

Modernity, Resource Development and Constructs of Indigeneity:
A Summary Analysis of Canadian Jurisprudence and Aboriginal Rights

by

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Table of Contents

Acknowledgements	3
Abstract	4
Foreword	5
Introduction	6
 Chapter I: Modernization Theory and Essentialist Constructs of Indigeneity	 11
1. Who's Agency in the Development Discourse?	12
1.1. Modernization Theory	13
1.2. A Postcolonial Critique of Development	16
2. Strategic Essentialism and Political Empowerment	17
3. Conclusion	22
 Chapter II: The James Bay Project: The Effectiveness of Strategic Essentialism in the 1970s	 24
1. A Short History of Indigenous and Settler Relations: Erasing Native Land in Canadian Jurisprudence	26
2. The James Bay Project, Québécois Nationalist Aspirations and Cree Self-Determination	31
2.1. Hydroelectricity in the James Bay Region: An Economic and Symbolic Resource for the Québécois	32
2.2. Constructs of Indigeneity in the James Bay Conflict: A Look at the <i>Kanetewat v. James Bay Development Corporation</i> Court Case	41
3. Conclusion	46
 Chapter III-"If Others Can Do It, Why Not Us?" The "Frozen Rights" of Aboriginal People in Canada in the 21st Century	 48
1. Aboriginal Self-determination and Resource Development	52
2. Placing a Measure of Restraint on the Powers of the Crown: Section 35(1) of the 1982 Constitution	54
3. Aboriginal Rights and Activities in the Canadian Judicial System	60
3.1. Interpreting Aboriginal Rights as "Frozen Rights"	61
4. Court Battles for Self-Determination and Economic Development in the Maritimes	67
4.1. Background on the Supreme Court Decision <i>R. v. Marshall</i> ; <i>R. v. Bernard</i> , 2005	67
4.2. Why did the Supreme Court Justices Exclude Commercial Logging from Mi'kmaq Treaty Rights?	70
5. Conclusion	74
 Summary and Conclusion	 77
 References	 83

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Abstract

Stereotypes and constructs of indigeneity have social, legal and economic implications for Aboriginal communities in Canada. In particular, essentialist constructs of indigeneity, whether they are manipulated by Aboriginal people themselves or used by judges as legal tests, significantly inform the making of judicial decisions. This paper explores how essentialist constructs of indigeneity both influence judicial decisions and restrict the economic self-determination of Aboriginal peoples in Canada. In the first chapter, a conceptual framework is developed to examine the appropriation of essentialist constructs by those at the margins of society while being explicitly critical of the various essentialisms embedded in modernisation theory, i.e. the tradition-modernity polarity. An analysis of the 1973 *Kanetewat v. James Bay Development Corp.* in the next chapter highlights the benefits of the strategic use of essentialist constructs of indigeneity by Aboriginal people: opposing hydroelectric development on the grounds that it would harm their traditional way of life, the James Bay Cree successfully brought the James Bay Project to a halt. Finally, my last chapter demonstrates the limited effectiveness nowadays of strategic essentialism in the judicial system. Through my analysis of the impact of the 1982 Canadian Constitution on certain subsequent Supreme Court cases, the most noteworthy of which is the 2005 *Marshall R. v. Bernard R.* v. Supreme Court decision, this chapter shows that legal constructs of indigeneity embedded in the legal system (i.e. “frozen” rights approach to Aboriginal rights) block Aboriginal people from engaging in resource development. In sum, Aboriginal people in Canada do not have the liberty to assert their right to self-determination since they can only legally engage in traditional and customary practices: not only does this imply that they have less than full ownership of their traditional lands, it also means that Canadian jurisprudence restricts them from being modern Aboriginal communities, i.e. to assume both modern and traditional identities. *Key Words: economic self-determination, modernity, Aboriginal rights, resource development.*

Foreword:

This major paper reflects my area of concentration—Hydroelectric Development and Aboriginal Self-Determination— and demonstrates my understanding of the various ways resource development can either restrict or enable Aboriginal self-determination. In particular, this paper gave me the opportunity to fully explore one of my components (i.e. Hydro Development and Aboriginal Self-Determination) and fulfill learning objective 3 that I had set out for myself in the MES Plan of Study. Upon retrospection, I believe that Chapter 1, in which I developed the conceptual framework for the paper, is the chapter that most closely fulfills my learning objective 3. While I had set out to understand how development affects aboriginal peoples' right to self-determination (LO3) and how large-scale development projects were detrimental to ecosystem and community health (LO4), it became apparent that it was not development per se that stood in the way of aboriginal self-determination; slowly I started to question the way I categorized development, native identity, modernity, etc., and I came to adopt a more nuanced view of development and large-scale hydro-electric projects. Moreover, I strived to stand away from categorizing development as inherently harmful to the environment and aboriginal communities and instead explore how economic development relates to aboriginal self-determination.

Introduction:

Essentialist constructs—loosely known as stereotypes—of Aboriginal people are embedded in North American culture. Deeply ingrained in our society, they are continuously reproduced in societal institutions such as the education system, mass media and the legal system. For example, up until recently, high school history books in Canada only talked about Aboriginal people when referring to the 17th and 18th century. After the French regime, many Canadian historical narratives ceased to even mention them; it is as if they had disappeared or didn't matter anymore. What about native people living on reserves, one may ask in critiquing this historical narrative? Falling back on stereotypes about native people plentiful in cowboy and Indian movies (e.g. *Dances with Wolves*, *Geronimo*, *Rio Grande*, etc.) the answer would go along the lines that they are but remnants or fragments of those “noble savages” who lived once upon a time in North America. Some environmentalists will support Aboriginal causes and land claims only in as much as Aboriginal people are willing to play the “authentic” native role (Braun, 1997; Ramos, 2003). The preservation of nature is seen by environmentalists to be akin to the preservation of primordial Aboriginal identity. Indeed, the idea that Aboriginal people are now modern and want to live in contemporary ways seems to be lost on too many deaf ears.

For the purposes of this paper, I will be focussing on how the Canadian judicial system reproduces meaning about Aboriginal people and their cultural practices and how First Nations negotiate essentialist constructs of indigeneity in the legal system for political and economic leverage. In particular, this paper highlights the various ways constructs of

indigeneity inform Court decisions in Aboriginal rights cases in Canada and restricts Aboriginal peoples' capacity to develop in contemporary ways, i.e. obtain economic self-determination and profit from their land.

Aboriginal identity has become much more than a social construct; the continued existence of the Indian Act—a vast body of colonial legislation which has regulated Aboriginal identity since 1876—has codified Aboriginal culture and identity in its laws (Lawrence, 2004). However, not only has the federal government established fixed requirements for Indianness through Bill C-31 (Act to amend the Indian Act in 1985) which divides Aboriginal families based on various legal categories of native identity¹, it also sets cultural checks via the legal system on even those Aboriginal communities it recognizes as authentic by delimiting which economic activities they can and cannot practice. Moreover, even if the Aboriginal group in question has all the markers of native identity that the dominant society and federal government recognize (i.e. status and being reserve-based), Aboriginal people are still restricted to traditional activities. Essentially, they do not have the freedom to decide which activities are Aboriginal and which are not; the federal government invested the judicial system with this decisional power.

My first chapter, “Modernisation Theory and the Essentialist Construct of Indigeneity”, provides the theoretical framework for understanding the effects of essentialist constructs of indigeneity on Aboriginal peoples' economic self-determination—understood in this paper as their freedom to modernize. The first part of this chapter

¹ For example, individuals who are registered under Section 6(2) of Bill C-31 must marry a status Indian to pass the status on to their children (Kennedy, 2010).

consists of a brief overview of modernisation theory and a critique of its central theoretical premise—the tradition-modernity polarity, where tradition and modernity are construed to be two mutually exclusive categories. In short, this premise implicates that indigenous culture (perceived to be inherently traditional) is antithetical to a modern identity. As such, while modernisation theory purports to be universally applicable, in practice it excludes Aboriginal people from modernisation since according to this theory the latter cannot assume both a traditional identity and a modern one. The last section of this chapter focuses on explaining the concept of strategic essentialism—a way for Aboriginal people to resist essentialist categories of indigeneity by appropriating culture as an instrument for political empowerment. Here, I will argue that in using strategic essentialism Aboriginal people are advertently or not demonstrating that they are part of the modernisation discourse and therefore agents in creating meaning about themselves as modern communities.

The thrust of Chapter II, “The James Bay Project: The Effectiveness of Strategic Essentialism in the 1970s”, is to highlight the political use of essentialist constructs of indigeneity by both the Québec government (via the James Bay Development Corp.) and the James Bay Cree in the 1973 *Kanatewat vs. James Bay Development Corp.* court case. On one hand, the James Bay Cree argued that they had Aboriginal title to the James Bay area and that the hydro development projects envisaged would affect their traditional way of life. On the other hand, the Québec government’s main defence was that since there were no longer any “authentic Indians” in the James Bay area resource development would have no significant effect on the so-called Indians. In order to illustrate how essentialist constructs

of indigeneity became legal categories, the first section will provide a general explanation of Canadian courts' definitions of Aboriginal titles and rights since the late 19th century. Most notably, the 1888 *St. Catherine's Milling* court case's characterisation of native title as a right to occupancy or sustenance (only fishing, gathering and hunting are recognised as valid Aboriginal activities) set the common law practice of couching Aboriginal identity in primordial terms. The second section will begin with a brief description of Québec's modernisation process in order to highlight the economic and political significance of hydroelectricity and the James Bay project to Québec society. Here, I will demonstrate how the Canadian judicial system has helped perpetuate the social construction of indigeneity as part of primordial nature and frozen at the time of European contact. Finally, I will argue that strategic essentialism was a very effective strategy for the James Bay Cree in the 1970s: by positioning themselves as inherently traditional and part of nature, the James Bay Cree successfully convinced the judges in the *Kanetewat* Québec Superior Court decision to issue an injunction against the James Bay project (albeit temporarily) which led the way to the first modern treaty in Canada.

The third and last chapter, "If Others Can Do It, Why Not Us?": The "Frozen Rights" of Aboriginal People in Canada in the 21st Century", demonstrates the limits of strategic essentialism nowadays. While the recognition of Aboriginal rights and titles in the 1982 Constitution has made strategic essentialism an even harder weapon against unwanted resource development projects for Aboriginal people, the fact that the Constitution provides no definitions of what these rights and titles entail, has left an open ground for Justices to interpret Aboriginal rights and titles as "frozen" in time, i.e. courts only protect

those Aboriginal activities they deem to be 'traditional'. All activities that cannot be proven to have a link with Aboriginal culture at the approximate time of European contact are prohibited by courts. In particular, modern activities, including resource development projects for financial gain, are especially perceived by courts to be un-Aboriginal and therefore illegal; and this remains the case even if those modern activities are crucial to the native community's survival and economic well-being. Most notably, the analysis of the 2005 Supreme Court case *Marshall R. v.; Bernard R. v.* constitutes the key demonstration of how Supreme Court Justices effectively used essentialist constructs to restrict Aboriginal people from engaging in contemporary activities.

Chapter I:

Modernisation Theory and Essentialist Constructs of Indigeneity

“Modernity belongs to that small family of theories that both declares and desires universal applicability for itself. What is new about modernity follows from this duality. Whatever else [it] may have created, it aspired to create persons who would, after the fact, have wished to become modern.” (Appadurai, 2003, p.1)

Economic development purports to bring better living standards to all those who ‘wish to become modern’. However, one may argue that to be truly modern, one must relinquish all markers of a ‘traditional’ identity and make way for progress. The contradiction is that while economic development claims to be universally applicable (i.e. it wants to make everyone modern and Western), indigenous peoples are excluded from development: construed to be the remnants of an ancient past, they should relinquish their traditions or indigenous identity markers to make way for progress; or, alternatively, remain ‘authentic’ Indians and embrace their role as nature’s protectors. The notion that ‘indigenous’ can have a double-meaning of modern and traditional is incommensurable to the discourse of development/modernisation which is premised on quintessential notions of tradition and modernity. Although it is acknowledged that notions of progress and modernity did not simply appear in the aftermath of the Second World War, but have developed as a result of a combination of historical processes that can be traced back to Europe’s age of Enlightenment, once repackaged and exported as a set of development strategies, and then re-appropriated by the non-western world, have had resounding effects still felt today. The first part of this chapter will briefly explain the central theoretical framework of international development—modernisation theory— and its

postcolonial critique. The second part will advance the idea that ‘strategic essentialism’—the appropriation of constructs of Indianness by Aboriginal people for political objectives—can, in meddling tradition and modernity, put into play what Homi Bhabha calls “a site of resistance and negotiation” to dominant discourses of development (Bhabha, 1995, 114).

Section 1: Who’s Agency in the Development Discourse?

Since the post-war period, enormous efforts have been made to ‘develop’ the ‘Third World’. This continues to be the case, even though many have argued that ‘development’ has failed to fulfill its promises to the ‘Third World’ (e.g. eradicate poverty, spread democracy, etc.) (Ibister, 2003; Nabudere, 1997; Pieterse, 1991). The fact remains, however, that whatever explanations surface to demonstrate its failure and to discredit it—its Eurocentric premises or the idea that neo-colonial and capitalist relations between the Third World and the West make the latter dependent on the former—, development is relevant today because the people of the ‘Third’ world or the so-called objects of development are, on the contrary, agents who are critically involved in development. First, I will briefly explain the central economic strategy of development, modernisation theory as formulated by economist Walt Rostow, since it not only clarified the objectives of development but also because it gave it direction. Next, I will describe the postcolonial critique of Arturo Escobar’s framing of development as a discourse in order to veer focus away from the notion of an all-powerful West and unto the agency of people at the margins of society, in the Third World or elsewhere.

1.1.: Modernisation Theory:

In an attempt to bring the 'Third World' up to par to western standards of living, modernisation theory, an economic and political theory of linear progress that was very popular in the 1960s, postulates that the 'third' world could develop if it pursued the same process of transition from 'primitive' to 'modern' forms of social organisations that had emerged in the West (Rostow, 1960; Almond, 1960; Pieterse, 1991; Ibister, 2003). Based on case studies of industrial revolutions and economic development in capitalist countries such as Britain, France and other mainly European nation-states, modernisation theorists, such as economist Walt Rostow and political scientist Gabriel L. Almond tried to determine why western nation-states fared, in their opinion, better economically, socially, and culturally, than non-western societies; they believed that these better living conditions were due to liberal economics or capitalism. The bulk of modernisation theory thus centers on the comparison of 'modern' urban-based economies to 'traditional' rural economies, so as to isolate the latter's deficiencies—the absence of democratic institutions, of technology, of initiative, etc.— and to find ways to repair those deficiencies (Ibister, p.31). In this model the state is also perceived to be the central organising force: the evolution of 'traditional' societies into 'modern' societies is integrally linked to transformations arising in the state—where the state's role lies in preparing the political and economic environment to facilitate modernisation.

Since economist Walt Rostow is frequently cited in reference to modernisation theory and is one of its main contributors, I will concentrate on explaining his conception of modernization theory developed in *The Stages of Economic Growth* (1960). Another

important contributor to modernization theory is political scientist Gabriel L. Almond, who argued that the evolution of traditional societies into modern societies is integrally linked to the development of the western political system, i.e. the state and democracy (Almond, 1960). Rostow, however, concentrated on the economic side of modernisation theory. His explicit goal in developing a theory on economic growth was to explain how material wealth and capitalist culture can be replicated in other nation-states, particularly traditional countries. By isolating the determinants of growth that led to western nations being 'developed', Rostow envisioned that the same conditions, outlined in his growth model, would allow any given traditional nation to become developed themselves. In short, modernization theory postulates that a primitive society will become modern if they go through the following five sequential stages of economic growth or development:

- 1) *Traditional Society*: These societies are characterised as primitive in the social, political and economic sense. They are construed to be 'inert' since they are only concerned with their subsistence and are content in emulating ancestral ways of life.
- 2) *Preconditions for take-off*: Sparked by a power-hungry elite or a disadvantaged group within the society, higher investments in the development of agriculture will lead to greater levels of industrialisation. This stage can last for more than a century.
- 3) *Take-off*: This stage of growth is defined by an industrial revolution whereby the existence of a few leading industries that can generate more growth to such an extent that foreign aid is no longer necessary to sustain the country's economy.
- 4) *Drive to Maturity*: At this stage of growth, the economy is much more differentiated than before as new industrial sectors (e.g. chemical and electrical industries) develop.

5) *Age of Mass Consumption*: In this final stage, society is now mostly urban and enjoying much prosperity as the 'benefits' of economic growth have spread out to the general population (Rostow, 1958).

In line with an evolutionist perspective, the stages of growth described above are predicated on a dichotomous view of western and non-western peoples: while modern western societies have reached the last stage of growth, non-western traditional societies are at the bottom of this evolutionary ladder and are seen as backward and in need of development/modernisation (Pieterse, 1991; Escobar, 1985). As such, in order to 'move up' the evolutionary ladder and progress into civilized societies (integrally related to higher standards of living), traditional societies must "overcome traditional values which are inappropriate to economic growth and the inert or resistant institutions which incorporate them" and adopt modern western technologies and a consumer ethos (Almond, 1960, p.159; Rostow, 1960) ². Further, underdevelopment or poverty is perceived to be due to the traditional society's inertia or other endogenous factors that have nothing to do with colonial legacies or imperialism.

While this theory is no longer considered so innovative by academia today, its premises still inspire modern-day development policies. Indeed, I would argue that the United States pull-out strategy in Afghanistan and Iraq which consist of opening free markets through the introduction of western democratic values is very likely inspired by modernisation theory.

² Although much critique has been made on modernisation theory and practice - expressed in Marxist and Dependency theories, the direction and form of 'progress', or progress itself for that matter, has remained relatively unchallenged in Northern countries, especially in the development sphere of debate.

1.2. A Postcolonial Critique of Development:

Postcolonial research has brought much criticism to modernisation theory and development. I shall not attempt to do an exhaustive coverage of all the critiques made of modernisation theory; this is outside the scope of this paper. Instead, I want to explain certain elements of its postcolonial critique, specifically, the dichotomous representation of Western society as advanced and the non-western world as 'uncivilised'. Postcolonialism, a current of thought which emerged out of cultural and literary studies in the 1980s, seeks to highlight the multiple ways in which various groups of people are creating alternative discourses to the dominant ones such as the modernisation discourse and subverting its power (Kapoor, 2002; Jacobs, 1996).

One important criticism made by Arturo Escobar in his book "Re-encountering Development" is that development is presented as a neutral and objective recipe for social change (Escobar, 1995). "Far from being an innocent, neutral or objective discourse of how a society might become modern, modernisation theory was part of the conceptual architecture of a diffusing imperialistic logic', which provides theoretical legitimisation for geopolitical intervention in Third World societies (Slater, 2008, p.85). Escobar also explains how modernisation theory in the last fifty years is now transcribed into a vast network of development policies, international planning agencies and institutions such as the World Bank and various other development practices. In short, according to Escobar, development as a discourse has enabled the West to create the Third World politically, economically, sociologically and culturally, and maintain dominion over it (1995).

Other postcolonial thinkers, such as Morgan Brigg, have challenged Escobar's discourse of development for absolving 'Third World' peoples from responsibility in the deployment of development (Brigg, 2002). In construing the development discourse to emanate from a purely western desire to dominate the "Third World", Brigg criticizes Escobar for localising power in the West where the western subject creates meaning about the Third World and development, literally erasing Third World peoples as subjects in the discourse of development and denying their power to produce and recreate meaning and knowledge. Moreover, while Escobar acknowledges that the local produces culture, he nevertheless ignored the fact that the objects of development—the Third World and indigenous peoples in the First World—also hold subject positions within and not outside the discourse of development—legitimizing, promoting and sustaining development. In short, whether they are engaged in resisting development or working to be 'modern', people at the margins of society are participants in creating meaning about development and are therefore part of the discourse and not outside it.

Section 2: Strategic Essentialism and Political Empowerment

"The strategic use of positivist essentialism in a scrupulously visible political interest" (Spivak, 1987, p.207).³

"Brazilian Indians, like so many native peoples the world over, have learned to value the concept of culture and, with remarkable sagacity, have taught the non-indigenous world, including anthropologists, how to critically absorb and reshape received ideas" (Ramos, 2003, p.363).

³ Postcolonial scholar Gayatri Spivak (1987) coined the term 'strategic essentialism'.

Before I discuss strategic essentialism—a site of resistance and negotiation to dominant discourses of development— it is important to consider that development as a discourse, like colonial and imperialist discourses, is both a global and a local phenomenon. Even if strategies of modernisation aim to be universally encompassing, integrative and tend to occur similarly in different places, not just in the 3rd world, one cannot ignore that local specificities also exert influence on the development discourse since development “necessarily takes hold in and through the local” (Jacobs, 1996, p.28). For example, this paper will illustrate the agency of local Aboriginal groups in Canada in challenging the premises of the global development discourse when they simultaneously assert an indigenous identity and engage in economic development like the most modern of societies.

This section will showcase strategic essentialism, a political strategy used by those who have been essentialised and marginalised and used particularly by indigenous peoples in local struggles. Indeed, essentialisms of gender, race, age, culture, sexuality, etc., have been thoroughly criticized by anthropologists and sociologists for having opened Pandora’s Box to a range of discriminating practices. But postcolonial theorists have argued that an ‘authentic’ or essentialist identity can sometimes be an effective political tool, amongst many others (e.g. blockades, demonstrations, signing modern treaties, litigation, etc.) for indigenous political empowerment (Spivak, 1987; Haraway, 1992; Bhabha, 1995; Ramos, 2003)⁴.

⁴ Note that the case studies in this paper will rest primarily on the anthropologist Alcida Rita Ramos’ abstraction of this term to indigenous contexts.

Cultural essentialism, the belief that groups of people have a set of essential features or the idea of culture as an essence, became prevalent in academic circles at the beginning of the 20th century (Francis, 1998). Early in the 20th century, anthropologists such as McIlwraith conceived culture to be a “sum total of manners, customs, practices and beliefs of a community” in which each element is an integral part of the whole culture (Francis, 1998: p.52). The obvious implication of this perspective of culture is that any changes made to an element or elements of a given culture risk disrupting the whole culture to such an extent, that the original culture will be lost forever. For example, historian Mark Francis highlights the fact that anthropologists and certain government officials were concerned that the culture of ‘natives’ had become so meddled and damaged by European influences, such in the case of residential schools and reserves, that authentic native culture was in danger of disappearing (1998, p.52-55). As a result, instead of being assimilated, indigenous culture and people had become an object of preservation and protection from the invasive hand of government. Hence, while essentialisms of race in the 19th century led scholars and government officials to develop colonial policies and projects that interfered directly in Aboriginal life so as to bring the latter up-to-par with European standards of living, culture seen as a fixed essence provoked a different perspective of Aboriginal people. Nevertheless, this concept of culture was not as innovative as Francis claims it to be. By filtering European culture from all the ‘others’, the concept of culture was to the early 20th century anthropologist what race was to the social Darwinist: the effect was to strengthen the boundary separating settler populations from colonized or indigenous populations.

Consequently, many critical thinkers have warned against this representational logic of culture, where culture is often “hastily read as the reflection of pre-given ethnic or cultural traits set in the fixed tablet of tradition” (Bhabha, 1994, p.3). For instance, Edward Said’s “Orientalism” provides one example of the dangers of essentialising culture. In brief, he shows how the creation of binary categories like the Orient and the Occident had led to the edification and essentialisation of ‘oriental’ culture against ‘occidental’ culture so that difference implies hostility (Said, 1995, p.351-353). Former President Bush’s evocative statement, “You’re either with us or against us on the war against terror” not only demonstrates the prevalence of this perspective, but also highlights the very real implications of having these theoretical and artificial categories of culture as a fixed essence tainted with political elements. As such, instead of perceiving race and culture as monolithic entities, the same critical theorists have called for the reinterpretation of culture as cyborg (Haraway, 1992), hybrid (Bhabha, 1994), or as quasi-objects (Latour, 1993). More precisely, they ask that culture be re-envisioned as a dynamic and heterogeneous object or a thing ‘in process’, always being made and transformed, and never achieved.

While some anthropologists have replaced antiquated narratives of culture and race with more open and dynamic definitions, the idea of culture as a fixed essence is still pertinent today. As Ramos points out in “Pulp Fictions of Indigenism”, even though culture is historically laden with all kinds of abuse, the notion of culture as a fixed essence cannot be simply thrown out and forgotten because while the world of academia has moved beyond essentialist constructs of race and culture, mainstream society today has almost

embraced this idea of culture (2003). Indeed, the media, environmental activists, courts, governments and even those who are the object of essentialisms participate in the creation and reproduction of culture and stereotypes.

(Lakota Legendary Native American
Formula, 2009)



Choosing those cultural features that will impress “whites”, minorities and indigenous people are also capitalising on difference or using strategic essentialism for personal gain. The Lakota joint care product above is a good example of strategic essentialism for profit-making objectives: promoting the ‘ancient’ and ‘time-tested’ Lakota joint care products against a back-drop of black and white images of a native man wearing a feather head band, this Aboriginal company’s objective is to emphasize those aspects of Native American culture, i.e. ‘traditional’ and ‘time-tested’, that will convince non-Aboriginals to buy their products. While some may argue against this use of strategic essentialism, capitalizing on difference also comprises a means of resisting the assimilative tendencies of the dominant society. As such, in many ways, strategic essentialism is a tool to resist society’s apathy to indigenous causes.

Moreover, to view essentialism as archaic and no longer applicable to social research would deny the agency of the marginalised and the essentialised. Being well

aware of the stereotypes that are made about them, indigenous peoples and other peoples at the margins of society develop ways to instrumentalise cultural traits and artefacts—whether or not they are a part of their traditions, borrowed or newly created—as empowerment mechanisms (Ramos, 2003). As Ramos argues, “under the guise of going along with what is expected of them, the Indians reinforce what they want the national society to see in them—if this brings political benefits” (2003, p.373). More specifically, by appropriating certain stereotypes made about them, i.e. asserting and displaying the expected Aboriginal identity markers, and using these stereotypes as political weapons, strategic essentialism is an effective way for Aboriginal peoples to achieve their political goals. For instance, in countries like Canada and the United States, where Aboriginal peoples have been heavily affected by betterment discourses and colonial strategies meant to assimilate them.⁵ Overemphasizing cultural difference or separatism not only confers more visibility to themselves and their claims but also underlines their specificity and distinctiveness as indigenous peoples⁶.

Conclusion:

‘Strategic essentialism’ highlights the idea that Aboriginal people and others at the margins of the dominant society are participants in the development discourse. Using the social construct of indigeneity, which is perceived as a pure residual identity untouched by

⁵ Many Aboriginal languages have been lost as a result of colonial practices such as residential schools.

⁶ In line with eugenics thought, the Canadian federal government in the 19th century believed that if they could re-socialize and re-educate the natives, they would succeed in bettering or improving the ‘lower’ races, such as the ‘Indians’. Much of the Department of Indian Affairs’ policies, e.g. residential schools, reserves, family planning, etc., focussed on exerting control over the domestic and intimate environments of Aboriginal people (Bednasek, C, and Anne Godlewska, 2009)

colonialism, Aboriginal people, politically and economically are purifying and recasting the meaning of this construct whether or not they are conscious of this process. They are, thereby, demarcating their subject position in discourses such as the development discourse that wishes to exclude them for not letting go of tradition and embracing modernity. As will be shown in the next chapter, the fact that Aboriginal people have used strategic essentialism and have reached desired political goals as a result, demonstrates that they are “an active and constitutive force in the formation of social categories and the uneven operations of power between them” (Jacobs, 1996, p.28). And so, one must adjust our lens of development as a discourse emanating from the West, to consider the various scales at which development takes place with a specific emphasis on the local scale.

Chapter II:

The James Bay Project: The Effectiveness of Strategic Essentialism in the 1970s

While the James Bay project has been challenged by a great number of environmental activists, ecologists and researchers for its ecological impacts on wildlife, the greatest opposition to this development project came from the James Bay Cree First Nation and the Inuit. As one of the largest hydroelectric systems in the world, the James Bay Project in Northern Québec has raised significant political controversy since its inception in 1971 and “has activated different identity narratives” for the Québécois and Aboriginal groups in Québec (Desbiens, 2004, p.101). The James Bay Project is a network of hydroelectric power stations on the La Grande River that entailed the flooding of traditional Cree territory the size of the state of New York. It was and still is a means for the Québécois to affirm their savoir-faire. On the other hand, it is a bleak reminder to Aboriginal peoples of how insignificant their narratives and claims are to the dominant society. Not only were they not consulted in regards to any element of the project, they were expected to calmly follow the dictates of the Québécois government and re-locate one of their villages, Fort George, to an area upstream of La Grande River (Richardson, 1977).

The latent postcolonial intention of the global discourse of development—modernisation ideology particularly, but not exclusively—is to assimilate local peoples worldwide to the western way of life. How else would different geographies bare eerily similar design transformations and environmental effects? As modernisation theory has rapidly spread around the world in mid-20th century on a mission to save so-called ‘traditional societies’ from poverty, its far-reaching effects have become extremely

problematic. Nevertheless, this chapter will stand short of critiquing the negative impacts of development or how the intensive use of western technology such as large-scale hydro dams and associated extraction of natural resources has been detrimental to local communities. Instead, I want to highlight the agency of Aboriginal groups in Northern Québec in challenging the notion that they should make way for progress. The James Bay project constitutes a turning point in Aboriginal and non-Aboriginal relations in Canada: not only did it lead to the first modern treaty between the James Bay Cree and Québec, through the use of strategic essentialism in Québec's Superior Court, it was the first time in Canadian history that Aboriginal people succeeded in bringing the dominant society's development projects to a halt⁷.

This chapter will explain how Canadian judicial interpretations of Aboriginal rights and titles as well as Québécois nationalist discourse in the 1960s and 70s helped perpetuate the social construction of First Nations as uncivilised and part of nature. In the first part of this chapter, the policies and key court decisions preceding the 1973 *Kanatewat v. James Bay Development Corporation* court case will be discussed to demonstrate how the Crown and the judicial system manipulated the legal definition of Aboriginal rights and titles in an effort to regulate Aboriginal identity and their relation to their land. The second section, the focal part of this paper, will demonstrate how the James Bay Cree invoked the 'Indian in touch with nature' resistance strategy or 'strategic essentialism' in the 1973 *Kanetewat v. James Bay Development Corp.* to protest against Québec's hydro development projects.

⁷ In 1975, the James Bay Cree surrendered Aboriginal title over their land in the first modern treaty entitled *The James Bay and Northern Québec Agreement* in exchange for \$225 million, retaining certain Aboriginal rights (Secrétariat aux affaires autochtones, 2006).

Section 1: A Short History of Indigenous and Settler relations:

Erasing Native Land in Canadian Jurisprudence

Through a brief overview of key Canadian policies and court decisions concerning Aboriginal people, this section will highlight the historical processes that led Aboriginal rights and titles to be labeled as mere occupancy rights thereby restricting them to practice only traditional activities such as hunting and fishing.

Although Aboriginal peoples had existed as sovereign nations well before the coming of the Europeans, the relationship between Aboriginal people and non-Aboriginal people was founded on the premise that present-day 'North America' was a terra nullius, a land to be divided and conquered by various European powers. When the Royal Proclamation of 1763⁸ announced the sovereignty of Britain over a large part of North-America, i.e. New France, it correspondingly denied the existence of the various Aboriginal nations' political and judicial systems (e.g. Iroquoian Confederacy⁹). Nonetheless, due to the importance of the fur trade and the European nations' race to conquer North-American territory, 18th and early 19th-century native-settler relations in Canada were very different from what they are today: cooperation, equality and negotiation were important attributes of native and newcomer relations since Europeans were dependent on natives who were "conversant with the terrain, knew the transportation routes, and were effective forest

⁸ The Royal Proclamation of 1763, which was issued in the wake of the British conquest of New France, provided the first Constitution for British colonial governments in the former French colonies and codified the rules regarding colonial/Aboriginal interaction with respect to the land (Foster, 2007, p.10-12).

⁹ See J.R. Miller, 2004, p.112-113, for more information on the Iroquoian Confederacy.

fighters” (Miller, 2004, p.179-181). Indeed, the British Crown in the Royal Proclamation Act did recognize Aboriginal title and acknowledged that most of the land was Aboriginal territory. More specifically, the Act was meant to regulate how settlers acquired land from First Nations, establishing the Crown as the intermediary between Aboriginals and non-Aboriginals (settlers had to obtain the authorization of the Crown) in order to deter conflict between the settlers and Aboriginal people, and paved the way for the making of the first treaties in Eastern Canada as representatives of the Crown sought to accommodate the Loyalists settlement needs (Bartlett, 1991, p.184-185).¹⁰

Unfortunately, by the mid-19th century, Aboriginal-settler relations ceased to be based on cooperation and partnership, as the state sought to regulate Aboriginal lives in a much more comprehensive fashion. The 1867 British North American Act (BNA Act) did not attribute any measure of self-government to Aboriginal peoples since they were denied independent authority to make laws or preserve their cultures (Imai, 1999, p.4-6). Instead, the 1867 BNA Act subdued First Nations as wards of the Crown providing the federal government with the authority to make laws in relation to “Indians and lands reserved for Indians”. The Indian Act, originally adopted in 1876 and still in existence today, enshrined the federal government’s paternalistic approach to Aboriginal people for much of the 20th century: “their lands and lives were controlled by government agents; their children sent to residential schools, language and custom were suppressed, and reserves allocated, or reduced by administrative fiat rather than by treaty” (Foster, et al., 2007, p.15).

¹⁰ The treaties ensured the surrender of Aboriginal title in exchange for the establishment of reserves and guarantees as to hunting, trapping and fishing rights, annuities, and certain social and economic undertakings by the colonial government (Bartlett, 1991).

Canadian tribunals have also greatly influenced Aboriginal and non-Aboriginal relations in Canada. For instance, the landmark 1888 *St. Catherines's Milling and Lumber Co. v. The Queen* court case is the first time Canadian jurisprudence dealt with the issue of Aboriginal title and treaty rights¹¹. Although the *St. Catherine's* case explicitly addressed and defined Aboriginal rights and titles, it is interesting to note that no representative from the Saulteaux-Ojibway band in Ontario ever participated in court deliberations. Rather, this court battle was solely between the province of Ontario and the federal government, each justifying jurisdictional authority over "land reserved for Indian occupation". First, in the lower courts, the province of Ontario had challenged what it deemed was a federal incursion in provincial affairs (a lumber company had obtained a federal permit allowing them to harvest trees on "Indian land"). Then, on appeal from the judgement of the Supreme Court which had ruled in favour of the province, the federal government argued at Privy Council (then the court of last resort) that, under the 1763 Royal Proclamation, the province had no say in the administration of 'Indian lands' since the Saulteaux-Ojibway had ceded title to their traditional territories solely to the Crown and not to the provinces.

Ultimately, while the Privy Council did recognize that the Royal Proclamation conferred the existence of Aboriginal rights and titles, it held that these rights were only "personal and usufructuary rights" and dependent on "the good will of the sovereign"(Bartlett, 1991, p.3-5). In other words, this case established the supremacy of the Crown: the Crown could take away and extinguish Aboriginal title if and whenever it

¹¹ While the *St. Catherines's Milling and Lumber* company was involved to a certain extent in this decision (as to whether the federal permit issued to them was valid), the *St. Catherine's Milling* decision mainly addressed the issue of provincial and federal jurisdiction.

desired to do so. The implication is that, unlike European settlers, Aboriginal peoples could not benefit from ownership of resources and engage in development, since Aboriginal title only conferred the right to practice traditional activities for sustenance. For most of the 20th century, this decision's characterisation of Aboriginal rights and titles served as the main reference in many subsequent court cases and federal policy affecting Aboriginal people. Indeed, for a long period of time, "courts concealed indigenous laws and privileged European claims over Aboriginal lands" (Borrows, 1997, p.17). While settlers were encouraged by the state to exploit natural resources in Canada's hinterlands and stimulate the national economy, Aboriginal communities were confined to a sedentary way of life on tiny reserves and forbidden from engaging in any development for financial gain.

Moreover, up until the early 1970s, as a result of the *St. Catherines's Milling and Lumber Co. v. The Queen* decision, Aboriginal title became a mere occupancy right in that Aboriginal people were authorized to use their land solely for traditional and customary purposes, e.g. hunting, fishing and trapping (Boudreault, 2003, p.92-93). In fact, the question of whether or not Aboriginal people in Canada even had any rights and titles was being put up for debate. Notably, Canada's former Prime Minister Pierre Elliott Trudeau's initiative to repudiate Aboriginal rights and titles with the 'white paper' in 1969, which ultimately failed, reflects to a great extent how the government perceived Aboriginal people: by eliminating the distinction between Aboriginals and other Canadians, government intentions fleshed out in the white paper were to assimilate Aboriginal people to the rest of the Canadian population (Miller, 2004, p.272-275).

It took almost a century for Canadian jurisprudence, in the landmark 1973 *Calder v. A.G. British Columbia* court case, to recognize that Aboriginal land rights and titles were inherent and did not depend on the recognition of the Crown.¹² In short, after a series of appeals in British Columbia's lower courts, the chief of the Nisga'a tribal council in British Columbia, Frank Calder, finally had his request for a declaration that Aboriginal title was never extinguished deliberated in the Supreme Court. While no final decision was rendered as to whether the Nisga'a had Aboriginal title to their traditional territories, this case was significant because Canadian jurisprudence finally acknowledged that Aboriginal title and rights "were founded on the pre-existence of indigenous organizations and laws" (Borrows, 1997, p.20). As such, Aboriginal titles and rights could not be readily extinguished based on the application of laws that existed prior to the 1867 BNA Act. As Boudreault states, "Aboriginal title existed as a right within the common law, regardless of whether it had been recognized by the government or acknowledged in any treaty" (2003, p.92-93). Nevertheless, though the *Calder* judgment initiated a more critical interpretation of Aboriginal rights and titles by judges, Canadian jurisprudence still favoured a very Eurocentric approach in cases dealing with Aboriginal matters; the *St. Catherine's* legal principle that Aboriginal title was "dependent on the goodwill of the Crown" remained uncontested.

By defining Aboriginal rights and titles as usufructuary in nature, the 1888 *St. Catherine's Milling and Lumber Co. v. The Queen* decision thereafter restricted Aboriginal people to practice only traditional activities such hunting, gathering and fishing. The next

¹² In the *Calder* case, the Nisga'a sued for a declaration that their Aboriginal title had never been lawfully extinguished (Foster, 2007, p.101-105).

section will specifically highlight how judges in the *Kanetewat v. James Bay Development Corp.* (a crucial decision in the 1970-80 James Bay Project affair) relied on this perspective of Aboriginal land rights and titles as mere occupancy rights. Worst, the tendency was to deny the existence of Aboriginal rights and titles, since the dominant point of view was that the Cree were no longer ‘real Indians’ since they had modernised and lost their traditional ways—culturally integrating snow mobiles and other technologies (Boyce, 1979). In particular, I will explain how the James Bay Cree used “strategic essentialism” as a political strategy to retain control over their traditional lands.

Section 2: The James Bay Project, Québécois Nationalist Aspirations and Cree Self-Determination

“The need to define James Bay solely in terms of how it relates to Southern Québec is part of the colonial mentality. This territory ... which we call Eenu Istchee ... has its own logic, its own history, its own ecosystems and its own hopes for development. Thus, the ‘North’ is not the Klondike of the South, nor the universal remedy for the South’s problems.” (Saganash, 1995, p.23)

Similar to the Canadian discourse that represents Canada’s North as the “true North strong and free”, the Québécois government under Robert Bourassa (the Premier of Québec during two mandates: 1970-76 and 1985-94), has participated in representing northern regions like the James Bay area as ‘pristine wilderness’ – essentially devoid of human intervention. In repeatedly evoking Northern Québec as a cold, wild, inhabitable and rugged landscape whose sole value rests in its hydrological energy potential, this government’s nationalist discourse dismissed the presence of Aboriginal communities in the James Bay region and legitimized hydro development incursions (Hamelin, 1998; Trudel, 1995). Within

such a discourse, the categorisation of the James Bay region as pristine wilderness legitimised indigenous identities and territorial claims only in so much as they coincided with definitions of indigeneity synonymously meaning pre-colonial and primitive. It is as if indigeneity was a prize to be won by those who promised to remain traditional and fulfill their duty as ‘trustees of the earth’.

The first part of this section will cover Québec’s process of modernisation, first in the 1960s, and then in the 1970s, particularly describing how Québécois nationalist discourse traced the contours of Québécois identity and ‘others’ - the Cree, the Naskapis and the Inuit. It will be shown that the ‘James Bay conflict’ cannot be reduced to a battle over resources and nationalism; it can also be understood as a “common ground for debating nature and culture, casting ‘natural resources’ as a cultural problem (Moore, 2003, p.16). The second part will focus on describing the *Kanatewat vs. James Bay Development Corporation* court case, as interpreted by Boyce Richardson in “Strangers Devour the Land”—as a historical moment in Aboriginal and Canadian relations where the Cree challenged the premises of development and constructed narratives of the North (1977). Through the use of strategic essentialism, the Cree asserted their agency in shaping the James Bay landscape. The case was temporarily won by the Cree and the James Bay Project was suspended briefly.

2.1.: Hydroelectricity in the James Bay Region, Québec: An Economic and Symbolic Resource for the Québécois

This section in its entirety is meant to highlight Hydro-Québec’s key role in the modernisation of Québec society. In particular, the process of modernisation in Québec

involved two phases, each corresponding to the respective mandates of Premier Jean Lesage (1960-66) and Robert Bourassa (1970-76 and 1985-94). This section will begin by describing the first phase of Québec's modernisation in the 1960s instigated by the Lesage government: a series of state-directed measures aimed at modernising Québec society in general, otherwise called Québec's Quiet Revolution, of which the appropriation of foreign-owned electric companies by the state was a key element. Then, I will discuss the second phase of Québec's modernisation process-- the development of Northern Québec—which was essentially propelled by Premier Robert Bourassa with the James Bay project in the 1970s.

2.1. Phase 1 of Québec modernisation

Up until the 1960s, Quebec has been painted by many historians as a conservative and traditional society, especially in relation to its other North American counterparts, i.e. Ontario, Canada and the United States (Gagnon and Bournet, 1997). The typical 'outsider' view of 1940s and 1950s francophone Quebec is that it was traditional, church-controlled, agrarian, and outside of the urban-industrial society (Cuccioletta and Lubin, 2004, p.128). Whereas the rest of North America had demonstrated great entrepreneurship by adopting liberal and capitalist ideologies and industrial practices, pre-Quiet Revolution Quebec was depicted as a backward society that had failed to liberalise, and was therefore a relatively isolated, closed and underdeveloped society. Francophone people were categorised as having a lack of entrepreneurship and innovative spirit and were blamed for Quebec's social and economic under-development (Gagnon and Bournet, 1997, p.34-36). Moreover, outsiders viewed the francophone traditional lifestyle to be accountable for Quebec's

delayed process of urbanisation and weak industrial sector and general underdevelopment¹³. However, the truth of the matter is that Québec's so-called underdevelopment relative to the rest of North America ensued from its historical context (the 1763 British Conquest of New France and the Union Act), not to mention discrimination. As Bélanger and Comeau explain, "anglophone elites dominated the economy and distributed disproportionate advantages to fellow anglophones at the expense of their francophone counterparts" (2004, pp.27).

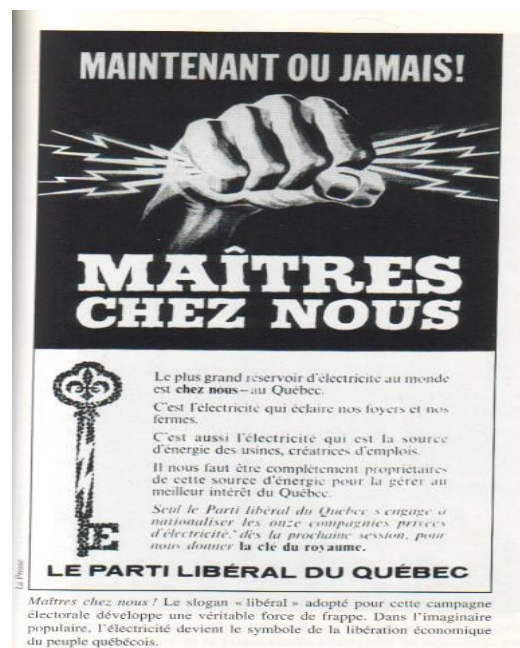
The 1960s Quiet Revolution was a significant moment in Quebec's history because it represents the period in which the French-Canadian majority re-established control over provincial social and economic affairs. In a matter of a few years, through a vast range of measures and massive investments aimed at "modernising" sectors like education, social services and the health system, the Lesage government succeeded in implanting a secular and welfare state. Moreover, the nationalisation of the province's electricity production and distribution was the key strategy to obtain Québécois control over the province's economy.

It can be argued that the first phase of modernisation in Québec followed a similar sequence to Rostow's stages of economic growth described in the first chapter—albeit much more rapidly than Rostow predicted: the nationalisation of Hydro-Québec was the largest investment in Québec's history and demanded a large mobilisation of capital from domestic sources. From its inception, Hydro-Québec, a state-run company, was meant to enable the economic independence of French-Canadians from privately-owned and mainly foreign

¹³ Though modernity, conceived as capitalistic and liberal values, was espoused by the Anglophone minority in Québec, modernity took longer to be expressed in the majority of French communities and Québec in general (Bélanger & Comeau , pp.27-31).

electricity companies¹⁴. Political leaders at the time correctly envisioned that in repossessing Québec's energy resources, Hydro-Québec would help offset Anglo-American control of the Québec economy and bring to term the abuses fostered by the previous private ownership scheme that only benefitted the Montréal region¹⁵.

This manifesto was published by the Liberals in the midst of the 1962 Québec elections (Québec Liberal Party, 2010)



Most notably, Premier Lesage's 1962 re-election platform exemplifies the extent to which hydro development was perceived to be central to Québec's prosperity so that "no one would be treated as a "second-class citizen" (CBC Digital Archives, 2009). Given that Hydro-Québec's partial state control of the energy sector in the early 1960s was deemed insufficient, the key item of the Liberal campaign was the nationalisation of electricity. It was

¹⁴ Prior to the creation of Hydro-Québec, an oligopoly of British and American companies controlled the primary sector (extraction of resources) and secondary sector (distribution of resources) of Québec's economy so that all power generation companies were owned by non-francophone people (Bélanger and Comeau, 1995). Mounting public resentment pushed the Liberal Premier of Québec, Adélard Godbout, in April 1944 to create Hydro-Québec (Ibid).

¹⁵ Until the early 1960s, the energy market continued to be dominated by a number of large private enterprises which had succeeded in establishing regional monopolies outside of Montreal and which continued to discriminate against French-speaking communities (many francophone rural regions did not have access to electricity for domestic or farm use)(Bélanger and Comeau, 1995).

a commitment to make Hydro-Québec the only player in Québec's energy sector and its 'engine' of modernisation (CBC Digital Archives, 2009). By taking advantage of public resentment toward private electricity companies, the Liberals' electoral strategy was to propose government-directed hydro-development as the means to French-Canadian emancipation in the province. The implication was that the nationalisation of Hydro-Québec would allow the exploitation of hydro resources for the purpose of economic growth and development, particularly benefiting the French-Canadian population¹⁶. The slogan 'la clé du royaume' (translation: the key to the kingdom) was precisely used in the election platform to demonstrate how Hydro-Québec was the instrument to national liberation¹⁷. Other slogans such as 'Maîtres chez nous' meaning 'Masters of our home' kindled the Québécois nationalist desire to have greater control over their territory, development and industry (see the image on the previous page).

2.2. Phase II of Québec modernisation

"The development of James Bay is a project without a precedent in the economic history of Québec, a turning point in our history. James Bay is the key to Québec's economic and social progress, the key to Québec's political stability, the key to Québec's future ... It will not ... be said that we will live poorly in a territory so rich. We will overcome our situation of economic inferiority." (Robert Bourassa, announcing the project on 30 April 1971; quoted in Sylvie Vincent 1985)

"Hydroelectric potential is the lens through which we adjust our vision of the North. Where the North was believed to be desolate and inhospitable, settled by only a handful of Inuit and Cree, we now can decipher the new border of Québec." (Bourassa, 1985, p.14)

¹⁶ It was conceded by the government that the benefits of the nationalisation of Hydro-Québec were great: fixed costs for the company diminished; increased productivity, modernisation of rural areas (previous lack of electricity had led to underdevelopment); and homogenizing of tariffs (Bélanger and Comeau, 1995).

¹⁷ In a short period, Hydro-Québec bought out the remaining private electric companies so that it became the sole owner of the production and distribution sectors of electricity.

In the late 1960s and especially in the 1970s, the Québécois provincial government under Premier Robert Bourassa (1970-1976) unravelled the second phase of Québec's modernisation. More and more, starting with the Newfoundland-Labrador Churchill Falls project in 1969 whose objective was to supply Hydro-Québec with power (IEEE Canada, 2008), Hydro-Québec development projects in Northern Québec was seen to be the key to a more accelerated economic modernisation of Québec and towards what may be considered the last stage of growth in Rostow's modernisation theory, 'the age of consumption'. Indeed, since the province's economic development came to be equated with the exploitation of Northern Québec for natural resources and hydro development, Hydro-Québec wielded a lot more power in Québec's economy than before.

However, the possibility that Québec's path to modernisation was detrimental to that of other non-francophone peoples on Québec territory— the Cree, the Naskapis, and the Inuit— hardly reflected on the decision-making process surrounding the hydro development of the North¹⁸. While Hydro-Québec sought to expand its economic significance and power by flooding the James Bay area, it ignored the fact that the majority of the population in the region was Aboriginal. In addition, while vigorous public debates were held by the Lesage government in the early 1960s on the theme of modernisation and the role of the state (what scholars now refer to as the Quiet Revolution), Aboriginal peoples and their concerns were, not surprisingly, pretty much excluded from this process; the concerns of a Aboriginal minority population about the process of modernisation could not supplant the needs of the

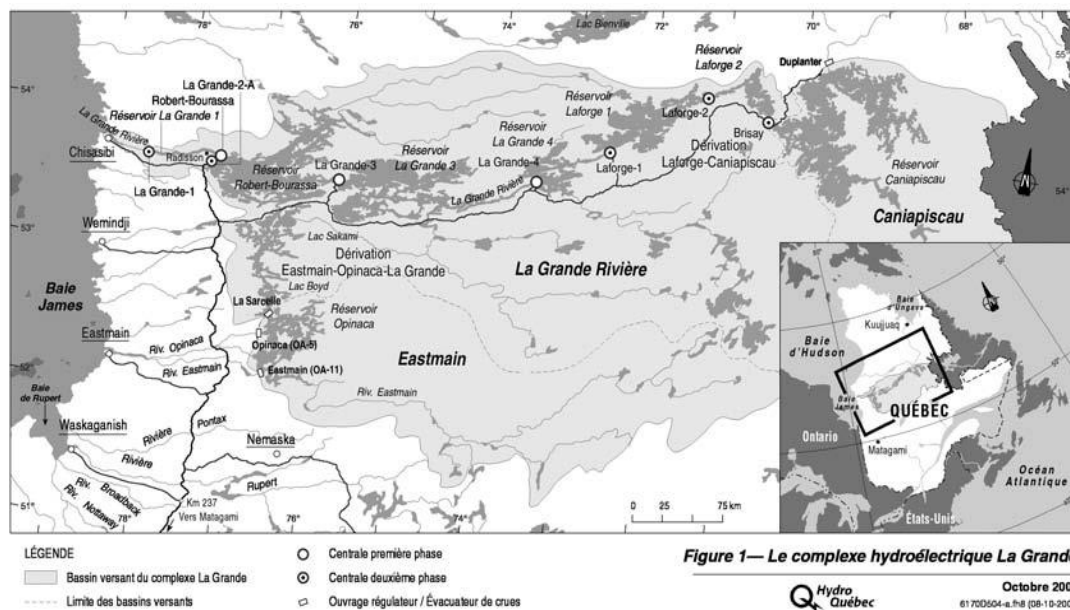
¹⁸ The James Bay Cree and the Inuit filed for an injunction on November 7, 1972 in the aims of suspending the construction of the James Bay Project and bring into debate the question of Aboriginal rights and titles; they signed the first modern agreement with the Québec government in 1975 (Richardson, 1977). The Naskapi later signed a separate agreement with the Québec government in 1978 (Vincent and Bowers, 1988).

Québécois majority. Instead, Premier Bourassa argued that they knew what was best for the region and for Aboriginal communities: hydro development projects would allow the 'underdeveloped' North to develop as economic growth would ensue from the creation of jobs—both the Québécois people and Aboriginal communities in the North would prosper (Bourassa, 1985).

Evidently, the second phase of modernisation in Québec characterised by hydro development was not only concentrated on resource extraction and economic imperatives of the Bourassa government; it also asserted Québécois territorial claims and nationhood (Desbiens, 2004). Hydro-Québec was especially imbued with Québécois national symbolism and economic aspirations during the construction of the La Grande Complex in the James Bay region (Desbiens, 2004). In particular, Québec Premier Robert Bourassa regularly stimulated nationalist sentiments by referring to the La Grande complex project as an opportunity to modernise Québec; its very size and location was a testimony to Québécois prowess and savoir-faire. Located in the center of the province of Québec, within the new drainage basin of the Grande Rivière, about 1 500 km north of Montreal, the La Grande complex came into being after significant alterations in the landscape (Hydro-Québec, 2003). It entailed the massive flooding of more than 10 000 km² of boreal forests habitat; the diversion of the Caniapiscau river, the Koksoak river, and the Eastmain river, etc., in order to create large reservoirs, dykes and drainage basins totalling almost 13000 km² (e.g. the Caniapiscau Reservoir)(Hydro-Québec, 2003; Ovington, 2002). It also required the development of a road system and an electricity grid that fragmented the James Bay ecological landscape (Hydro-Québec, 2003; Ovington, 2002). The scope and size of the

project itself, in being larger than any other hydroelectric development in North America, effectively stimulated nationalist feelings of pride and greatness (Bourassa, 1985, p.15).

The James Bay Project Territory (Presses internationales Polytechnique, 2009)



Furthermore, the construction of the La Grande Hydroelectric Complex, which coincided in part with Bourassa's two mandates as Québec's Premier, was motivated by the fact that Bourassa successfully traced a means by which francophone Québécois aspirations for national recognition could be fulfilled. Bourassa framed hydro development with nationalist aims: the La Grande Complex would bring Québec 'up to par' with the rest of North America and perhaps even rival the rest of Canada and the United States. Evidently, the James Bay Project was not merely based on profit-making incentives.

His book, *L'énergie du Nord: la force du Québec (1985)*, which explains the creative framework through which the James Bay Project has been materially configured in the

1970s, not only mobilized public support for the second phase of the James Bay Project in the late 1980s and early 1990s, but is very indicative of how the 'North' and 'Indians' were perceived by the Québécois at the time. Indeed, the determination of the Québécois government to modernise and transform the James Bay region into a monumental hydro-electric power supplier is partly due to the social construction of northern Québec as a barren, empty landscape with few inhabitants. Many passages in Bourassa's book construct the North's value to rest primarily on its potential for hydro exploitation: the damming of a vast system of rivers is deemed to be for the greater good of Québec and an opportunity to modernise. By transforming the James Bay "wilderness" into dams, the so-called natural landscape would become peripherally connected to civilisation: wilderness would cease to be the 'other' or the 'dark side' of civilisation and thereby become rationalised and governmentalised, and as such, discursively and politically malleable. The combination of publicly reducing the North to its hydro potential and the drive towards modernisation which commodified nature and rendered all other values (i.e. biodiversity, source of cultural meaning, history, identity, livelihood for Aboriginal people) obsolete.

Given that the North was far away and unfamiliar to most Québécois, it was easy to manipulate people into believing that the North is a rugged, cold, and uninhabited land. The fact that Robert Bourassa received an overwhelming public mandate in the fall of 1973 favouring the hydro-development of the James Bay leads one to think that the majority of the Québécois population at the time did not oppose hydro development or the idea of extending Southern Québec northwards (CBC Digital Archives, 2009). In becoming a nationalist symbol of Québécois 'savoir-faire' and economic independence for the francophone population of

Québec, Hydro-Québec was given political momentum to exploit the almost 'infinite' natural resources of northern Québec.

2.2.: Constructs of Indigeneity in the James Bay Conflict: A Look at the 1973

Kanatewat v. James Bay Development Corporation Court Case

The Cree had lived in northern Québec long before the French or the English had colonized southern Québec, but as the James Bay projects began in the year 1970, they were forced to justify that their culture, traditions and history were linked to the rivers, landscapes and animals that exist in northern Québec environments in order to bring a stop to dam development. In treating the Cree and Inuit as if they did not exist, the Québécois government reprehensively pushed the Cree to go through the humiliating process of justifying their way of life. In particular, since the government refused to negotiate with them, the Cree were constrained to voice their dissent through the Canadian court system (at the time, Aboriginal people were treated as minorities and governments did not recognize the existence of indigenous rights).

The court battle took shape through the exhibition of witness evidence that was meant to qualify the "authenticity" of the Cree as 'indigenous' or 'civilized'/non-indigenous. Through the testimonials of 167 witnesses in 78 days, the objective for the plaintiffs, the Cree and Inuit, was to prove that the work already done had damaged them, and that the work contemplated in the next 12 months or so would disrupt their lives to such an extent as to justify the suspension of work (Richardson, 1977, p.20). As such, in order to win the case,

the Cree and Inuit needed to prove their “authenticity” as indigenous peoples, i.e. that they were inherently linked to ‘nature’ in the way that they lived.

In defence, Hydro-Québec argued that there were no longer any “authentic” Indians in James Bay, that they had become civilised as a result of centuries of contact with ‘white men’. In short, Hydro-Québec attempted to persuade the judge to allow them to continue the work in the James Bay region by arguing that the Cree and the Inuit do not have native rights because they live like ‘white people’ (Malouf, 1973). As well, they argued that the work involved did not really affect the physical environment; and thus, the construction of future dams will have little effect on the Cree and Inuit (Malouf, 1973). The following excerpt from the court proceedings demonstrates how the corporate defence lawyer, Le Bel, attempted to corner a Cree witness into admitting that he was dependent on modern technology (Richardson, 1979, p.38)

LE BEL: Is it not a fact that most trappers for the last few years have used a plane to go to their traplines?

SHANUSH: Not all of them use the plane. Those people who do not take the plane, they paddle up the river, and for those that have a trapping territory close to the settlement, well, they wait until the river is frozen and then they will walk to their traplines.

LE BEL: And instead of paddling the river for the last few years have they been using outboard motors to go to their traplines?

SHANUSH: I do not know of any people that use outboard motors to go to the river, mainly because if they did they would have to take a lot of gas with

them, and since you cannot get more of their equipment into the canoe these people prefer to paddle up the river so that they could get more of their equipment into the canoe and a bit of supplies to take up with them.

Even though the Cree often resisted the categorisation of their cultural practices, both the crown and their lawyer "... gave back a native voice only to ask it to speak the language of traditional culture and cultural 'authenticity'... native peoples were asked to occupy subject position demarcated by others" in the court proceedings (Braun, 1997, p.24). As such, the most effective way to win the case was to use strategic essentialism. In other words, the Cree strategically participated in the court process of naturalising Indian culture in order to ultimately end Hydro-Québec construction. Through the testimonials of a multitude of Cree and various experts, O'Reilly, the plaintiff lawyer, tried to prove that the Cree had indeed never ceased to be true 'natural Indians' even if they did use modern technology such as airplanes.

O'Reilly interrogating Stephan Tapiatic, a Cree hunter (Richardson, 1977, p.126):

O'REILLY: Have you ever fished at the first rapids?

TAPIATIC: Yes, I have fished at the first rapids, and this is where I have been always fishing, and this is the place where most of the people of Fort George take their fish in the summer time. All the people I have seen fishing at the first rapids were from Fort George.

O'REILLY: How many people have you seen from Fort George at any one time?

TAPIATIC: I have seen about 1000 people fish there.

O'REILLY: How many members are there in the band?

TAPIATIC: I cannot tell you.

O'REILLY: When you say 1000 people, do you mean most of the band members fish at the first rapids?

TAPIATIC: Yes.

O'Reilly interrogating John Spence, a fisheries biologist (Richardson, 1977, p.131):

O'REILLY: Did you see any Indian people fishing at the LG-1 rapids?

SPENCE: Yes, at the time I was there I counted somewhere between 30 and 40 Fort George Indians.

O'REILLY: Did people camp there overnight?

SPENCE: Yes, certainly.

O'REILLY: And what were they doing?

SPENCE: The main object of going to the rapids was, if you want to put it that way, to intercept the whitefish that were coming into the river at that time from James Bay, and fish them in a very traditional method that these people have used for a very long time.

Court proceedings did not revolve around understanding or proving that the Cree imagined and lived their social natures differently than the Québécois. This was beside the point. The purpose of the case was simply to prove that the Cree and the Inuit used the land in the naturalised 'Indian' way, not to discuss how they socially constructed nature differently from the West. Categories of 'nature' and 'indigeneity' were not up for debate, as they were conceived to be fixed definitions. Moreover, the government denial of the

existence of Aboriginal rights was part of the effort to normalise the Cree, the Inuit and other indigenous peoples into the governmental apparatus so that they could better manage them. For example, the use of experts to translate Cree testimonies was inadvertently part of the process of normalising Cree cultural meanings. The case was won through the scientific manipulation of Cree witness testimonies, attempting to rationalise Cree and Inuit land-use pattern, e.g. how many pounds of meat each individual hunted per year, whether they used airplanes, snowmobiles, or other modern technologies for trapping, and so on. Moreover, Malouf's 180-page judgement (Malouf, 1973)—composed of legal jargon, statistics and scientific information— was a rationalised understanding of 'wilderness' and indigenous peoples. "'Nature' was made to appear as an empty space of economic and political calculation and particular actors authorised to speak for it. Such representational practices have legitimized the abstraction and displacement of commodities, i.e. resources from one set of cultural relations and their relocation within others." (Braun, 1997, p.7) To a large extent, the decision to suspend construction depended on proving whether or not the Cree fit within the non-native perception of indigeneity.

This case exemplifies how indigenous communities are continuously pressured to fashion their identity and cultural practices in accordance to dominant conceptualisations of indigeneity. In the event that indigenous rights are denied or ignored (e.g. extracting resources without consent), indigenous peoples find themselves obliged to assert, construct, and convince the courts of their cultural "authenticity" – having Indian status, for example, is not sufficient. Thus, in order for their interests to be protected, indigenous peoples, such as the James Bay Cree, are often constrained to represent themselves through the proxy of

closeness to nature (Braun, 1997), where an Aboriginal community is considered 'close to nature' depending on the extent to which their local environment has been transformed by modern elements and technology. Evidently, the favourable court ruling was predicated on the dichotomous definition of wilderness vs. civilisation/modernity/progress and in no way considered the Cree cultural concept of nature. Had the Cree and Inuit argued that they were 'modern' indigenous people, would the court have seriously considered their plea to suspend James Bay construction?

Conclusion:

Extractive resource systems, such as the James Bay Project in Québec, are often developed to satisfy the needs of non-local regions while ignoring the needs of local populations. In a sense, developing the North really meant developing a network for the extraction of resources; the intention was not to include Aboriginal people in the political economy. The former Cree chief Matthew Coon Come pointed out that hydro projects in the North are a case of ecological racism: Hydro-Québec wouldn't dare flood the villages, farms, homes and tombs of non-Aboriginal people, especially without warning and without their accord (Coon-Come, 1995: 197).

Hydro-Québec and the Bourassa government have constructed nature/indigeneity very similarly: the agency of nature and indigenous peoples are ignored. Yet despite these defamatory depictions that have been produced and reproduced over the years, the Cree have resisted the James Bay projects and have challenged 'indigenous' and 'wilderness' essentialisations. By insisting that they have actively shaped the northern landscape over

the last 10 000 years, the Cree have indirectly demonstrated that humans don't exist outside of nature, and that 'civilization' and 'wilderness' are not mutually exclusive. The repeated governmental neglect to take the Cree and other indigenous peoples seriously, e.g. the failure to consult the Cree in constructing Phase I. of the James Bay project, consolidated Cree determination to gain a greater measure of control over their own affairs – health, education, self-government. Cree actions to inhibit further hydro-electric development were part of the struggle for recognition of Cree cultural meaning and history related to their conceptualisation of nature. The *Kanatewat v. James Bay Development Corporation* court case attests to the Cree's abilities to manoeuvre the government and their constructed essentialisms in order to attain greater recognition and autonomy in Québec.

Unfortunately, as will be demonstrated in the next chapter, while strategic essentialism was a useful strategy in 1973 for the James Bay Cree to obtain control over their traditional land, it no longer proved to be effective for Aboriginal groups in Canada after the 1982 Constitution. In particular, I will show that while Aboriginal people can now effectively contest development projects for affecting their 'traditional' way of life, when Aboriginal people themselves want to engage in development for self-determination, courts use essentialist constructs of indigeneity to block them from doing so; courts cannot envision that Aboriginal people can be both traditional and modern.

Chapter III:
**“If Others Can Do It, Why Not Us?¹⁹”: The “Frozen Rights” of
Aboriginal People in Canada in the 21st Century**

“We only want to be in the driver’s seat with respect to resource development on our Traditional territories. [...] We only want to be in the driver’s seat so that we can ensure the developments on our lands are sustainable and that we benefit. We can use the knowledge of our Elders to ensure that what we do is sustainable.” (Keeper, 2002)

The above statement challenges dominant conceptualisations of Aboriginal peoples: the Pikangikum First Nation in Northern Ontario amongst many other Aboriginal peoples is getting involved in resource development and becoming an important player in certain resource industries such as forestry (Wyatt, 2006, p.9). However, even though some companies and provincial governments are increasingly taking into consideration Aboriginal concerns over resource use and are improving their industrial practices as a result of partnerships with various First Nations, Aboriginal persons and communities very sparingly occupy leadership roles in resource development projects (Wyatt, 2006; Simpson, Storm and Sullivan, 2007). Moreover, while Canada’s wealth and economic backbone derive from the exploitation, extraction and development of abundant resources, Aboriginal peoples continue to obtain much less than their fair share of the financial profits generated in the resource industry, making it difficult for them to become self-sufficient. Too many Aboriginal communities, living in Canada’s resource territory, are in an impoverished state as they are relegated to auxiliary positions and excluded from taking

¹⁹ “See les autres le font, pourquoi pas nous?” These are the words of an Atikamekw forestry worker from Wemotaci, Québec (Wyatt, 2006, p.14).

charge of decisions relating to resource management²⁰. Other than “La Paix des Braves”²¹ and the Nisga’a Final Agreement²² in which the state gave back some jurisdictional control to the Cree and the Nisga’a over their land, the current judicial and legislative context doesn’t permit Aboriginal nations to develop their land and resources for financial profit and on their own terms and conditions. Taking First Nation community leaders’ perspectives into account, Simpson, Storm and Sullivan (2007) have pointed out that financial gain from resource development is usually only possible for Aboriginal groups if they acquiesce to work in partnership and along the conditions of the private sector and provincial governments.

Aboriginal peoples in Canada and elsewhere are fighting to assert their agency. The judicial system is one of the ways by which they work to obtain a greater measure of political and economic autonomy. In particular, section 35(1) (hereafter s. 35(1)) of the Constitution Act, 1982, entrenched the existence of Aboriginal and treaty rights: “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed”²³. “With the enactment of the Constitution Act, 1982, substantive protection was given to Aboriginal and treaty rights, and First Nations jurisprudence,

²⁰ This article written from various Aboriginal perspectives brings attention to the fact that although much wealth is generated from resource development projects on Aboriginal territories such as Northern Manitoba, not many financial benefits extend to local First Nation communities besides short-term employment opportunities (Simpson, Storm and Sullivan, 2007, p.58-60).

²¹ On the 7th of february2002, the Quebec government and the Grand Council of the Cree concluded a final agreement—La Paix des Brave. This agreement stipulates that the Cree will gain substantial access to natural resources, become important partners in development initiatives in the region as well as they will receive 3.5 billion dollars over the next 50 years. In exchange, the Cree will accept to drop all judicial proceedings against the provincial government and will not oppose any government hydro-development projects.

²² On May 11th, 2000, the federal government, the government of British Columbia and the Nisga’a Nation concluded a final agreement which stipulates the transfer of nearly 2000 square kilometres of Crown land to the Nisga’a Nation for the purposes of forestry and other harvesting activities.

²³ See Constitution Act, 1982 R.S.C. 1985, Appendix II, No.44 EN. Canada Act, 1982(U.K).

developed across countless generations by Elders, knowledge keepers, performers and storytellers, was revitalized”(Henderson, 2007). Indeed, since the 1973 *Kanetewat* court case representing the James Bay Cree struggle for control over their traditional territory, *Eenou Istchee*, Aboriginal peoples in Canada have increasingly looked to the judicial system, referring back to “this Constitutional provision that has served as the primary basis for the legal recognition and protection of Aboriginal practices in Canada”(Connolly, 2006, p.30).

As described in the previous chapter, judicial constructs of indigeneity have historically contributed to the dispossession of Aboriginal people and to the longstanding implementation of suppressive policies. Although the recognition and affirmation of Aboriginal rights and titles in the Constitution have certainly benefitted Aboriginal peoples, to what extent has s. 35(1) actually improved the lives of the Aboriginal people concerned? In particular, has this reconfigured legislative space incited courts to broaden their interpretation of Aboriginal rights and titles and to disregard essentialised constructs of indigeneity in favour of more comprehensive notions of culture and identity, empowering Aboriginal communities to develop their traditional territories as they see fit, whether it be for traditional or commercial purposes?

This chapter will attempt to answer the foregoing questions by examining judicial interpretations of Aboriginal rights and titles and their impact on Aboriginal resource development. There still remains a pervasive disjuncture in Canadian jurisprudence between Aboriginal rights and titles on the one hand, and activities on the other: courts restrict Aboriginal people from undertaking economic development projects. Moreover, in order to protect their interests, Aboriginal peoples are still obliged to represent themselves

and their social and economic activities through the proxy of closeness to nature and in accordance to dominant conceptualisations of indigeneity. By circumscribing Aboriginal people to traditional activities, the courts are not only playing a role in defining the limits of the modern and the traditional – the identity of Aboriginal peoples as opposed to non-Aboriginal people, they are also contravening the right to self-determination of Aboriginal peoples.

Most notably, s. 35(1) of the 1982 Constitution laid out a whole new legal framework through which constructs of indigeneity were used by the judiciary to impose conditions and limitations on resource development projects. First, this chapter will briefly discuss the significance of resource development to Aboriginal self-determination. Then, in the second section, I will highlight the significance of s. 35(1) of the 1982 Constitution to resource development and Aboriginal peoples, with a particular emphasis on how First Nation claims in courts have changed as a result of the Constitution: whereas the consultation of Aboriginal nations was not previously considered necessary by developers to exploit resources on Aboriginal land, s. 35(1) has led Canadian courts in the last decade to decide that the Crown and private companies have the duty to consult and accommodate Aboriginal concerns prior to undertaking resource development activities on Aboriginal territory. The third section will cover the processes through which Aboriginal rights and titles, as interpreted by courts, have become ‘frozen’ rights, fitting nicely within dominant constructs of indigeneity. As well, I will propose an answer as to why courts have not made the right to self-determination the key organizing principle in Canadian Aboriginal law. Finally, in the fourth section, through an analysis of the 2005 Supreme Court decision,

Marshall R. v.; Bernard R. v., I will demonstrate how judges are continuing to use rigid constructs of indigeneity to effectively bar Aboriginal communities from engaging in 'significant' profit-making activities and all activities that do not coincide with how judges perceive 'traditional' activities to be.

Section 1: Aboriginal Self-Determination and Resource Development

"Across the country, some of the most blatant instances of human rights violations against Indigenous peoples revolve around a refusal to recognize and protect land and resource rights, essential to the well-being and cultural survival of Indigenous peoples." (Kennedy, March 2010)

Aboriginal nations in Canada have never surrendered their land or resources to the French or to the English. Most notably, in his analysis of the purpose of the treaties to Aboriginal peoples in the 18th and 19th centuries, James Sákéj Youngblood Henderson, an Aboriginal lawyer, brings attention to the fact that there exists no passage in the treaties wherein First Nation leaders relinquished sovereignty of their traditional territories to the Crown (Henderson, 1997). Instead, Aboriginal treaty negotiators conceived the treaties as a promise that they would share their land and resources with the settlers in exchange for the Crown's protection of their livelihood and way of life (Henderson, 1997, p.76-78). As such, it is no mystery why First Nations are continuing to insist that the Crown fulfill its treaty obligations—its end of the bargain, ensuring that the right to self-determination of Aboriginal peoples be respected by all levels of government.

The right to self-determination will be defined as in Article 3 of the United Nations' Declaration of the Rights of Indigenous Peoples: "By virtue of that right they (indigenous

peoples) freely determine their political status and freely pursue their economic, social and cultural development” (United Nations Declaration on the Rights of Indigenous Peoples, 2007). While the hard-line interpretation of self-determination is usually understood to mean total sovereignty and independence, most Aboriginal people do not perceive self-determination to lead to the dismantling of Canada, but rather as a modern version of the two-row wampum concept²⁴. According to this concept, the two rows of purple beads represent the parallel existence of Aboriginal peoples on one hand, and other nations on the other (Akwasasne.ca, 2009). In this treaty, self-determination defined as the non-interference of one group of peoples into the affairs of the other ensures the peaceful co-existence of all peoples.

Despite the various facets of self-determination, for the purposes of this study, I will focus only on the economic aspect of Aboriginal self-determination: the freedom to exploit, manage and protect resources on their traditional territories in the way that they see fit. The health and well-being of Aboriginal communities can only be truly optimized when they have control over their land and natural resources. First Nations need to be the sole decision-makers of how resources are to be used for purposes of “cultural revitalization, political self-empowerment, and even economic self-sufficiency” (Goldenburg, 2002, p. 284). The power to collectively shape Aboriginal identities, cultures and places is impeded by the fact that First Nations still do not have control over their own natural resources in the sense that they are legally forbidden to profit financially from the use of their land and resources beyond that of a modest livelihood.

²⁴ As part of the 1613 treaty between the Dutch and the Iroquois Six-Nations, this wampum belt represents the basis of agreement between the Haudenosaunee and other nations (Akwasasne.ca, 2009).

Section 2: Placing a Measure of Constraint on the Powers of the Crown:

Section 35(1) of the 1982 Constitution

Section 35(1) of the Constitution has provided Aboriginal peoples in Canada with strong legal ammunition against unwanted large-scale resource development projects such as hydro development. No longer will resource developers, even with a permit issued by the Crown, be able to extinguish Aboriginal title and/or treaty rights. From this point on, the Crown may only extinguish Aboriginal title by a constitutional amendment or by agreement with the Aboriginal people concerned²⁵. While the 1867 BNA Act conferred supreme powers to the Crown, the 1982 Constitution Act finally placed a measure of constraint on the latter. The enactment of s. 35(1) underlined the Crown's duty to protect First Nations from federal and provincial laws that infringe on Aboriginal titles and rights (Boudreault, 2003, p.88-90). As well, it served as a guiding principle in ensuring that the Crown honor its obligations towards Aboriginal people, such as providing for Aboriginal participation in resource development, consultation and compensation, and ensuring economic and regional fairness (Foster et al, 2007, p.205-209).

In addition, the fact that s. 35(1) relates to peoples rather than individuals, meaning it deals with group rights rather than individual rights, gives this part of the Constitution a *sui generis* (unique) character. Aboriginal rights and titles, unlike individual rights defined under the *Canadian Charter of Rights and Freedoms*, can be interpreted by tribunals in a much more open and dynamic fashion, beyond that which is prescribed by law, enabling

²⁵ Note that if the government chose to amend parts of the Constitution relating to Aboriginal peoples, the latter would not have an official vote and changes could still be made without their consent (Shin Imai, 1999, p.10).

tribunals to consider the “indigenous collective context” rather than just the individual Aboriginal context in litigation (Foster et al, 2007, p.205-209). By recognizing Aboriginal rights and titles as *sui generis*, the federal government recognized the “confluence and co-existence of indigenous and English laws”; courts thereafter have had a duty to take into account both legal perspectives (Borrows, p.21).

Prior to the 1982 Constitution Act, First Nations could not easily buttress their Aboriginal rights and titles in litigation against resource developers; a range of issues relating to the nature and legal definition of Aboriginal title would have to be worked out in subsequent judicial decisions and treaty negotiations²⁶. In short, Aboriginal title and rights were perceived by the courts as mere occupancy rights, hardly deterring provincial and private developers from encroaching upon Aboriginal land. If a company like Hydro Quebec obtained a permit from the government conferring the right to undertake an economic activity on a given territory, it could undertake that activity pretty much uninhibitedly. Indeed, as shown in the last chapter, when the Cree sought to obtain acknowledgement of their Aboriginal title in the 1973 *Kanatewat v. James Bay Development Corp.*, Aboriginal title was considered a mere usufructuary-occupancy right, it did not entitle the Cree to complete ownership of the resources on their land. As such, resource developers were not obliged to obtain their consent or share the profits of resource development unless the Cree could prove that their traditional way of life would be affected by the James Bay Development Corporation’s project. Had the Cree not successfully proven

²⁶ The 1973 Calder Supreme Court case was the most significant case prior to the 1982 Constitution. It was the first time that Canadian jurisprudence recognized that all Aboriginal nations, whether or not they had signed treaties, possessed ancestral rights to their land. Nevertheless, until the Constitution, Aboriginal title and rights still remained poorly defined by Canadian jurisprudence (Otis et al., 2004, p.84-86).

that they were ‘traditional Indians’, the assertion of Aboriginal title would have been worthless—the Quebec Superior court would not have issued the injunction to restrain the construction of the James Bay Project. Therefore, prior to the Constitution, given that Canadian tribunals refused to adjudicate in favour of obliging companies to obtain authorization and/or pay for the right to exploit Aboriginal land, the titles of settlers and resource developers were given priority over those of Aboriginal peoples²⁷.

Though there were many court battles over the nature and scope of Aboriginal title in the last twenty years, the practical significance of this constitutional provision can be more fully appreciated as a result of two Supreme Court of Canada judgments in November 2004: *Taku River Tlingit First Nation vs. British Columbia* and the *Haida Nation vs. British Columbia (Minister of Forests)*. On the grounds that they had Aboriginal title to the land in question, in the *Taku River Tlingit First Nation vs. British Columbia*, the Taku River Tlingit First Nation in Northern British Columbia opposed the province’s decision to grant permission in 1998 to Redfern Resources Ltd. (a mining company) to re-open a mine and build a road through this First Nation’s traditional territory. Similarly, on appeal from the court of appeal of British Columbia, the Haida Gwaii First Nation, in the *Haida Nation v. British Columbia* court case, contested the BC government’s decision to reissue “tree farm licenses” to Weyerhaeuser Co. (a large forestry firm), allowing it to harvest trees on part of their traditional territory for more than five decades without their consent. For both First Nations, Aboriginal title had not been legally recognized and they argued that allowing these projects to go forward would impact negatively on the exercise of their Aboriginal

²⁷ For more information on the cases that have upheld the dominance of settler and developer titles over those of Aboriginal titles in Canadian jurisprudence, see Bartlett, 1991, p.12-26.

rights and titles, therefore threatening their sustainability as a people. Although the Supreme Court ultimately ruled against the Taku River Tlingit First Nation, where their concerns regarding the reopening of the mine were consequently dismissed, this judgment along with the Haida decision, set a legal precedence in Aboriginal and Canadian relations: the Crown and resource developers can no longer pursue economic activities on Aboriginal land without consulting and seeking to accommodate Aboriginal peoples' needs.

At the very least, s. 35(1) and the *Haida Nation* and *Taku River Tlingit First Nation* decisions provided some restraint on the Canadian state's ability to exercise its sovereignty over Aboriginal people and land. As of November 2004, the Supreme Court of Canada in the aforementioned cases recognizes that the Crown as well as third parties have the duty to consult and seek to accommodate the concerns of Aboriginal people prior to sanctioning resource exploitation projects on Aboriginal territory. Moreover, even in cases where the existence of Aboriginal title has not been recognized by the judiciary, the fact that a "potential" Aboriginal title exist (i.e. a treaty is in the process of being negotiated), obligates the Crown and third parties to consult and accommodate Aboriginal concerns prior to resource development.

Indeed, Aboriginal rights and titles are taken more seriously than before by Canadian jurisprudence. The following year, in November 2005, as a result of both these Supreme Court decisions, the Innu of Betsiamites, in Québec, succeeded in convincing Superior Court judges to issue Krueger (a lumber company) an order to cease lumber clearing on Île Levasseur in Quebec²⁸. Being that Île René-Levasseur is part of a

²⁸ Première nation de Betsiamites c. Canada (Procureur général), [2005] J.Q. no. 8173.

comprehensive Innu land claim²⁹, they argued that the Québec provincial government had erred in granting Krueger permission to engage in logging activities on their traditional lands, even more so since the government never even consulted them on this issue. Ultimately, the Superior Court of Quebec concurred with the Innu applicants on the basis that the Crown and the Québec provincial government had failed in their constitutional duty to consult the Innu and to try to accommodate their concerns prior to issuing a permit authorizing Krueger's logging project.

The Crown and the private sector can no longer unabatedly exploit natural resources on traditional Aboriginal territory: they must consult First Nations and try to accommodate them prior to undertaking resource development projects. The 1982 Constitution Act along with the aforementioned decisions gave a greater measure of strength and legal status to the notion of Aboriginal title: in situations where Aboriginal people are not properly consulted, First Nations, through the assertion of Aboriginal title, can now successfully obtain an injunction from the Court and bring resource development to a halt.

Nonetheless, these court decisions have not challenged the dominant position of the Canadian federal and provincial governments, because while the latter are obliged to attempt to consult and accommodate the First Nations concerned, they are not obliged to obtain their agreement. In other words, as long as the provinces and/or companies make an effort to consult First Nations before engaging in development activities, no matter how small and superficial these efforts may be, courts will consider that the former have

²⁹ The Betsiamites Innu community and three other Innu communities in Québec are currently in the process of negotiating a modern treaty called "L'approche commune".

fulfilled their duty to consult and accommodate First Nation concerns. For example, in the Taku River Tslingit decision, the Supreme Court decided that the British Columbia Ministers of Environment and of Energy had fulfilled their duty to consult and accommodate the Taku River First Nation in the environmental assessment process engaged by the province, that it “owes a common law duty of ‘fair dealing’ [...] but it is not under duty to reach an agreement with First Nations (p.15)”. Thus, since courts have not specified the extent to which the Crown must consult and accommodate Aboriginal peoples and have determined that the former need not reach an agreement with First Nations, courts are complacently tipping the balance of power in favour of the Crown. If Aboriginal title was deemed to be equal to that of the Crown’s (as it is asserted to be in the Constitution), judges would have, for example, made it obligatory for the government of British Columbia to reach an agreement with the Taku River Tslingit First Nation.

Additionally, although the 1982 Constitution recognized the *sui generis* (unique) character of Aboriginal rights and titles, it fell short of including Aboriginal perspectives on defining the meaning of these rights: rather than having had the federal government and First Nations collaboratively define the content of Aboriginal title and rights in the 1982 Constitution, s. 35(1) omits any definition of Aboriginal rights and titles, and has provided Canadian courts with the responsibility of defining the content of Aboriginal rights (Imai, 1999, p.29). Consequently, Canadian courts have been progressively defining the meaning of Aboriginal rights and titles on a case by case basis: namely, apprehending which economic activities Aboriginal people are entitled to practice on their lands. While s. 35(1) has provided Aboriginal communities with more freedom to decide which private companies can develop their land, the following section will discuss how Aboriginal

peoples are restricted from autonomously engaging in resource development unless they can prove that the activity contemplated is a “traditional” activity.

Section 3: Aboriginal Rights and Activities in the Canadian Judicial System

More than 25 years later, s. 35(1) of the 1982 Constitution, a momentous event in the history of Aboriginal and Canadian relations, aspired by many to markedly alter the legal terrain in favour of Aboriginal people, has not substantially improved the living conditions of Canada’s Aboriginal peoples. Jennifer E. Dalton, a lawyer, points out that one of the prime reasons why s. 35(1) has not lived up to expectations is that the right to self-determination has not been accorded due recognition by Canadian courts: there exist “[...]no firm agreement on precisely what self-determination entails, either under international law or in the Canadian context”(Dalton, 2006, p.12). Indeed, s. 35(1) does not include any definition of the meaning of Aboriginal rights and titles nor does it make direct reference to the right of self-determination of Aboriginal peoples. Instead, it has been up to the Supreme Court, under common law³⁰, to elaborate the content, scope and nature of Aboriginal rights and titles on a case-by-case basis, and decide therefore “what characteristics indigenous practices need to possess in order to obtain recognition and protection under s. 35(1)”. The lack of precision of s. 35(1) on the content of Aboriginal rights has led to the present pervasive disjuncture between Aboriginal rights and titles on the one hand, and the activities on the other: using the ‘frozen rights’ approach (explained

³⁰ Under common law, Supreme Court rulings dictate how decisions are made in the lower courts (courts of appeal) and the direction that subsequent decisions take.

in the next section), courts only recognize an Aboriginal activity if the latter can be proven to be 'traditional'.

Notwithstanding the existence of a Canadian Declaration of the Rights of Indigenous peoples and the many Aboriginal perspectives that can inform the judiciary on the nature, scope, and content of Aboriginal rights, even more problematic is that judges have clearly not retained these Aboriginal perspectives to make their judgements. It seems as if the judicial system has excluded outright indigenous definitions of Aboriginal rights and titles. Instead of opting for a judicial interpretation of rights and titles that would make space for Aboriginal peoples to decide for themselves which economic activities to pursue on their traditional territories, courts have chosen to interpret Aboriginal rights merely as "continuing rights to discrete practices and customs, ... in danger of reducing Aboriginality to a package of anthropological curiosities." (Cheng, 1997, p.432).

Section 3.1.: Interpreting Aboriginal Rights as "Frozen Rights"

The "frozen rights" approach to Aboriginal rights and titles has been utilised until the present day by courts, on the provincial and federal levels, to impose legal limits on what type of activities Aboriginal peoples can and cannot practice. In particular, the Supreme Court's landmark *Delgamuukw* and *Van der Peet* decisions, in which Chief Justice Lamer clarified the nature and scope of Aboriginal rights and titles, are notoriously known in Canadian Aboriginal law circles for laying down the legal proofs and parameters that have guided judges' decisions in determining the existence of Aboriginal rights and titles. The *Delgamuukw* Supreme Court decision constitutes the first time Justices directly

attempted to define Aboriginal title. After a series of appeals in the British Columbia provincial courts, the case finally went to the Supreme Court where the Gitksan and Wet'suwet'en hereditary chiefs claimed ownership and jurisdiction (self-government) on behalf of their respective nations over a total of 58 000 square kilometres in north western British Columbia³¹. Ultimately, though no decision was rendered as to whether the claimants had Aboriginal title to the land in question, the decision was significant because it defined the nature of Aboriginal title as a right to the land itself, and also because it recognised the use of oral history as proof of Aboriginal title (Gitksan Treaty Office, 2005). Similarly, the *Van der Peet* Supreme Court decision³² was significant because it ascertained that Aboriginal rights and activities could only be legally recognized if they can be proven to be “integral to a distinctive culture”³³. In this case, since Dorothy Van der Peet, a member of the Stó:lō Nation in British Columbia, could not prove that selling fish for commercial purposes was an integral part of her culture, the charge that she was illegally selling salmon caught under a native food and fish licence, which prohibited the sale of fish, was not repealed by the Supreme Court³⁴.

The significance of the latter two court cases lies not so much in the rulings themselves, but in Chief Justice Lamer's contribution to the Canadian Aboriginal law discourse, otherwise known as the so-called “frozen rights” or “dynamic” approach³⁵. The author has retained two tests developed by Chief Justice Lamer out of at least a dozen legal

³¹ Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

³² R. v. Van der Peet, [1996] 2 S.C.R. 507

³³ Ibid, p.4.

³⁴ Ibid.

³⁵ Not only was Lamer Chief Justice in Delgamuukw and Van der Peet, he was also the Chief Justice in other landmark Aboriginal rights cases such as *R. v. Gladstone* ([1996] 4 C.N.L.R. 65), *R. v. N.T.C. Smokehouse* ([1996] 4 C.N.L.R. 672). As such, a great part of Canadian Aboriginal law is marked by the way he interpreted Aboriginal culture and Aboriginal rights and titles in those cases.

tests for determining whether an Aboriginal activity can be eligible for legal recognition³⁶. Given that these two tests have been used repeatedly by judges as justification to recognize or not the existence of an Aboriginal right to practice an activity, a general understanding of these tests will demonstrate how dominant conceptualisations of indigeneity espoused by courts have directly restrained Aboriginal economic development initiatives. First, in *Van der Peet*, Chief Justice Lamer established that an Aboriginal activity is one that has a link with pre-colonial activities. Similarly, in *Van der Peet* and *Delgamuukw*, he imposed economic limits on Aboriginal activities: in short, any activity that can sever the ‘special’ bond between Aboriginal people and their traditional territories and that provides for more than subsistence or a moderate livelihood cannot obtain legal recognition.

Chief Justice Lamer in *Van der Peet* expressly defined the “frozen rights” approach in Canadian Aboriginal law:

It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of Aboriginal rights under s. 35(1).³⁷

As such, under the “frozen rights” approach, in order for courts to recognize an Aboriginal right to practise a certain activity, Aboriginal claimants must go through the burden of proving a degree of similarity between the contemplated activity and a pre-colonial practice, tradition or custom. In opposition to the majority of Justices in *Van der Peet* who believed that only those Aboriginal activities that existed prior to contact with Europeans

³⁶ For more information on the other legal tests, see Brian Tom’s webpage (Toms, 2007).

³⁷ *Van der Peet* at paras 62-3.

should be protected by S. 35 (1)³⁸, Chief Justice Lamer did not condone the strict application of this test, since this would impose an unrealisable condition that Aboriginal practices be frozen in time. To account for the passage of time and European colonisation of North America, he acknowledged that more evolved forms of ‘traditional’ or ‘ancestral’ indigenous practices can be protected “provided that continuity with pre-contact practices, customs and traditions is demonstrated”³⁹.

Does this mean that protected activities on Aboriginal territories are limited to traditional customs and practices? According to the economic limits he sets on Aboriginal practices, this depends on whether the Aboriginal claimant can demonstrate that the activity contemplated will only provide for a ‘moderate livelihood’ and will not result in ecosystem disruption and resource depletion. Describing the essence of Aboriginal title as “a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture”, Lamer in *Delgamuukw*, states that there is “an inherent limitation on the uses that the land may be put”⁴⁰. Notably, strip mining the land or converting it into a parking lot are cited as examples of activities that would destroy the cultural significance of the land and that cannot, as such, be protected under s. 35(1)⁴¹.

By inferring that the Aboriginal relationship to land and nature is different than the relationship to land of non-Aboriginals, Chief Justice Lamer not only imposed his cultural

³⁸ Van der Peet at paras 11.

³⁹ The evolution of practices, customs and traditions into modern forms will not prevent their protection as Aboriginal rights (Van der Peet, para. 64).

⁴⁰ *Delgamuukw*, para 127-128.

⁴¹ *Ibid*.

and political conceptualizations about Aboriginal relationships to land and resources as 'special', but effectively ruled out the possibility of Aboriginal groups engaging in large-scale resource development projects. Moreover, he has failed to at least consult Aboriginal peoples in regard to his reasoning on Aboriginal culture prior to setting such important parameters limiting Aboriginal activities to traditional and in balance-with-nature purposes⁴². By assuming to be an expert on the issue of Aboriginal relationships to land, Chief Justice Lamer discounted Aboriginal perspectives and imposed his political and cultural views in *Delgamuukw* and *Van der Peet* (now the legal premises on the content of Aboriginal rights and titles), which have since shaped the legal terrain in a way that prevents First Nations from using their Aboriginal rights as affirmed in the Constitution to secure a greater share of commercial resources and wealth.

Likewise, Chief Justice Lamer's interpretation of Aboriginal culture and their relationship to land conflates the notion of protecting Aboriginal rights and titles with the idea of preserving land and Aboriginal identity. While he states that the 'nature of occupation' has changed since the time of occupation, he then states that Aboriginal land cannot be used for purposes that would prevent future generations of Aboriginals from continuing to practise their traditional activities⁴³. What is disconcerting about this limit on Aboriginal title and activities is that he alludes to the court's conservation duty to future generations of Aboriginals: to prevent 'over-harvesting' or the desecration of traditional land, the court has a duty to ensure the preservation of Aboriginal land for future

⁴² Given that Aboriginal peoples have been expropriated as a result of the colonization process and under the pretext that they were mostly nomads, shouldn't s. 35 (1) which takes into account the Aboriginal right to self-determination necessarily affirm Aboriginal peoples' right to re-appropriate the resources on their Traditional territory and make use of these resources as they please?

⁴³ *Delgamuukw R. v.*, para. 154.

Aboriginals to enjoy (McNeil, 2006, p.284). Moreover, this notion of preserving Aboriginal culture and land for future generations connotes the underlying fears and ambitions of the dominant culture: “people are fearful of losing marginalized cultures in a way that is similar to their fears of endangered landscapes, species and the trappings of a nostalgic past”(Aboriginal Education: New South Wales Government of Australia, May 2007). Sadly, one could argue that this paternalistic limit on Aboriginal title does not only discriminate against indigenous people, as it assumes that Aboriginal people cannot autonomously manage their own resources, but it also denotes how dominant racist constructs of indigeneity are legally embedded in the court system to the disadvantage of Aboriginal peoples in Canada.

Furthermore, this “frozen rights” approach, even in its broadest and its most generous interpretations of Aboriginal rights and titles, even when judges attempt to account for colonisation, ‘modernity’ and Aboriginal perspectives, disavows Aboriginal peoples’ agency in shaping and transforming culture and place. As long as courts do not make the right to self-determination the key organizing principle in determining the existence of Aboriginal rights and titles, this approach to Aboriginal rights and titles will continue to idealize pre-Colombian indigenous economies and deny the Aboriginal right to practice non-traditional or commercial activities. The following section will demonstrate how courts have used the “frozen rights” approach refined by Chief Justice Lamer in *Van der Peet* and *Delgamuukw* to reject the Aboriginal treaty right to commercial logging.

Section 4: Court Battles for Aboriginal Self-Determination and Economic Development in the Maritimes

Canadian courts have been criticized for their reliance on essentialist categories of indigeneity that stereotype the character of all Aboriginal peoples and Aboriginal social and economic systems as inherently tied to ‘traditional’ pre-Columbian ways of life (Goldenburg, 2002) (Greymorning, 2006). Indeed, judges’ perceptions of Aboriginal people continue to greatly influence how a ‘traditional’ activity is defined. Economic development projects put forward by Aboriginal people are only sanctioned by government authorities if they are framed in a traditional/naturalised manner or elaborated in a way that would coincide with judges’ perceptions of traditional Aboriginal activities. As a result of the “frozen rights” approach to Aboriginal rights and titles elaborated in *Van der Peet*, *Delgamuukw* and other post-Constitution Supreme Court decisions, First Nations must bear the burden of proving the “authenticity” of their Aboriginal rights: in short, they must convince the judges that the economic activities they wish to pursue are ‘traditional’ and in *harmony with nature*. In this section, I will discuss the Supreme Court Decision *R. v. Marshall*; *R. v. Bernard*, 2005,⁴⁴ a perfect example of how judicial constructs of indigeneity worked to disavow the Mi’kmaq treaty right to exploit forest resources for financial gain.

4.1. Background on the Supreme Court Decision *R. v. Marshall*; *R. v. Bernard*, 2005

This court case does not mark the first time that Indigenous peoples in Canada have argued in courts that they have a right to engage in profit-making activities: *R. v. Gladstone*,

⁴⁴ *R. v. Marshall*; *R. v. Bernard*, [2005] S.C.R. 220, [2005] S.C.J. No. 44;

1996⁴⁵, *R. v. N.T.C. Smokehouse Ltd*, 1996⁴⁶ and *R. v. Peter Paul*, 1997⁴⁷ court cases are a few of many examples of First Nations defending their Aboriginal right to engage in commercial activities. However, *R. v. Marshall; R. v. Bernard*, 2005, which involves the harvest and sale of timber (an activity that is considered outside the traditional indigenous realm of activities such as hunting, fishing and gathering) is particularly significant in Canadian Aboriginal law not only “because the Supreme Court ruled on the validity of an Aboriginal title claim for the first time”(McNeil, 2006, p.282), but also because it reinforced the idea that Aboriginal peoples are not only interested in subsistence activities. Regardless of the fact that the Mi’kmaq defendants lost this court battle, the fact that they asserted their rights to engage in a non-traditional activity—logging on treaty land—and that they also wanted to do it for financial gain is a challenge in itself to dominant conceptualisations of indigeneity⁴⁸.

Charged with unlawful possession of logs in spring 1998, Joshua Bernard, a Mi’Kmaq member of the Eel Ground Reserve in New-Brunswick, argued in the provincial court that he was not required to obtain permission from the Crown to harvest logs for the purpose of sale. Almost simultaneously, Stephan Frederick Marshall along with thirty-four other Mi’Kmaq people in Nova Scotia were charged with unlawfully cutting timber on Crown lands in Nova Scotia and Cape Breton Island. In both cases, the accused argued in

⁴⁵ The Supreme Court recognized an Aboriginal right to trade in herring spawn on kelp because the court considered the activity to be an integral part of the distinctive culture of the Heiltsuk prior to contact. *R. v. Gladstone*, [1996] 2 S.C.R. 723, p.4.

⁴⁶ The Supreme Court rejected an Aboriginal right to sell fish to private companies. *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672

⁴⁷ The New Brunswick Court of Appeal entered a conviction against Peter Paul for illegally cutting down maple logs on Crown lands for sale. *R. v. Paul (T.P.)* (1997), 193 N.B.R. (2d) 321.

⁴⁸ One year later, in *R. v. Sappier; R. v. Grey*, 2006, the Supreme Court affirmed the Mi’kmaq had an Aboriginal right to harvest trees for personal use.

the lower provincial courts that since they had Aboriginal title to the land they had a concurrent Aboriginal right to engage in commercial logging and therefore they were not required to obtain permission from the Crown. Following a series of appeals in their respective provincial courts and given the similarities, the two cases were finally linked together on appeal before the Supreme Court as *R. v. Marshall; R. v. Bernard*, 2005.

As in the earlier decision *R. v. Marshall* 1999⁴⁹ (a case involving commercial eel fishing not to be confused with *R. v. Marshall; R. v. Bernard*, 2005), the defendants asked the provincial court to uphold the truckhouse clause⁵⁰ of the Peace and Friendship treaties of 1760-61 between the British Crown and the Mi'kmaq nation, which they argued conferred them the right "to harvest and sell all natural resources that they used to support themselves in 1760". Moreover, given that the Mi'kmaq had had the small-scale commercial right to eel fishing affirmed by the Supreme Court of Canada in the landmark *R. v. Marshall* 1999, they logically presumed that if commercial fishing was considered by the judiciary to be an Aboriginal activity so would commercial logging. Nonetheless, while the respective provincial Courts of appeal had given decisions favourable to the accused, once these two cases were consolidated on appeal before the Supreme Court of Canada as *R. v. Marshall; R. v. Bernard*, the Justices refused to recognize commercial logging as an

⁴⁹ Subsequent to this decision, many non-Aboriginal people in the Maritimes contested the Mi'kmaq right to engage in commercial fishing. Instead of accepting the terms and conditions of the federal government's Marshall Response Initiative (2000-2007), the Esgenoôpetitj (Burnt Church, New Brunswick) community decided to develop their own fisheries policy and regulations. This action was met with fierce opposition from non-natives who responded by cutting lines and destroying traps belonging to the people of Esgenoôpetitj (Future Forest Alliance, 2000)

⁵⁰ The truckhouse clause is a trading clause "whereby the British agreed to set up trading posts, or "truckhouses", and the Mi'kmaq agreed to trade only at those posts" (*R. v. Marshall; R. v. Bernard*, para. 8.)

Aboriginal activity, since they perceived this activity to be non-traditional and harmful to the environment⁵¹.

4.2. Why did the Supreme Court Decision Exclude Commercial Logging from Mi'kmaq Treaty Rights?

“The Court’s task in evaluating a claim for an Aboriginal right is to examine the pre-sovereignty Aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right”⁵². The Supreme Court’s decision to recognize or not the commercial right to logging was contingent on the Mi’kmaq proving that this activity was the “modern equivalent or a logical evolution of Mi’kmaq use of forest products at the time the treaties were signed”⁵³. Of course, the Mi’kmaq defendants knew they had to use ‘strategic essentialism’ and frame commercial logging as an ancestral and traditional practice if they were to have any chance in convincing the Justices to recognize an Aboriginal right to commercial logging. As such, they used Chief Augustine’s testimony of oral Mi’kmaq history in *R. v. Bernard* to attest to the fact that the Mi’kmaq were involved in trade activities of wood products: “[t]here were some trade of canoes, toboggans, modes of travel ... Because the British and the Europeans wanted to use these equipments to travel through the winter on the ice and the snow.”⁵⁴

⁵¹ Even with this specific clause protecting the right to trade in their treaty, the Mi’kmaq did not succeed in convincing the judges that they had a title right to commercial logging. How will other First Nations who have no such trading clause in their treaties fare in courts? One wonders what legal arguments can be used to convince judges of the indigenous right to engage in resource development.

⁵² *R. v. Marshall*; *R. v. Bernard*, para. 48.

⁵³ *Ibid*, para. 117.

⁵⁴ *Ibid*, para. 120.

Unfortunately, although the Supreme Court had affirmed a small-scale commercial right to eel fishing in the *R. v. Marshall* 1999, in *R. v. Marshall & R. v. Bernard* 2005 the Justices did not recognize the Aboriginal right to commercial logging. To determine if the Mi'Kmaq had a right to commercially harvest timber, the courts required that the Mi'Kmaq defendants prove that the activity was a modern equivalent (the test of continuity discussed in the previous section). While it was recognized that the trade clauses of the Peace and Friendship treaties of 1760-61 conferred a right to trade, the judges refused to interpret the clause as also conferring a right to harvest natural resources. According to the judges, commercial logging is "not the logical evolution of a traditional Mi'kmaq trading activity in 1760-61." The judiciary's conception of Aboriginal culture and interpretation of Aboriginal treaty rights had bearing on the court's willingness to accept profit-making activities (i.e. commercial logging) as Aboriginal activities.

Logging was not a traditional Mi'kmaq activity. Rather, it was a European activity, in which the Mi'kmaq began to participate only decades after the treaties of 1760-61. If anything, the evidence suggests that logging was inimical to the Mi'kmaq way of life, interfacing with fishing which as in *Marshall* 1, was a traditional activity.⁵⁵

Unless the Mi'kmaq could provide evidence to suggest that they traded logs or raw wood products at the time the treaties were signed, the Justices refused to consider commercial logging as a logical evolution of pre-colonial trading practices. While the Justices could conceive that the use and trade of finished wood products could be part of indigenous traditional culture, they could not fathom that the trade of raw materials can be anything but "inimical to the Mi'kmaq way of life".

⁵⁵ Ibid, para. 34.

While the Justices asserted that the “Aboriginal perspective grounds the analysis at every step”⁵⁶, on many occasions, the judiciary can be shown to have actually dismissed contemporary Aboriginal perspectives (based on oral histories and the knowledge of their elders) on what constitutes an Aboriginal activity. For example, the judiciary based its decision to negate the Mi’kmaq right to commercial logging solely on its understanding of both British and Mi’kmaq intentions and aspirations at the time of treaty negotiations. Not only did the judiciary reject the idea of logging as a traditional indigenous activity, it also construed all non-traditional activities to be outside the imaginative realm of Mi’kmaq people⁵⁷: as far as the Justices could understand, the Mi’kmaq of the 18th century could not have been interested in anything other than traditional activities. As lawyer Guy Campion Charlton skilfully demonstrated, the idea that commercial logging was not traditional was not based on evidence but on the assumption that “indigenous treaty negotiators could only have intended—and did intend— to reserve or retain natural resources and uses that were traditional” (Charlton, 2007, p.43). Thus, once again, the idea that indigenous culture and practices are dynamic and influenced by the aesthetics of the time and place (regardless of European influence) does not comprise any part of judicial reasoning; in line with the “frozen rights” approach to Aboriginal rights and titles, courts construe Aboriginal culture and practices to be immutable and frozen-in-time.

Convoluting Aboriginal testimonies, meant to affirm the right to practice commercial logging, the Justices framed Aboriginal commercial logging as harmful to

⁵⁶Ibid, para. 50.

⁵⁷ Ibid, para. 116, “The parties contemplated access to types of resources traditionally gathered in the Mi’kmaq economy for trade purposes.”

salmon fishing, a traditional Mi'kmaq activity, and therefore counter intuitive to traditional Aboriginal rights:

“The stories were mostly about British people coming in and cutting timber, cutting large big trees and moving them down the river systems and clogging up the rivers, I guess, with bark and remnants of debris from cutting up lumber. And this didn't allow the salmon to go up the rivers.”⁵⁸

According to the Justices, any activity that can be shown to be harmful to the environment is antithetical to Aboriginal traditional activities: indigenous peoples could not contemplate to engage in activities that would interfere with salmon fishing⁵⁹. Similarly to the 1973 *Kanetewat* court case in which the Cree had to demonstrate that they were “authentic” Indians, the Justices in this case have also represented indigenous culture and practices as homogenously and inherently linked to nature. In the courts’ point of view, activities equated to “the wholesale exploitation of natural resources”, in breaking Aboriginal peoples’ ‘special’ bond with nature, could not possibly be considered Aboriginal activities. Like endangered species, Aboriginal traditional activities are perceived by the judiciary to be threatened by the woes of capitalism: Aboriginal rights and titles are meant to preserve the essence of traditional culture from disappearing. Thus, in failing to sincerely incorporate Aboriginal perspectives on Aboriginal rights and titles, judges are reaffirming dominant conceptualizations of Aboriginality to a set of discrete pre-capitalist practices such as fishing, hunting and gathering, thereby inhibiting the Aboriginal right to self-determination.

⁵⁸ R. v. Marshall; R. v. Bernard, para. 122.

⁵⁹ Ibid, para. 122-124.

Conclusion:

When it's a question of preserving Aboriginal culture, courts are willing to uphold the Aboriginal rights and titles affirmed in the Canadian Constitution, allowing First Nations to defend themselves against private sector usurpers. Somehow, however, when Aboriginal nations assert Aboriginal rights or titles interchangeably with commercial rights to land and resources, judges become confounded with the notion of self-determination. Though some judges have attempted to take into account modernity in considering that the practice of traditional activities has 'evolved', the fact remains that courts only authorize Aboriginal peoples to pursue activities that are duly defined as 'traditional' (ex: harvesting, hunting, fishing, etc.) and that they consider to be relevant to their cultural constructs of indigeneity.

Rather than dispensing with colonial attitudes and paternalistic legal tests, the Canadian court system as demonstrated in the analysis of *R. v. Marshall*; *R. v. Bernard*, has been imbued with the sense to preserve imaginary Aboriginal identities concomitantly working against Aboriginal efforts to gain greater autonomy over social, political and economic development. Indeed, instead of having the Constitution explicitly recognize the right to self-determination of Aboriginal peoples, s. 35(1) has made the judicial system the main source for definition of Aboriginal rights and titles and has correspondingly given courts the responsibility to decide which economic activities Aboriginal people can and cannot practice. As a result, courts will continue to make decisions based on antiquated racial premises and block Aboriginal people from profiting financially from their own land

and resources—repudiating the Aboriginal right to self-determination as defined in the Universal Declaration of Rights of Indigenous Peoples.

Why do courts have such narrow interpretations of Aboriginal rights and titles? It would seem that the Supreme Court Justices know not to overstep the boundary separating the federal and provincial legislative spaces and the jurisdictional space. To keep good face on the international scene, the federal government concedes to its own non-binding conception of the inherent right to Aboriginal government⁶⁰. The Canadian government has been broadly accepting of Aboriginal nations' rights. What they have been resistant to however are those groups' rights to redistribution of economically valuable resources. For example, "in a number of other areas that may go beyond matters that are integral to Aboriginal culture", the government makes clear in one of the sections of the Indian and Northern Affairs website concerning *Canada's approach to the implementation of the Inherent right to Aboriginal self-government* that the jurisdictional supremacy of federal and provincial laws will not be impeded by Aboriginal laws: "primary law-making authority would remain with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws" (Indian and Northern Affairs Canada, 2010). Thus, discouraging First Nations from resorting to lengthy and expensive litigation to enjoy the full scope of Aboriginal rights, one can deduce that the federal government is indirectly instructing the Supreme Court Justices to concede as little as possible in the way of Aboriginal rights and titles. Furthermore, since the Supreme

⁶⁰ According to the Canadian government, Aboriginal peoples have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources (Indian and Northern Affairs Canada, 2010).

Court judges are strongly predisposed to consider the far-reaching and long-term effects of their decisions in order to maintain and protect the *pérennité* of the state, they will therefore tend to rule in favour of Aboriginal nations only in as far as these decisions do not significantly infringe on the jurisdictional authority of the federal and provincial governments. Whereas the right to self-government may require the state to share power with the First Nations in question, Supreme Court judges know it is beyond their legal scope and are unwilling to undermine the country whose flag they serve despite the separation between the legislative and executive branches⁶¹.

Unfortunately, the federal government has not made any legally binding commitments to make its intentions to have a more equitable relationship with Aboriginal nations come to fruition. Up until now, the Canadian Constitution has not been amended to include the Aboriginal right to self-determination, nor has the federal government implemented policy that would give back First Nations autonomous control over their land and resources.

⁶¹ Aboriginal rights and titles as formulated in the United Nations Declaration on the Rights of Indigenous Peoples (United Nations General Assembly, 2007).

Summary & Conclusion:

“Legal categories shape peoples’ lives; they set the terms that individuals and communities must utilise, even in resisting these categories (Lawrence, 2004, p. 230).

My main concern in this paper was to better understand the extent to which legal constructs of indigeneity affect Aboriginal peoples’ capacity to obtain self-determination in an economic sense. The questions that animated me throughout the process of writing this paper were: Does Canadian jurisprudence impede on Aboriginal peoples’ ability to determine their identity or “authenticity”? Can Aboriginal people develop their communities in modern ways or as they see fit? And finally, I came to ask myself if Canadian society had reached the postcolonial era.

In Chapter II, I began with a discussion of how the late 19th century *St. Catherine’s Milling* court case pegged a departure point in Canadian jurisprudence of perceiving Aboriginal title and rights as mere occupancy rights, i.e. less than full ownership rights. Starting with this case, Aboriginal people have thereafter been legally restricted from using their land in whichever way they please; the only Aboriginal activities that were legally recognised were those that were considered to be traditional and customary practices⁶². The *Kanetewat v. James Bay Development Corp.* case (1973) demonstrated the pervasiveness of this judicial construct of indigeneity. Rather than making way for Québec development and progress, the James Bay Cree, in the 1970s, confronted the legality of the James Bay project (that it was done without their consent) on the grounds that their

⁶² However, until mid-20th century, even traditional Aboriginal activities were heavily regulated as the federal government made the practice of many ceremonies, such as the potlatch and Sundance, criminal (Milloy, 1999, p.21).

traditional practices and way of life would be jeopardised by the project envisaged. At the time, the fact that these primordial/essentialist constructs of indigeneity also existed as legal categories (elaborated in the *St. Catherines Milling* decision) worked to the advantage of the Cree. Strategic essentialism—the use of cultural constructs for political aims—was a very effective strategy for the James Bay Cree in this court case: for the first time Aboriginal people succeeded in temporarily halting a government-initiated development project—the James Bay Project—until an agreement was reached between them and the Québec government. However, while it became clear to me that strategic essentialism was a strong political empowerment tool in the 1970s, I wondered: Is strategic essentialism still used in courts by Aboriginal people in the 21st century, and if so, is it as effective in validating Aboriginal claims?

After studying a number of Supreme Court cases in Chapter III, the resounding answer to the aforementioned question is that Aboriginal people no longer even have the choice to use strategic essentialism as a political strategy; following the Supreme Court *Van der Peet* decision that set into motion the *frozen rights* approach to Aboriginal rights and titles, it became a legal requirement for Aboriginal people to prove their “authenticity” and that of their activities. Justices continued to rely on archaic and essentialist constructs of indigeneity to interpret Aboriginal rights and titles to make their decision; and this continues to be the case in the 21st century regardless of the fact that the federal government has recognised and affirmed Aboriginal rights and titles in the 1982 Constitution. Notwithstanding that this acknowledgement of Aboriginal rights and titles was a step in the right direction, the fact that the federal government stood short of defining these rights and titles has mitigated the expected benefits. The socio-economic

condition of Aboriginal peoples has not significantly improved. Moreover, as a result of the absence of definitions of Aboriginal rights and titles, the Supreme Court has been able to side-step the issue of Aboriginal self-determination and to continue to make rulings predicated on primordial categories of Indianness that are ultimately limiting Aboriginal people's capacity to develop their resources and land in contemporary ways and thus hindering their ability to become self-sufficient.

Moreover, it became clear in the 2005 *Marshall & Bernard* Supreme Court decision that Aboriginal people are not the ones who define their traditional activities; the federal government has invested Justices with this decisional power. In particular, in order to have courts rule in their favour and give them the legal permission to practice the activity contemplated, Aboriginal people have to prove that the latter is integral to their distinctive culture. The frozen rights approach to Aboriginal rights and titles obliges Aboriginal claimants to essentialize their culture, i.e. frame the activity contemplated to fit within the boundaries of what Justices consider to be traditional native culture.

Proving that an activity is integral to a distinctive culture can be especially difficult when the activity contemplated has a 'modern' connotation. As shown in my analysis of the *Marshall & Bernard* Supreme Court case, the Mi'kmaq were unsuccessful in convincing the Justices that logging for financial gain was a valid contemporary native activity. There are two reasons for this: 1) the claimants could not demonstrate to the Justices' satisfaction that logging was an activity that was practiced at the time of European contact; and 2) under the assumption that development (i.e. logging for financial gain) is essentially harmful to nature and the preservation of primordial native culture, the Justices

paternalistically refused to permit the Mi'Kmaq to engage in logging, even though this activity could be economically beneficial to the Mi'kmaq community and help them survive as a contemporary Aboriginal community.

While strategic essentialism can still be an effective strategy in judicial cases where First Nations oppose development or modernisation (e.g. *Haida Nation v. British Columbia* (2004), in situations where Aboriginal people actually want to engage in economic development (e.g. *Marshall & Bernard* (2005), strategic essentialism will not work because development is seen as an antithesis to primordial native culture. Thus, due to the frozen rights approach to Aboriginal rights and titles, essentialist constructs of indigeneity, even if they are used by Natives to further their interests, will restrict the ability of Aboriginal people to self-determine in contemporary ways. Moreover, up until now, contemporary native activities that have an ambiguous link with the European contact period, that can generate financial benefits, and that can foster economic development, have not been legally recognized by Canadian Justices to be Aboriginal activities— they are too modern.

In conclusion, the way Aboriginal people represent themselves and the way others (i.e. courts, governments, media, etc.) perceive them have tangible bearings on Aboriginal peoples' capacity to obtain self-determination. More precisely, their ability to economically self-determine is greatly restricted by the way judges and courts interpret Aboriginal rights, titles and practices. Hence, I can't help but deduce that the federal government's relationship with Aboriginal peoples in Canada, through the proxy of colonial legislation and jurisprudence, is still a colonial one, and that we are not a postcolonial society [yet]. Generally speaking, I think that in order to become a postcolonial society, all of Canadian

society—Aboriginal people and non-Aboriginal people— need to radically question categories of native identity and particularly essentialist constructs of indigeneity that freeze native culture to imaginary pre-colonial times. Essentialist constructs of Indianness are a far cry from contemporary Aboriginal native culture: the reality today is that the majority of the Aboriginal population live in Canada's urban centers—the so-called hubs of modernity, and not in Canada's hinterlands; and this trend is unlikely to diminish in the future⁶³.

Essentialist constructs of indigeneity in Canadian jurisprudence need to be challenged. Anthony Connolly, a lawyer who has written extensively about the frozen rights approach, and anthropologist Brian Toms, suggest that it's up to anthropologists to challenge judges' perceptions about native identity since anthropologists have historically been significant actors in the creation and perpetuation of essentialist constructs of indigeneity. However, I believe that placing the onus on anthropologists to present alternative cultural constructs doesn't challenge the colonial mentality that is pervasive in Canadian jurisprudence: judges and 'experts' on Indianness are still given the privileged position of deciding what native identity is. An essential step to becoming a postcolonial society is sacrificing the privileged position of judges and anthropologists in producing meaning about others; in a postcolonial society, First Nations would have the leading role in defining who they are and which activities define their culture.

John Borrows, an Anishinabe professor and lawyer, emphasizes the need to do away with the frozen rights approach to Aboriginal rights and activities and its key defining

⁶³ In the 2006 census, 54% of Aboriginal people lived in urban centers (Statistics Canada, 2006).

feature the 'integral to a distinctive culture' test (1997). In its place, courts should adopt a legal approach that centers on both the Aboriginal perspective of Aboriginal rights and activities and the idea that the adoption of modern activities by Aboriginal communities is integral to the survival of contemporary native communities (Borrows, 1997, p.32). If courts want to protect Aboriginal culture and support the development of healthy Aboriginal communities, they cannot limit themselves to the sole protection of traditional activities; not only does this paternalistic approach constitute a refusal to accept that Aboriginal peoples are modern, it hinders the self-determining capacity of their communities, and ultimately, their well-being.

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