The Colour of Law: Ideological Representations of First Nations in Legal Discourse

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RACISM IS the ugly and powerful process that contributes to the construction of relations of domination and subordination between racialized, ethnic, national and/or cultural groups in society (Anthias and Yuval-Davis, 1992). There are ideological aspects of racism as well as concrete exclusionary, discriminatory, exploitative and violent effects. Ideologically, racism constructs reality such that it becomes part of what is taken for granted about the world, providing for those who escape its aim more than those who are its target, 'a description of and explanation for the way in which the world is experienced to work' (Miles, 1989: 80). Racism is thus, in part, a process of representation (see later) which provides a frame of reference and guide for conduct for dominant racialized, ethnic, national and cultural groups (Cotterell, 1984; Hall, 1988). In this way it contributes to the rationalization, naturalization and legitimation of concrete oppressive practices. However, racism also forms part of the experience of its target groups, who not only confront its material effects, but often internalize as well as resist and negotiate many of its oppressive messages (Anthias and Yuval-Davis, 1992; Stanley, 1991). Racism is multidimensional, taking particular forms in relation to various racialized, ethnic, cultural and national groups, and in relation to the historico-geographic conditions and

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contexts of its development and application. As well, it is experienced differentially according to class, gender, sexual identity and disability. A product of both 'historical legacy and individual and collective attempts to make sense of the world' (Miles, 1989: 132), racism is in constant evolution, taking on new forms within each discourse in which it finds expression, and adapting to changed circumstances and conditions.

Law provides one of the discourses in which racism is constructed, reproduced and reinforced. Law has been and continues to be implicated in racist processes in a variety of ways. In an earlier article I examined some of the more subtle ways in which racism operates in law by considering how the ideological form of law, grounded in liberalism, constrains judicial decision-making in child welfare cases involving First Nations[1] children (Kline, 1992). Law's often abstract and indeterminate form also facilitates the judicial importation of racist ideological thought, formally external to legal discourse, into the legal interpretive process (see Gavigan, 1988). It is this relationship between law and racism that I will analyse here. My discussion will focus on the ways in which certain ideological representations of First Nations are embedded in and expressed through judicial reasoning. These representations took shape within the history of oppression and subordination of First Nations by European and Canadian colonial powers, and have assumed new forms and expressions in the contemporary context. They are a component of what a number of writers have referred to as 'racist ideologies' (see, for example, Anthias, 1990; Crenshaw, 1988; Lawrence, 1982; Solomos, 1986). Such representations have become part of what is simply taken for granted and understood as common sense. Judges internalize racist ideologies along with other dominant ideologies. Analysing the articulation of such externally formulated ideological representations in legal decisions thus provides a useful framework, in addition to focusing on the liberal form of law, for investigating the relationship between judicial reasoning and ideology where First Nations people confront law and the legal system (see also Kline, 1993). After developing a brief historical account of what I identify as three ideological representations of 'Indianness',[2] I will illustrate how these ideological representations are manifest in aboriginal rights cases (including land claims, treaty rights, and hunting and fishing rights cases) and child welfare cases, areas of particular importance to First Nations in Canada.

RACIST IDEOLOGY

Ideology is, in part, a representational process. Beliefs, images, attributions and explanations which are constructed historically in conjunction with and in relation to material and cultural conditions and power relations, are presented as natural, inevitable and necessary within the current social order. However, the concept of ideology also goes further, allowing for an exploration of 'the connection between ideas, attitudes, and beliefs, on the one hand, and economic and political interests, on the other' (Hunt, 1985: 13). It presumes that the 'common sense' of a society has developed historically, within particular

relations of race, gender, class, sexual identity and so on. In this article, I rely on the concept of ideology to emphasize the relationship between early colonialist practices and representations of First Nations which continue to inform contemporary practices, including those within law and the legal system.

Ideology is related to discourse in the sense that discourse is the 'arena or medium in which ideology functions' (Hall, 1988: 73). While all representations are mediated through discourse, only some discourses – namely those which mediate the relationship between groups that are unequal in terms of social power (P. A. Jackson, 1989: 51) – are usefully characterized as ideological. Thus, the concept of ideology draws attention to the role played by some discourses in relations of domination (Boyd, 1991; Purvis and Hunt, 1993). To understand how some discourses come to be dominant, and others subordinate, it is necessary to consider how the social institutions implicated in the formation and transmission of knowledge are grounded in and structured by relations of race, gender, class, sexuality and so on. The discursive codes available to unscramble the meaning of events in the world reflect the unequal relations of power which shape the knowledge production process (Hall, 1988). Consequently, 'discourses gain more power depending on their relationship to dominant ideologies and material structures' (Boyd, 1991: 105). Law, for example, is a discursive field which, given the social relations and material structures of its production, is more open to dominant ideologies, which are in turn themselves reinforced and legitimated by their incorporation into law (Bakan, 1990; Boyd, 1991).

Racist ideologies are 'the product of dominance, a result of the power to define who could, and who could not, legitimately and equally participate within the dominant society' (Stanley, 1991: 320). Yet racist ideologies are not simply 'false' representations (Hunt, 1985, 1988; Thompson, 1984). Understanding ideology as a discursive phenomenon helps to mediate the relationship between truth and interpretation by focusing on the construction of truths in and through language and representation (Hall, 1988: 73). At the same time, we should not lose sight of the importance of investigating the connection between ideologies and the interests they help to constitute as well as promote. Recognition of the grounding of ideologies in economic, political and cultural relations also has important implications for the development of strategies to eliminate racist ideologies. It suggests that we 'should concentrate less on trying exclusively to persuade those who articulate [racist representations] that they are "wrong" and more on changing those particular economic and political relations' (Miles, 1989: 82).

The power of ideology is usually explained by its 'grain of truth' (Gavigan, 1988), its capacity to 'engage genuine wants, needs and desires' (Eagleton, 1991: 45) of those who are subordinated as well as those who are dominant. In the case of racist ideology, however, the power of ideology is derived more from its effects within the dominant society than from its capacity to 'capture' those targeted. For example, the frames of reference and guides for conduct provided by the representations of First Nations I set out in more detail later are not primarily directed at First Nations people. They do not set up

something 'real' to be gained by First Nations; something that, at least in the abstract, they would aspire to. On the contrary, these often denigrating and stereotypical representations explicitly portray the targeted group in mystified terms, thus helping to rationalize, legitimate and obscure, at least for members of the dominant society, relations of oppression (see Heilbroner, 1985: 107). As part of this process, racist ideologies serve a consensus-building, unifying role for the dominant society by designating First Nations as 'Other' against which the dominant society, crosscut by multiple axes of gender, class, sexual identity and so on, may be constructed as a more cohesive unit (Anthias, 1990; Crenshaw, 1988; see also later). Thus, while the *objects* of racist ideologies in this context are certainly First Nations, it is those in the *dominant society*, including judges, who are primarily constructed as *subjects* through the operation of such ideology. Following from this, my focus will be on the manifestation of racist ideologies within dominant structures in general, and within law in particular.[3]

Finally, I want to emphasize that the implication of the analysis of racist ideology conducted in this article is not that judges, as individuals, are necessarily racist. Judges, like other members of the dominant society, operate within discursive fields in which racist ideology helps to constitute what is and is not to be taken for granted as 'just the way things are'. The appearance of racist ideological representations within judicial discourse may be more a reflection of the power and pervasiveness of such dominant ideology in the wider society and the particular susceptibility of legal discourse to it, than individual racial prejudice on the part of judges. Ideology constitutes judges as *subjects* 'at the roots of their lived experience and seeks to equip them with forms of value and belief relevant to their specific social tasks and to the general reproduction of the social order' (Eagleton, 1991: 222). As subjects, however, judges are 'always conflictively, precariously constituted' (Eagleton, 1991: 223), not least because of some differences in social location among them, which in turn create the potential for dominant ideology to be resisted by them, and the forms of consciousness constituted by it challenged and overcome.

IDEOLOGICAL REPRESENTATIONS OF INDIANNESS

Within the context of the colonialist projects of the Spanish, French and English states, there developed a set of images, stereotypes, attributions and evaluations of First Nations. When Europeans began to settle the territory now referred to as North America they arrived with already formulated representations of First Nations as Other (see later). In the course of contact between the cultures, these representations were modified and others generated. The relationship between these representations and the way First Nations were treated by the Europeans is a complex one (see Fisher, 1977). The representations facilitated and, in turn, were influenced by, the transformation of the existing social relations and modes of production in North America which occurred with the arrival of the Europeans. Such representations 'actively structured, rather than simply legitimated' (Miles, 1989: 101) this process. They effectively 'became a "relation

of production", an ideological component of the totality of relations that constituted not only a system of production in the narrow sense, but a whole way of living' (Miles, 1989: 101).

The representations that evolved in the colonial period now form the basis for contemporary representations of First Nations, and thus constitute one of the frameworks within which the courts adjudicate issues relating to First Nations. In this part, I will trace briefly the development of three such representations.[4] While they have varied temporally, geographically and contextually, and particularly in accordance with the differing histories and intentions of the Europeans involved in their construction (see Fisher, 1977: 94; see also Berkhofer, 1978 and, generally, Hall et al., 1978: 170), it is possible to discern a set of features which continue to resonate today. I will focus on three interrelated streams of ideological representations of Indianness: first, the 'devaluative ideology of Indianness'; second, the 'ideology of homogeneous Indianness'; and, third, the 'ideology of static Indianness'.[5]

The first of these, the devaluative ideology of Indianness, represents First Nations in terms of their lack of Euro-Canadian ways. First Nations, in other words, are constructed not only as different from but as inferior to Euro-Canadians. The representational process of negatively evaluating characteristics attributed to a racialized group is generally what people associate with racism, as it is most obviously related to the denigration of those who are represented. However, racism also involves 'a less coherent assembly of stereotypes, images, attributions and explanations . . .' (Miles, 1989: 79). The second two representational themes I rely on fall into this latter category.

The ideology of *homogeneous* Indianness represents First Nations as a unity across cultural variation. Rather than recognizing the diversity of Aboriginal cultures, First Nations are conceived of as homogeneous. The third form, the ideology of *static* Indianness, represents First Nations culture as static across time. Despite centuries of contact with First Nations and the changing conditions of their lives, 'real Indians' are constructed by the dominant society as those who live as they did before or during the early period of European contact. Though I consider the devaluative, homogeneous, and static ideologies separately for the purpose of analytical clarity, I want to emphasize that these ideologies developed in conjunction with one another and are conceptually and operationally interconnected. This can be seen in my review of the development of the three ideologies of Indianness which follows.

There is evidence that the ideology of homogeneous Indianness and the devaluative ideology have their origins in the initial contact between Spanish explorers and the people who lived on the islands of the West Indies in the fifteenth century. It is well known that the specific term 'Indian' resulted from the mistaken geography of Columbus, who, under the impression he had landed among islands off Asia, called the peoples he met *los Indios* (Berkhofer, 1978: 3). Implicit in the generic label 'Indian' was, in part, a conception of First Nations as homogeneous. As Berkhofer (1978: 3) points out, because 'the original inhabitants of the Western Hemisphere neither called themselves by a single term nor understood themselves as a collectivity, the idea and the image of the Indian must

be a "white" conception'. The early characterization of North and South American indigenous peoples as hostile and depraved savages also derived from Columbus's initial description of the indigenous peoples of the Caribbean, and was subsequently generalized to all indigenous peoples of the Americas.[6] This image was later reinforced by the French and British, who encountered not the Aztec and Inca civilizations of the south, but those whom they perceived as 'wilder' peoples (Berkhofer, 1978). Their initial perceptions are reflected in the terms they chose to refer to First Nations – '*sauvage*' in French, and 'savage' in English (Berkhofer, 1978:6; cf. Miller, 1989:28). The British adopted the term 'Indian' in the seventeenth century, but the French continued to use '*sauvage*' at least into the nineteenth century (Berkhofer, 1978:6).

As knowledge of the Americas increased among Europeans, two trends emerged in the imagery applied to First Nations. First, First Nations continued to be regarded as wild, uncivilized people (Berkhofer, 1978:14; Fitzpatrick, 1992:72–3). Second, though writers did occasionally note the differences among the many societies of the New World, generalized terms such as 'Indian' continued to be used (Berkhofer, 1978:23), and a conflated understanding of the diversity of the First Nations continued to be advanced (Bienvenue, 1985:204; Fisher, 1977:88; Patterson, 1972:39; see also Pearce, 1988:255). This early tendency is now inscribed in contemporary practice. For example, use of generalized terms to refer to First Nations continues today,[7] and certain stereotypical images, based upon amalgamations of particular aspects of the cultures of some First Nations, have come to represent the 'Indian' writ large (see Berkhofer, 1978:26; Hirschfelder, 1982:49).

The construction of First Nations as inferior was central to the arguments of several of the more sophisticated apologists for European colonialism in the fifteenth and sixteenth centuries (Dickason, 1984:129–30; Williams, 1990:42), as well as to the early perceptions of Spanish colonialists (see later). First Nations were defined in 'negative contrast to the civilised state' (Fitzpatrick, 1992:73) and found wanting in language, law, government, clothing, arts, trade, agriculture, marriage, morals, metal goods and, most importantly, religion (Berkhofer, 1978:10). Such devaluative representation allowed for the development of a negative reference group against which 'white' identity could be defined (Ferguson, 1966, quoted in Fitzpatrick, 1992:66; Pearce, 1988:5; see also Goldie, 1989; Said, 1979; Todorov, 1984). To this extent the devaluative images of First Nations might be understood as more descriptive of European culture than the cultures of those they were supposed to describe (see Goldie, 1987:78). The Europeans who travelled to North America to establish settlements had a particular 'need to reassure themselves of their own "civilization" ... by emphasizing the "savagery" of the aborigines' (Fisher, 1977:94). Their observations, as a result, tended to conform to the preconceptions they carried with them from Europe. The views of the fur traders, in contrast, were less disparaging and based more on direct experience with specific Nations and individuals (Fisher, 1977:80). Differences in the imagery constructed by settlers and by fur traders were also the result of these two groups' differing intentions toward First Nations (Fisher, 1977:88).

The difference constructed between 'white' society and First Nations society which gave rise to the idea of the 'Indian' in the first place also contributed to the ideological representation of First Nations culture as static and non-adaptive (see also Berkhofer, 1978:25; Hirschfelder, 1982:49; M.Jackson, 1989:265; Jacobs, 1972). Despite centuries of contact and the changed conditions of the lives of First Nations, 'white' society continued to construct the 'real' Indian as 'the aborigine he [sic] once was, or as they imagine[d] he once was, rather than as he is now' (Berkhofer, 1978:28). First Nations people were defined historically by their assumed differences from 'whites,' and any adoption of 'civilization' as defined by 'whites' meant they could no longer be considered truly First Nations (see Berkhofer, 1978:29; Kellough, 1980:361–2; Patterson, 1972:28; Trigger, 1985:117). And because, according to 'white' conceptions, civilization was destined to triumph over savagery, it followed that the 'Indian' was to disappear either through death or assimilation into the larger, more 'advanced' society (Fisher, 1977:87; Patterson, 1972:109; Ragdale, 1989:406). Thus, within the ideology of static Indianness, First Nations

> are relegated to a timeless past without a dynamic, to a 'stage' of progression from which they are at best remotely redeemable and only if they are brought into History by the active principle embodied in the European. (Fitzpatrick, 1992:110)

Against this framework, First Nations people today who have managed to retain their traditional economies and ways of life are often considered as 'living a primitive, barbaric, and unpleasant life that [those] of European ancestry abandoned thousands of years ago' (Usher, 1986:181; see also Turpel, 1989–90:34). Representations of static Indianness are also numerous in popular culture, where '[t]he image [of First Nations] is of people of the past, suggesting . . . that "Indians" do not exist in the present or that, if they do, they are less "Indian" today' (Moore and Hirschfelder, 1982:64).[8] The ideology of static Indianness has also applied in a particular way to the Metis, who are often represented as of only historical and not contemporary significance. Joan Crow (1990:49) observes that

> most historians, elected politicians, legal professionals, and Canadian citizens have perpetuated a static understanding of Metis identity, as a throwback in time. Metis people are seen, generally, as an historical event frozen within Canada's history. From that historical perspective, the Metis are seen as a group of individuals who developed a sense of unity for the sole purpose of resisting confederation.

Crow (1990:26) notes, however, that '[t]he Metis people, not surprisingly, are of the opposite view and see themselves as being a contemporary people with a contemporary identity which incorporates Metis history'. Other First Nation communities have been struggling to demonstrate the dynamic nature of their traditions in specific contexts, such as in the areas of childcare and child protection practices, and the flexibility of such traditions in the face of contemporary demands. There has been some acknowledgement of this by the dominant society, but static representations of First Nations continue to occlude

recognition by the dominant society of the significance to First Nations people of contemporary incarnations of traditional ways.

LEGAL REPRODUCTION AND REINFORCEMENT OF IDEOLOGICAL REPRESENTATIONS OF INDIANNESS

I have argued that ideological representations of First Nations developed out of the material relations of colonialism, and continue to be constructed, reproduced and reinforced in a wide variety of discursive contexts. The remainder of this article will focus on legal discourse, a field of particular importance because of its association with state power (Woodiwiss, 1990). Here, I am interested in how the often abstract and indeterminate form of law (Yablon, 1985) allows judges to import ideological frameworks formally external to law – like popular representations of First Nations – into the interpretive process. I will consider two different areas of law which have an important impact on First Nations, aboriginal rights and child welfare law, to illustrate some of the ways that ideological representations of First Nations are manifest in legal discourse. I should note at the outset, however, that in legal discourses, as in others, racist ideologies are not smoothly and unproblematically reproduced and reinforced. Challenges to racism are sometimes posed within the discourse, as well as from outside, representing anti-racist tendencies that are part of the complex politics of Canada's colonialist history and present.

DEVALUATIVE IDEOLOGY OF INDIANNESS

Early legal examples of the devaluative ideology can be found in Commonwealth cases concerning land title disputes in colonial territories. In *Re Southern Rhodesia* (1919), for example, the Judicial Committee of the Privy Council held that the indigenous peoples of what is now Zimbabwe had no rights to their land after the 1833–4 conquest of the territory by the British South Africa Company and the British government. In its reasons, the Judicial Committee explained (1919: 233) that the 'natives of Southern Rhodesia' were 'so low in the scale of social organization that their usages and conceptions of rights and duties [were] not to be reconciled with the institutions or the legal ideas of civilized society'.[9] As a result the Privy Council found it impossible to recognize their relationship to their lands within a common law framework. While in 1823 the Supreme Court of the United States did recognize certain First Nations rights in *Johnson* v. *M'Intosh* (1823), Chief Justice Marshall (at 590) nonetheless relied on similar negative imagery, referring to 'the tribes of Indians inhabiting th[e] country' as 'fierce savages, whose occupations was war'. A devaluative portrayal of First Nations was also apparent in *St Catherine's Milling and Lumber* (1888), the first case in Canada to consider First Nations land rights. There, the Judicial Committee of the Privy Council (at 51) referred to the hunting and fishing practices of the Salteaux, central to their way of life, as 'avocations'. As late as

1929, in *R.* v. *Syliboy*, First Nations were referred to as 'uncivilized people or savages' (at 313). Similar devaluative characterizations were still evident in the 1960s when the Nis'ga brought the first land claim to the Canadian courts in *Calder* (1970). In the trial judgment, Gould, J. referred (at 66) to the 'Indians of the mainland of British Columbia' as 'undoubtedly at the time of settlement *a very primitive people with few of the institutions of civilized society*, and none at all of our notions of private property'. These comments were repeated almost verbatim by Davey C. J. B. C. (at 66) in the Court of Appeal decision in that case.

Contemporary courts continue to represent First Nations in ways that reflect this devaluative ideology. The recent decision of McEachern J., as he then was, in *Delgamuukw* (1991) provides an important example.[10] In language strikingly reminiscent of much earlier decisions, the plaintiffs' ancestors were described by McEachern J. (at 31, 25) in terms of their lack of the '*badges of civilization*' – as 'a primitive people without any form of writing, horses, or wheeled wagons'. This, together with the observation that slavery, starvation and wars were common to the Gitksan and Wet'suwet'en, led him (at 13) to the conclusion that 'aboriginal life in the territory was, at best, "nasty, brutish and short"'.[11]

Central to devaluative constructions of First Nations as primitive and uncivilized is the characterization of the society in question as devoid of law (Fitzpatrick, 1992). This is well illustrated by McEachern J., who moved on from this general characterization of First Nations society, to devalue the richness and complexity of forms of governance and social organization specific to the Gitksan and Wet'suwet'en. These were constructed by him (at 222) as merely forms of 'communal living', as opposed to governance by *law*. In McEachern J.'s view (at 223) there was a 'legal and jurisdictional vacuum . . . prior to British sovereignty'.

> Before that time there was no reason for the plaintiffs' ancestors, individually or communally, to purport to govern the wilderness beyond the areas surrounding their villages even though they may have used such areas from time to time for aboriginal purposes. . . . They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by law. (at 221–2)

McEachern J. (at 219) found the 'aboriginal rules' relayed to him 'so flexible and uncertain that they [could]not be classified as laws'. He thus concluded (at 226) that there was no 'reliable evidence' to establish that 'the Gitksan and Wet'suwet'en, as aboriginal peoples rather than villagers had institutions and governed themselves'.[12]

A further example of devaluative ideology at work can be found in McEachern J.'s dismissal of important evidence provided by the plaintiffs as failing to meet legal evidentiary standards. In particular, he held (at 75) that many oral histories of the Gitksan and Wet'suwet'en were 'of dubious value as detailed proof of specific events (or locations) which are believed to have occurred before contact' and, thus, 'reliable' only to 'confirm findings based on other admissible evidence'. In contrast, he found (at 75) that 'the scientific evidence, particularly

the archaeological, linguistic and some historical evidence' was persuasive in establishing 'that aboriginal people have probably been present in parts of the territory, if not from time immemorial, at least for an uncertain, long time before the commencement of the historical period'. So, for example, though the Gitksan and Wet'suwet'en provided abundant oral evidence of the long existence of the House system, because an early trapper, who kept good records of the people he encountered, did not mention the system, McEachern J. was 'left in considerable doubt about [its] antiquity . . .' (at 75). The Gitksan and Wet'suwet'en (at 214) also provided extensive evidence of the long existence and significance of the feast hall as 'the seat of [Gitksan and Wet'suwet'en] government'. However, because nineteenth-century reports by the trapper and another European 'hardly mention[ed] the feast, particularly as a legislative body', McEachern J. (at 214) was 'not persuaded that the feast has ever operated as a legislative institution in the regulation of land'.

Though *Delgamuukw* (1991) represents a particularly egregious example of the legal reproduction and reinforcement of devaluative representations of First Nations, it is important to note that there has also been judicial resistance to, and even disapproval of, such characterizations. As early as 1921, for example, Lord Haldane of the Judicial Committee of the Privy Council cautioned in *Amodu Tijani* (1921:402) that 'in interpreting the native title to land' the tendency 'operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law . . . has to be held in check closely'.[13] Lord Haldane's statement was relied on by the dissenting Supreme Court judges in *Calder* (though it did not have an impact on the trial judge or Court of Appeal in that case, as illustrated above) who also cautioned further that

> [t]he assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species. (at 346)

Similarly, in *Simon* (1985), the Supreme Court of Canada noted (at 400) that the language in the *Syliboy* case, referred to above, 'reflect[ed] the biases and prejudices of another era in our history'. Such language was declared (at 400) 'no longer acceptable in Canadian law', as well as 'inconsistent with a growing sensitivity to native rights in Canada'. The re-evaluation reflected in such statements is encouraging, though, on another level, it also attests to the strength and power of devaluative ideology in judicial discourse as well as the particular subject position of McEachern J., as all of the above-mentioned examples were available to him.

In addition to its appearance in aboriginal title and treaty rights cases, evidence of the devaluative ideology can also be found in child welfare cases involving First Nations children. In this context, the devaluative ideology emerges in the tendency of courts to prefer the values and concerns of the dominant society in

regard to child development to those of First Nation people. Examples can be found in cases relating to psychological bonding, permanency of placement and the standards to be applied in determining whether or not to remove a child from his/her familial home and community.

With respect to the first two of these, the orthodoxy in developmental psychology is that psychological bonding between a child and her caregivers is more important to a child's development than the maintenance of ties between a child and her biological parents (Goldstein et al., 1973, 1979). On this basis the literature has concluded that children who have been found in need of protection should be placed *permanently* in the setting that best facilitates the development and maintenance of psychological ties with parental figures (Bush and Goldman, 1982: 223–4). These principles now figure centrally in child welfare law, and have tended to override concerns about maintaining the culture and identity of First Nations children. The point is well demonstrated in *Racine* (1983), where Wilson J. held that, 'the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes' (at 171). Because the child in that case had been with her foster parents for several years by the time that case came to trial, the maintenance of the psychological bond was held to outweigh the so-called 'racial element'. This conclusion was reached despite the mother's repeated efforts to gain access to the legal system to regain custody of her child. Similarly, in *Re D. L. C.* (1986), the Alberta Queen's Bench held (at 247) that the foster parents of a First Nations child were his 'psychological' parents, and accepted expert evidence that 'there [would be] serious short and long-term risks to the psychological well-being of the child in breaking the bond by returning him to his mother'. This was thought (at 250) to be of greater concern than 'the possibility of identity problems for a child in inter-racial or cross-cultural adoptions'.

A similar pattern is evident in cases which focus on the importance of permanency of placement. In *Kenora-Patricia Child and Family Services* v. *M. (C.)* (1989), for example, the Ontario Provincial Court had to decide between opposing plans for the disposition of two Ojibway children, aged 3 and 6, whose mother had died since their apprehension, and whose father was incarcerated. The agency applied for Crown wardship with a view to placing the children in a First Nation home. This was opposed by the Ojibway Tribal Family Services, who suggested that the children be placed on their home reserve with their mother's sister, her partner and their four children, initially under the supervision of the provincial agency, but with a view to adoption. Because the children had already been placed in a number of foster homes, including two First Nations foster homes, the overriding concern of the Court (at 4) was the children's 'immediate special needs for permanence'. Though concerned that neither plan adequately addressed this need, the Court granted Crown wardship to the agency. The aunt was even denied *access* to the children on the ground that it would hinder a permanent adoption placement. This case represents a clear valuation of permanency of placement over maintaining a child's First Nations identity and bonds to her culture, reflecting the devaluative ideology. My

purpose here is not to deny the importance and relevance of psychological bonding and permanency of placement, but only to suggest that treating these factors as more important than all others, as courts have tended to do, has particular negative effects in First Nations child welfare cases. The appropriateness of emphasizing psychological bonding and permanency over other factors is further challenged by the fact that even outside the context of cross-cultural concerns, the psychological theory upon which this emphasis is based has been seriously criticized in more recent work (Ricks et al., 1990).

The devaluative ideology is also evident in First Nations child welfare cases that define the relevant *standard* of living conditions and childcare in terms of the dominant society's values and priorities. More specifically, such cases tend to emphasize the material conditions within which a child is raised, with the result that non-material concerns such as that of maintaining a First Nations child's identity and culture are devalued. For example, in *B. B.* v. *Director of Child and Family Services* (1988), the Manitoba Court of Appeal focused on the conditions within which twin girls, apprehended at birth, would be raised. Their mother, a First Nations woman, lived on social assistance in a northern community with no running water or paved roads. She shared a small two-bedroom house with her own mother, her twin sister, and her sister's three children. The Court held that there was only one standard of care to be considered, namely whatever would be in the 'best interests' of the children. Because 'the type of household in the case before [the Court] [could] not provide the simple and essential elements of life' for the children (at 247), the child welfare agency's application for permanent guardianship was granted.[14]

This construction of a universal standard of care by the Manitoba Court of Appeal represents a clear valuation of dominant concerns, with a corresponding devaluation of aspects of First Nations life that are absent from non-First Nations society. Meeting this universal standard is presumed more important by the Court than other factors – including maintaining the ties of a First Nations child to her identity and culture. The implications of this decision are even more far-reaching, however, when placed within the social and economic context in which the majority of Metis live in Manitoba. Recent data indicate that 53 percent of adults who identify as Metis in Manitoba have an income under $20,000, 22.7 percent are without paid work, and 17.44 percent live in homes requiring major repairs (Statistics Canada, September 1993, March 1994). When information of this sort is set alongside the approach of the Manitoba Court of Appeal, a great proportion of Metis households in Manitoba are rendered questionable in terms of their appropriateness for the raising of children. Underlying reliance on a universal standard is the notion that it is better for First Nations children to be brought up in a middle-class environment than to remain within their own communities.

A number of lower court decisions have challenged this type of approach, and the related devaluation of First Nations communities, by holding that the standard of care in child welfare cases must reflect the 'average in the particular class or group to which the parent(s) belong' (*Mooswa* (1977): 102), rather than some universal ideal. In *Re H.(A. M.)* (1989), for example, the Tsawassen Band in

British Columbia was identified (at 9) as having 'standards and expectations' differing 'quite widely from the more rigid standards and expectations of English-Canadian culture' and, thus, a different standard of childcare, housekeeping, hygiene and organization than that of the 'wider community' (at 10) was applied. Though the mother in that case was considered unlikely 'to make it as a single mother in a hostile outside world', the court was of the view (at 13) that 'within the cocoon of the Band (a sheltering environment for all its shortcomings) . . . there [was] a real chance she [would] become an acceptable mother . . .'.

On one level, this flexible approach may appear somewhat encouraging, as it takes into account differences among communities. It thus seems to challenge certain devaluative representations of First Nations ways of life by recognizing their equal validity with those of the dominant society. However, this approach has also been severely criticized for misapprehending the issue as one of *cultural* difference (Monture, 1989: 14). In *Re Eliza* (1982), for example:

> the court benevolently recognized the importance of recognizing 'community differences'. But the judge used ethnocentric stereotypes of the 'drunken Indian' to shape the definition of 'community differences'. Provincial Court Judge Moxley referred to habits such as 'acceptance of widespread drinking and even drunkenness' and 'tolerance to violence while drunk'. These are not habits that are 'tolerated' by First Nations communities – they are some of the *realities* of racial oppression. (Monture, 1989: 14)[15]

Rather than constructing the relevant issue as one of cultural difference, the poverty and social problems of First Nations communities and their colonialist roots must themselves be directly recognized and addressed. Instead of blaming individuals and attempting to remedy the situation by removing children from their families and communities, First Nations communities must be supported financially and otherwise enabled to confront and develop solutions to contemporary conditions and circumstances rooted in colonialist policies and practices of the past.

IDEOLOGY OF STATIC INDIANNESS

The ideology of static Indianness is apparent in aboriginal title jurisprudence where First Nation claims to land have been rejected on the ground that claimants have adopted certain practices of the dominant society and, therefore are no longer 'real Indians'. In *United States* v. *Joseph* (1876), for example, the United States Supreme Court found (at 614–19) that the Pueblo Indians held land in fee (although not individually), lived in fixed villages rather than nomadic communities, had adopted agriculture, the Spanish language and Christianity and were, in '[t]heir names, their customs, their habits . . . similar to those of the people . . . in the midst of whom their pueblos are situated'. They were thus considered to have remained 'Indians only in feature, complexion, and a few of their habits' (1876: 614–19). Consequently, they were denied the protection of laws prohibiting 'white' settlement on lands belonging to Indian tribes (see

Ragdale, 1989: 416). Similarly, in *Delgamuukw* (1991), the federal government argued that the Gitksan and Wet'suwet'en abandoned their aboriginal title to land when their traditional lifestyle gradually changed after European settlers arrived (Still, 1989; *Delgamuukw, Proceedings at Trial*, 1989).

The ideology of static Indianness also informs the reasons in *Delgamuukw* (1991) in numerous ways. McEachern J. held (at 53) that in order to make their case, the Gitksan and Wet'suwet'en had to establish, first that their 'social organization . . . exists today in the same or nearly the same form as at the time of contact' and, second, that they 'have used and occupied all of these separate and remote territories for aboriginal purposes'. In his view, 'aboriginal purposes' included

> all those sustenance practices and gathering for all those products of the land and waters of the territory . . . which they practised and used *before exposure to European civilization (or sovereignty)* for subsistence or survival, including wood, food and clothing, and for their culture or ornamentation – in short, what their ancestors obtained from the land and waters for their aboriginal life. (at 228)

Those economic activities of the Gitksan and Wet'suwet'en which the judge considered to have developed *after* contact, like 'trapping for the fur trade' and 'commercial activities, even those related to land or water resource gathering' (at 229), were in his view *not* to be characterized as aboriginal activities.[16]

On the basis of the evidence, McEachern J. then concluded (at 56) that 'most Gitksan and Wet'suwet'en people do not now live an aboriginal life' and that '[t]here is very little, and decreasing, interest in pursuing [aboriginal] activities at the present time'. In his view, they had 'been gradually moving away from [an aboriginal life] since contact . . .' (at 56). He had great difficulty, as a result, with those witnesses who attempted to assert otherwise at trial. He considered one anthropologist expert witness, for example, to have 'placed far more weight on continuing aboriginal activities than [he] would from the evidence . . .' (at 50). This and other evidence, he concluded (at 56), 'had a decided complexion of unreality about it, as if nothing has changed since before contact'. It was particularly compelling to McEachern J. that '[w]itness after witness *admitted* participation in the wage or cash economy' (at 56), as though this and a continuing aboriginal life were mutually exclusive. These views correspond directly to the ideology of static Indianness. McEachern J. essentially defined the Gitksan and Wet'suwet'en by their assumed differences to 'whites', with the result that any adoption of 'civilization' as defined by 'whites' meant that they, and their activities, could no longer be considered truly aboriginal.

In contrast to *Delgamuukw*, some contemporary cases have represented First Nations in ways that challenge the static ideology of Indianness to some extent. In *Hamlet of Baker Lake* (1979), for example, the fact that the 'organized society of the Caribou Eskimos' had 'materially changed in recent years' was considered 'of no relevance' to a determination that they and their ancestors were members of an organized society (at 47). In another case, *Simon* (1985), requiring the interpretation of the meaning of Micmac hunting rights in a 1752 Treaty, the Supreme Court of Canada stated (at 403) that such rights should 'be interpreted

in a flexible way that is sensitive to the evolution of changes in normal hunting practices'. A similar recognition of the dynamic nature of First Nations cultures is apparent in *Sparrow* v. *The Queen* (1990), in which the Supreme Court held (at 171) that 'the phrase "existing aboriginal rights" [in s. 35(1) of the Constitution] must be interpreted flexibly so as to permit their evolution over time'. According to the Court, this would enable the affirmation of aboriginal rights 'in a contemporary form rather than in their primeval simplicity and vigour' (at 171, quoting Slattery, 1987: 782). This increasing recognition is important, yet McEachern J.'s choice not to develop this approach in *Delgamuukw* demonstrates once again the resiliance and tenacity of ideology, in this case static ideology, in combination with McEachern J.'s individual resistance to alternative conceptions of aboriginal society. This recent tempering of static ideology, moreover, has not precluded other courts from continuing to distinguish contemporary practices, such as commercial fishing, from protected aboriginal rights to fish for food and ceremonial purposes (see *R.* v. *Van der Peet*, 1993). Thus, the influence of static ideology continues in the context of aboriginal rights cases beyond *Delgamuukw*, though perhaps in more subtle forms.

As well, there is a thin line between the willingness of some courts to recognize and protect the adaptation of First Nations cultures to practices of the dominant society, and the judicial *imposition* of such modifications upon First Nations. In *Jack and Charlie* v. *The Queen* (1985), the Supreme Court of Canada held that a traditional First Nations religious practice could be carried out today differently than it had in the past, in such a way as to not contravene the law. The Court decided against the appellants partly because they had not modified the practice accordingly. The appellants in the case were members of the Tsartlip Band, located on the southern tip of Vancouver Island. They had been charged with hunting and killing a deer in closed season contrary to the British Columbia Wildlife Act. As part of their defence, they argued that they had hunted and killed the deer in accordance with directions from a Shaman, so that Elizabeth Jack, who was the wife of one accused and the sister of the other, could satisfy the wishes of the spirit of her dead great-grandfather through a religious burning ceremony.

The Supreme Court of Canada upheld the charges, relying in part on a statement by the trial judge that 'it would be possible [for the Coast Salish people] to maintain their historic religious ceremonies and yet not contravene the provision of the Act *by retaining a supply of deer meat in storage* for such ceremonies',[17] presumably in a freezer. This was despite evidence at trial indicating that *fresh* deer meat was considered necessary by the Coast Salish in such circumstances (*Jack and Charlie*, 1985: 339–41; Mandell, 1987: 363). The appellant's factum before the Supreme Court also stated explicitly that the use of defrosted meat was sacrilegious, though the Supreme Court decided in the end that there was insufficient evidence in the record to support this claim (*Jack and Charlie*, 1985: 344). From one perspective, the reasons in this case implicitly counter the notion that First Nations religious beliefs can only be practised in traditional ways, thereby challenging ideological representations of First Nations as static. The effect, however, is to require First Nations to act in a

so-called contemporary manner in a context in which they are struggling to maintain their traditions in the face of continuing non-recognition and destruction. Though *Jack and Charlie* appears on its surface to represent a counter-tendency to the static ideology, there is at its foundation a striking similarity to cases like *Delgamuukw* in the court's presumption of a capacity and authority to define the parameters of First Nations beliefs and traditions.

Ideological representations of First Nations as static and non-adaptive can also be found in child welfare cases. They are apparent, for example, in the judicial tendency to assume that First Nations people who live in urban environments are not 'real Indians', since their way of life does not comport with stereotypical conceptions of aboriginal life prior to European contact. Consequently, 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. In *K.(C. J.)* v. *The Children's Aid Society of Metropolitan Toronto* (1989), for example, the Ontario Provincial Court questioned (at 81) whether a First Nations grandmother, who had moved to Toronto from her reserve as an adolescent, would be able to 'ensure the retention and respect for the Indian culture. . .' in her grandchildren if they were returned to her from foster care.[18] Implicit in the reasoning of the Court (at 81–2) is the assumption that moving to a city and continuing to identify and live according to traditional First Nations ways and values are mutually exclusive. The same assumption is also operative in *Re C. J. W. S.* (1987), in which the court rejected a plan to have a First Nations child returned from foster care to the home of his Cree grandmother in Edmonton, where he would have been cared for during the day by his Metis mother who lived across the street. The family advanced the plan on the ground that it would allow the child to maintain his First Nation identity. This was rejected by the court, which characterized the plan as placing the child 'in a city environment' rather than 'among his people . . .' (at 52). Although the child would have been with his extended family, the city seemed to the court, by definition, a non-First Nations environment and the urban-dwelling mother and grandmother equivalent to non-First Nations caregivers. Accordingly, the court saw no reason to disturb the bond that had already grown between the child and his non-First Nations foster parents.

IDEOLOGY OF HOMOGENEOUS INDIANNESS

Finally, in relation to the ideology of homogeneous Indianness, judicial decisions in the context of aboriginal rights tend to recognize, at least rhetorically, the specificity of different First Nations, and further divisions thereof, and therefore, at least in this regard, tend not to reproduce the ideology (*Calder*, 1973: 148; *Hamlet of Baker Lake*, 1979: 22–5; *Guerin*, 1985). Even in the *St Catherine's Milling* case (1888), the Judicial Committee of the Privy Council referred (at 47) to 'the *several nations and tribes* of Indians who lived under British protection', and also distinguished the particular group impacted by the dispute in question as 'the Salteaux tribe of Ojibway Indians'. While this tendency does challenge the

ideology of homogeneous Indianness to some extent, it might be attributed to the fact that legal claims in this area are usually made by specific First Nations, and in relation to defined territories. Such observations and references, therefore, do not necessarily reflect a substantive as opposed to a superficial understanding of the diversity of First Nations.

In *Delgamuukw* (1991), for example, McEachern J. is careful to refer specifically to the Gitksan and Wet'suwet'en, and to distinguish rather than conflate their various traditions and practices (e.g. at 56). However, the judgment also contains many representations of the Gitksan and Wet'suwet'en, and First Nations in general, as homogeneous. For example, at many points McEachern refers to the Gitksan and Wet'suwet'en generically as 'Indians'. Similarly, he highlights (at 48) 'the "indianness" of these people whose culture seems to pervade everything in which they are involved'. He also assumes (at 56) that there is a distinct form of 'aboriginal life' and activities which can be generally distinguished as 'aboriginal pursuits', reflecting a homogeneous understanding of aboriginal peoples. It is the pervasiveness of homogeneous representations such as these that has prompted Mary Ellen Turpel (1989–90: 6) to question 'the extent to which the dominant legal culture has taken account of . . . differences within the plethora of Aboriginal cultures which exist . . .'.

The ideology of homogeneous Indianness is evident as well in child welfare cases. Judicial decisions relating to care arrangements for First Nations children found to be in need of protection often disregard a child's attachment to her *particular* First Nations community and culture, while recognizing the importance of her maintaining *general* First Nations identity. This reproduces and reinforces an image of First Nations cultures as homogeneous. In *Racine* (1983), for example, the Supreme Court of Canada rejected an Ojibway mother's challenge to the adoption of her daughter by a 'white' woman and Metis man. The mother had argued that her daughter should grow up within her own Ojibway tradition and culture. For Wilson J., however, writing for a unanimous Court, the issue was 'that [the child] was of Indian parentage' (at 172). Wilson J. was concerned not with the child's Ojibway identity, but with the potential racial prejudice to be faced by a First Nation child – any First Nation child – brought up within, and by members of, the dominant society. Consequently, it was sufficient that both foster parents were 'sensitive to the inter-racial aspect' (186) of the adoption. Moreover, she considered the Metis foster father, in particular, well positioned to provide 'a model . . . of how to survive as a member of a much maligned minority' (at 164–5). Though such guidance would certainly be important to the child, Wilson J.'s focus on this factor, without attention to the issue of which particular First Nation the foster father was associated with,[19] indicates apparent indifference to the child's lack of exposure to *Ojibway* culture as she grew older (see also Kline, 1992: 127).

Similarly, in *Wilson* v. *Young* (1983), the court responded to concerns about the retention of a Cree child's identity by suggesting (at 188) that it was sufficient the foster parents had 'informed [the child] of her origin' and had given her 'native heritage . . . prominence in her upbringing'. That her foster brother was also 'native', her foster mother 'proudly [laid] claim to some native blood', and

the family had attended First Nations social and cultural events and had developed a good relationship with the foster son's parents on a nearby reserve, provided even more support for the Court's view that any anxieties about the child losing her heritage were unfounded (at 188). Both *Racine* and *Wilson* thus demonstrate how courts have difficulty in the child welfare context seeing beyond a homogeneous conception of 'Indianness' to the particularity of First Nations cultures.

CONCLUSION

My goal in this article has been to provide insight into some of the ways racism is reinforced and reproduced ideologically within law. I have sought to demonstrate that ideological representations of First Nations, which took shape within the colonialist history of oppression of First Nations in Canada, continue to inform contemporary judicial decision-making with problematic effects for First Nations and First Nations people. The areas of law examined in this article, aboriginal rights and child welfare law, though analytically distinct, are nonetheless similar in their common association with colonialist ideologies and effects. In each area courts, as institutions of the dominant society, draw upon these dominant ideological representations of First Nations to explain and justify their decisions. Through their incorporation into a discourse, law (Gavigan, 1988; Hunt, 1985), which carries its own power to define 'reality' and to disqualify competing discourses (Smart, 1989:4), such representations are then granted further authority and legitimacy. At the same time, however, the ideological representations I describe are neither always nor smoothly reflected in judicial reasoning. Indeed, as noted above, some courts have been persuaded to accept alternative conceptions of First Nations, which challenge the dominant ideological representations of Indianness. Legal discourse, in other words, is a site of ideological contestation.

Recognition of the potential for ideological struggle within the courts raises certain strategic questions for those concerned with the treatment of First Nations by law. What factors, for example, contribute to the displacement or reinforcement of dominant ideologies or acceptance of oppositional ideologies within law? Examination of this question is of considerable strategic importance for those struggling within legal discourse, though it is equally important to recognize that significant ideological transformation is unlikely to occur without substantial change to the social relations responsible for the emergence of dominant ideologies. Questions about variability among different judges and courts – and, indeed, among different areas of law (like child welfare and aboriginal rights) – are generally under-theorized in the literature on law and ideology. This article is no exception, having the more modest ambition of tracing the historical and continuing presence of ideological representations of Indianness and their effects in some areas of legal discourse. Further work is required to expand knowledge about such issues. More generally, and perhaps most importantly, the analysis in this article suggests it is necessary to challenge

the underlying power and authority accorded to legal actors and institutions to define First Nations and impose destructive regimes upon them. The very fact of this power is often obscured by the naturalizing and legitimizing effects of dominant ideology, especially within the allegedly neutral domain of legal discourse. In strategic terms, the exact approach to challenging the authority and legitimacy of dominant legal institutions in regard to First Nations will depend on numerous factors, including the area of law and the particular social and economic circumstances in question. In the end, however, the process of addressing such questions must necessarily be guided by current First Nations strategies of self-government, in all of their complexity.

NOTES

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1. I use the term 'First Nations' throughout this article to refer to those who are descendants of peoples indigenous to the territory now called Canada, including the variety of Nations (Haida, Tlinkit, Mohawk and so on) as well as Metis and Inuit peoples. The term 'Metis' has two different meanings and in this article I do not distinguish between them. It refers to a particular group of descendants of unions between First Nations and Europeans during the fur trade who congregated in the Red River Settlement in the territory now called Manitoba, as well as more generally to all descendants of unions between First Nations people and non-First Nations people.The result is that there is a diverse range of First Nations with which contemporary Metis are associated. The term 'Indian' is used in its legal sense to mean a person who falls within the criteria established in the 'Indian Act', R. S. C. 1985, C. 1–5.
2. I use the term 'Indianness' to represent notions that have been constructed by the dominant society rather than by First Nations people themselves.
3. I do not consider the extent to which First Nations people themselves have internalized racist ideologies, nor the destructive effects of such internalization. Though certainly important to investigate (Gavigan, 1988; Hall, 1986; Purvis and Hunt, 1993), such questions are not the focus of the present study. I am of the view, moreover, that the relationship of First Nations people to racist ideology would be more appropriately revealed through research and analysis conducted by First Nations people. I do not subscribe to the view, however, that *only* those targeted by racism should be the ones analysing its processes and effects. For example, those who are considered 'white' in Canadian society are constructed by racism just as those who are constructed as 'people of colour'. But those who are 'white' most often derive the benefits of racism, to greater and lesser extents, as opposed to its burdens, exclusions and violent effects. This provides those who are 'white' with concrete knowledge of some aspects of racism directed at 'people of colour', in particular the ways it is reproduced and reinforced within dominant processes,

institutions and structures. Not only do those who are 'white' have the responsibility to confront, analyse and challenge racism, but we must also educate ourselves so as to do this work beneficially, rather than in such a way as to reproduce and reinforce oppressive structures (see Alcoff, 1991–92). I believe, however, that there are some aspects of racism that are best left to the analysis of those targeted. For example, the ways that First Nations people in Canada *experience* oppressive structures such as the child welfare system is something that would best be undertaken by First Nations people themselves, including the extent to which First Nations people internalize dominant ideologies, and the effects of such internalization.

4. The approach I take to examining ideological representations of Indianness is similar to that of Errol Lawrence in his exploration of the historical development of contemporary 'anti-black racist ideologies' in 1970s Britain (Lawrence, 1982). The brief discussion in this part of the article is meant to be the beginning of an exploration of 'some aspects of this history, tracing particularly the gradual sedimentation of these ideas into common-sense thinking' (Lawrence, 1982: 58). Further development is certainly required and, in particular, documentation of the reproduction and reconstruction of the ideological representations of Indianness during the historical periods not considered in this analysis.
5. This construction of three ideologies of Indianness is built on the careful, detailed comprehensive analyses of other studies that have traced the development and continuity of different representations of First Nations constructed by whites (see, in particular, Berkhofer, 1978; Dippie, 1982; Fisher, 1977; Francis, 1992; Goldie, 1989; Littlefield, 1990; Pearce, 1988/1953; Sheehan, 1973; Williams, 1990; see also Hirschfelder, 1982: 73; Memmi, 1965).
6. Columbus, however, also composed the first in a long series of more 'positive' images of First Nations peoples, 'as lacking in European accomplishments but pleasant withal' (Berkhofer, 1978: 6). For a comprehensive historical account of the development of the image of 'The Noble Savage' see Cro (1990).
7. Perhaps the best example is the use of the term 'Indian' throughout the federal Indian Act, which provides no legislative recognition of the multiplicity of First Nations. This formulation has been challenged to some extent by use of the term 'aboriginal' (rather than 'Indian') in amendments to the Canadian Constitution in the Constitution Act, 1982, which, in turn, is defined as inclusive of Indian, Inuit and Metis peoples of Canada. The variety of Nations continues to be conflated, however, in continued use of the collective term 'Indian'. It is important, as well, to distinguish use of generic terms by dominant institutions and actors from the use of collective terms such as 'First Nations', 'Native', 'Aboriginal', and 'Indian' by First Nations people themselves and their supporters. The latter practice is followed for reasons of political efficacy and effect, as well as in recognition of the similarity of treatment of the various peoples by the dominant society over time. My use of the term 'First Nations' throughout this article is intended to fall within the latter use of the term, rather than within the tendency that corresponds to the homogeneous ideology of Indianness. I acknowledge, however, that there may sometimes be a very fine line between one use and the other.
8. A particularly notorious example can be found in an exhibition mounted during the winter Olympics in Calgary, Alberta in 1989. As Cardinal-Shubert (1989: 23) explains:

> The exhibition was called 'The Spirit Sings' but it pushed the notion that Native culture was dead, wrapped up, over and collected . . . . We protested the fact that Native culture was being used by the Olympics to foster a world

> view that Native culture was dead, all over, collected; and that what was still practiced was frozen in the 18th century.

To counter this understanding, Cardinal-Shubert suggested (1989:23) that the Olympics 'should have held exhibitions featuring contemporary Native art as it is now'. Static representations of Indianness have been challenged by others as well. For example, in regard to the Dene, Puxley (1977:111) has argued that:

> . . .[C]ulture lives in men [sic], not in museums. It is what people *do* together . . . . Only the Dene can define their culture, and Dene culture is alive today to the extent that the Dene announce their own identity. For this reason, the united Dene struggle for recognition of their rights is every bit as much a cultural act as making a skin boat or holding a drum dance . . . . It is the shared experience from consciousness, united action which makes Dene culture a living reality. Anyone who thinks culture is represented simply by artifacts and dying rituals is a prisoner of colonial consciousness . . . [which] deprives men [sic] of their sense of themselves, today, relegating their identity to a thing of the past.

See also, e. g., Asch (1984) and Strickland (1986).

9. This passage was cited with approval in another important (and more recent) aboriginal rights case, *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1979), as providing part of the rationale for a requirement that plaintiffs claiming aboriginal title must first prove 'they and their ancestors were members of an organized society'. Mahoney J. of the Federal Court Trial Division argued that this followed from his conclusion on the basis of the authorities that the common law 'can give effect only to those incidents of [the enjoyment of land] that were, themselves, given effect by the regime that prevailed before'.

10. This case is particularly significant because it advances a claim of ownership and jurisdiction by the Gitksan and Wet'suwet'en over the vast expanse of their traditional territories in northern British Columbia. It represents a proactive attempt by the Gitksan and Wet'suwet'en to challenge dominant colonialist conceptions of their traditional and contemporary ways of governance, and the relationship of their lands to the Canadian state (and to the British state before it). While McEachern J.'s reasons in rejecting this claim at the trial level might be dismissed by some as providing exceptionally blatant examples of colonialist thinking, I believe it important to analyse the roots of his belief that such views were legally and otherwise valid and legitimate. We need to be careful as well not to underestimate the power and legitimacy accorded such views through their reinforcement in legal discourse by a highly placed and well-respected judge, Chief Justice of the Province no less, when the judgment came down. These blatant examples will be set alongside much more subtle and nuanced illustrations in the analysis which follows.

I want to acknowledge as well the delivery of the Court of Appeal decision in this case on 25 June 1993 after completion of this article. While the judgments of the Court of Appeal require careful analysis of their relationship to the ideological framework developed in this article, the appearance of the Court of Appeal decision should not in any way detract from the significance of the analysis of the reasons at the trial level. The nature of ideological analysis is such that it illuminates processes unaffected by more legalistic concerns of precedent and hierarchies of authority (see also Boyd, 1993).

11. The quoted phrase is from Hobbes (1952), who, as Fitzpatrick (1992: 76–7) argues, was a leading figure in juxtaposing First Nations societies as Other, as savage, against the attributes of European society.
12. Not surprisingly, in constructing this argument, McEachern J. relies, in part, on the devaluative statement in *Re Southern Rhodesia* quoted in the text above.
13. The cases which recognize that aboriginal people may have property rights in land, however, are not always as positive as they may at first seem. In settler colonies where land was taken in purported transfer from resident peoples, the tendency was to find that these peoples did have effective rights of ownership and so could transfer (absolute) title. Their 'rights' were thus recognized so that they could be held not to have any in the lands they had supposedly transferred. I am grateful to Peter Fitzpatrick for drawng my attention to this point.
14. For the Manitoba Court of Appeal (at 247), the 'poverty and the customs of the inhabitants' of the community were irrelevant. This can be contrasted to the trial judge who found that the living conditions of the household in which the mother lived were 'deplorable by [the]standards . . . [of] middle class "white" society', but held that they were not so far out of the ordinary for the community for him to say that the children would be at risk if returned to their mother. The Supreme Court of Canada did allow an appeal on the basis that the Manitoba Court of Appeal had incorrectly applied the statute in question and that new evidence had become available (2 March 1989) (S.C.C.), Dickson C. J., Lamer, Wilson, La Forest, L'Heureux-Dube, Sopinka and Cory J. J. [unreported]. Though the Court briefly noted disagreement with the approach taken to standards by the Court below, no reasons were provided, leaving the law in a state of confusion on this point.
15. A similar critique would apply to *Re H. (A. M.* 1989), which constructed the relevant issue as one of the Band in question having different 'standards and expectations' than those of 'English-Canadian *culture*'.
16. This approach to determining aboriginal rights has since been affirmed by a majority of the B. C. Court of Appeal in regard to commercial fishing engaged in by members of the Sto: lo Nation: *R.* v. *Van der Peet* (1993).
17. As paraphrased by Taggart J. A. in *R.* v. *Jack and Charlie* (1982) at 32 (emphasis added). Compare *R.* v. *Sioui* (1990), in which charges against members of the Huron Band for practising ancestral customs and religious rights in contravention of provincial park regulations were dismissed by the Supreme Court of Canada, on the basis that the activities conducted by the accused in the park were protected by a 1760 treaty and were not incompatible with Crown occupancy rights in relation to the territory in question.
18. Elders, even those who live in urban centres, are not regarded by First Nations as they are typically in the dominant society, as those whose productive life has diminished or ended. Rather, they are seen as 'the guardians of the society's traditions and history and the repository [and transmitters] of its collective wisdom' (Jackson, 1988: 267).
19. See, above, note 1.

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