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### From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life'

Constance MacIntosh

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# From Judging Culture to Taxing "Indians": Tracing the Legal Discourse of the "Indian Mode of Life"

## **Abstract**

In this article I consider how judicial decision making characterizes Indigenous peoples' culture outside the context of determinations under section 35(1) of the Constitution Act, 1982. I am concerned with how contemporary jurisprudence sometimes subjects Indigenous people to stereotyped tests of Aboriginality when they seek to exercise legislated rights. These common law tests of Aboriginality tend to turn on troubling oppositional logics, such as whether or not the Indigenous person engages in waged labour or commercial activities. These tests arose in historic legislation and policy that were premised on social evolutionary theory and were directed at determining whether an Indigenous person was to be deemed economically assimilated. Before such legislation and policies were repealed, however, the tests crossed into the common law and have since been read into legislation. As a result, the doctrine of precedent has reinforced and continually renewed this oppressive discourse to the present day. This article is, in essence, a call to critically engage and confront the assumptions that underlie our rubrics of analysis.

## **Keywords**

Indigenous peoples--Legal status; laws; etc.; Judgments; Indigenous peoples--Government relations; Canada

## From Judging Culture to Taxing “Indians”: Tracing the Legal Discourse of the “Indian Mode of Life”

CONSTANCE MacINTOSH \*

In this article I consider how judicial decision making characterizes Indigenous peoples' culture outside the context of determinations under section 35(1) of the *Constitution Act, 1982*. I am concerned with how contemporary jurisprudence sometimes subjects Indigenous people to stereotyped tests of Aboriginality when they seek to exercise legislated rights. These common law tests of Aboriginality tend to turn on troubling oppositional logics, such as whether or not the Indigenous person engages in waged labour or commercial activities. These tests arose in historic legislation and policy that were premised on social evolutionary theory and were directed at determining whether an Indigenous person was to be deemed economically assimilated. Before such legislation and policies were repealed, however, the tests crossed into the common law and have since been read into legislation. As a result, the doctrine of precedent has reinforced and continually renewed this oppressive discourse to the present day. This article is, in essence, a call to critically engage and confront the assumptions that underlie our rubrics of analysis.

Dans cet article, j'examine la façon dont la prise de décisions judiciaires attribue des caractéristiques à la culture des peuples indigènes hors du contexte des déterminations aux termes du paragraphe 35 (1) de la *Loi constitutionnelle de 1982*. Je m'intéresse à la manière dont la jurisprudence contemporaine soumet parfois les peuples indigènes à des tests stéréotypés d'autochtonie lorsqu'ils cherchent à exercer les droits que leur accorde la législation. Ces tests d'autochtonie aux termes de la *common law* ont tendance à engendrer une logique troublante d'opposition, comme de savoir si oui ou non une personne indigène est engagée dans des activités salariées ou commerciales. Ces tests tirent leur origine de la législation et des politiques historiques, lesquelles étaient fondées sur le postulat de la théorie évolutionnaire et visaient à déterminer si un indigène devait être censé comme assimilé du point de vue économique. Toutefois, avant que de telles législations et

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\* Associate Professor, Schulich School of Law, Dalhousie University. I thank and acknowledge both John Borrows and Brian Noble for their helpful and encouraging comments on an earlier draft of this article. I also wish to thank the anonymous reviewers for the care with which they reviewed and commented on my article and, in particular, for pointing out several historical errors, as well as the student editors of the Law Journal for their meticulous work. Any remaining errors are, of course, my own.

politiques ne soient abrogées, les tests ont imprégné la *common law*, et sont depuis incrustés dans la législation. Par conséquent, la doctrine du précédent a renforcé et constamment renouvelé ce discours oppresseur, et ce, jusqu'à nos jours. En substance, cet article constitue une invitation à pousser et à confronter, d'un point de vue critique, les hypothèses qui sous-tendent les rubriques de notre analyse.

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WHEN I ENTERED LAW SCHOOL after completing graduate work in anthropology, I was both intrigued and troubled by how notions of culture were deployed in legal reasoning about Aboriginal peoples. I was surprised to read that decisions could turn on whether a person was living an "Indian mode of life," and wondered how such a concept could be intelligible, much less legally relevant. My experiences with Aboriginal rights claims after law school augmented my concerns, as many of these claims turned on whether certain practices were deemed integral to an Aboriginal people's culture. The idea of lawyers making arguments about such matters in a courtroom, and a judge then determining the core features of an Aboriginal people's culture, seemed to be an extreme exercise in colonialism.<sup>1</sup> Once I began teaching law, I found myself hesitating whenever I taught the logic and language of recent taxation cases, which asked whether certain property ought to be shielded from taxation or garnishment to "preserve

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1. For an eloquent critique of how Aboriginal identity has been defined and shaped by non-Aboriginal people, see Emma Laroque, *Defeating the Indian* (Agincourt: Book Society of Canada, 1975) at 8.

the traditional way of life in Indian communities by protecting property held by Indians *qua* Indians."<sup>2</sup> In-class discussions would rage for hours about what the phrases "Indians *qua* Indians" and "the traditional way of life" meant.

Aboriginal peoples' cultures and cultural practices have a long history of being portrayed and employed in a variety of legal decision-making contexts. However, much of the current scholarly literature focuses on decisions pertaining to section 35(1) of the *Constitution Act, 1982*,<sup>3</sup> under which the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."<sup>4</sup> This focus is no surprise, given that the provision forms the basis for the complex project of reconciling Canadian claims of sovereignty with the fact that "aboriginal people were the original organized society occupying and using Canadian lands."<sup>5</sup>

As articulated in *R. v. Van der Peet*,<sup>6</sup> the test for recognizing rights under section 35(1) rests on an inquiry into what practices are integral to the culture of an Aboriginal people or community at the time of European contact with that people. This test has been subject to extensive and careful scrutiny by such scholars as Michael Asch, John Borrows, Patrick Macklem, and Kent McNeil. Among other critiques, they conclude that the test situates Aboriginal culture as frozen in time and reduces it to a series of discrete stereotypes.<sup>7</sup> They also share the critique that the test creates an optic of analysis that, through its focus on practices, deflects engaging with the rights of Aboriginal people as inherently political rights.<sup>8</sup> The scholarly critiques in this area are thorough, and I will not be adding substantively to them in this article.

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2. *Folster v. R.* (1997), 148 D.L.R. (4th) 314 at para. 14 (F.C.A.) [*Folster*].

3. Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4. *Ibid.*, s. 35(1).

5. *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686 at para. 45 [*Sappier*].

6. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

7. John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 *Const. Forum* Const. 27. See also Chilwin Chienhan Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 55 *U.T. Fac. L. Rev.* 419; Rosanne Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-*Sparrow* Era" (1997) 31 *U.B.C. L. Rev.* 293.

8. See e.g. Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*" (2000) 5 *Rev. Const. Stud.* 119 at 133-37; Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stan. L. Rev.* 1311 at 1340-50; and Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 *Sask. L. Rev.* 281.

I will point out, however, that the decision by the Supreme Court of Canada (SCC) in *R. v. Sappier; R. v. Gray*<sup>9</sup> captured and spoke to at least some of my concerns<sup>10</sup> (and to some of those expressed in the scholarly literature) about how the concept of culture is mobilized in section 35(1) jurisprudence. In *Sappier*, Justice Bastarache acknowledged the uneven quality of judicial engagements regarding what is integral or distinctive to an Aboriginal people's culture. He wrote: "Culture, let alone 'distinctive culture,' has proven to be a difficult concept to grasp for Canadian courts."<sup>11</sup> Justice Bastarache posited that part of the difficulty is that "[u]ltimately, the concept of culture is itself inherently cultural,"<sup>12</sup> and he accepted scholarly criticism that the section 35(1) jurisprudence risked reducing Aboriginal cultures to "racialized stereotypes"<sup>13</sup> and "anthropological curiosities."<sup>14</sup>

Although he did not overrule the *Van der Peet* test, Justice Bastarache's comments do present a potential turning point for how Aboriginal culture is understood in section 35(1) engagements. He expressly acknowledged, and rejected, the stereotyping that can be engendered from asking questions about what practices are integral to the cultures of Aboriginal peoples.<sup>15</sup> His comments may well initiate considerable change in this area of law.

But what about instances where ideas of Aboriginal culture have been incorporated into judicial or policy practices *outside* of section 35(1) determinations of whether a claimed right is integral to a culture? What about taxation jurisprudence that contemplates whether property is owned by "an Indian *qua* Indian," or just by "an Indian"? The jurisprudence suggests that whatever makes people Aboriginal is so superficial that it can just be turned on or off, and a judge can determine whether that on/off switch has been flipped.

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9. *Supra* note 5.

10. For a more robust discussion of how I see *Sappier* as potentially signaling significant changes, see Constance MacIntosh, "Developments in Aboriginal Law: The 2006-2007 Term" (2007) 38 S.C.L.R. (2d) 1 at 29-35.

11. *Supra* note 5 at para. 44.

12. *Ibid.*

13. *Ibid.* at para. 45.

14. *Ibid.* at para. 42.

15. Some would argue that, as long as the s. 35(1) test is framed in terms of references to "culture" instead of political rights, we are asking the wrong questions. See e.g. Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor Y.B. Access Just. 17; Asch, *supra* note 8.

In this article, I trace the language and oppositional concepts that taxation jurisprudence draws upon, both historically and contemporarily. I find that there are ways in which Aboriginal individuals' rights and obligations—outside of the section 35(1) context—have been, and continue to be, determined by an assessment of whether a person is living an Aboriginal culture, “lifestyle,” or “mode of life.” Historically, these assessments have arisen in the law of enfranchisement<sup>16</sup> and in policies about whether a child of both Aboriginal and non-Aboriginal heritage had to attend residential schools. The assessments have also arisen expressly in contemporary decisions, including those regarding who has the rights of an “Indian” for the purpose of interpreting certain agreements between the Prairie provinces and Canada. The assessments have also arisen in the interpretation of the taxation provisions in the *Indian Act*,<sup>17</sup> in decisions about the best interests of Aboriginal children in child welfare cases (as discussed in the late Marlee Kline’s work),<sup>18</sup> and in sentencing decisions for Aboriginal persons, pursuant to the *Criminal Code*’s requirement that sentencing judges give “particular attention to the circumstances of aboriginal offenders.”<sup>19</sup>

This article discusses why using Aboriginal culture as a measuring stick for assessing the legal status and rights of Aboriginal people is problematic, both conceptually and in practice.<sup>20</sup> Historically, these rubrics were believed to en-

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16. “Enfranchisement” was the name of the legal process under which Aboriginal persons whom the state had considered to be “Indian” lost the status of “Indian” and were no longer subject to the terms of the *Indian Act*. See Part I(D).
  17. R.S.C. 1985, c. I-5 [*Indian Act*].
  18. See Marlee Kline, “The Colour of Law: Ideological Representations of First Nations in Legal Discourse” (1994) 3 Soc. & Leg. Stud. 451. In her study of child welfare decisions, Kline finds a “judicial tendency to assume that First Nations people who live in urban environments are not ‘real Indians’ ... [and so] courts question the ability of urban-dwelling First Nations people to impart First Nations identity and culture to their children, and this, in turn, is used to support apprehension and placement decisions” (at 466).
  19. *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(e). For a discussion of how Aboriginality is understood in the context of sentencing decisions, see Margot Hurlbert, “*R. v. Moccasin* and the Continued Struggle for Fairness in Aboriginal Sentencing” (2008) 71 Sask. L. Rev. 391 at 409; Brian Pfefferle, “*Gladue* Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration” (2008) 32 Man. L.J. 113 at 126-29. The issues arising from conceptions of Aboriginal culture in child welfare and sentencing decisions are outside the scope of this article. I do, however, engage with the other areas I have described because they illustrate a specific trope or through-line in the discourse that informs contemporary taxation jurisprudence.
  20. For a close reading of how “culture” is problematically deployed in Aboriginal rights cases,



able state objectives and, therefore, had legitimacy as analytic instruments. For example, discussions of an Aboriginal individual's "mode of life" in the late nineteenth and early twentieth centuries most often appeared in situations where a person's legal rights and liabilities depended on whether the person was—in the eyes of the decision maker—assimilated or still in the process of being assimilated. This was an essential and logical distinction for the colonial state project, as it was primarily those Aboriginal peoples who had not "yet" assimilated whom the state wished to subject to a distinct legal regime.

In interpreting statutory language that supported the colonial state project, and which required assessments of an Aboriginal person's "mode of life," courts developed tests to measure whether an Aboriginal person practised "Aboriginal culture," or otherwise displayed signs of "Indianness." Although legislative provisions that explicitly required judicial determinations of whether an Aboriginal person lived "as an Indian" have all been repealed, the common law jurisprudence has perpetuated these assessments. Indicators that supposedly signal economic assimilation continue to be used systematically to evaluate the authenticity of an individual's Aboriginal culture or "Aboriginality." In effect, we are working with a common law concept of "Indian," which, through its pedigree, grants both life and legitimacy to assimilation discourse of the late nineteenth and early twentieth centuries.

Part I of this article examines the legislation of the late nineteenth and early twentieth century, which required a court to consider whether an Aboriginal person lived an "Indian mode of life." The state goal of assimilation was understood to be attainable through *economic* assimilation, so a pivotal marker for identifying whether an Aboriginal individual had assimilated was whether the individual had entered into the waged or industrialized workforce. I track the rationale of this requirement to the evolutionary theory of the time, which calibrated social development against economic practices. Participation in the waged economy and the cash marketplace supposedly signaled that "complete" assimilation had either taken place or was inevitable, and so the person no longer needed to be recognized and distinguished legally as an "Indian." To illustrate how assessments of whether a person lives an "Indian mode of life" draw upon

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see Asch, *supra* note 8. See also Ronald Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18 C.J.L.S. 1. Drawing heavily from Asch, Niezen reviews the tensions between anthropological and judicial conceptions of culture.

social evolutionary theory, I survey the jurisprudence on the statutory category of "non-treaty Indians" and administrative decisions about whether to permit enfranchisement applications.

Thereafter, in Part II, I briefly review policies that admitted Métis children to residential schools and examine their reliance on economic oppositions. I then turn to contemporary jurisprudence that considers whether Métis people are living an "Indian mode of life" for the purpose of the Natural Resource Transfer Agreements. In Part III, I engage with contemporary taxation jurisprudence. This jurisprudence is significant because, while the current *Indian Act* makes no reference to "Indian mode of life,"<sup>21</sup> the case law nonetheless replicates and draws upon the markers that are associated with that concept. The final Part considers contemporary examples of how the SCC both rejects and draws upon the organizing rubric of economic oppositions that historically indexed an "Indian mode of life." This discourse is tenacious, but not totalizing, and, as a consequence, it can be cast off only with conscious effort. This article is, in part, a call to make that effort.

I wrote this article in the spirit of the work of Catherine Bell and Michael Asch, which traced how contemporary judicial characterizations of Aboriginal rights to land are ideologically rooted in deeply racist precedents of the early twentieth century.<sup>22</sup> As noted above, however, my analysis avoids engaging with section 35(1) in favour of less studied areas of law. This approach seems especially appropriate in light of how the reasons in *Sappier* may modify section 35(1) analyses. I am also influenced by the work of the late social justice advocate, Marlee Kline, who called for tracing and challenging the "continuing presence of ideological representations of Indianness and their effects in ... areas of legal discourse"<sup>23</sup> as a tactic for confronting the "power and authority accorded to legal actors and institutions to define First Nations and impose destructive regimes upon them."<sup>24</sup> This article takes up her call in identifying how oppressive ideologies continue to be reinforced within legal discourse.

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21. See *supra* note 17.

22. Catherine Bell & Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) 38.

23. *Supra* note 18 at 468.

24. *Ibid.* at 469.

## I. SOURCING THE PRESENT IN THE PAST

### A. DISTINCTIONS TO PROTECT AND ENABLE ASSIMILATION

It is generally understood that legislators in the late nineteenth and early twentieth centuries drafted early Canadian Indian policy to pursue several intertwined objectives.<sup>25</sup> One was to “gradually civilize,” or assimilate, Aboriginal people. A second was to “protect” Aboriginal people until they were successfully assimilated (and thus deemed able to protect themselves).<sup>26</sup> State officials had to know when they could withdraw paternal protective measures, which involved a distinct set of legal obligations and disabilities. Otherwise, from the perspective of state officials, these measures could turn into a lingering advantage for—or, alternately, cause prejudice to—an “assimilated Indian” in his or her activities. Aboriginal people who were members of bands or treaty groups—and so had a right to live on reserved land—could be identified through community membership or by where they lived. However, some Aboriginal people did not have such clear affiliations,<sup>27</sup> potentially keeping them outside the colonial project.

The historic *Indian Act* category of a “non-treaty Indian” was drafted to capture such populations. A “non-treaty Indian” was defined as a person with “Indian blood” who did not belong to any recognized band or treaty group, but who “lived an Indian mode of life.”<sup>28</sup> The effect of the definition was that persons who had Aboriginal (or a combination of Aboriginal and non-Aboriginal)

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25. See Sidney L. Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 31-34; *Report of the Royal Commission on Aboriginal Peoples, Vol. 1: Looking Forward, Looking Back* (Ottawa: Canada Communication Group, 1996) at 263 [*Report of the Royal Commission*]; and John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy” in James Rodger Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 127 at 127.
26. See Haring, *ibid.* Haring observes that, by “[l]egally holding Indians in this condition [of being placed into a distinct legal category], the government could subject them to unique forms of social control, educate and Christianize them, and ‘gradually’ train them for the full responsibilities of citizenship” (at 33).
27. For a discussion of various circumstances that would have led to such a result, see Wendy Cornet, “Aboriginality: Legal Foundations, Past Trends, Future Prospects” in Joseph Eliot Magnet & Dwight A. Dorey, eds., *Aboriginal Rights Litigation* (Toronto: LexisNexis Canada, 2003) 121 at 129-31.
28. *An Act to Amend and Consolidate the Laws Respecting Indians*, S.C. 1876, c. 18 [*Indian Act* (1876)].

heritage, but who were not part of a group already recognized as "Indian" by the state apparatus, could be subjected to certain terms of the *Indian Act*.<sup>29</sup> As Andrew Armitage observed in his comparison of Aboriginal assimilation policies in Australia, Canada, and New Zealand, identification "was integral to one-way assimilation. ... Being defined as Indian ... was intended to determine to whom assimilationist social policies should be applied."<sup>30</sup> Legislators shaped the definition of "non-treaty Indian" to ensure that a distinctive legal regime embraced all Aboriginal persons who still had to be assimilated into the European economic order. However, they did not intend to impose a regime upon all persons who happened to be of Aboriginal ancestry.

## B. MODE OF LIFE

The *Indian Act's* statutory directive to consider the "mode of life" of certain Aboriginal persons as the key criterion for assessing whether they counted as "Indian"—instead of considering, for example, whether a person self-identified as Aboriginal or "Indian"—resonated with the social theory of the late eighteenth to early twentieth centuries. The phrase "mode of life" is linked to the scholarly work of political and social theorists who sought to understand the origin and development of human societies. Although there is some variation, most theorists of the time identified developmental hierarchies or stages through which human societies evolved within a positivistic and unilineal framework.

One of the more influential approaches came from anthropologist Lewis Henry Morgan. He identified three stages of human social evolution, which can be gleaned from the title of his seminal 1877 work, *Ancient Society, Or Research in the Lines of Human Progress from Savagery through Barbarism to Civilization*.<sup>31</sup> "Civilization" was, essentially, Western European society. Scholars like Michael Asch, who have studied the period, have observed that "this form of reasoning was dominant" well into the nineteenth century, both in social as well as judicial theory.<sup>32</sup>

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29. For the legislative origin of "non-treaty Indians," see Robert K. Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007) 70 Sask. L. Rev. 153.

30. Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 86.

31. See Lewis H. Morgan, *Ancient Society, Or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (London: Macmillan & Company, 1877).

32. Asch, *supra* note 8 at 127. Asch notes that, although this approach was dominant, it was also

The penetration of these concepts into the common sense of the common law is, perhaps, best illustrated in the 1919 decision *Re Southern Rhodesia*.<sup>33</sup> In that case, the Privy Council described the Indigenous litigants as being “so low [on] the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.”<sup>34</sup> The evolutionary scale was present in the judicial imagination well into the 1920s, and was used to substantiate conclusions about the political character and rights of an Indigenous people.

Morgan linked these stages of civilizational development to technological change. In particular, he theorized that technological progress was what enabled social progress and allowed movement up the ladder—stage by stage—towards civilization. Morgan’s work resonated with that of other influential writers of the time, including Karl Marx and Friedrich Engels. Indeed, some consider Marx and Engels to have developed the organizing phrase “mode of life,”<sup>35</sup> although this concept may also have roots in the liberal political economy writings of Adam Smith.<sup>36</sup> These social theorists argued that human societies could be meaningfully categorized and placed on a developmental ladder according to how they produced their mode of production—that is, how they organized for the purpose of subsistence. Marx and Engels wrote:

The way in which men produce their means of subsistence depends first of all on the nature of the actual means they find in existence.... This mode of production ... [is] a definite *mode of life* on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both with *what* they produce and *how* they produce.<sup>37</sup>

Marx theorized that each “certain mode of production, or industrial stage, is *always* combined with a certain ... social stage,”<sup>38</sup> and that, together, they identify a mode of life. Thus, the phrase “mode of life” reflects theories of po-

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criticized by contemporaneous scholars of culture, such as Bronislaw Malinowski.

33. [1919] A.C. 211 (P.C.).

34. *Ibid.* at 233.

35. See Bradley E. Ensor, “Social Formations, Modo de Vida, and Conflict in Archaeology” (2000) 65 *Am. Antiquity* 15 at 17.

36. Cf. William Roseberry, “Political Economy” (1988) 17 *Ann. Rev. Anthropol.* 161.

37. Karl Marx & Friedrich Engels, *The German Ideology* (New York: International Publishers, 1947) at 7 [emphasis in original].

38. *Ibid.* at 18 [emphasis added].

litical economy: by looking to the material factors of what a person *produces* and the material means *by which* he or she produces, one can identify a "mode of life" that determines an individual's placement within the evolution of human societies.

The European economic practices of establishing permanent settlements, clearing land for agriculture, sequestering allotments of land as fee simple property, and cultivating and harvesting resources for both personal needs and market needs elsewhere, would have been incompatible with the practices of many Aboriginal people.<sup>39</sup> Indeed, as the *Report of the Royal Commission* commented, given the differences in their approaches to natural resources and the land in general, "Aboriginal people came to be regarded as impediments to productive development."<sup>40</sup> Aboriginal economies—which were largely outside of a cash workforce—were believed to be at a different and lower evolutionary stage than Euro-Canadian wage-based economies. In this context, the state objective of assimilation could only be achieved by engaging Aboriginal people in the European economic order and creating conditions for "accelerating" their social evolution so that they could compete with Euro-Canadians within that order.<sup>41</sup> To assess "mode of life" was to ask what sort of economic activities an Aboriginal individual engaged in. This was a logical (if racist) exercise to enable the state to determine whether individual "non-treaty Indians" were already assimilated into the industrial "mode of life." If they were still living more like "Indians," they would need to be subjected to the restraints and protections of the assimilation apparatus.

### C. ASSESSING "MODE OF LIFE"

Cases where a judge applied the legislation and assessed the "mode of life" of alleged "non-treaty Indians" tended to focus on whether the facts indicated an adoption of European economic practices. The most robust body of reported jurisprudence involved trials brought against shopkeepers who were accused of selling alcohol to "non-treaty Indians." Various incarnations of the *Indian Act* prohibited the sale of alcohol to "non-treaty Indians," under threat of fines or

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39. See *Report of the Royal Commission*, *supra* note 25 at 138.

40. *Ibid.*

41. *Ibid.* at 263.

jail time.<sup>42</sup> The outcome of the charge against the shopkeeper would depend on whether there was evidence supporting or refuting the fact that the Aboriginal customer lived an “Indian mode of life.”

In *R. v. Mellon*,<sup>43</sup> for example, a shopkeeper was charged with selling alcohol to a “non-treaty Indian.” The shopkeeper argued that the customer did not live an “Indian mode of life” because of his appearance, demeanour, and employment in the cash economy. The court considered his evidence refuting the allegation that the customer, referred to as the “half-breed,” lived an “Indian mode of life”:

[H]e never dressed like an Indian; ... [he worked] freighting between Calgary and Edmonton for two summers; ... he never wore moccasins; [and] he was driving a pair of horses and selling posts the day he got the liquor. In fact, [the purchaser] 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 [who do not live the Indian mode of life].<sup>44</sup>

These statements contrast understandings of markers of “Indianness” with those of “whiteness”—of living an “Indian mode of life” versus participating in the colonial economic order. In particular, the last statement in the quoted passage grounds this contrast in a hierarchy of social evolution with the identification of there being a “better” (and, thus, also a lesser) “class of half-breeds.” Similarly, in *R. v. Hughes*,<sup>45</sup> the Crown argued that an Aboriginal purchaser lived an “Indian mode of life” because the purchaser either lived on an Indian reserve or “fished and lived in a tent.”<sup>46</sup> Living on a reserve, or in non-permanent housing outside the waged economy, demonstrated an “Indian mode of life.” In the 1914 case *R. v. Verdi*,<sup>47</sup> the purchaser allegedly abandoned the “Indian mode of life” because there was evidence that he was “living as an ordinary white citizen, paying municipal taxes, etc.”<sup>48</sup>

These cases demonstrate the ways in which the judiciary determined whether

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42. *Indian Act* (1876), *supra* note 28, s. 79.

43. (1900), 7 C.C.C. 179 (N.W.T.S.C.) [*Mellon*].

44. *Ibid.* at 180-81.

45. (1906), 4 W.L.R. 431 (B.C. Co. Ct.).

46. *Ibid.* at 432.

47. (1914), 23 C.C.C. 47 (N.S. Co. Ct.).

48. *Ibid.* at 48 (quoting the headnote).

an Aboriginal person was living an "Indian mode of life" during the first few decades of the twentieth century. There was a clear dichotomy between what "white" people did and what "Indians" were expected to do. Evidence that an Aboriginal person was participating in the cash economy was used to prove that the person had abandoned the "Indian way of life."<sup>49</sup> Although the court drew upon other indicators (such as language), these cases emphasized oppositions between waged and non-waged work, and between living on and living off a reserve. These oppositions persist in today's jurisprudence as key organizational indicators of "Indianness."

#### D. BECOMING "OF WHITE STATUS"

Much has been written about the former provisions of the *Indian Act* under which an Aboriginal person—whom the state had recognized as an "Indian"—could lose the legal obligations, rights, and limitations of being an "Indian."<sup>50</sup> These provisions persisted in various forms from 1869<sup>51</sup> until 1985.<sup>52</sup> The legislation called this process "becoming enfranchised," and only the state could assess whether or not the enfranchisement criteria had been met. Indeed, under

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49. For an intriguing discussion of the role of waged work in the lives of Aboriginal peoples of British Columbia during this period, see Rolf Knight, *Indians at Work: An Informal History of Native Labour in British Columbia, 1858-1930* (Vancouver: New Star Books, 1996) at 20. Knight observes that "[v]irtually all Indian adults were employed in some way" in the waged economy, and that both Aboriginal as well as white labourers tended to engage in seasonal work.

50. See e.g. 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: McGill-Queen's University Press, 1977) 64 at 66. Turpel-Lafond writes: "The expression, 'Indian,' is an alien one. It is a term imposed by the colonial governments. ... First Nations people ... have names for our peoples. ... The word 'Indian' denies and effaces the diversity of our peoples." For critical discussions of the history of the term "Indian" and other state efforts at defining Indigenous peoples, see Cornet, *supra* note 27 at 121-29; Bonita Lawrence, "Gender, Race and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18 *Hypatia* 3; and D'Arcy Vermette, "Colonialism and the Process of Defining Aboriginal People" (2008) 31 *Dal. L.J.* 211.

51. *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, c. 6, ss. 16-19 [*Indian Act* (1869)].

52. See *Indian Act*, R.S.C. 1970, c. I-6 [*Indian Act* (1970)]. See also Robin Jarvis Brownlie, "'A better citizen than lots of white men': First Nations Enfranchisement – An Ontario Case Study, 1918-1940" (2006) 87 *Can. Hist. Rev.* 29.



the *Indian Act*'s 1869 manifestation,<sup>53</sup> an Aboriginal person who asserted that he or she had become enfranchised without first obtaining state endorsement was guilty of an offense and subject to imprisonment.<sup>54</sup>

Enfranchisement legislation—like the jurisprudence that considered whether an alleged “non-treaty Indian” lived an Indian mode of life—calibrated rights, entitlement, and identity against social and economic practices, and the values and capacities that those practices presumably reflected. The *Indian Act* (1876) associated enfranchisement with the question of whether Aboriginal individuals had proven that they had obtained a sufficient “degree of civilization ... to become a proprietor of land in fee simple.”<sup>55</sup> There was a deemed correlation between losing one’s “Indianness” and gaining capacity to own private property.<sup>56</sup> This correlation was also foundational in Morgan’s writing (although his writing appeared almost a decade after enfranchisement legislation was enacted). Morgan wrote that having the idea of private property “marks the commencement of civilization,”<sup>57</sup> and so was a key threshold that signaled when a person or group is passing out of one socio-evolutionary stage and into the next. The evolutionary hierarchy was clear: those who were “Indians” presumably could not be capable of owning and working land, but could, with the right inducements, progress to the point of being able to do so. If this occurred, they could leave life on reserved land behind them and move into the realm of private property ownership, which included participation in the cash economy.

Under the legislation, when Aboriginal persons became enfranchised, they were no longer legally distinguishable from other British subjects and would “no longer be deemed Indians within the meaning of the laws relating to Indians.”<sup>58</sup> Robin Brownlie extensively reviewed internal correspondence among officials of the Department of Indian Affairs (DIA) who decided whether to

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53. *Indian Act* (1869), *supra* note 51.

54. *Ibid.*, s. 19.

55. *Indian Act* (1876), *supra* note 28, s. 86.

56. This position persists, in a modified form, in the contemporary writing of Tom Flanagan and Christopher Alcantara. See e.g. “Individual Property Rights on Canadian Indian Reserves” (2004) 29 *Queen’s L.J.* 489 (arguing that on-reserve poverty is the result of reserve lands being held under a regime which impedes individuals from being able to effectively exercise private property rights).

57. Morgan, *supra* note 31 at 6.

58. *Indian Act* (1869), *supra* note 51, s. 19.

grant enfranchisement. His archival work uncovered letters that refused applications for enfranchisement due to the finding that the Aboriginal applicant "would not be able to take his place as a white man."<sup>59</sup> In a similar vein, Brownlie uncovered DIA correspondence that required those becoming enfranchised to be "able to compete with whites,"<sup>60</sup> or be able to support one's family "in a reasonable degree of comfort in competition with white people."<sup>61</sup> Brownlie also found enfranchisement certificates that certified that the applicant "[from] that date on is of white status."<sup>62</sup>

Following the common sense of the time, if Aboriginal persons were judged capable of supporting themselves in the cash economy, it meant they had been assimilated and were no longer in need of a unique legislative regime. Not surprisingly, Brownlie characterized enfranchisement as a process where "First Nations people were ... being legally transformed from Indians into whites."<sup>63</sup>

The legislative amendments of 1885 introduced the category of "probationary Indian."<sup>64</sup> At this point, the statute required not just evidence that the person seeking enfranchisement had obtained an appropriate "degree of civilization," but also evidence that he or she, once given the chance, would develop land. The "probationary Indian" received a temporary grant of land and was under surveillance for three years. After this time, if the Superintendent-General was satisfied that the "probationary Indian" had made adequate progress towards improving the land, then enfranchisement and a grant of the land in fee simple would follow. Sufficient assimilation for the purposes of the state project (such that the status of "Indian" was no longer necessary or appropriate) rested on one's ability to see and consume land as a private capital resource.<sup>65</sup> This again resonated with Morgan's social theory.

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59. Brownlie, *supra* note 52 at 45.

60. *Ibid.* at 33.

61. *Ibid.* at 47.

62. *Ibid.*

63. *Ibid.* at 30.

64. *Indian Act* (1867), *supra* note 28, ss. 87-88.

65. The expectation of modifying the land was further brought to the forefront in 1919, when the *Indian Act* was amended to allow for the creation of enfranchisement boards, whose terms required them to consider and report upon "the land occupied by each Indian ... and the improvements thereon," among other things. See *An Act to Amend the Indian Act*, S.C. 1919-1920, c. 50, s. 3.

The *Electoral Franchise Act*<sup>66</sup> also identified improvements to land as evidence that an Aboriginal person was moving beyond the “Indian mode of life” and towards being able to participate in “white” society. The Act was brought into force the same year that the “probationary Indian” category was created. It granted the right to vote to “Indians” who were “in possession and occupation of a separate and distinct tract of land in such reserve ... and whose improvements on such separate tract are ... of the value of at least one hundred and fifty dollars.”<sup>67</sup>

Similar provisions persisted in various forms of the enfranchisement legislation over the next few decades. The penultimate amendment, which was in force from 1918 to 1951, allowed enfranchisement to any “Indian” who did not reside on a reserve and did “not follow the Indian mode of life.”<sup>68</sup> It signaled a continuing association between “Indian mode of life,” living on a reserve, and being insufficiently assimilated into “white” society. The last amendment, in force from 1951 to 1985, dropped the reference to “mode of life.” Instead, the legislation made enfranchisement contingent on finding that the “Indian” was “capable of assuming the duties and responsibilities of citizenship, and ... [was] capable of supporting himself and his dependents.”<sup>69</sup> This latter requirement resonated with the concerns that the DIA had expressed in its correspondence at the turn of the nineteenth century: whether applicants would be able to support their families if they were no longer shielded from the marketplace, but rather were in competition with whites within a cash-based economy. And so, as of 1985, the measurement for proving assimilation—that persons should “no longer be deemed Indians within the meaning of the laws relating to Indians”<sup>70</sup>—remained calibrated against an economic ordering that echoes with nineteenth-century theories of social evolution.

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66. *Electoral Franchise Act*, S.C. 1885, c. 40.

67. *Ibid.*, s. 11(c).

68. *An Act to Amend the Indian Act*, S.C. 1918, c. 26, s. 6 (inserting s. 112A to the *Indian Act* (1906)). Because this provision was never litigated, there is no case law interpreting it.

69. *Indian Act* (1970), *supra* note 52, s. 109 (the last iteration of enfranchisement provisions). These provisions were later repealed. See *An Act to Amend the Indian Act*, R.S.C. 1985 (1st Supp.), c. 32, s. 20.

70. *Indian Act* (1869), *supra* note 51, s. 16.

## II. "SETTLED" VERSUS "INDIAN" MODES OF LIFE

### A. DISTINGUISHING THE CHILDREN

Métis people, like "non-treaty Indians," posed a conundrum for the state. There is considerable scholarly literature regarding state machinations over Métis people and whether Métis people ought to be treated as "Indians" for the purpose of law and policy.<sup>71</sup> The typical outcome of such machinations is evidenced by the assertion of Lieutenant Governor Alexander Morris around 1880. In the context of settling treaties with Aboriginal inhabitants of the Prairie provinces, he stated: "They must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land."<sup>72</sup>

Reports on the residential school system show a similar policy for assessing whether Métis children should attend the schools. The residential school system operated as industrial schools that emphasized training in trades, and had the goal of placing graduating children outside of reserve communities and within the waged labour market.<sup>73</sup> To this end, Métis children were sorted into two categories: children who, according to the state, required residential school to enable their assimilation and those who did not. Children who were "living an Indian mode of life" would be considered for admission. Children whose families lived what was referred to as a "settled mode of life" were generally not required—or, due to cost to the government, not permitted—to attend.<sup>74</sup>

Essentially, the decision to admit children to the schools was based on whether the Métis children were living too much like Indians. If so, then they

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71. See e.g. Cornet, *supra* note 27 at 142; Larry N. Chartrand, "Are We Métis or Are We Indians? A Commentary on *R. v. Grumbo*" (2000) 31 Ottawa L. Rev. 267; and Catherine Bell, "Who are the Métis People in Section 35(2)?" (1991) 29 Alta. L. Rev. 351. This confusion certainly persisted until 2003, when the SCC recognized Métis as distinct rights-bearing people (as opposed to being communities whose rights derived from their founding Aboriginal ancestors' cultural practices). See *R. v. Powley*, [2003] 2 S.C.R. 207. This approach has attracted considerable scholarly attention for its erasure of Métis history and culture. See e.g. Catherine Bell & Clayton Leonard, "A New Era in Métis Constitutional Rights: The Importance of *Powley* and *Blais*" (2004) 41 Alta. L. Rev. 1049.

72. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which they Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co., 1880) at 69.

73. *Report of the Royal Commission*, *supra* note 25 at 337.

74. Larry N. Chartrand, Tricia E. Logan & Judy D. Daniels, *Métis History and Experience and Residential Schools in Canada* (Ottawa: Aboriginal Healing Foundation, 2006) at 75.

were “in need of civilization”<sup>75</sup> so that they could assimilate effectively into the European-style economic order. A DIA policy memo from 1913 stated: “[Children] of mixed blood ... whose parents on either side live *as Indians* ... should be eligible for admission.”<sup>76</sup> Correspondence up to the 1940s reflected this criterion, and the written reasons for admitting Métis children consistently referred to their parents as “living the Indian mode of life.”<sup>77</sup>

What did that “mode of life” look like? In most of the correspondence that Larry Chartrand, Tricia Logan, and Jody Daniels retrieved from archival databases in their extensive review of the Métis residential school experience, the meaning of “Indian mode of life” was seen as so self-evident that no further description was needed. Some correspondence expanded the description with reference to a family being “destitute” or living off the running of a trap line (which presumably signalled non-participation in the regular waged economy).<sup>78</sup>

Identifying a Métis person who lived an “Indian mode of life” for the purpose of residential school enrollment was, for the most part, an exercise in racism. It involved calibrating the perceived socio-economic practices of Aboriginal individuals against a norm associated with industrialized European-descended settlers. Based upon this calibration, it identified who was in need of socio-industrial evolutionary assistance, and who had advanced beyond needing protections and could compete “as white men.” Persons who lived an “Indian mode of life” did not aggressively clear and cultivate the land, were not engaged in waged labour, and tended to be destitute.

## B. DESTITUTION AND THE “INDIAN MODE OF LIFE”

The phrase “Indian mode of life,” and all its sweeping implications about what can or cannot be generalized, is also found in more recent decisions regarding the application of the *Natural Resources Transfer Agreements* (NRTAs).<sup>79</sup> The

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75. *Ibid.* at 19.

76. *Ibid.* at 117 [emphasis added].

77. *Ibid.* at 118.

78. *Ibid.* at 118-19.

79. *Manitoba Natural Resources Transfer Agreement (1930)*, being Schedule 1 to the *Constitution Act, 1930* (U.K.), 20-21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26, s. 13; *Alberta Natural Resources Transfer Agreement (1930)*, being Schedule 1 to the *Constitution Act 1930* (U.K.), 20-21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26, s. 12; and *Saskatchewan Natural Resources Transfer Agreement (1930)*, being Schedule 1 to the

NRTAs are a series of agreements that Canada entered into with each of the three Prairie provinces in 1929 and 1930. These agreements were made to address the fact that, at Confederation, the federal government retained jurisdiction over public lands and resources within the provinces.<sup>80</sup> The agreements transfer jurisdiction from the federal government to the respective provincial governments. All three agreements include identical terms, stating that the "Indians" of each Prairie province would have the right to hunt, trap, and fish for food year-round on unoccupied Crown lands and other lands to which they had a right of access.

The question of whether persons who self-identify as Métis are "Indian" for the purpose of the NRTAs has been litigated on several occasions, most recently in 2003.<sup>81</sup> In interpreting the NRTAs, courts have used the definition of "Indian" found in the 1927 version of the *Indian Act*,<sup>82</sup> because this version was in force when the agreements were made. As discussed above, the *Indian Act* (1927) defined "non-treaty Indian" as including "any person of Indian blood ... who follows the Indian mode of life."<sup>83</sup>

The last few decades of jurisprudence regarding whether a Métis person is an "Indian" for the purposes of the NRTAs have tended to define "Indian" modes of life through findings of economic destitution and inconsistent cash employment. The cases illuminate the entrenched character of these racist

*Constitution Act 1930* (U.K.), 20-21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26, s. 12. For an in-depth legal-historical analysis of the NRTAs, see Frank J. Tough, "The Forgotten Constitution: The Natural Resources Transfer Agreements and Indian Livelihood Rights" (2004) 41 Alta. L. Rev. 999.

80. Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis" (2002) 1 Indigenous L.J. 237 at 257-58.
81. The SCC has now determined that the NRTA between Manitoba and Canada was not intended to include Métis people under the category of "Indians." See *R. v. Blais*, [2003] 2 S.C.R. 236 [*Blais*]. However, the Court's finding turned on the fact that the two governments had historically distinguished between the identities and legal rights of Métis and those of Indian communities. As a result, the governments would not have intended the term "Indian" in the NRTA to embrace Métis. The Court wrote: "The difference between Indians and Métis appears to have been widely recognized and understood by the mid-nineteenth century. ... Government actors and the Métis themselves viewed the Indians as a separate group" (at para. 21). No such assessment has been made for the sister agreements in Alberta and Saskatchewan. See Bell & Leonard, *supra* note 71 at paras. 29-31.
82. *Indian Act*, R.S.C. 1927, c. 98 [*Indian Act* (1927)].
83. *Ibid.*, s. 2(h).

markers of “Indianness” within contemporary common law. For example, in the 1993 case of *R. v. Ferguson*,<sup>84</sup> the Métis defendant was charged with hunting without a licence and unlawful possession of wildlife. However, the Alberta Provincial Court found that the defendant fell under the NRTA, based on the definition of “non-treaty Indian” in the *Indian Act* (1927). Evidence that the defendant lived an “Indian mode of life” included his having grown up in an isolated Cree-speaking community and his first language having been Cree. The court found that “[f]ood was obtained by hunting and gathering. The usual Cree Indian customs were followed in respect to philosophy of life and lifestyle.”<sup>85</sup> This all led the court to find that “the defendant [was] an Indian in terms of culture.”<sup>86</sup>

The Crown appealed the decision to the Alberta Queen’s Bench. The Crown’s key argument was that the defendant was not living an “Indian mode of life,” as his “current lifestyle ... [included] running tractors and building roads.”<sup>87</sup> The Crown argued that engaging in these waged labour practices was sufficient both to eviscerate any claim that the defendant lived an “Indian mode of life” and to trump the relevance of language practices and assertions of personal philosophy. The Queen’s Bench dismissed the Crown’s appeal, finding that these employment activities were too “casual or intermittent [a] lifestyle pursuit”<sup>88</sup> to jeopardize the defendant’s status.

The Alberta Queen’s Bench analysis in *Ferguson* is disappointing on several levels. First, it follows from the court’s reasons that, had the defendant been *regularly* employed as a farm laborer or construction worker, this would have been sufficient to have eroded his claim as “an Indian in terms of culture,” despite the fact that he followed “usual Cree Indian customs ... in respect to philosophy of life and lifestyle.”<sup>89</sup> Although the *Indian Act* (1927) required an assessment of “Indian mode of life,” the court in 1994 was *not* required to draw upon Euro-Canadian ideas of “Indian mode of life” from the turn of the twentieth century.

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84. [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.) [*Ferguson* trial decision], aff’d [1994] 1 C.N.L.R. 117 (Alta. Q.B.) [*Ferguson* Queen’s Bench decision].

85. *Ferguson* trial decision, *ibid.* at para. 19.

86. *Ibid.* at para. 20.

87. *Ferguson* Queen’s Bench decision, *supra* note 84 at para. 17.

88. *Ibid.*

89. *Ferguson* trial decision, *supra* note 84 at para. 19.

It is also disappointing because the court refrained from addressing the defendant's argument that the proper meaning of "Indian" should not be derived from the various *Indian Act* definitions.<sup>90</sup> Counsel argued that the court should instead "establish the 'Indian' characterization of Mr. Ferguson"<sup>91</sup> through a broader consideration of the meaning of Aboriginality and through reference to other instruments, such as section 35 of the *Constitution Act, 1982*. Given that the term "Indian mode of life" was statutorily mandated as a consideration, the defendant's proposition could have modernized the court's approach and brought it in line with contemporary understandings of Aboriginality—ones that would include bringing Aboriginal people into the dialogue in which they are being defined.

The Alberta Queen's Bench chose not to explore the merits of this argument because it found that the lower court's decision in favour of the defendant could stand. Although faced with an opportunity to consider the legitimacy of a judicial framework that relied on racist social evolutionary theory to inform constitutional interpretation, the court remained silent because the facts satisfied the racist framework that upheld the acquittal. While the defendant was exonerated, in following this course of action, the court joined the line of those who have reproduced, and so have legitimized, conceptions of "Indianness" and Aboriginal culture that served the colonial project.

The court's reasons could have been written just as readily at the beginning of the twentieth century in an administrative decision about whether a Métis child would be required to attend a residential school, or in a judicial determination of whether a shopkeeper had correctly judged that a Métis client was of "the better class of half-breeds."<sup>92</sup> The 1995 NRTA case of *R. v. Desjarlais*<sup>93</sup>

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90. The defendant's counsel may have been drawing upon the extensive commentary on the damages caused to Aboriginal individuals, families, and communities by the definitions of "Indians" within the *Indian Act*, as well as the connections between the definitions and the racist colonial project. See Dwight A. Dorey, "The Future of Off-Reserve Aboriginal Peoples" in Magnet & Dorey, *supra* note 27, 11. He states: "The *Indian Act* imposes on our people an archaic caste system ... [which] distorts the perception of Canadians about Aboriginal issues. It also distorts the perceptions of *Indian Act* bands" (at 17). See also Pamela Palmater, "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" (2000) 23 Dal. L.J. 102 at 117-20.

91. *Ferguson* Queen's Bench decision, *supra* note 84 at para. 11.

92. *Mellon*, *supra* note 43 at 181.

93. [1995] A.J. No. 1324 (Prov. Ct.) [*Desjarlais*]; *aff'd* [1995] A.J. No. 1320 (Q.B.).



showed similar stereotyping. The case involved two Métis who were charged with hunting out of season on Crown land. The trial judge concluded: "It will clearly be more difficult to show an Indian mode of life where a person has had protracted employment in locations and in environments making it difficult to maintain traditional cultural and family ties."<sup>94</sup> In this particular case, an "Indian mode of life" was made out because the court only had "evidence of part-time, casual type employment on the part of this Accused."<sup>95</sup> With regard to the co-accused, the court concluded that he currently "enjoys and follows an Indian life style"<sup>96</sup> as he "has only limited part-time employment to date"<sup>97</sup> and has been subjected to "limited outside influences."<sup>98</sup> The court stated that, in the future, outside influences like "location and employment may act to dilute or extinguish his actual Indian life style or his present Indian life style state of mind."<sup>99</sup> In effect, the court found that an "Indian mode of life" is characterized and maintained by having a marginal employment history and living in borderline destitution.

The courts should be particularly conscious of importing past prejudices or stereotypes in such cases because the NRTAs are part of the Constitution. In *R. v. Blais*,<sup>100</sup> the SCC specifically discussed the consequences of the NRTAs being constitutional documents. It wrote: "A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure 'for individuals the full benefit of the [constitutional] protection.'"<sup>101</sup> This approach is required because "one of the most fundamental principles of Canadian constitutional interpretation [is] ... that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."<sup>102</sup> The way constitutional documents are interpreted must change and progress in a liberal fashion in response to changing situations or values. This approach is necessary to "[en-

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94. *Desjarlais, ibid.* at para. 22.

95. *Ibid.*

96. *Ibid.* at para. 21.

97. *Ibid.*

98. *Ibid.*

99. *Ibid.*

100. *Blais, supra* note 81.

101. *Ibid.* at para. 17.

102. *Re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 22.

sure] the continued relevance and, indeed, legitimacy of Canada's constituting document."<sup>103</sup> The principle that interpretations must "evolve and must be tailored to the changing political and cultural realities of Canadian society" applies to all parts of the Constitution<sup>104</sup> and has been firmly in place since at least 1930.<sup>105</sup> When interpreting and applying constitutional instruments, "[l]egislative history provides a starting point ... [but] it is seldom conclusive as to the scope of that competence for legislative competence is essentially dynamic."<sup>106</sup>

Indeed, in *Edwards v. Attorney-General for Canada*<sup>107</sup> (often called the Persons Case), the government argued that the understanding of the term "persons," as of 1867, was definitionally incorporated into the *Constitution Act, 1867*, and so ought to govern any provisions of the instrument that used that term. Given the prejudices of 1867, this would mean that women could never be "persons" for the purpose of taking political office. The Privy Council rejected this argument as offensive for its "frozen" character, finding the understanding of the capacity of women, as reflected in 1867, to be a "relic of days more barbarous than ours,"<sup>108</sup> and to have no place in contemporary constitutional interpretation.

Surely, one would expect that an understanding of Aboriginal peoples' cultures, as existing in opposition to, or somehow eroded by, engaging in regular waged work, is a similarly unacceptable "relic of days more barbarous than ours," from a time when Western thought subscribed to social evolutionary theory and followed a rubric that depended upon distinctions between industrial economic practices and others. Yet courts continue to draw oppositions between what is "Indian" and what is "white," where an "Indian mode of life" or "state of mind" is, by definition, displaced or placed at risk by regular waged employment. Are Aboriginal cultural practices really so incompatible with holding down a paying job that being employed can reasonably be assumed to undermine who an Abo-

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103. *Ibid.* at para. 23. See also *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 94; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 at 1029; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 723; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 365; and *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

104. *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 23.

105. See *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) at 136 [*Edwards*].

106. *Martin Service Station v. MNR*, [1977] 2 S.C.R. 996 at 1006. See also *Re BC Motor Vehicle Act* [1985] 2 S.C.R. 486 at paras. 46-52 (where Lamer J. found for the majority that, while legislative history was admissible, it was to have little weight).

107. *Edwards*, *supra* note 105.

108. *Ibid.* at 128.

iginal person is? Are the cultures of Aboriginal people so fragile that they can only take one form?<sup>109</sup> As I have shown, the conceptual origin of these propositions rests in social evolutionary theory, which deemed Aboriginal economies to be at a different and lower evolutionary stage than the Euro-Canadian wage-based economy. These propositions were foundational for legitimating the colonial project and justifying state treatment of Aboriginal persons. These propositions have since been roundly discredited as racist and harmful, and assimilation is no longer a state goal; yet contemporary judicial reasoning continues to perpetuate these myths when interpreting statutory language.

In the NRTA examples above, the legislation required the decision maker to consider the “mode of life” of the Aboriginal person. I turn now to situations where the judiciary is under no such obligation because the legislation does not impose any such requirement: the jurisprudence regarding the taxation and garnishment provisions of the *Indian Act*.

### III. TAXING “INDIANS”

#### A. THE MITCHELL DECISION

The perpetuation of a turn-of-the-century concept of “Indianness,” which defines Aboriginality or “living an Indian mode of life” through suppositions of pre-capitalist economic markers, is consistently found in decisions regarding statutory exemptions from taxation and garnishment under the current *Indian Act*.<sup>110</sup> The key provisions read, in part:

87(1). Notwithstanding any other Act of Parliament or any Act of the legislature of a province ... the following property is exempt from taxation:

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian or a band situated on a reserve.

87(2). No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

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109. For a thoughtful analysis of why these conceptions must be fought, see John Borrows, “Physical Philosophy: Mobility and the Future of Indigenous Rights” [Borrows, “Physical Philosophy”] in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) 403.

110. For a general history of the suite of statutory provisions regarding taxation, see J. Peter Ranson, “The Evolution of Aboriginal Tax Exemptions: The Past, the Present, and the Future” (2005) *Can. Tax. Found.* 75.

89(1). Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution...<sup>111</sup>

These exemptions are unique.<sup>112</sup> In *Mitchell v. Peguis Indian Band*,<sup>113</sup> the SCC explored the source and purpose of these provisions, and identified the practice of recognizing or granting taxation, garnishment, and seizure exemptions as dating back to colonial Indian policies. For example, the *Royal Proclamation, 1763*<sup>114</sup> assured Aboriginal peoples that the Crown would "protect them in the possession and use of such lands as were reserved for their use."<sup>115</sup> It also guaranteed that Aboriginal peoples would not be dispossessed of any benefits that "they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations."<sup>116</sup>

The statutory language of the *Indian Act* goes beyond shielding reserved lands and treaty benefits. It also embraces the broad category of "personal property," while imposing several unique restrictions on scope. One of these restrictions is section 87(1)(b), which provides that the personal property must be "of an Indian ... on a reserve." Ostensibly, this provision links the exemption to a geographic location (reserved land), and to owners who are "Indians" (with the term "Indian" logically referring to those who fall under the definition of "Indian" that is provided within the same statute).<sup>117</sup>

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111. *Supra* note 17, ss. 87, 89(1).

112. There is debate over whether these provisions are merely a creature of statute, subject to revocation at the discretion of the Crown, or, like Aboriginal rights recognized under s. 35 of the *Constitution Act, 1982*, are a codification of an existing right with an independent source, such as treaty promises. Although taxes are not specifically addressed in the written terms of any treaties, assurances regarding taxation were clearly offered when at least some treaties were negotiated. See Richard H. Bartlett, *Indians and Taxation in Canada*, 3d ed. (Saskatoon: Native Law Centre, 1992) at 1-14.

113. [1990] 2 S.C.R. 85 [*Mitchell*].

114. R.S.C. 1970, App. II, No. 1.

115. *Mitchell*, *supra* note 113 at para. 85, La Forest J. Although disagreeing on another point, L'Heureux-Dubé J. agreed with La Forest J.'s interpretation of the legislation. See also para. 50.

116. *Ibid.* at para. 86. See also Joel Oliphant, "Taxation and Treaty Rights: *Benoit v. Canada's* Historical Context and Impact" (2003) 29 Man. L.J. 343. Oliphant concludes that, with regard to these historic taxation relations, "the Crown's original aim was to shield Indians until such time as they were able to participate in Canada's commercial mainstream" (at 372).

117. *Indian Act*, *supra* note 17, s. 2 (defining "Indian" as a person who is registered as an Indian or is entitled to be registered as an Indian). "Indian" may also refer to a person embraced by

However, Justice La Forest did not subscribe to this interpretation in *Mitchell*. Drawing upon the history of such exceptions, he interpreted the provisions as operating to “shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, *i.e.*, their land base and the chattels on that land base.”<sup>118</sup> The awkward phrase “*qua* Indian” is nowhere to be seen in the legislation. So what does it signal, and what difference does adding this phrase make? The following statement, which Justice La Forest adopted as an accurate characterization of how the provision operates, is illuminating: “A tax exemption on the personal property of an Indian will be confined to the place where the holder of such property is *expected* to have it, *namely on the lands which an Indian occupies as an Indian, the reserve.*”<sup>119</sup>

Justice La Forest’s interpretation of the provision is provocative. The statutory phrase “of an Indian ... situated on a reserve” has been transformed into “of an Indian *qua* Indian situated on a reserve.” This evokes, once again, a conceptual opposition, a splitting of self, that only strikes Aboriginal people, and results in the ebb and flow of their Aboriginality in a judicially determinable manner.<sup>120</sup> The provision’s recast scope seems defined less by geography (on a reserve) and whether the owner falls under the statutory definition of “Indian,” and more by a manner of occupation (“as an Indian”) that is understood (“expected”) to map naturally onto that geography. Justice La Forest’s comments imply that it is reasonable to expect that Aboriginal people live *qua* “Indians” when they live on reserves, and that the way Aboriginal people live changes—likely becomes less “as an Indian,” and more something else—if they live off the

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s. 91(24) of the *Constitution Act, 1867*, which provides that “Indians and lands reserved to the Indians” are a federal head of power. The meaning in this section is not entirely settled. It includes, at a minimum, those Aboriginal persons whose names are listed on the Indian Register and persons who are Inuit. However, it potentially includes a much larger population of First Nations persons who do not have status under the *Indian Act*. See *e.g.* Joseph Eliot Magnet, “Who are the Aboriginal People of Canada?” in Magnet & Dorey, *supra* note 27, 23 at 47-48.

118. *Mitchell*, *supra* note 113 at para. 87.

119. *Ibid.* [emphasis added].

120. For a critique of how *Mitchell* evades engaging Aboriginal people on their own terms and serves to undermine any efforts to foster a sense of Canadian citizenship, see John Borrows, “The Supreme Court, Citizenship and the Canadian Community: the Judgments of Justice La Forest” [Borrows, “Citizenship”] in Rebecca Johnson *et al.*, eds., *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (Ottawa: Supreme Court of Canada Historical Society, 2000) 243 at 261-64.

reserve. This takes us squarely back to the factors that drove assessments of whether "non-treaty Indians" were "Indians," and what living on a reserve was seen to signal for the economic assimilation project.

Although other—and far less problematic—interpretations of Justice La Forest's writing are possible, subsequent courts have explicitly adopted such a reading of Justice La Forest's reasons. The judicial insertion of the phrase "*qua* Indian" becomes pivotal in perpetuating the concepts developed within the assimilation-era jurisprudence. It both permits sections 87 and 89 of the *Indian Act* to be let loose from the moorings of their express language, and provides an opening, if not a requirement, for subsequent courts to make pronouncements about when or how an Aboriginal person acts *qua* "an Indian."

Justice La Forest explains that these statutory exemptions do not attach to personal property that an "Indian may acquire, hold, and deal with ... in the commercial mainstream."<sup>121</sup> Just like the phrase "*qua* Indian," there is no reference to "commercial mainstream" in the legislation—there is only reference to reserves. The term "commercial mainstream" is conjured to give shape to an economic opposition, identifying features of property *not* held "*qua* Indian" and on a reserve. Perhaps most surprisingly, Justice La Forest assumes that Aboriginal people understand this term to delineate a meaningful boundary line. He writes: "Indians, when engaging in the cut and thrust of business dealings in the commercial mainstream are under no illusions that they can expect to compete from a position of privilege with respect to their fellow Canadians."<sup>122</sup> Are "reserves," by definition, outside the concept of commercial mainstream? Or do the ways in which an Aboriginal person has ownership "*qua* Indian" conflict with how one is able to own in the commercial mainstream? The answers are not entirely clear.<sup>123</sup>

Implicit in Justice La Forest's approach is the notion that it is possible and rational to conceive of Aboriginal people as holding personal property—both as

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121. *Mitchell*, *supra* note 113 at para. 88.

122. *Ibid.* at para. 122. I thank John Borrows for pointing out to me that, in *Mitchell*, La Forest J. makes a series of assumptions about what Aboriginal people believe or know, without apparently hearing from Aboriginal people on the matters in question. See Borrows, "Citizenship," *supra* note 120 at 262-64.

123. For one reading of what La Forest J. had intended and the difference between this reading and the subsequent judicial interpretations, see Martha O'Brian, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track" (2002) 50 *Can. Tax J.* 1570 at 1576-77.

all others do under the common law and as uniquely “*qua* Indian”<sup>124</sup>—and that judges and tax officials can distinguish between the two types of ownership. These sorts of oppositions resonate with the assimilation-era jurisprudence and their logics of essentialized difference.

## B. MITCHELL'S LEGACY

*Mitchell* was specifically about whether property was available for garnishing, but the SCC engaged in a general discussion of the taxation provisions in which the garnishment provisions are embedded. Subsequent cases draw on the discussion in *Mitchell* as a key precedent for interpreting statutory tax exemptions of the *Indian Act*, especially where intangible property is at issue.

For example, the SCC cited *Mitchell* in *Williams v. R.*,<sup>125</sup> a case that determined whether the section 87 exemption could capture unemployment insurance benefits. The intangible character of the payments raised the question of their situs (where the payments should be deemed to be located) and, in particular, whether the income could be considered to be located “on a reserve.”

Questions about situs are not uncommon in the taxation arena, and they are typically answered by asking a series of questions about the nature of the income-producing transaction and the purpose of the taxation provision.<sup>126</sup> Consistent with this practice, the Court in *Williams* found that the situs could be determined by considering a number of connecting factors in light of the purpose of the exemption, the type of property, and the nature of the taxation.<sup>127</sup> Drawing upon *Mitchell*, Justice Gonthier wrote: “The purpose of the situs test in [section] 87 is to determine whether the Indian holds the property in question as part of the entitlement of an Indian *qua* Indian on the reserve.”<sup>128</sup> On the facts of *Williams*, Justice Gonthier found that the most important connecting factor that deter-

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124. It is essential to avoid analogizing to rights arising under Aboriginal title here. Like the rights in question under the taxation provisions, Aboriginal title rights are a distinct form of property right. However, unlike the rights in question, they are not created by statute or treaty, but have their origin in the coming together of colonial and indigenous legal systems. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]. For a discussion of the most recent SCC findings on the nature of Aboriginal title, see McNeil, *supra* note 8.

125. *Williams v. Canada*, [1992] 1 S.C.R. 877 [*Williams*].

126. See e.g. Tim Edgar & Daniel Sandler, eds., *Materials on Canadian Income Tax*, 13th ed. (Toronto: Carswell, 2005) at 217.

127. *Supra* note 125 at para. 37.

128. *Ibid.* at para. 19. See also paras. 32, 37.

mined if an applicant qualified for unemployment benefits was the location of the employment income.<sup>129</sup> As the income was earned on reserve, the unemployment benefits were found to fall within the protective scope of section 87.

So what happened to "Indian *qua* Indian" and the contrast between on-reserve and the commercial mainstream? These ideas do not seem to have played much of a role in the Court's reasoning. The one exception is Justice Gonthier's observation that "an Indian has a choice with regard to his personal property."<sup>130</sup> This choice, he wrote, is between situating property "on the reserve," where it is protected from taxation and seizure, or situating it off the reserve, making it "more fully available for ordinary commercial purposes in society."<sup>131</sup> The only contrast that resonates with *Mitchell* is the suggestion that "ordinary" commercial activities—or engagements with the "commercial mainstream"—do not take place on reserves. Overall, Justice Gonthier's interpretation of the taxation provisions seems to rest far closer to the provision's plain words.

Despite the differences between these two SCC decisions, subsequent courts have read them as presenting a singular position, together invoking a considerable set of oppositions about "Indians" that completely rejuvenate the presumptions of the assimilation-era jurisprudence (if those presumptions were ever dormant). Subsequent applications of the SCC's judgments illustrate the ease with which contemporary courts consistently read the lead precedents in a way that invokes and endorses a continuing role for the colonial economic logic.<sup>132</sup>

For example, in *Folster v. R.*,<sup>133</sup> the Federal Court of Appeal found that Justice La Forest's reasons in *Mitchell* "characterized the purpose of the tax exemption provisions as, in essence, an effort to preserve the traditional way of life in Indian communities by protecting property held by Indians *qua* Indians."<sup>134</sup> Similarly, the court found that Justice Gonthier, in *Williams*, "sought to ensure that any tax exemption would serve the purpose it was meant to achieve, namely, the preservation of property held by Indians *qua* Indians on reserves so that their

129. *Ibid.* at paras. 39-43.

130. *Ibid.* at para. 18.

131. *Ibid.*

132. It has been argued that the interpretations adopted by subsequent courts, and, in particular, their focus on "the traditional way of life" of Aboriginal peoples, are not supported by the SCC jurisprudence. See O'Brian, *supra* note 123 at 1576-77.

133. *Folster*, *supra* note 2.

134. *Ibid.* at para. 14.



traditional way of life would not be jeopardized.”<sup>135</sup> The court amplifies and makes explicit associations between living on a reserve and living an “Indian way of life”: that Aboriginal people live “as Indians” when they live “the traditional way of life,” and that this way of life is what takes place on reserves. These associations are, arguably, only implied in *Mitchell* (and are even less present in *Williams*). Like the discussions about whether Métis children or enfranchisement applicants live an “Indian mode of life,” there is a presumption that the meaning of living “the traditional way of life” is so obvious that it generally needs no elaboration.

The Federal Court of Appeal further developed these associations in *Southwind v. Canada*.<sup>136</sup> In this case, the income in question arose from a business. The court interpreted section 87 of the *Indian Act* as supporting a contrast between the income of businesses that are “integral to the life of the Reserve”<sup>137</sup> and the income of businesses “in the ‘commercial mainstream.’”<sup>138</sup> The former would likely qualify for the section 87 shield, while the latter would not. The court explained that “commercial mainstream” is a term used to “isolate those business activities that benefit the individual Native rather than his community as a whole,”<sup>139</sup> and that the job of the court in such cases is to “draw the lines, as best we can, between ... income that is situated on the Reserve and integral to community life, and income that is primarily derived in the commercial mainstream, working for and dealing with off-reserve people.”<sup>140</sup> The term “commercial mainstream” invokes the assimilation-era threshold that marks Aboriginal people who are assumed to have made a break with their community due to their willingness to engage in income-earning activities that are for their personal benefit. The court’s approach is not unlike the contemporaneous NRTA cases where an individual’s claim to living an “Indian mode of life” would be threatened by “protracted employment.”<sup>141</sup>

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135. *Ibid.* at para. 16.

136. (1998) 156 D.L.R. (4th) 87 (F.C.A.) [*Southwind*].

137. *Ibid.* at para. 13.

138. *Ibid.* In drawing upon the language of what is integral to community life, Linden J. appears to be drawing upon the test for assessing whether a practice is protected as a s. 35(1) Aboriginal right. This test asks about what is integral to the culture of an Aboriginal claimant. See O’Brian, *supra* note 123 at 1576.

139. *Southwind*, *ibid.* at para. 14.

140. *Ibid.* at para. 17.

141. *Desjarlais*, *supra* note 93 at para. 22.

Later the same year, in *Recalma v. Canada*,<sup>142</sup> the Federal Court of Appeal repeated its message that income-generating activity in the "commercial mainstream" contrasts with income-generating activity that is "intimately connected to' the reserve, that is, an 'integral part' of Reserve life."<sup>143</sup> How do we determine the difference? The court tells us to consider the business activity "in relation to its connection to the Reserve, its benefit to the traditional Native way of life."<sup>144</sup> The economic oppositions multiply, and yet seem to be just variations on the same theme.

The Tax Court of Canada followed and expanded upon the jurisprudence of the Federal Court. In *Lewin v. Canada*,<sup>145</sup> the court pronounced on whether investment income of Aboriginal individuals arose through "basically ordinary services related to the economic aspects of life,"<sup>146</sup> or if it was connected to "the protection or safeguarding of the interests, culture and development of the traditional way of life of the Indians living on the reserve."<sup>147</sup> The court implied that the "traditional way of life" of Aboriginal peoples did not embrace "economic aspects" (or at least economic aspects beyond a subsistence economy). The Federal Court of Appeal affirmed this decision.<sup>148</sup>

There is a clear connection between the colonial presumptions for measuring assimilation and the contemporary judicial analytic practices for understanding when the property of an Indian *qua* Indian is situated on a reserve. For example, in the 1906 decision in *Hughes*, the court found that Aboriginal people live "as Indian" when they live on a reserve or outside the waged economy.<sup>149</sup> This turn-of-the-century distinction is reflected in the Federal Court of Appeal's contemporary refrain that "'commercial mainstream' contrasts with 'integral to the life of a reserve.'"<sup>150</sup>

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142. (1998) 158 D.L.R. (4th) 59 (F.C.A.) [*Recalma*].

143. *Ibid.* at para. 9. For a critique of the reasoning in this case, see O'Brian, *supra* note 123 at 1577-78.

144. *Recalma, ibid.* at para. 11.

145. [2001] T.C.J. 242.

146. *Ibid.* at para. 63.

147. *Ibid.* at para. 25.

148. *Lewin v. Canada*, [2002] F.C.J. 1625 (C.A.).

149. *Supra* note 45.

150. *Shilling v. Canada (Minister of National Revenue)* (2001), 201 D.L.R. (4th) 523 at paras. 65-66 (F.C.A.); *Folster, supra* note 2 at para. 14.

Contemporary taxation jurisprudence does not draw a distinction between those who do and those who do not need protection and accelerated progression along an evolutionary scale based on economic practices. The contrast is instead drawn between those whose economic choices are taken to signal that they remain committed to living “*qua* Indian” and, therefore, on a reserve, and those who have taken up a more individualistic path (as evidenced, in particular, by being off the reserve or entering into business transactions with off-reserve people and institutions).<sup>151</sup> But the result is essentially the same, and the on-reserve versus off-reserve binary, with its linkage to living “*qua* Indian,” remains strong.

I am not suggesting that there is a straightforward and immediate causal relationship between what we see in the “non-treaty Indian” cases and the taxation jurisprudence. My point is that, at the turn of the century, judges had no choice but to ask about the Indian “mode of life,” and the racist social theory of the time necessarily informed their understanding of what that meant. The legislation no longer requires judges to turn to such concepts, but the ideas have gained such normative traction within the panoply of judicial precedent that the courts continue to draw upon and perpetuate them.<sup>152</sup>

In *Folster, Southwind, and Recalma*, the Federal Court of Appeal articulated a series of dichotomies and associations that, although not identical, are certainly consistent. The court assumes that it can identify “the traditional Native way of life” and what would “benefit” that way of life, and that a connection exists between living this traditional life and living on reserves. There is also a rift between economic activities that benefit an Aboriginal individual and those that benefit an Aboriginal community generally, where the former flags a transition into the “commercial mainstream” and is at odds with living “as an Indian.”

Finally, the courts believe that all of these matters are judiciable, relevant, and appropriate for understanding when the “personal property of an Indian [is] situated on a reserve.” The SCC rearticulates aspects of this position in *McDiarmid Lumber Ltd. v. God’s Lake First Nation*,<sup>153</sup> where it describes reserves as protected places that specifically enable Aboriginal culture to be adhered to and reinforced.<sup>154</sup>

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151. As discussed in Part V, the SCC, when questioned directly, formally disapproves of courts adopting this stereotype.

152. For a discussion of the cloaking power of precedent, see Bell & Asch, *supra* note 22 at 59-64.

153. *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, [2006] 2 S.C.R. 846.

154. *Ibid.* at paras. 105-07. As this decision turned on the meaning of “agreement” under s.

Reserves are described as essentially figuring as enclaves of "true Aboriginal tradition," and only able to continue to serve this role if the marketplace is kept at bay. Reserve-based communities can certainly be centres for facilitating cultural strength and growth—the problem arises from the assumptions that reserves naturally and obviously play this role, that cultural strength and growth cannot be developed elsewhere, and that commercial activity is incompatible with robust Aboriginal cultures.<sup>155</sup>

The only decision of the Federal Court of Appeal that problematizes this approach is *Sero v. Canada*.<sup>156</sup> Justice Sharlow, writing for the court, observed:

[I]t is not clear to me whether, in determining the situs of investment income for purposes of section 87 of the *Indian Act*, it is relevant to consider the extent to which investment income benefits the "traditional Native way of life." ... [I]t is at least arguable that the "traditional Native way of life" has little or nothing to do with reserves.<sup>157</sup>

As the appeal did not turn on this matter, the court refrained from taking a definitive position on the relevance of asking this question. The court's *obiter* comment, however, does entertain exposing the presumptive associations between reserves and "Indians living *qua* Indians," and between living off a reserve and not living "as an Indian." It also questions whether the jurisprudence has strayed unreasonably from the legislation.<sup>158</sup> Overall, *Mitchell's* reference to "Indian *qua* Indian," and the use of the term "commercial mainstream" to signal an opposition, has both drawn upon the rubrics from the past and spawned an enduring legacy. While the logics of this legacy have been subject to some internal scrutiny, it is still, by-and-large, going strong.

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90(1)(b) of the current *Indian Act*, I do not discuss this case here. For an analysis of this case's place within the jurisprudence, see Constance MacIntosh, "Developments in Aboriginal Law: The 2006-2007 Term" (2007) 38 Sup. Ct. L. Rev. 1 at 2-18.

155. For a more fulsome discussion, see Borrows, "Physical Philosophy," *supra* note 109.

156. [2004] 2 C.N.L.R. 333 (F.C.A.) [*Sero*], leave to appeal to SCC refused, [2004] S.C.C.A. 88. See also *Large v. Canada*, [2006] T.C.J. 398, aff'd [2007] F.C.J. 1507 (C.A.). At trial, the court observed that "the connecting factor referring to 'the traditional Native way of life' has been criticized" (at paras. 46-50), but then considered whether there was any evidence that the investment activities benefited the community. The matter was dismissed on appeal.

157. *Sero*, *ibid.* at para. 25.

158. For a discussion of this comment, see Martha O'Brien, "Investment Income and Indian Reserves: The Disconnecting Factor" (2004) 52 Can. Tax J. 543 (providing case comments on *Sero* and *Frazer v. The Queen*).

#### IV. PERPETUATIONS AND INTERVENTIONS

Although the SCC has played a role in perpetuating such conceptualizations of Aboriginality, it has also problematized them. In this Part, I illustrate how the SCC has, on the one hand, identified and rejected the very sort of reasoning that underlies much of the jurisprudence and policy that I have tracked, but how, on the other hand, it has also implicitly applied them. This reflects, I believe, the fact that this discourse is not a totalizing one, but is rather extremely tenacious and hegemonic. Marlee Kline identified similar inconsistencies in judicial reasoning in her work on racialized legal discourse, where prevailing approaches and counter-narratives exist in tandem.<sup>159</sup>

##### A. THE COUNTER-NARRATIVE

*Corbiere v. Canada (Minister of Indian and Northern Affairs)*<sup>160</sup> is concerned with section 77(1) of the *Indian Act*, which provided that only band members who are “ordinarily resident” on their reserve have the right to vote in band council elections.<sup>161</sup> The Court was asked to determine whether these provisions violated the equality guarantees of section 15(1) of the *Canadian Charter of Rights and Freedoms*.<sup>162</sup> In their set of concurring reasons, the members of the Court agreed that the federal statute “reinforces the stereotype that band members who do not live on reserves are ‘less Aboriginal’”<sup>163</sup> and are “not interested in ... preserving their cultural identity.”<sup>164</sup> The decision included considerable discussion on the harm that has been done to the dignity of Aboriginal persons by virtue of having “been only seen as ‘truly Aboriginal’ if they live on reserves,”<sup>165</sup> and how the statutory denial of the right of band members who do not live on reserves to vote reified this harm. Justice L’Heureux-Dubé spoke directly to the fact that “Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society,” leading to the

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159. Kline, *supra* note 18 at 458, 468.

160. [1999] 2 S.C.R. 203 [*Corbiere*].

161. *Supra* note 17, s. 77(1).

162. *Canadian 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.

163. *Corbiere*, *supra* note 160 at para. 92, L’Heureux-Dubé J.

164. *Ibid.* at para. 18, McLachlin & Bastarache JJ.

165. *Ibid.* at para. 71, L’Heureux-Dubé J.

stereotyped "assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed—that they must assimilate into this other world."<sup>166</sup>

We see here a direct acknowledgement of the economic oppositions that I have been tracing through the jurisprudence and of the damage they have caused to Aboriginal individuals and communities. Aboriginal people have been wrongfully perceived as losing themselves if they are successful in an urban centre (e.g., they derive a decent income from a job), and Aboriginal culture has been pigeon-holed as incompatible with living in an industrialized society or outside of reserve communities.

The SCC sends out a somewhat mixed message. When asked directly, the Court is quick to disparage those who would associate Aboriginality, or Aboriginal cultural identity, with having a de facto link to living on-reserve or off-reserve, or for assuming that Aboriginal cultures are incompatible with working in an industrial economy. However, such stereotyping seeps in indirectly, and the common law is a soft and diffused target. When Justice L'Heureux-Dubé commented in *Corbiere* that the on-reserve/off-reserve "perception is deeply rooted and persistently reinforced,"<sup>167</sup> I suspect that she was commenting on society at large. The judiciary is also a part of this society and equally vulnerable to falling prey to these tenacious presumptions. We see some of these presumptions in *Delgamuukw v. British Columbia*<sup>168</sup> and *R. v. Marshall*.<sup>169</sup> I turn to these Aboriginal rights cases not to discuss the Court's assessment of the claimant's specific section 35(1) rights and what is integral to the specific Aboriginal cultures at issue, but rather to consider other elements of the judicial reasoning process that illustrate how presumptions about the universal nature of Aboriginal culture continue to surface implicitly.

## B. IDENTIFYING IMPLICIT PERPETUATIONS

In *Delgamuukw*, the SCC explicitly rejects defining Aboriginality through economic oppositions, but then seems to implicitly build them into its reasoning. The SCC found it an error of law for the trial judge to have concluded that

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166. *Ibid.*, citing with approval the *Report of the Royal Commission*, *supra* note 25.

167. *Ibid.*

168. *Delgamuukw*, *supra* note 124.

169. *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*].

the constitutionalized rights of an Aboriginal person would be abrogated if the individual made the choice to “participate in the wage or cash economy.”<sup>170</sup> The Court also found that, as a matter of law, Aboriginal title rights could not extend to uses of title land that were inconsistent with the claimant community’s cultural relationship to the land. That relationship was established by “the activities that have taken place on the land and the uses to which the land has been put by the particular group.”<sup>171</sup>

Despite rejecting participation in the cash economy as legally relevant for determining whether an Aboriginal person’s constitutionalized rights *qua* Aboriginal have been abrogated, the Court’s examples of what sorts of activities would likely be *prima facie* incompatible with Aboriginal relationships to land are industrial economic activities. The two examples that the Court gives are strip mining and building a parking lot. The Court’s characterization of Aboriginal title rests on a foundation that deems Aboriginal cultural practices to be potentially inconsistent with having the capacity to decide to use land for its best economic purpose. It seems inconceivable to the Court that an Aboriginal people’s relationship to a tract of land could be primarily economic, given the Court’s conclusion that the Aboriginal relationship to land has “an important non-economic component.”<sup>172</sup> This definition of title, which the Court seems to indicate is to apply universally to all Aboriginal peoples, necessarily requires that a strong connection *other than an economic one* be made out. So, unless a strong “non-economic” attachment is proven, it is unlikely that a claim to Aboriginal title could be recognized. The oppositions that operationalized the nineteenth century characterizations of “Indianness” and “Indian mode of life” continue to flourish, although in slightly different manifestations.

Similar assumptions about the incommensurability of Aboriginal peoples’ cultures and economic interests arose in *Marshall*, which involved interpreting a treaty. The clause in question was a promise by the Mi’kmaq signatories to not engage in trade except at government “truckhouses” (or trading posts).<sup>173</sup> The SCC had previously set out a number of principles that govern treaty interpretation. They include choosing “from among the various possible interpretations

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170. *Delgamuukw*, *supra* note 124 at para. 50.

171. *Ibid.* at para. 128.

172. *Ibid.* at para. 129.

173. *Marshall*, *supra* note 169 at para. 6.

of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."<sup>174</sup>

Basing its decision largely upon records that indicated the Mi'kmaq signatories had requested that the treaty include the establishment of a truckhouse "for ... furnishing them with necessaries,"<sup>175</sup> the SCC concluded that both parties had intended that the treaty right to trade would "not [be] a right to trade generally for economic gain, but rather a right to trade for necessaries."<sup>176</sup> The Court then defined "necessaries" as equivalent to a "moderate livelihood"<sup>177</sup> and being able to provide for "such basics as 'food, clothing and housing, supplemented by a few amenities,' but not the accumulation of wealth."<sup>178</sup> As a result, the treaty right only permitted harvesting and selling resources (in this case, eels) to the point that their sale would support such a lifestyle.

A large body of scholarly work has criticized these reasons because they assume that the Mi'kmaq would agree to a cap on their right to trade when trading had "address[ed] ... day-to-day needs,"<sup>179</sup> or that the British would not want every fur that they could get to sell to the seemingly endless market demand from merchants in England.<sup>180</sup> One of the more forceful critiques of the notion that both of the parties *intended* this result was penned by Gordon Christie. He wrote:

But what can be made of the argument that, in asking for a truckhouse to exchange peltry, the Mi'kmaq were agreeing to a limit on the treaty right, such that they could be prevented by the Crown from attempting to hunt and fish to the extent that they might be able to trade for more than necessaries? Was that in the contemplation of the Mi'kmaq (or the British)? Does this suggest that if a Mi'kmaq family had a good winter of hunting, came to a truckhouse to trade and found that they could obtain more than necessaries with their substantial supplies of

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174. *Ibid.* at para. 78.

175. *Ibid.* at para. 58.

176. *Ibid.*

177. *Ibid.* at para. 7.

178. *Ibid.* at para. 59.

179. *Ibid.*

180. Bruce H. Wildsmith, "Vindicating Mi'Kmaq Rights: The Struggle Before, During and After Marshall" (2001) 19 Windsor Y.B. Access Just. 203 at 225-26. See also Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143 at 186; Warren J. Sheffer, "R. v. Marshall: Aboriginal Treaty Rights and Wrongs" (March, 2000) 10 Windsor Rev. Legal Soc. Issues 77 at 95-97.



pelts, the British could find that they had exceeded the terms of the treaty ... ? What would the Mi'kmaq family have imagined if they had been informed that from that point on their hunting would be regulated, so that they could no longer lawfully bring to the truckhouse a substantial supply of pelts? Had their people's representatives agreed to such an arrangement?<sup>181</sup>

Justice Binnie believed his interpretation "was the common intention in 1760."<sup>182</sup> Most of the critiques of this aspect of the judgment find it absurd or arbitrary. I see his interpretation as continuing in the mold of contrasting Aboriginal "modes of life" with participating in a cash economy, or Aboriginal "lifestyles" being culturally commensurate with just getting by on "basics." It is possible that Justice Binnie simply could not believe that the Mi'kmaq signatories could themselves imagine a life that went beyond meeting their "day-to-day" basic requirements—just as the Court in *Delgamuukw* could not contemplate that, somewhere in Canada, there may be an Aboriginal people whose relationship to at least some tracts of land has a predominantly economic component.<sup>183</sup>

## V. COUNTERING THE DISCOURSE

Situations such as *Marshall*, where there are analytical deficiencies that allow assimilation-era logics and assumptions to underwrite judicial reasoning, must be ferreted out and challenged if we are to liberate our jurisprudence—and Aboriginal peoples—from the harms of social evolutionary thinking. Canadian legislation no longer asks the question of whether an "Indian" has achieved a stage of civilization where he or she ought to be deemed capable of owning land in fee simple. Such a question, directly put, would be met with well-deserved outrage. But the ideological by-products and prejudices of earlier times persist. We have created a common law concept of "Indianness" that reflects the legislated and jurisprudential definitions that were once crafted to enable assimilation-era state goals. These definitions also persist outside of the jurisprudence. In his careful analysis of how Aboriginal people's mobility practices have been

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181. Christie, *ibid.* at 186.

182. *Marshall*, *supra* note 169 at para. 59.

183. See *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*]. See also Borrows, "Citizenship," *supra* note 120 at 267 (observing that La Forest J.'s dissent in *Gladstone* "seems to define Aboriginal identity as resting at a seemingly lower level of social organization that did not contemplate large scale commercial relationships").

used to undermine their rights, John Borrows observes that the fictions of colonialism have been internalized by some Indigenous peoples,<sup>184</sup> leading some to engage in self-policing and judging of others, pursuant to a form of the assimilation-era logics.<sup>185</sup> The resulting damage is well-illustrated by the stories collected by Bonita Lawrence in her aptly named book, *"Real" Indians and Others*.<sup>186</sup> In this book, Lawrence draws upon interviews to explore "how mixed-blood urban Native people understand and negotiate their own identities in relation to community and how external definitions and controls on Indianness have impacted their identities."<sup>187</sup> She often brings the analysis back to the harm fostered by the persistent social and legal stereotype that "being Aboriginal and being urban and mixed blood are mutually exclusive categories."<sup>188</sup>

I take direction from Patricia-Monture Angus, who wrote in her germinal book, *Thunder in My Soul: A Mohawk Woman Speaks*: "Only by understanding the history of the Canadian legal system can we then understand why the result of this system is not justice."<sup>189</sup> The ideas of "Indianness" and of living an "Indian mode of life" that are discussed in this article arose in ugly times in Canadian history and enabled state objectives which have since been formally acknowledged as unacceptable. As Marlee Kline writes, legal institutions have been accorded power to define Aboriginal peoples, and "this power is often obscured by the naturalizing and legitimizing effects of dominant ideology, especially within the allegedly neutral domain of legal discourse."<sup>190</sup> The origin of these notions, and the jurisprudential discourse which they spawned, must not be buried under the legitimacy that is accorded to the practice of following precedent. Any assumption that they represent a rational or legally relevant rubric is an assumption born of a social theory that has long been discredited. We must put such rubrics aside and aggressively mobilize those moments of judicial and societal intervention that were evidenced in such cases as *Corbiere*.

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184. Borrows, "Physical Philosophy," *supra* note 109 at 408.

185. *Ibid.* at 408-11.

186. Bonita Lawrence, *"Real" Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004).

187. *Ibid.* at 1.

188. *Ibid.* at 10.

189. Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 35.

190. Kline, *supra* note 18 at 469.

