL CONCEPT

25 Without doubt, evidence of the legacy of liberalism on "Aboriginality" can be found in the Indian Act. The Indian Act focused on the concept of individuals over collectives, and on assimilation to combat the so-called "Indian problem".[55] To some degree, this legislation has had the effect of creating "Indians" as defined under the Act as being self-serving and not interested in the preservation of the group.

26 In addition to the Indian Act, the 1969 "White Paper"[56] is an example of national unity and liberalism affecting "Aboriginality".[57] The basic thrust of this policy paper was to eradicate the definitions and differences created by the Indian Act and remove all legal distinctions between "Indians" and other Canadians. This eradication was recommended in the name of avoiding discrimination of the minority "Indians".

27 Aboriginal activists rejected the proposition put forth in the "White Paper," as it had the potential of eradicating what recognition Aboriginal peoples had in Canadian society.[58] The paper's underlying thesis was that separate status contributed to economic backwardness, social isolation, and retrogressive cultural enclaves.[59] Alternatively, Aboriginal groups preferred to use the Hawthorn Report's terminology defining Aboriginal peoples as "Citizens Plus".[60] The rejection of the "White Paper" has evidenced the Aboriginal acceptance that "Aboriginality" has been legislatively taxonomized by non-Aboriginal government. While the rejection demonstrates such recognition, community concepts of "identity" have still been damaged.

28 The basis upon which "Aboriginality" is defined is built on the history of assimilation and liberal-individualism. Aboriginal peoples, and consequently Aboriginal rights, are stuck in the confines of an assimilationist model that ignores Aboriginal communities and their desires. The myth of race[61] plays into the concept of "Aboriginality," in that archaic conceptions of blood quantum[62] defined who is, and who is not, part of the ethnic class of Aboriginal peoples. This has had a particularly negative impact on some Aboriginal peoples who have defined what being "Indians" means in Canadian society, based often on seeing "Indians" as individuals who are victimized, marginalized, and who belong to communities with a plethora of social problems. Indeed, it is liberal conceptions of Aboriginal rights that have made such rights acceptable to the majority of Canadians, who find some comfort in believing that Aboriginal rights exist in order to help Aboriginal people become better individuals.

29 That Aboriginal rights are derived and defended from the concept that Aboriginal peoples must suffer to be authentically "Aboriginal," is perhaps best exemplified in the language of the Hawthorn Report, where it is noted that the concept of "Citizens Plus," which Aboriginal rights under s. 35(2) of the Charter arguably create, is due at least partially to "the reverse status Indians have held, as citizens minus, which is equally repugnant to a strongly egalitarian society, has been tolerated for a long time".[63]

30 It appears that the Hawthorn Report has mirrored a sentiment one may feel when listening to Aboriginal Canadians in the communities in which they live. The "Citizens Plus" concept of rights is built on the idea that Aboriginal peoples were treated poorly, and thus need to be treated more favourably, to help them "play catch-up" with their non-Aboriginal counterparts. Indeed, this is often the basis through which rights for on-reserve status Indians--such as tax exemptions--are legitimized, despite being somewhat arbitrary in their application.[64]

- VI. AUTHENTICALLY ABORIGINAL: A FROZEN CONCEPT

31 The linking of an Aboriginal social identity to Aboriginal peoples, and the individual and collective rights that flow from such an identity, effectively freezes rights and rights-bearers in time. In a philosophical and even practical sense, personal identity and association with a collective identity implies that changes in the individual identity will make the individual different from the collective, redefining the individual as something other than a member of the collective identity. Thus, members of Aboriginal communities living on-reserve will often frown upon those members who have moved off the reserve for the purposes of attaining a job or attending school. While some members of the community will welcome such people back, the choice may have considerable interpersonal consequences.[65] As Drew Hayden Taylor writes:

> - Many reserves and Native educational organizations are constantly encouraging and extolling the virtues of education on the youth. Yet, these communities also believe that the more educated you become, the less "Native" you will be. They scorn and disdain those who want to or have gone through the educational process. Evidently, knowledge and learning deprives individuals of their cultural heritage.[66]

32 The Aboriginal person who no longer acts "Aboriginal," and is no longer treated as Aboriginal, cannot be said to have an Aboriginal identity under this conception.[67] Acting, relating, and simply being "Aboriginal" as it is understood and defined becomes a contingent factor to assess "authentic" Aboriginal peoples. This assessment affects Aboriginal rights, and how persons receiving such rights are seen within their own communities. This phenomenon could be particularly problematic if Aboriginal communities, armed with colonial biases, are capable of excluding members, and effectively excluding those members from any claims to Aboriginal rights. With "authenticity" assessments, in combination with the historical defining and redefining of Aboriginal peoples, it is difficult, if not impossible, to assess who is capable of being Aboriginal. Both the legislative identity and the social identity perpetuate a confusing cycle.

33 Taxonomic identity, at least partly owing to the Indian Act, and other legislative policies in Canada, defines definite qualities for who is, and who is not, of a certain "identity". This taxonomic identity discourages people, including the judiciary, from thinking and understanding "a people" as a political, social, and historical entity. After much time, taxonomic identity becomes a real identity, and those attempting to discern "identity" do not recognize the power, domination, and flawed philosophical foundations upon which "a people" and their own "peoples" have been categorized and defined. As Bonita Lawrence writes:

> - To be federally recognized as a status Indian in Canada, an individual must be able to comply with strict standards of government regulation. The effect of having Native identity so highly regulated by a body of laws such as the Indian Act is that our ways of understanding Native identity are, in a sense, shaped by these various laws. The Indian Act, in this respect, is much more than a set of regulations that have controlled every aspect of Indian life for over a century. It provides ways of understanding Native identity, organizing a conceptual framework that has shaped contemporary Native life in ways that now are so familiar as to almost seem "natural."[68]

It is of little surprise that present day Aboriginal peoples have assessed their authenticity against a backdrop of the liberal conception of identities.[69] This is particularly so given the societal changes imposed through the Indian Act.[70]

34 The conception of identity has successfully detached collective interests within Aboriginal communities. Although difference and recognition of difference among all peoples has always occurred, the concept of individual rights has redefined the interests of Aboriginal peoples. These interests have become as self-serving as avoiding criminal liability through the assertion of an "Aboriginal right". While the interests of Aboriginal peoples have been redefined, perceptions of authenticity have also been redefined. This phenomenon is a natural occurrence with identity finding. As Charles Taylor explains, "[d]efining myself means finding what is significant in my difference from others."[71] The "rights" given to Aboriginal peoples, and that are recognized and affirmed under s. 35(2) of the Constitution Act, 1982, are not the rights that flow from "Aboriginality" or being "here first," but rather flow from the taxonomic assessment of a racialized people. This has confused the basis upon which "Aboriginal rights" should exist.

35 There is no better evidence that the collective identities of Aboriginal peoples have been confused and misconceived than in the new political groupings Aboriginal people have created.[72] I suggest that these political groupings demonstrate the success of liberal Indian policy in destructing Aboriginal communities. Several of the most prominent Aboriginal organizations have seemingly embraced the redefinition of Aboriginal identity, by attempting to represent the post-colonial categories of Aboriginal peoples.

36 Looking at the various organizations themselves, the fragmentation in representation can be seen. For example, the Assembly of First Nations (AFN) represents status Indians living on reserves,[73] while the Congress of Aboriginal Peoples (CAP) represents off-reserve Aboriginal peoples.[74] The dichotomy between the two groups demonstrates the divide between Aboriginal peoples and the internalization that Aboriginal status Indians are different than non-status Indians at the core of their existence.[75] These two groups represent two different causes, and by virtue of this, define membership and "Aboriginality" in a distinctly different way.[76]

37 While there is little doubt that on-reserve and off-reserve Aboriginal people have differing needs and concerns, the sometimes diametrically opposed AFN and CAP have reorganized politically according to colonial definitions.[77] This is particularly troubling in that modern claims for the right to define citizenship will likely be

based on the political and social reorganization. It is this phenomenon that has confused Aboriginal political leaders into misunderstanding that which is truly against their interests.[78]

38 A second example of the post-colonial divide in Aboriginal communities is the sexual discrimination faced by Aboriginal women at the hands of Aboriginal men.[79] The Native Women's Association of Canada (NWAC) is perhaps the most notable example of the political divide between Aboriginal peoples and Aboriginal women. During the late 1990s, the NWAC opposed the AFN and other First Nations organizations, arguing that Aboriginal women's interests were not being addressed. Of particular importance in this regard is an argument made by the NWAC that Aboriginal self-government is an inherent right, and further that such a right cannot be exercised by "the currently existing patriarchal forms of governance that were created by a 'foreign government,' that is, those created under the Indian Act".[80]

39 The NWAC was active in the pre-Charlottetown Accord debates and dealt with a number of political and social conflicts from their own communities. Particularly problematic for Aboriginal women during these debates was the argument advanced by the AFN that the Charter should not apply to Aboriginal governments.[81] The NWAC, the National Action Committee on the Status of Women, and the National Métis Women of Canada were denied the right to participate in these debates. This denial exemplifies that Indian Act political and societal changes have occurred in Aboriginal communities, but that the post-Indian Act political organizations are unwilling to address the problems created by the new forced social and political arrangements.[82] As Green writes:

> - The single most influential factor determining the exclusion of NWAC from the constitutional arena was the collective refusal to see Aboriginal women's concerns...as distinct from and equally legitimate with Aboriginal men's concerns, and to see "male-stream" organizations as precisely that.[83]

Given the internalization of exclusionary policies by Aboriginal communities, are Aboriginal communities capable of defining members and thus, controlling who has access to "rights"?[84]

- VII. THE RIGHT TO DEFINE CITIZENSHIP...IS IT TOO LATE?

40 The current form of "Aboriginality" in Canada has permeated into the lives and identities of those associated and descended from the Aboriginal peoples. The colonial policies that purported to shrink those persons defined as "Aboriginal" have created an internalization of identity in Aboriginal communities.[85] Cornet makes the following comments regarding the right to define citizenship in the face of colonial definitions:

> - A system of racial identification and classification imposed through colonialism is quite different from self-identifying cultural groups organizing themselves into collectiveities, as peoples...The right of self-determination is concerned with peoples, not race. "Race" implies attributed racial identities assigned by some outside power that assumes superiority in itself.[86]

41 "Aboriginality," in the sense of Aboriginal rights as defined by government, has transformed and influenced the relations between Aboriginal peoples, their representatives, and the Canadian state. Although the recognition of Aboriginal peoples and Aboriginal rights occurs through the definition of "Aboriginality," this recognition has not involved the consultation or meaningful involvement of Aboriginal groups.

42 Contrary to the policy enforced by the Indian Act, Aboriginal peoples have a right to define those members of the larger communities that collectively hold rights.[87] Failure to recognize this right to define membership could have significant consequences according to some theorists. As Christie writes:

> - Insofar as decisions about how to live their collective lives are manifestations of their assertions of identity, these sorts of decisions are vitally important. But the power to control their destinies as Aboriginal peoples, to maintain control over their self-definition, must be fundamental, for otherwise we could imagine a people being constructed by another. If Aboriginal communities lose the power to control their self-definition they lose themselves--they effectively become "another."[88]

43 In a sense, it is difficult to see how Aboriginal communities have maintained control over their own self-definition. Contrary to Christie's comments, the legislatively imposed definitions of what and who is

"Aboriginal" has created a situation where a people are being constructed and defined by another. Despite this, there still exists reason to presume that Aboriginal peoples have a right to define themselves. How this right is to be implemented is where the problem lies. As the NWAC organization has proven, placing the control in the hands of Aboriginal communities is much the same as placing it in the hands of colonial governments. As Lawrence writes:

> - To treat the Indian Act merely as a set of policies to be repealed, or even as a genocidal scheme, which we can simply choose not to believe in, ignores how having the identity of colonized people classified by colonial government regulations can strongly influence their understand[ing] of their identity. The practices dictated by the Indian Act--in particular, the manner in which Native women for over a century lost their Indian status if they married white men, and how "half-breeds" (now called Métis) have been excluded from any recognition as Indian...now seem[s] normal...Instead of recognizing that these categories were created by the settler government to divide us.[89]

When an individual has lost status, that person is no longer capable of being active in their community. Furthermore, "communities" have been redefined and reorganized into "Bands," a concept that was imposed on Aboriginal peoples by the Indian Act[90] and that has displaced numerous Aboriginal people. How then can Aboriginal peoples properly define themselves when their communities are dislocated?[91]

- VIII. JUDICIAL AND QUASI-JUDICIAL APPLICATION OF "ABORIGINALITY" TO ABORIGINAL RIGHTS

A. DECISIONS FROM CANADIAN COURTS

44 While there are a number of problems with allowing post-colonial Aboriginal communities to define themselves, the Canadian judiciary is finding it equally problematic to assess Aboriginal membership and rights. The courts in Canada have developed a number of tests to assess the validity of the rights claimant, and to describe the content of the rights those claimants seek. There is seldom, if ever, an attempt to recognize the actual identity of the individual before the court. This approach, however, arguably changed in the case of R. v. Powley.[92] In that case the Supreme Court of Canada was faced with the claims of two individuals who asserted membership in a Métis community, and the Aboriginal right to hunt and fish for food that flow from such a membership.

45 In Powley, the Supreme Court developed an "Aboriginality" test consisting of self-identification, ancestral connection, and community acceptance. The three part test is problematic in that self-identification will be typically asserted in the context of criminal liability, and the obvious outcome is that the accused will likely identify with any group that will allow him or her to avoid criminal liability. Second, ancestral connection, when coupled with the community acceptance test, creates interpersonal community problems.

46 Courts attempting to apply membership criteria to Aboriginal peoples are faced with problematic applications of criteria based either on the broken history of "Aboriginality," or the myth of race. Following the Powley decision, the Saskatchewan Provincial Court dealt with the case of R. v. Laviolette,[93] which unequivocally demonstrates that the doctrine of "Aboriginality" in Aboriginal rights cases in Canada is confused.

47 In Laviolette, the accused was charged with ice fishing out of season on Green Lake. He identified himself to the Crown's representatives as a member of Flying Dust First Nation, a First Nation located in Northern Saskatchewan. The accused resided in Flying Dust and was married into the community. Furthermore, he was fishing with Flying Dust community members when he was charged with out-of-season fishing. The other two community members, treaty Indians, were not charged as they were fishing for food in accordance with a treaty right. One other Métis person was also fishing on the lake, but was not charged because he was born in Green Lake, and "fit within the policy of the Department of the Environment, which recognizes an Aboriginal right to hunt and fish for food if certain criteria are met".[94]

48 The fact that Laviolette resided, married, and associated with the community of Flying Dust would, presumably, mean that he was indeed a member of this community. It would be these considerations that would lead one to conclude that the social, political, and cultural attachment to the Flying Dust community existed. Laviolette, perhaps engulfed by individual interest, and a desire to avoid criminal liability and the penalties that

followed, allowed the Court to apply the Powley test in his favour. Rather than using what might seem to be basic reasoning and an examination of the communities themselves, the Court decided that Laviolette was a member of the Green Lake Métis community. This was decided on the basis that one of Laviolette's ancestors had belonged to the community and he had relatives in the community. Presumably, under the right pressures, "Aboriginality" can apply in a number of ways.

49 The application of the Powley decision to the Laviolette case demonstrates Canadian judiciary often applies the myth of race. The result of the history of "Aboriginality" in Canada has been the considerable confusion of who should have Aboriginal rights. The Powley case demonstrates that the courts believe that only persons biologically descended from a Métis ancestor could belong to a Métis rights bearing community. Furthermore, as the accused obviously looked Aboriginal, Kalenith J. may have been reluctant to hold Laviolette criminally liable while his friends, equally Aboriginal in appearance, were not charged. Thus, this case may have been affected by the self-interest of the accused and the substantive fairness of the process. Perhaps the saying "hard cases make bad law" best describes this case. One can likely find many more hard cases upon which to apply membership criteria.

50 The Saskatchewan Provincial Court and the Supreme Court of Canada in both the Laviolette decision and the Powley decision deserve respect for addressing the difficult question that was placed before them. In the post-colonial Aboriginal communities that have been reorganized and redefined by colonial legislation, how can one fairly determine residency? Furthermore, when an individual's liberty is at stake, how can one be asked to identify with any group other than the group that will enable that individual to avoid liability?

51 The liberal conception of rights and the reorganization of Aboriginal communities have made the concept that "[a]boriginal rights are collective rights"[95] a challenge to accept. If Aboriginal rights are made to apply in the collective sense, and also made to apply due to the fact that the claimants were "here first," then how does one deal with complications created by the colonial reorganization of groups? Which groups are capable of being defined as holding collective interests? Can these groups change from their historical roots? If these groups can change, who can authorize the change?

B. DECISIONS FROM CANADIAN ADMINISTRATIVE TRIBUNALS

52 A recent application for an oil sands mine and bitumen processing facility in Fort McMurray demonstrates the problems associated with Aboriginality, and the liberal application of rights theory in the historical context. The conception of Aboriginal rights being collective rights was reinforced, and the idea that "Bands," as defined colonially, are holders of collective interests became problematic for members of Aboriginal communities who have been displaced.

53 On February 27, 2007, Imperial Oil made an application before the Alberta Energy and Utilities Board for an oil sands mine.[96] In the application, a group of interveners composed of the Clearwater River Paul Cree Band, the Wood Buffalo First Nation, the Wood Buffalo First Nation Elders Society, and an individual, John Malcolm, sought meaningful consultation as to the environmental concerns with a building project on the basis of their "Aboriginality". In a sense, the interveners claimed an Aboriginal right to consultation.

54 The Alberta Energy and Utilities Board Panel assessed each intervener, and questioned whether or not the particular party was capable of holding and asserting an Aboriginal right. The Panel first held that the Clearwater Band was not a recognized entity, nor a distinct community of individuals with Aboriginal rights that give rise to a duty imposed on governments to consult. The Panel reasoned that because the Clearwater Band was not a "Band" as defined in the Indian Act, it could not claim an Aboriginal right as a collective group.[97] The Panel further reasoned that many of the individuals who identified themselves as members of the Clearwater Band were registered members of another recognized Indian Band, and thus the Clearwater "Band," as a collective, was not entitled to consultative rights.[98]

55 The Panel also assessed the Aboriginal and treaty rights asserted by the Wood Buffalo First Nation (WBFN), and concluded that the WBFN was also not a "Band" under the Indian Act, and that members of this group were also members of another recognized Indian Band.[99] A similar conclusion was drawn when assessing the claim of the Wood Buffalo First Nation Elders Society, where the Panel held that an Aboriginal society is not capable of holding Aboriginal and treaty rights.[100]

56 In the case of the individual, John Malcolm, the Panel held that Aboriginal and treaty rights were communal rights, and where there is a corresponding duty on the part of governments to engage in meaningful consultation with Aboriginal peoples, that duty is owed to "the recognized aboriginal community as a whole and not to individuals".[101] The Panel further held that Malcolm's "status under the Indian Act appears to be unresolved".[102]

57 These proceedings demonstrate the problems associated with defining Aboriginal rights in the post-colonial era. Aboriginal peoples, given this analysis, are incapable of joining collectively under their own terms. They are unable to form their own societies, and cannot avoid the definitions imposed upon them by the Indian Act. The application by a "created" and perhaps ad hoc group of Aboriginal people, will not give rise to so-called "Aboriginal rights" where a legislatively created "Band" under the Indian Act presumably will.[103]

58 As Aboriginal rights seem to inevitably flow from descent and culture, the Panel's decision in Imperial Oil presupposes that people may belong to only one societal cultural at any given time. This is a fallacy; people may move in and out of cultures, may belong to more than one culture simultaneously, and may change the culture itself.[104] If this conception of identity and "Aboriginality" is a reality, then it is hard to distinguish between early enfranchisement legislation and the current polices which prevent political and social reorganization. Thus, in a practical sense, social and political organization of Aboriginal peoples is "frozen" to fit within pre-existing colonial community formations for the purposes of achieving recognition in Aboriginal rights claims.

59 Given the historical context upon which this decision is reasoned, it is difficult to understand how the concept of being "Aboriginal" or being "here first" has any moral or cultural basis. The basis for Aboriginal rights, it appears, is based not on culture or on family lineage, but rather on historical definitions that arbitrarily created categories and groupings of Aboriginal people. It is complicated situations like Imperial Oil that make "race" and genetics seem like a more just approach to "Aboriginality". Perhaps one could argue that the easiest solution would be to accept that as long as the individual is biologically descended from an Aboriginal community, and can fulfill a certain "percentage" of descent, that person can claim generic Aboriginal rights anywhere in Canada. This application may lead to improper results, but may be less arbitrary. In any case, it is difficult to draw a principled line between Indian Act "Bands," and an ad hoc grouping of people who are of Aboriginal descent.

- IX. THE INDEFENSIBILITY OF ABORIGINAL RIGHTS

60 To ask that Aboriginal people be defined on descent can become rather tautological in the sense that there has been no guidance regarding the amount of biological connection one must have. The conception of descent presupposes racial categorization and not culture. Furthermore, self-identification is also problematic as such a claim may only occur when the individual faces criminal liability. Community acceptance and group membership is equally problematic, because it is impossible to overcome the history of bad policy and discrimination of Aboriginal peoples.

61 In the end, Aboriginal rights, as defined as rights belonging to those persons who were "here first," leave much to be desired. The hard questions about membership are made even harder when attempting to find practical solutions for Aboriginal peoples. The liberal "rights" approach has left persons with Aboriginal rights feeling as if they are entitled to such rights on the basis of something connected to their skin colour or challenge-laden life. How can rights that exclude legitimate first peoples be defensible? Perhaps throwing a collective approach by the wayside and first, acknowledging that Aboriginal societies have been negatively affected by liberalism, and second, finding a liberal solution to the problems of individually displaced peoples, may be the best method of achieving reparations--focusing on needs rather than rights. Such theories must be discussed against the backdrop of so-called "Aboriginality".

62 Attempting to define Aboriginal rights after colonization is, in a sense, colonizing. Although some may argue that the proper approach is to salvage what rights and peoples remain, it is patently and fundamentally unfair to give rights, which are supposed to be inherent rights, only to the group of people who have been fortunate not to be dealt colonization's "bad hand".

63 Although some scholars attempt to define Aboriginal rights as group rights,[105] in practice, Aboriginal rights are rights granted collaterally to one's membership, and are often asserted for one's individual liberty or a small group's liberty. Taking a macro-view at the place Aboriginal peoples play in our society, one must ask: Do

Aboriginal rights serve a function for most Aboriginal peoples? Do they serve a function for inner-city Aboriginal people in larger centers? Do they serve a function for the displaced women of Bill C-31 and their families? In the end, we should all have trouble accepting that Aboriginal rights "are better than nothing" in their current form. Analyzed critically, Aboriginal rights are only "better than nothing" for some Aboriginal peoples. For many, Aboriginal rights serve to exclude legitimate claimants, and create a group of doubly disadvantaged citizens who are excluded from the larger society and from Aboriginal rights bearing communities. Do we really want to promote two-tiered Aboriginal peoples?

64 Accepting the current state of Aboriginal rights claims, and returning to the so-called sui generis and ab-origo context within which Aboriginal rights are asserted in principle, one may conclude that being "here first" can no longer be fairly determined. In reality, Aboriginal rights appear to exist, not in the context of being "here first," but primarily in the context of need for reparations. Indeed, Aboriginal rights are legitimized on the basis that Aboriginal peoples were treated poorly, and therefore, Aboriginal peoples need extra rights to help them survive.

65 If we look critically, not at what Aboriginal rights should be, but what Aboriginal rights are in practice, we will understand that reparations for Aboriginal peoples are not properly distributed through the arbitrary application of Aboriginal rights. If the goal of Aboriginal rights is to ensure Aboriginal peoples receive "extra" benefits to help them survive, then should we not look to individually displaced Aboriginal people who need help? Do we need to look to Aboriginal groups when so many Aboriginal individuals are excluded from these groups?

- X. ABORIGINAL RIGHTS: A CONCLUSION

66 Going back to what it means to be "ab-origo," are the existing forms of Aboriginal rights defensible? If they are, against whom are they defensible? The current form of Aboriginal rights in Canada needs to be questioned critically. The billions of dollars spent every year on Aboriginal peoples and Aboriginal rights have done little more than create inter-ethnic conflict between Aboriginal peoples, and continue to leave Aboriginal people as the most destitute people in Canada. If "Aboriginality" and Aboriginal rights are getting Aboriginal peoples where they are today, a re-examination of the purpose behind recognizing the liberalized concept of group rights must occur.

67 Legal and legislative notions of "Aboriginality" in Canadian law are problematic and have been misconceived due to calculated and miscalculated attempts by the colonial government. Individual claims to equality conflict with legislative definitions which have influenced the practical assessment of what, and who, is an "Aboriginal". The internalization of these definitions has placed the "identity" and "culture" of Aboriginal peoples as a questionable concept within Aboriginal communities. Aboriginal peoples within these communities have turned against one another, and there may be little hope of recovering from the conflicts created by the forced reorganization.

68 Aboriginal and non-Aboriginal peoples must examine the existing rights scheme in Canada and ask themselves: Why are Canada's Aboriginal peoples the most destitute and politically debilitated people in Canada? While I do not suggest that the rights scheme in Canada has created these destitute and debilitated peoples, I would suggest that it certainly has not helped all Aboriginal peoples. Furthermore, Aboriginal rights may be excluding the very people most in need of help.

69 A re-examination of both the basis for Aboriginal rights and the practical purpose of these rights must take place. A closer examination may lead observers to conclude that while Aboriginal rights are based in the concept that Aboriginal peoples were "here first," the practical purpose of Aboriginal rights is to support and salvage those people who are a percentage of the "here first" population. In this sense, Aboriginal rights have served to be a form of reparations and entitlements based on support and survival. Understanding this, what sorts of reparations are we to give to the rest of the people who were "here first"?

70 Aboriginal peoples, like the judiciary and the Canadian public, are incapable of ignoring the past treatment of Aboriginal peoples and the definitions that have defined them. What then can we do with Aboriginal rights and claims to such rights? Just to say we, as Canadians, have preserved some traditions of some Aboriginal peoples should not be enough to base a rights regime. As an obscure observer, I do not have the answers to these problems, but would suggest that on the basis of fairness, unless an appropriate answer can be found, Aboriginal rights are indefensible.

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1 This is a term that has been used a number of times by the Supreme Court of Canada, particularly in Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 [Corbiere].2 This concept was first developed in H.A.C. Cairns, S.M. Jamieson & K. Lysyk, A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies ed. by H.B. Hawthorn (Ottawa: Indian Affairs Branch, 1966) vol. 1, M.-A. Tremblay, F.G. Vallee & J. Ryan, ibid., vol. 2 [Hawthorn Report]. The concept of "Citizen Plus" is aptly described by Justice Hood of the British Columbia Supreme Court in Thomas v. Norris, [1992] 2 C.N.L.R. 139 at 162, [1992] B.C.J. No. 210 (QL) as follows: "While the plaintiff may have special rights and status in Canada as an Indian, the 'original' rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike. He lives in a free society and his rights are inviolable. He is free to believe in, and to practise, any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise their collective rights in doing so. His freedoms and rights are not 'subject to the collective rights of the Aboriginal nation to which he belongs.'"3 Cairns, Hawthorn Report, supra note 2 at 6.4 In this article the term "post-colonial" will refer to the period of time after colonization.5 There are rights and benefits associated with registered Indian status, especially on reserves, where the majority of registered Indians are located. These rights non-exhaustively include: access to funding for housing; post-secondary schooling; tax exemption status; and land and treaty rights. Aboriginal populations in other communities, such as Métis and Inuit peoples, do not have legal or practical access to the same rights and benefits due to location and categorization.6 As noted by the Royal Commission on Aboriginal Peoples (RCAP): "[T]he Indian Act is the repository of the struggle between Indian peoples and colonial and later Canadian policy makers for control of Indian peoples' destiny within Canada...By examining the act, how it came about and how it continues to influence the daily experience of Indian people in Canada, much can be learned". See Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 258 [Report].7 See Katherine Biber, "Being/Nothing: Native Title and Fantasy Fulfilment" (2004) 3 Indigenous L.J. 1 for the argument that nationhood and Aboriginal identity are merely fantasy.8 Tom Flanagan, First Nations? Second Thoughts (Montreal and Kingston: McGill-Queen's University Press, 2000) at 11.9 In The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, [1981] 4 C.N.L.R. 86 at 89 (C.A.), the Court explained that "[t]he Indian peoples of Canada have been there from the beginning of time. So they are called the 'Aboriginal peoples'." See also Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, where this concept was cited in regard to Aboriginal title.10 For the common law recognition of this proposition, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515 at 559, 8 L. Ed. 483 (U.S.S.C. 1832), where Marshall C.J. recognized that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed". For a theoretical discussion of this concept, see Arthur J. Ray, I Have Lived Here Since the World Began: An Illustrated History of Canada's Native People (Toronto: Lester & Key Porter Books, 1996).11 S. Prov. C. 1850, 13 & 14 Vict., c. 42. This Act was seen as legitimate and valid, due to the Colonial Laws Validity Act, 1865 (U.K.), 41 & 42 Vict., c. 63.12 To view historical legislation dealing with Canada's Aboriginal peoples, see Indian and Northern Affairs Canada, "Historical Legislation", online: www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/ index_e.html.13 Supra note 11.14 Joseph Eliot Magnet, "Who are the Aboriginal People of Canada?" in Dwight A. Dorey & Joseph Eliot Magnet, eds., Aboriginal Rights Litigation (Markham, ON: LexisNexis Butterworths, 2003) 23 at 43.15 S. Prov. C. 1851, 14 & 15 Vict., c. 59.16 This conflicts with the understanding that Aboriginality can exist in a form of kinship which could, in theory, allow non-Aboriginal people with no biologically link to those thought to be "Aboriginal people" to become linked to the group. As noted by Raymond D. Fogelson, "Perspectives on Native American Identity" in Russell Thornton, ed., Studying Native America: Problems and Prospects (Madison: University of Wisconsin Press, 1998) 40 at 44-45: "For Native Americans identity was primarily associated with kinship. Kinship not only included those with whom one could trace familiar common descent, but could be extended to include more ramifying groups like clans, moieties, and even nations. Moreover, besides biological reproduction, individuals and groups could be recruited into kinship networks through naturalization, adoption, marriage, and alliance. Identity encompassed inner qualities that were made manifest through social action and cultural belief." For a discussion of outsiders becoming members of a group, see S. Alan Ray, "A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants" (2007) 12 Mich. J. Race & L. 387. The conception that captivity can lead to an internalization of an identity, something perhaps akin to the "Stockholm Syndrome," has been discussed in a number of works: see James Axtell, "The White Indians of Colonial America," in James Axtell, The European and the Indian: Essays in the Ethnohistory of Colonial North America (Oxford: Oxford University Press, 1981); and June Namias, White Captives: Gender and Ethnicity on the American Frontier (Chapel Hill: University of North Carolina Press, 1993). Perhaps one of the most popular and fascinating captivity narratives is that of John Tanner. See John Tanner, A Narrative of the Captivity and Adventures of John Tanner, (U.S. Interpreter at the Saut de Ste. Marie) During Thirty Years Residence Among the Indians in the Interior of North America, ed. by Edwin James (London: Baldwin & Cradock, 1830).17 Supra note 15.18 Supra note 14 at 43.19 It should also be noted that the term "Indians" was used in s. 91(24) of the Constitution Act, 1867, (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, but that the term was not defined therein. In The Attorney General of Canada v. Canard, [1976] 1 S.C.R. 170 at 207, 52 D.L.R. (3d) 548, Justice Beetz found that "using the word 'Indians' in s. 91(24), creates a racial classification and refers to a special group for whom it contemplates the possibility of special treatment. It does not define the express 'Indian'."20 Supra note 14 at 44.21 S.C. 1951, c. 29.22 Ibid., s. 12.23 Magnet, supra note 14 at 44.24 Ibid.25 (2001), [2002] 3 F.C. 292 at paras. 71-72, 212 D.L.R. (4th) 169, 2001 FCT 1418.26 For a broad discussion of the three policy pillars in Indian policy, see John L. Tobias, "Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy" in J.R. Miller, ed., Sweet Promises: A Reader on Indian-White Relations in Canada (Toronto: University of Toronto Press, 1991) 127.27 For a more modern example of assimilation policy, see James (Sákéj) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 6 Citizenship Studies 415, particularly with regard to the "gentle invitation" by Queen Elizabeth II for Aboriginal peoples to embrace Canadian citizenship.28 An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians, S. Prov. C. 1857, 20 Vict., c. 26 [Gradual Civilization Act]. Note that this Act was consolidated into the 1876 Indian Act. Furthermore, compulsory enfranchisement was attempted through s. 3 of An Act to Amend the Indian Act, S.C. 1920, c. 50, and through s. 7 of An Act to Amend the Indian Act, S.C. 1933, c. 42. It should also be noted that the 1869 An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, added a blood quantum requirement for the first time. After 1869, the only people considered "Indians" under the

Indian Act were those that had "one-quarter blood". See Olive Patricia Dickason, Canada's First Nations: A History of Founding Peoples from Earliest Times (Toronto: McClelland & Stewart Inc., 1992) at 251, 259.29 Gradual Civilization Act, ibid.30 Magnet, supra note 14 at 46. See also Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities", online: www.ainc-inac.gc.ca/pr/ra/rmp/rmp_e.pdf; Stewart Clatworthy, "Impacts of the 1985 Amendments to the Indian Act on First Nations Populations" in Jerry P. White, Paul S. Maxim & Dan Beavon, eds., Aboriginal Conditions: Research as a Foundation for Public Policy (Vancouver: UBC Press, 2003) 63; and Stewart Clatworthy & Anthony H. Smith, Population Implications of the 1985 Amendments to the Indian Act, Final Report, Prepared for the Assembly of First Nations, December 1992.31 Now see Indian Act, R.S.C. 1985, c. I-5.32 See Martin J. Cannon, "Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada" in Jerry White, Wendy Cornet and Eric Anderson, eds., Bill C-31 and First Nations Citizenship: Past Development, Current Impacts and Future Considerations (Toronto: Thompson Nelson, forthcoming) in draft form, online: www.arts.usask.ca/sociology/people/MartinCannon/ DIANDPaperFinalDraft.pdf; Joan Holmes, Bill C-31: Equality or Disparity? (Ottawa: Canadian Advisory Council on the Status of Women, 1987); Indian and Northern Affairs Canada, Correcting Historic Wrongs? Report of the National Aboriginal Inquiry on the Impacts of Bill C-31 (Ottawa: Minister of Supply and Services Canada, 1990); Shirley Bear with the Tobique Women's Group, "You Can't Change the Indian Act?" in Jeri Dawn Wine & Janice L. Ristock, eds., Women and Social Change: Feminist Activism in Canada (Toronto: James Lorimer and Company, 1991); Thomas Isaac, "Self-Government, Indian Women and Their Rights of Reinstatement Under the Indian Act: A Comment on Sawridge Band v. Canada", Case Comment, [1995] 4 C.N.L.R. 1; Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict" in Sandra Burt, Lorraine Code & Lindsay Dorney, eds., Changing Patterns: Women in Canada, 2nd ed. (Toronto: McClelland & Stewart, 1993) 92; and Joyce Green, "Canaries in the Mines of Citizenship: Indian Women in Canada" (2001) 34 Can. J. Polit. Sci. 715.33 Bonita Lawrence, "Mixed-Race Urban Native People: Surviving a Legacy of Policies of Genocide" in Ron F. Laliberte et al., eds., Expressions in Canadian Native Studies (Saskatoon: University of Saskatchewan Extension Press, 2000) 69 at 79 [Lawrence, "Mixed-Race"; emphasis in original].34 There is evidence that Aboriginal women face the most difficult socio-economic circumstances in Aboriginal communities. See Linda M. Gerber, "Multiple Jeopardy: A Socio-Economic Comparison of Men and Women Among the Indian, Métis and Inuit Peoples of Canada" (1990) 22 Canadian Ethnic Studies 69. Consider also: The Attorney General of Canada v. Lavell, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; Courtois v. Canada (Department of Indian Affairs and Northern Development), [1991] 1 C.N.L.R. 40, 11 C.H.R.R. D/363 (C.H.R.T.); Corbiere, supra note 1; Sawridge Band v. Canada (1995), [1996] 1 F.C. 3, [1995] 4 C.N.L.R. 121 (T.D.); and Goodswimmer v. Canada (Attorney General), [1995] 2 F.C. 389, 123 D.L.R. (4th) 93 (C.A.). Note also the British Columbia Supreme Court's decision in McIvor v. The Registrar, Indian and Northern Affairs Canada, 2007 BCSC 26, which held that ss. 6(1) and 6(2) of the Indian Act, dealing with the entitlement to register as an Indian, were discriminatory and violated the Charter, and could not be saved under s. 1.35 Magnet, supra note 14 at 57.36 Wendy Cornet, "Aboriginality: Legal Foundations, Past Trends, Future Prospects" in Dorey, supra note 14, 121 at 133.37 Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.38 Ibid., s. 35(2).39 The issue of Aboriginal membership has been described as non-justiciable, in that the process is political and not legal: see Paul L.A.H. Chartrand, "Defining the Métis of Canada: A Principled Approach to Crown-Aboriginal Relations" (2006) at 10 [unpublished]. On "justiciability," see generally Lorne Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada (Toronto: Carswell, 1999).40 See Claude Denis, "Indigenous Citizenship and History in Canada: Between Denial and Imposition" in Robert Adamoski, Dorothy E. Chunn & Robert Menzies, eds., Contesting Canadian Citizenship: Historical Readings (Peterborough, ON: Broadview Press, 2002) 113 at 116.41 For a discussion of this concept, see generally Cheryl I. Harris, "Whiteness as Property" (1993) 106 Harv. L. Rev. 1707; and Margaret Lock, "Genetic Diversity and the Politics of Difference" (1999) 75 Chicago-Kent L. Rev. 83. It is notable that in Mabo v. Queensland (No. 2) (1992), 175 C.L.R. 1 at 70, [1992] HCA 23, Brennan J. for the Court held: "Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people." As the Supreme Court of Canada in R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686 at para. 45, 274 D.L.R. (4th) 75, 2006 SCC 54 writes, "the notion of aboriginality must not be reduced to 'racialized stereotypes of Aboriginal peoples'".42 See Nancy Shoemaker, "Categories" in Nancy Shoemaker, ed., Clearing a Path: Theorizing the Past in Native American Studies (New York: Routledge, 2002) 51.43 Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in Caroline Andrew & Sandra Rodgers, eds., Women and the Canadian State (Montreal and Kingston: McGill-Queen's University Press, 1997) 64 at 66.44 This term is used in Terry P. Wilson, "Blood Quantum: Native American Mixed Bloods" in Maria P.P. Root, ed., Racially Mixed People in America (Newbury Park, CA: Sage Publications, 1992) 108.45 Drew Hayden Taylor, "How Native Is Native if You're Native?" in Laliberte, supra note 33, 58 at 58-59.46 Although race is socially defined, some theorists stress that it is also defined on the basis of physical criteria: see Maurianne Adams, "Core Processes of Racial Identity Development" in Charmaine L. Wijeyesinghe & Bailey W. Jackson III, eds., New Perspectives on Racial Identity Development: A Theoretical and Practical Anthology (New York: New York University Press, 2001) 209.47 See Larry Chartrand, "Métis Identity and Citizenship" (2001) 12 Windsor Rev. Legal Soc. Issues 5.48 I thank Paul L.A.H. Chartrand who shared this thought with me in a personal conversation in the summer of 2006.49 Bonita Lawrence writes: "Native resistance to colonization rejects notions of 'pan-Indian' identities that can, at best, only aspire for equality within a settler state framework"; "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3 at 5. See also Hilary N. Weaver, "Indigenous Identity: What Is It and Who Really Has It?" (2001) 25 Am. Indian Q. 240.50 The concept that a uniform identity can and does exist, has, to some degree, been internalized by Aboriginal peoples. See Sander L. Gilman, Difference and Pathology: Stereotypes of Sexuality, Race, and Madness (Ithaca: Cornell University Press, 1985) at 20, where the author links self-identity to stereotyping.51 These boundaries have been formed around communities, see Eva Marie Garroutte, Real Indians: Identity and Survival in Native America (Berkeley: University of California Press, 2003) at 99.52 Michael A. Hogg & Dominic Abrams, Social Identifications: A Social Psychology of Intergroup Relations and Group Processes (New York: Routledge, 1988) at 2.53 Indeed, the stereotyping can be internalized. When such internalization occurs, societal orders can change. As Bhabha writes: "For it is the force of ambivalence that gives the colonial stereotype its currency: ensures its repeatability in changing historical and discursive conjunctures; informs its strategies of individuation and marginalization; produces that effect of probabilistic truth and predictability which, for the stereotype, must always be in excess of what can be empirically proved"; Homi K. Bhabha, The Location of Culture (New York: Routledge, 1994) at 66.54 D.H. Taylor, supra note 45 at 59, jokingly states: "I know many successful Aboriginal people who are every bit as 'Native' as those who still subsist on Kraft Dinner and drive 1974 Dodge pickups."55 The "Indian Problem" was labeled as such by Duncan Campbell Scott, who stated: "I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone...Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill"; John Leslie & Ron Maguire, The Historical Development of the Indian Act (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Center, 1978) at 114.56 Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Queen's Printer, 1969) ["White Paper"].57 For a discussion of this and other policies regarding the Trudeau Indian policy, see generally Sally M. Weaver, Making Canadian Indian Policy: The Hidden Agenda, 1968-1970 (Toronto: University of Toronto Press, 1981); and J.R. Miller,

Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989).58 To some degree the definitions of "Aboriginality" through historic Indian policy have been successful in assimilating at least some Aboriginal Canadians, and have had the effect of creating members of Aboriginal communities who are concerned with individual goals rather than community goals.59 Alan C. Cairns, "Aboriginal Canadians, Citizenship, and the Constitution" in Douglas E. Williams, ed., Reconfigurations: Canadian Citizenship & Constitutional Change: Selected Essays (Toronto: McClelland & Stewart, 1995) 238.60 Hawthorn Report, supra note 2. For a critic of the "White Paper" ideology, see Harold Cardinal, The Unjust Society: The Tragedy of Canada's Indians (Edmonton: M.G. Hurtig, 1969).61 See Ashley Montagu, Man's Most Dangerous Myth: The Fallacy of Race, 5th ed. (New York: Oxford University Press, 1974); and Ian F. Haney López, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice" (1994) 29 Harv. C.R.-C.L.L. Rev. 1.62 It should be noted that the Indian Act has used blood quantum (and still uses it, subject to the Band's discretion) and culture as defining features of Indians, something that is inconsistent with internal norms of identity: see L. Chartrand, supra note 47. The concept of blood corresponding to identity was thought to symbolize and embody racial and genetic difference by Euro-North Americans. See also: Laura Kathryn Ferguson, 'Indian Blood' or Lifeblood? An Analysis of the Racialization of Native North American Peoples (M.A. Thesis, Montana State University, 2005), online: www.montana.edu/etd/available/unrestricted/ Ferguson_0505.pdf; Circe Sturm, Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma (Berkeley: University of California Press, 2002); Fogelson, supra note 16; Steve Russell, "Apples are the Color of Blood" (2002) 28 Critical Sociology 65; Pauline Turner Strong & Barrik Van Winkle, "'Indian Blood': Reflections on the Reckoning and Refiguring of Native North American Identity" (1996) 11 Cultural Anthropology 547; and Frederick K. Lomayesva, "Indian Identity and Degree of Indian Blood" (1995) 3 Red Ink 33. For an elaborate discussion of this concept in the American context, see Paul Spruhan, Quantum of Power: Historical Origins of Blood Identification in the United States Indian Policy (M.A. Thesis, University of Chicago, 1996).63 Cairns, Hawthorn Report, supra note 2 at 6.64 See W. Graham Allen, "Taxation Aspects of the Sechelt Agreement-in-Principle" (2000) 48 Can. Tax J. 1817, for an example where the Indian Act taxation exemption has arbitrary results. However, it can be justified in that there are policy reasons to support and attract individuals living on reserves. This arguably presumes that urban areas are easier for some Aboriginal peoples to live. At an interpersonal level, Aboriginal peoples who live on reserves will often scorn the concept that urban reserves can be exempt from taxation, given the fact that urban reserves are not as destitute as many rural reserves.65 See Fogelson, supra note 16. This is to be contrasted with the early sociological conception that identity can change, but remain the same, in that identity can "mature". Erikson indicates that evolution can occur with identity: Erik H. Erikson, Identity and the Life Cycle (New York: W.W. Norton & Company, 1994). Indeed, as William Wordsworth noted, "The Child is the father of the Man": "My heart leaps up when I behold" in E. de Selincourt, ed., The Poetical Works of William Wordsworth (Oxford: Clarendon Press, 1940) 226. This is not to imply that leaving a reserve is an evolution, but rather to demonstrate that it can be "maturing" for some persons living on reserves.66 D.H. Taylor, supra note 45 at 58. For a discussion of the possible lack in authenticity of some members of Aboriginal communities asserting status for preferential treatment, see Cornel D. Pewewardy, "So You Think You Hired an "Indian" Faculty Member? The Ethnic Fraud Paradox in Higher Education" in Devon Abbot Mihesuah & Angela Cavender Wilson, eds., Indigenizing the Academy: Transforming Scholarship and Empowering Communities (Lincoln: University of Nebraska Press, 2004).67 Note that the courts have, to some degree, internalized the conception that urban Aboriginal peoples are somehow different from on-reserve Aboriginal peoples. The application of s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46, in R. v. Gladue, [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385 [Gladue], is perhaps the best indication of this. At trial, Jamie Gladue stated that because the accused was living off reserve in an urban centre, she had grown up in a regular community and not an "Aboriginal community," and therefore there were no special circumstances arising from her Aboriginal status. Rebutting this presumption, the counsel on behalf of Aboriginal Legal Service of Toronto argued on appeal that, "The idea that an Aboriginal people can only be an Aboriginal person while living on a reserve is clearly false and is demeaning to the almost half the population of Aboriginal people who do live off reserve". See Gladue, ibid. (Factum of the Intervener Aboriginal Legal Services Toronto at 12). See also R. v. John, [2004] 7 W.W.R. 643, 182 C.C.C. (3d) 273, 2004 SKCA 13.68 Lawrence, "Mixed-Race," supra note 33 at 76.69 The fact that the Indian Act definitions control so much in the lives of Aboriginal people is one primary reason that authenticity of Aboriginality is assessed under the Indian Act model. As Ovide Mercredi and Mary Ellen Turpel note in In The Rapids: Navigating the Future of First Nations (Toronto: Penguin Books Canada, 1993) at 81: "From the time of birth, when an Indian child must be registered in one of seventeen categories defining who is an "Indian," until the time of death, when the Minister of Indian Affairs acts as executor of the deceased person's estate, our lives are ruled by the Act and the overwhelming bureaucracy that administers it."70 In The Malaise of Modernity (Concord, ON: House of Anansi Press, 1991) at 29 [C. Taylor, Modernity], Charles Taylor explains that the concept of identity is a powerful moral ideal that is imposed from the outside on one's self, and "[i]t accords crucial moral importance to a kind of contract with myself, with my own inner nature, which it sees as in danger of being lost, partly through the pressures towards outward conformity, but also because in taking an instrumental stance to myself, I may have lost the capacity to listen to this inner voice". On the issue of identities as being defined by the Indian Act, see generally Robert K. Groves & Bradford W. Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'" (2004) 67 Sask. L. Rev. 257.71 Modernity, ibid. at 35-36.72 This includes the concept of community leadership. See Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto (Don Mills, ON: Oxford University Press, 1999) at 1, 30.73 See J. Wherrett & D. Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas", abridged and revised version, prepared by the Institute of Intergovernmental Relations for the Native Council of Canada, 1992, online: www.ainc-inac.gc.ca/pr/ra/rep/ cha1_e.html. I understand that this is an oversimiplification of whom the AFN proports to represent, however, for the purposes of this article, this general categorization can be presumed.74 Congress of Aboriginal Peoples, "CAP Corbiére Commission Report--Issues for Phase II", online: www.abo-peoples.org/programs/corbiere/corbiere8.html.75 It should be reinforced that the genocidal policies of the Canadian government contributed to the creation of "on-reserve" and "off-reserve" Aboriginals. In addition to the Indian Act definitions, these genocidal policies have included residential schools, the widespread adoption of Aboriginal children by non-Aboriginal families, and considerable economic policies that forced Aboriginal peoples from their reserves. It should be noted that Lawrence, "Mixed-Race", supra note 33 at 87 states as follows: "Everybody I interviewed asserted loftily, as if it was all too obvious, that status had nothing to do with whether one is a Native person or not. At the same time, almost everybody, when pressed, admitted that they did feel that status Indians were "more Native" that non-status Indians or Métis" [emphasis in original].76 This is perhaps most evident in the recent CAP support for the Conservative government, while the AFN supported the Liberals. See Congress of Aboriginal Peoples, News Release, "Congress of Aboriginal Peoples Applauds Conservative Election Victory" (27 January 2006), online: www.abo-peoples.org/Communications/NewsReleases/ Harper%20Election%20Release.pdf; and Doug Cuthand, "Best for Chiefs to Steer Clear of Partisan Politics" The [Saskatoon] StarPhoenix (24 February 2006) A11.77 RCAP wrote: "Perhaps less well appreciated is the way the Indian Act, because of its separation of status and non-status Indians, has influenced how national Aboriginal political organizations are structured. The legislation helped institutionalize divisions between Aboriginal political organizations. This is not to suggest that Aboriginal peoples do not have divisions and differences of their own. However, the Indian Act legislated key divisions and helped create Aboriginal political structures that made divide-and-conquer politics an easier game to play" (Report, supra note 6 at 251).78 The saying "too many chiefs, not enough Indians" is an apt description of post-colonial Aboriginal political groups. The changes imposed on Aboriginal societies by the definition and redefinition of "Aboriginality"

have created opposition and decentralization within Aboriginal groups. There is little protection for individual rights under this conception, and at some point there must be a more concentrated effort as a collective minority if genuine political power is to be obtained.79 For a discussion of this issue, see Joyce Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act" (1985) 1:2 Native Studies Review 81; Lynn Gehl, "'The Queen and I': Discrimination Against Women in the Indian Act Continues" (2000) 20:2 Canadian Woman Studies 64; and Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's L.J. 279. See also D. Sanders, "Indian Status: A Women's Issue or an Indian Issue" (1984) 3 C.N.L.R. 30.80 Margaret A. Jackson, "Aboriginal Women and Self-Government" in John H. Hylton, ed., Aboriginal Self-Government in Canada: Current Trends and Issues (Saskatoon: Purich, 1994) 180 at 185.81 See Native Women's Association of Canada v. Canada, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224.82 Cannon has argued that: "[L]egal assimilation is furthered by the inability of governments (deliberate or inadvertent) to transfer knowledge concerning legal inequality to status Indian communities" (supra note 32 at 13). One has to wonder if education has the ability to change the views of these communities now.83 Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" in Laliberte, supra note 33, 328 at 348.84 For a discussion of how definitions of "Indian" have affected the concept of identity and authenticity in American Indian communities, see Eva Marie Garroutte, "The Racial Formation of American Indians: Negotiating Legitimate Identities within Tribal and Federal Law" (2001) 25 Am. Indian Q. 224.85 As Jordan writes: "[I]ndividuals recognize their self-sameness and continuity in time and perceive that others recognize their self-sameness and continuity"; Dierdre E. Jordan, "Aboriginal Identity: The Management of a Minority Group by the Mainstream Society" (1986) 6 The Canadian Journal of Native Studies 271 at 273. As a social function, identity will change when assessment criteria for identity and membership also change.86 Cornet, supra note 36 at 125.87 For a discussion of this concept, see Delia Opekokew, "Self-identification and Cultural Preservation: A Commentary on Recent Indian Act Amendments" (1986) 2 C.N.L.R. 1. In the American context, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (U.S.S.C. 1978) which effectively upheld the right of the Santa Clara Pueblo community to enact membership criteria that discriminated against the rights of female members of the community. It should be noted that this case has been subject to heavy criticism. See also Denis, supra note 40 at 115-17; and Jo-Anne Fiske & Evelyn George, Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law (Ottawa: Status of Women Canada, 2006), online: www.swc-cfc.gc.ca/pubs/ pubspr/index_e.html select: "Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law".88 Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous L.J. 67 at 98 [emphasis in original].89 Lawrence, "Mixed-Race", supra note 33 at 76.90 The Indian Act created the concept of band council, and imposed the concept on Aboriginal peoples despite their existing traditions.91 For a discussion of these issues in relation to on-reserve membership, see Corbiere, supra note 1.92 R. v. Powley, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1, 2003 SCC 43 [Powley].93 R. v. Laviolette, [2005] 3 C.N.L.R. 202, 267 Sask. R. 291, 2005 SKPC 70 [Laviolette]. I thank Paul L.A.H. Chartrand for his discussions of this decision with me.94 Ibid. at para. 1.95 R. v. Powley, [1999] 1 C.N.L.R. 153 at para. 22, 58 C.R.R. (2d) 149 (Ont. Ct. J. (Prov. Div.)).96 Imperial Oil Resources Ventures Limited Application (27 February 2007), Alberta Energy and Utilities Board Decision 2007-013, online: www.eub.ca/docs/documents/ decisions/2007/2007-013.pdf [Imperial Oil]. On the scope of administrative tribunals, see generally Paul v. British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449, 2003 SCC 55.97 Imperial Oil, ibid. at 13.98 Ibid.99 Ibid.100 Ibid. at 14.101 Ibid.102 Ibid. In contrast, the Court in Labrador Metis Nation v. Newfoundland and Labrador (Minister of Transportation and Works), [2006] 4 C.N.L.R. 94, 779 A.P.R. 257, 2006 NLTD 119, held that a community represented by a corporate entity had Aboriginal rights and had selected the corporation as its agent to assert the Aboriginal rights. This dichotomy demonstrates the continued confusion in this area.103 For a discussion of the concept of "Bands" effecting membership and entitlements, see Larry Gilbert, Entitlement to Indian Status and Membership Codes in Canada, (Scarborough, ON: Carswell, 1996).104 See S.O. Gaines Jr. et al., "Interethnic Relationships" in Judith A. Feeney & Patricia Noller, eds., Close Relationships: Functions, Forms and Processes (New York: Psychology Press, 2006) 171 at 172.105 See e.g. Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J.L. & Jur. 19; and Jocelyn Gagne, Entitlement to the Rights of Aboriginal People (LL.M. Thesis, University of Ottawa, 1992) (Ottawa: National Library of Canada, 1994).