



Reconceiving Notions of Aboriginal Identity

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Introduction

Canada is one of the only nations in the world that continues to use legislation to limit access to services and benefits for Aboriginal peoples on the basis of a descent criterion. This practice has served to create artificial distinctions among Aboriginal people, sometimes even within the same extended families, and serves mostly to exclude Aboriginal people who are not “registered Indians” from access to distinctly Aboriginal services and the power of self-determination, with no concern for how individuals define themselves. As Madame Justice l’Heureux-Dubé stated in the *Corbiere* case, in the context of off-reserve residency, “People have often only been seen as ‘truly Aboriginal’ if they live on reserves.”¹ This attitude toward Aboriginal peoples who reside off reserves or are not registered Indians has done serious, lasting damage to all Aboriginal people by dividing up communities and even families according to externally created administrative categories, undermining the social cohesion necessary for communities to be functional, and stripping them of the power to define who constitutes the community according to their own traditions.

State-imposed definitions of identity and the attitudes they have fostered towards who really “counts” as Aboriginal are tools of colonization, which has had profound effects on the health and well-being of Aboriginal peoples. In particular, assimilation has played a key role in the maladies faced by Aboriginal Canadians today.² Aboriginal people suffer higher rates of infectious and chronic disease, higher mortality and infant mortality and lower socio-economic status compared to the general Canadian population.³ Aboriginal identity, sometimes referred to as the concept of “connectedness,” is seen as a key determinant of health to Aboriginal people.⁴ Whether the distinctions that create these harms are made among individuals or among entire communities, the effects on health and well-being are felt at the level of individuals and families.

In fact, Aboriginal scholars such as Jaime Mishibinijima, Alex Wilson, Jeannine Carrier, Carrie Bourassa, and R. Johnner see Aboriginal identity as a social determinant of health. Mishibinijima, for example, argues that “having a strong identity or feeling connected has been shown to act as a deterrent to high risk behaviors such as multiple drug use, school absenteeism, or risk of injury or pregnancy as well as to having a poor body image and a high degree of emotional stress.”⁵

¹ *Corbiere. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203, para. 71.

² Royal Commission on Aboriginal Peoples, Vol. 3, 107. RCAP recognized that assimilation happened to all Aboriginal people both on and off-reserve.

³ Canadian Institute for Health Information, *Improving the Health of Canadians* (Ottawa: Canadian Institute for Health Information, 2004), 80, 85; Health Council of Canada. *The Health Status of Canada’s First Nations, Métis and Inuit Peoples* (Toronto: Health Council of Canada, 2005), 17-21.

⁴ Johnner, R., Gingrich, P., Jeffery, B., and Maslany, G. “Does Aboriginal Identity Make a Difference?

Single Mothers and Exclusion in Health”. *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 6(1), 2008, 140-142; J. Carriere, “Maintaining Identities: The Soul Work of Adoption and Aboriginal Children”, *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 6(1), 2008, 69-70; C. Bourassa, M. Hampton and K. McKay-McNabb, “Racism, Sexism and Colonialism: The Impact on the Health of Aboriginal Women”. In *Canadian Woman Studies: An Introductory Reader* (Toronto: Inanna Publications, 2006), 542-544.

⁵ J. Mishibinijima, *Identity as a Social Indicator of Health and Wellness:*

First Nations Women in Rural Communities, (Ottawa: National Aboriginal Health Organization, 2008), http://www.naho.ca/english/speaker_04.php, (accessed Feb. 8, 2009).

Indeed, the link between Aboriginal identity and health and well-being is fast becoming an area of study unto itself not only here in Canada, but around the world. The Public Health Agency of Canada noted in 2004 that the strongest predictors of poor health status are socio-economic status, gender and Aboriginal identity.⁶ There is also a growing body of literature regarding the construction of Aboriginal identity and women's health that supports the argument that Aboriginal identity is linked to health and well-being. Alex Wilson⁷ found that their identities as Aboriginal women were central to health and well-being. Johner et al found that single Aboriginal mothers also saw identity as key to their health and well-being.⁸ Similarly, Kubik, Bourassa and Hampton found that, as a result of assimilation policies and construction of Aboriginal identities, Aboriginal women are the most vulnerable population because racism and sexism combine to create poorer socio-economic and health outcomes.⁹

The division among Aboriginal peoples and exclusion of some Aboriginal people from access to services granted to others by the operation of federal legislation and policies have been the subject of both intergovernmental conflict in Canada and legal challenge under the equality rights provisions of the *Canadian Charter of Rights and Freedoms*.¹⁰ A number of these legal challenges to the distinctions that the federal government has created between "Indians," and particularly those residing on reserves, and other Aboriginal peoples have been successful. If we accept that there is a real possibility that the federal role in defining and distinguishing among Aboriginal peoples through legislation and policy cannot be sustained, one would be right to ask

⁶ Public Health Agency of Canada, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004), 2-3.

⁷ Alex Wilson. *Living Well: Aboriginal Women, Cultural Identity and Wellness*. (Manitoba: Prairie Women's Centre of Excellence, 2004), 20-23. Jeannine Carriere refers to Aboriginal identity as connectedness. She notes that connectedness is an understanding of oneself and one's connection to others. She found that connectedness plays a key role in health and is, in her opinion, a determinant of health. Carriere also argues that disconnectedness is linked to ill-health. She states: "The major loss identified by adoptees in the present study was identity. All 18 participants described that their need to know their birth family stemmed from longing to know who they are and where they come from. In describing identity issues, the adoptees referred to feelings of being different than school friends or others in society. Part of this feeling urged them to begin observing Aboriginal people whenever they could and interpreting how they fit into Aboriginal societies. The loss of information was described as fundamental to their development" Although Carriere is focusing on loss of Aboriginal identity via adoption, her findings are similar to Wilson's, who noted that: One participant stated that, "If Aboriginal women are going to make an impact or be empowered by their communities, we have to go back to our roots, the basis of our cultures. That will lead us to respect and honour women ... When honour and respect flow in our community, we won't have problems – it will empower everyone."

⁸ They found that Aboriginal identity and social exclusion are related and that social exclusion results in marginalization, oppression and poorer socio-economic and health outcomes. Johner, R., Gingrich, P., Jeffery, B., and Maslany, G. "Does Aboriginal Identity Make a Difference? Single Mothers and Exclusion in Health". *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 6(1), 2008, 140-142;

⁹ Wendee Kubik, Carrie Bourassa and Mary Hampton. "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada," *Humanity & Society* (2009, Vol. 33, Nos. 1 and 2, Feb/May), 19, 22-27.

¹⁰ Section 15 of the *Charter* states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

what the available alternatives are. In particular, one should seek alternatives that would serve to decolonize that state by returning to Aboriginal communities their authority to define community membership according to their own traditions and rules that are seen to be legitimate by the community members themselves. That is the purpose of this paper: to discuss the harms that state-imposed categorization of the identity of individuals as “more” or “less” authentic do to individual well-being; what alternatives exist to replace the federal government’s role in determining Aboriginal “status” with self-determined processes for identifying members of Aboriginal communities; and the implications that a return to self-determined understandings of community membership and, in particular, a return to Aboriginal traditions about community membership and community life could have for the well-being of Aboriginal individuals.

Prior to delving into the effects that settler state distinctions among Aboriginal peoples in Canada have had on the well-being of Aboriginal individuals and communities, and the question of self-determined alternatives to state controlled definitions of Aboriginal people, however, we will review the history of legislative definitions of “Indians” in Canada. In addition we will review Canadian jurisprudence on *Charter* challenges to the limitations on Aboriginal people’s access to Aboriginal-specific benefits. This review will outline both how the state has created distinctions and what the reaction to those state-imposed definitions has been.

I. Legislative Definitions of Aboriginality in Canada

The Development of Indian Status Rules

Settler governments in Canada have long taken on the role of defining, and thereby limiting, who is an “Indian” and then tying access to a whole variety of programs, services and benefits to that definition. The first legislative definition of “Indian” in the Canadas pre-dated Confederation. This was contained in the *Act for the better protection of the Lands and Property of the Indians in Lower Canada* in 1850. This definition was a broad one, which included all persons of “Indian blood” who were “reputed to belong to the particular Body or Tribe” and their descendants; all persons intermarried with this first group and residing among them, and their descendants; all persons residing among “Indians” whose parents on either side were “Indians”; and all persons “adopted in infancy by an such Indians” and their descendants.¹¹ As broad as this definition is, it was nonetheless a definition grounded in notions of race and blood, rather than membership. As well, this broad definition did not last long; the legislation was amended the following year to exclude those adopted in infancy and non-Indian men married to Indian women.¹²

In 1857, the Canadian legislature passed the *Gradual Civilization Act*.¹³ This did not directly change the definition of “Indian” in previous legislation, but it established the process by which an Indian man could choose to become enfranchised. Upon enfranchisement, an Indian man would gain the same rights as other Canadians, including the right to vote, but both he and his

¹¹ *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S. Prov. C. 1850, c. 42 (13 Vic., c. 42), s. 5.

¹² *An Act to repeal in part and to amend an Act, entitled, An Act for the better protection of the Lands and property of the Indians in Lower Canada*, S. Prov. C. 1851, c. 59 (14 Vic., c. 59), s. 2.

¹³ *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, c. 26 (20 Vic., c. 26).

family would lose their Indian status and an Indian woman could not regain status except by marriage to another Indian man.¹⁴ As well, enfranchisement was based on the presumption of the superiority of the colonial culture over that of Aboriginal peoples, which began the process of devaluing and undermining Aboriginal culture.¹⁵

After Confederation, the definition of “Indian” used in Canada East (the former Lower Canada) was extended to the entirety of the new Dominion. But this was amended in 1869, with the passage of the *Gradual Enfranchisement Act*, so that an Indian woman who married a non-Indian man ceased to be an Indian, as did any children of that marriage.¹⁶ Women could not own property and, once a woman left the reserve to marry, she could not return because non-Indians could not reside on the reserve. This rule also applied to her children. If an Indian man, however, married a non-Indian woman, he not only retained his Indian status, but the non-Indian woman would gain status under the *Act* and so would their children. This provision made explicit the sexism that had existed in the process of defining who was an “Indian” in the pre-Confederation era. This approach to defining “Indians” according to the status held by men was carried over into the first *Indian Act*, passed in 1876, as was the process for enfranchisement. One could choose to become enfranchised and, over various iterations of the *Indian Act*, Indian (First Nations) people would automatically become enfranchised if they received a university or college education, became clergy, acquired any professional designation, or lived outside of the country for five years or more.

With its passage in 1876, the *Indian Act* would become the primary tool of assimilation used by the new Dominion government. The intent was to absorb Indian people into the body politic of Canada so that there would be no “Indian problem” and, in the words of Sir John A. Macdonald, “to wean them by slow degrees from their nomadic habits, which have become almost an instinct, and by slow degrees absorb them on the land.”¹⁷ The *Indian Act* had three central goals. These were to:

- 1) define who Indians were and were not;
- 2) manage and protect Indian lands;
- 3) concentrate authority over Indian people (Indians were to be civilized and Christianized).¹⁸

While the *Indian Act* referred to “Indian blood” in determining status from the passage of the first *Indian Act* in 1876, this was replaced with the concept of “registration” with the 1951 revision to the Act; a new bureaucratic entity, the Indian Register, was created to administer the process. This action also served to tighten access to Indian status, and the benefits that flowed with it, for fiscal reasons.¹⁹ As well, in the conversion to a centralized system of registration, the names of many people who ought to have been on the band lists were never added, thus denying

¹⁴ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Supply and Services Canada, 1996), Vol. 1, at 271-3.

¹⁵ *Ibid.* at 273.

¹⁶ *Ibid.* at 274-6. This statute also limited the vote in band council elections to Indian men, thereby removing Indian women from the political life of the band.

¹⁷ T. Wotherspoon and V. Satzewich, 28-29. One may also remember that the Macdonald government banned the potlatch of the North West Coast Indians.

¹⁸ Wotherspoon and Satzewich, 30.

¹⁹ Royal Commission on Aboriginal Peoples, Vol. 1 at 311.

them and their descendants access to Indian status, the services provided to status Indians, and the recognition of their Aboriginal identity both by society at large and by other Indigenous peoples that increasingly came to be tied to state recognition of status.²⁰ Overt gender discrimination continued in the post-1951 status rules. A status Indian woman who married a non-status Indian man still automatically lost her status and the attendant rights, while a status Indian man who married a non-status Indian woman not only kept his status, but passed his status onto his wife.²¹

This discriminatory rule was brought before the United Nations in 1981 by an Indian woman, Sandra Lovelace, who had lost her status upon marriage. Between this challenge and the inclusion of the new *Canadian Charter of Rights and Freedoms*, which included equality rights, in the Canadian Constitution in 1982, the Government of Canada realized that the overt gender discrimination in the *Indian Act* would need to be altered. Thus, the government introduced Bill C-31. While this removed the most overt gender discrimination in the *Indian Act* status rules, discrimination between status and non-status Indians continued. The Royal Commission on Aboriginal Peoples (RCAP) provided an extensive description of how the new status rules contained in Bill C-31 operate and how they perpetuate past gender discrimination. As described by the Royal Commission,

The bill created two main categories of status Indians. Under subsection 6(1), legal status is assigned to all those who had status before 17 April 1985, all persons who are members of any new bands created since 17 April 1985 (none have been created), and all individuals who lost status through the discriminatory sections of the Indian Act. Subsection 6(2) covers people with only one parent who is or was a status Indian under any part of section 6(1). It must be stressed that the one-parent rule in subsection 6(2) applies only if that parent is entitled to status under subsection 6(1). Thus, if an individual has one parent covered by subsection 6(2) and one who is non-Indian, the individual is not entitled to status. The children or other descendants of Indian women who lost status under the discriminatory provisions described earlier will generally gain status under subsection 6(2), not subsection 6(1), since the reason their mothers lost status in the first place was that their fathers did not have Indian status when their parents were married.²²

Thus, the Royal Commission concluded that:

sex discrimination, supposedly wiped out by the 1985 amendments, remains. ... Such anomalies result from the fact that the Bill C-31 amendments build on past status and membership policies and provisions. They are, in this respect, somewhat reminiscent of the 1951 revisions in which the notion of 'entitlement to registration as an Indian' replaced that of 'Indian blood', but without breaking with past practices.²³

Status can still be lost over only two generations, as follows:

6(1) parent + non-status parent = 6(2) child
6(2) parent + non-status parent = non-status child

These examples demonstrate how confusion and division is created within communities, and even families, when status, and the social recognition of identity that comes with it, and access to

²⁰ *Ibid.* at 312.

²¹ *Indian Act*, 1951 (Can.), c. 29, s. 12(1)(b).

²² Royal Commission on Aboriginal Peoples, Vol. 4, at 39-40.

²³ *Ibid.* at 37.

benefits are separated from the identity that Aboriginal individuals assign to themselves. These are the echoes of Canada's previous assimilation policy that remain with us today.

Inuit and Métis under Section 91(24)

The implementation of the assimilation policy through both treaties and the *Indian Act* also affected Métis people. As women lost status through marriage to non-Aboriginal men, many of their children identified as Métis and were accepted into Métis communities. The federal government, however, has never recognized Métis as “Indians” for the purpose of exercising federal jurisdiction and Métis were not recognized as an Aboriginal people with Aboriginal rights in Canadian law until their inclusion in the definition of “aboriginal peoples” in the *Constitution Act, 1982*.

It is interesting to note that, earlier, the Supreme Court of Canada had determined that Inuit are “Indians” for the purposes of interpreting the federal jurisdiction over “Indians and Lands reserved for the Indians” in s. 91(24) of the *Constitution Act, 1867*. Yet Métis have never been treated by the federal government as being within this paragraph.²⁴ The inclusion of Inuit within the term “Indians” and the later use of the term “aboriginal peoples” in s. 35 of the *Constitution Act, 1982* to describe the holders of Aboriginal rights logically raises the question of whether the term “Indians” in s. 91(24) of the 1867 Act would not best be interpreted as being synonymous with the term “aboriginal peoples.” The Métis National Council, for one, has highlighted this problem, noting that, despite this constitutional recognition, the federal government continues to assert that the provision of services to Métis people are a provincial responsibility and thus does not live up to its constitutional commitments.²⁵ The Royal Commission on Aboriginal Peoples also found, in their 1996 report, that the federal government not only has a constitutional responsibility to Métis people, but also a fiduciary responsibility under s. 91(24) of the *Constitution Act, 1867*.²⁶ RCAP argues that there was no legal definition of “Indian” at that time and that Métis and Half-breeds were often referred to as “Indian”. The Commission notes:

We are convinced that all Métis people, whether or not they are members of full-fledged Aboriginal nations, are covered by section 91(24). There are several reasons for that conclusion. The first is that at the time of Confederation, use of the term 'Indian' extended to the Métis (or 'halfbreeds' as they were called then). This can be seen, for example, in section 31 of the *Manitoba Act, 1870* and in section 125(e) of the *Dominion Lands Act 1879*, both of which made provision for land grants to "halfbreed" persons ("Métis" in the French versions) or in connection with the "extinguishment of Indian title". The Supreme Court of Canada held as early as 1939 that Inuit ("Eskimos") are included within the scope of section 91(24) because the section was intended to refer to "all the aborigines of the territory subsequently included in the Dominion", and there is every reason to apply the same reasoning to Métis people. Most academic opinion supports the

²⁴ *Re. Eskimos* [1939] S.C.R. 104. While the Supreme Court of Canada decided in *R. v. Blais* [2003] 2 S.C.R. 236 that Métis were not included in the term “Indians” in paragraph 13 of the *Canada-Manitoba Natural Resources Transfer Agreement* of 1930, the Court specifically stated, at paragraph 36 of their judgment, that “We emphasize that we leave open for another day the question of whether the term “Indians” in s. 91(24) of the *Constitution Act, 1867* includes the Métis — an issue not before us in this appeal.”

²⁵ Métis National Council, *Canada-Aboriginal Peoples Roundtable Sectoral Sessions Policy Papers* (Ottawa: Métis National Council, 2005), 8.

²⁶ See, for example, Royal Commission on Aboriginal peoples, Vol. 4 at 294-5.

view that Métis are Indians under section 91(24), and a recent commission of inquiry in Manitoba reached the same conclusion. We support this view.²⁷

One would hope that these critical comments would give the federal government pause to consider whether continuing to impose definitions of identity through the legislative determination of status is appropriate.

II. The Problem with Status

After reviewing the legislative definitions of Aboriginal people, we now turn to how these definitions affect Aboriginal people. We describe why the definition of status, as developed historically, should change due to:

- The racist and arbitrary basis of current definitions of status;
- The current challenges in courts to status distinctions; and,
- The current definitions negatively shape Aboriginal identity and thereby inhibit Aboriginal well-being.

The Racist and Arbitrary Basis of Status

This synopsis of state-imposed definitions of identity is only part of the history and current reality of the federal government's role in Aboriginal peoples' lives. Like other colonized countries, the concept of 'race' was used in Canada to exert dominance over a particular category of people and simultaneously to legitimize the colonizer's actions. The difference is that the Canadian state not only defined who was and who was not a status Indian historically, but continues to do so today and, in doing so, it continues to exert a measure of control over First Nations people. Moreover, the effects of historical policies such as assimilation also affected Métis and Inuit people. These effects still linger and continue to have a devastating impact on Aboriginal people and their well-being.

A brief historical account of the impact of colonial policies reveals how specific policies were implemented to remove barriers to the success of the federal government's National Policy. One of these barriers was Aboriginal people. An assimilation policy was adopted well before the creation of the Dominion of Canada in 1867, but it intensified after Confederation and the establishment of the National Policy.²⁸

For Aboriginal people in Canada, colonization remains one of the most destructive elements affecting societal structures today. Family organization, child rearing practices, political and spiritual life, work and social activities have been turned upside-down by Canada's colonial system.²⁹ Aboriginal people, as a whole, have been marginalized by the racist policies and

²⁷ *Ibid.* at 209.

²⁸ P.D. Elias, *Dakota of the Canadian Northwest: Lessons for Survival* (Regina: Canadian Plains Research Centre, 2002), 221.

²⁹ C. Bourassa, M. Hampton and K. McKay-McNabb, "Racism, Sexism and Colonialism: The Impact on the Health of Aboriginal Women". In *Canadian Woman Studies: An Introductory Reader* (Toronto: Inanna Publications, 2006), 542-544.

attitudes instituted by the British colonizers. Moreover, as Tim Schouls notes: “The colonial relationship was a dominant one in which Aboriginal peoples were unilaterally, and without consent, subjected to the superior power and influence of the settler society.”³⁰ As a result of colonization, and, in particular, the colonial construction of Aboriginal identity, the magnitude of social, economic and political problems faced by Aboriginal people is enormous.³¹

With the rise of capitalism there was a need to control the resources and settle the land. The acquisition of land from the Hudson’s Bay Company and the subsequent removal of First Nations people from it through treaty-making were essential steps in this process. The land they occupied was required to facilitate the creation of a market for Canadian industry through intensive settlement.³² The ideology of race was used to control and manipulate the class interests that emerged from this staple-based hinterland economy.³³ The fur trade was a very important part of Canadian political and economic history. Both First Nations and Métis people played important roles in advancement of the trade. British colonizers, traders and merchants used race to define these groups of people and to assert dominance over them. In this way, they ensured that the inequality and hierarchical aspect inherent in capitalism was entrenched in colonial policy.³⁴

Critical race theory acknowledges that this ideology was not only inherent in the early capitalist system but has profound effects in contemporary society. Critical race theory argues that race is a social construction, not a biological characteristic. Race is an idea, a discourse, a system that ensures some people in society have an advantage over others. This social construction has profound consequences for material well-being in daily life. Critical race theory makes race visible and empowers those who have been oppressed through the process of “othering” by recognizing that social norms have been constructed to serve the interests of the privileged.³⁵ It is important to understand that the construction of Aboriginal identity was a key element of the Canadian government’s assimilation policy and had profound effects on all Aboriginal people. It would be a mistake to think that past colonial practices do not affect the contemporary health and well-being of Aboriginal people. It would also be a mistake to assume that the construction of identity has ceased. As Wayne Warry points out:

“In debates about Aboriginal peoples, history is often contested and white-washed. The neo-conservative right, in both Canada and Australia, relies for its arguments on historical revisionism or denial. They claim that Aboriginal poverty and ill health are the result of the failure of contemporary policies rather than the product of hundreds of years of colonialism and that any moral wrongs occurred as part of colonial history. On the other hand, Aboriginal advocates argue

³⁰ T. Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory and the Politics of Self-Government*, (Vancouver: UBC Press, 2003), 40.

³¹ N. Adelson, *Reducing Health Disparities and Promoting Equity for Vulnerable Populations. Aboriginal Canada: Synthesis Paper*, (Toronto: York University, 2004), 5.

³² J. Green, “Towards a Détente With History: Confronting Canada’s Colonial Legacy,” *International Journal of Canadian Studies*, 12 (1995), 85-87.

³³ R. Bourgeault, “Race and Class Under Mercantilism”, in *Racial Oppression in Canada* (Toronto: Garamond Press, 1988), 67.

³⁴ *Ibid*, 53.

³⁵ M. Cherland and H. Harper, *Advocacy Research in Literacy Education: Seeking Higher Ground* (New Jersey: Lawrence Erlbaum, 2007), 108-110.

that clear government and public recognition for past wrongs, by apology and compensation, is necessary if reconciliation with Aboriginal peoples is to occur.”³⁶

Edward Said concurs, arguing that races are constructed for the benefit of those in power. Race is an inherent aspect of colonization; although colonization has ended, its effects are still evident in society. He notes: “In our time, direct colonization has largely ended; imperialism, as we shall see, lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic and social practices.”³⁷ Furthermore, Said argued that neither imperialism nor colonialism was a simple act of accumulation and acquisition; rather, both are supported by ideological formations that ensure those who are being colonized become controlled through ideology and believe that they are “inferior” or “subordinate” to the colonizers.

These ideological formations are embedded in the assimilation policy of Canadian governments, which, as noted above, even pre-date the passage of the first *Indian Act* in 1876.³⁸ Race was a well-developed ideology used by governments of the time to support such policies³⁹. As Wotherspoon and Satzewich note:

“The policy of assimilation did not mean the physical annihilation of Indian people, rather it referred to the cultural and behavioral change of Indians such that they would be culturally indistinguishable from other Canadians. The charge of ‘cultural genocide’, while serious in its implications, is not inappropriate.”⁴⁰

Clearly, race and gender were two powerful ideologies that legitimated government policy. Wotherspoon and Satzewich summarize the thinking behind the *Act*:

- 1) Indians and their land were to be assimilated;
- 2) Indians were not capable of making rational decisions for their own welfare and this had to be done by the department on their behalf;
- 3) Indian women should be subject to their husbands as were other women. Their children were his children alone in law. It was inconceivable that an Indian woman should be able to own and transmit property rights to her children.⁴¹

Perhaps the most glaring example of the Canadian government’s use of racist ideology to enhance the assimilation process is in education. The government asserted that Indian (First Nations) people were, by nature, unclean and diseased and residential schools would save Indian children from the “insalubrious influences of home life on reserve. School officials told students that cultural alienation was to be welcomed as the first step toward healthful living and long

³⁶ W. Warray, *Ending Denial: Understanding Aboriginal Issues* (Toronto: Broadview Press 2007), 53.

³⁷ E. Said, *Culture and Imperialism* (New York: Vintage Books, 1993), 9.

³⁸ The first explicit effort to eliminate Aboriginal distinctiveness is the *Gradual Civilization Act* of 1857, which first introduced the concept of “enfranchisement”, by which an Indian could renounce their Indian identity.

³⁹ S. Grammond, “Disentangling ‘Race’ and Indigenous Status: The Role of Ethnicity,” *Queen’s Law Journal*, 33 (2008), 3.

⁴⁰ T. Wotherspoon and V. Satzewich (eds.), *First Nations: Race, Class and Gender Relations* (Regina: Canadian Plains Research Centre, 2000), 28.

⁴¹ *Ibid*

life.”⁴² In 1920, the *Indian Act* was amended so that it was illegal for Indian children to stay home from school. Essentially the government forced parents to send their children to the residential schools. As the Canadian Research Institute for the Advancement of Women describes it,

“[F]or over a hundred years, a Canadian government policy to assimilate Aboriginal peoples by taking kids away from their families to residential schools where they were punished for speaking their language, practicing their own cultural and religious traditions, and often the victims of physical and sexual abuse, left generations of Aboriginal people without parenting skills, without self-esteem, and feeling ashamed of who they were and hopeless about the future.”⁴³

The Royal Commission on Aboriginal Peoples contended that residential schools had the single greatest impact on Indian (First Nations) people in Canada and continues to have inter-generational impacts. The major outcome today is the high incidence of violence perpetrated against Aboriginal women.⁴⁴ In fact, at least three-quarters of Aboriginal women have experienced family violence and the mortality rate for Aboriginal women due to violence is three times higher than for non-Aboriginal women. Further, the rate of suicide among Aboriginal women is three times the national average and sexual abuse rates are higher among Aboriginal women.⁴⁵

A Succession of Legal Challenges

As Canada continues to legislate distinctions among Aboriginal peoples based on race and residency, Canadian legislation continues to be opposed by those Aboriginal people excluded from the benefits provided to status Indians who reside on reserves. One avenue for opposing these legislative distinctions that has been used a number of times is the courts, by launching legal challenges asserting that legislative distinctions offend the equality rights guarantees of the *Canadian Charter of Rights and Freedoms*. Equality rights challenges to the exclusion of some Aboriginal peoples from the political participation, programs, services or other benefits provided to status Indians, reserve residents, or members of Indian bands can be divided into three broad groups of cases: those in which individuals challenge the exclusion of some Aboriginal people based on their off-reserve residency,⁴⁶ those in which individuals challenge the exclusion of

⁴² M. Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia 1900-50* (Vancouver: UBC Press, 2001), 57.

⁴³ Canadian Research Institute for the Advancement of Women, “CRIAW fact sheet, Women's experience of racism: How race and gender interact,” <http://www.criaw-icref.ca> (accessed January 27, 2005).

⁴⁴ T. Day, *The Health Care Sector's Response to Woman Abuse: The Tip of the Iceberg* (London, ON: Centre for Research on Violence against Women and Children, 1995), 19.

⁴⁵ Native Women's Association of Canada, *Background Paper – Aboriginal Women's Health . Canada – Aboriginal Peoples' Roundtable Health Sectoral Session* (Ottawa: Ontario, 2004), 4.

⁴⁶ In the first category, challenges to residency distinctions, there have been four cases. In one of these, *Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115, [2003] 4 F.C. 1133 (F.C.T.D.) the Federal Court, Trial Division concluded that it was not necessary to decide the question of the constitutionality of excluding off-reserve band members from voting under a band custom election code. In the other three cases (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Clifton v. Hartley Bay (Electoral Officer)*, 2005 FC 1030, [2006] 2 F.C.R. 24, [2005] 4 C.N.L.R. 161 (F.C.T.D.); and *Esquega v. Canada (Attorney General)*, 2007 FC 878, [2008] 1 F.C.R. 795 (F.C.T.D.)), however, including one case that has come before the Supreme Court of Canada and another

some Aboriginal people from the right to have Indian status or band membership and the benefits that flow from those statuses,⁴⁷ and those in which Aboriginal communities challenge the exclusion of some communities from the benefits available to *Indian Act* bands.⁴⁸ There is certainly variation in the success rates of these different classes of challenge and even those constitutional challenges that are ultimately successful require the Aboriginal claimants to endure long and arduous legal processes before their rights are recognized. Still, the majority of the cases of these types that have been decided to date have resulted in decisions in which the distinctions were found to be contrary to the claimants' equality rights.

The case in which the status rules in the *Indian Act* themselves have come under the most direct attack is the case of *McIvor v. The Registrar, Indian and Northern Affairs Canada*,⁴⁹ which was decided by the British Columbia Court of Appeal in April 2009. In this case, Sharon McIvor and Charles Jacob Grismer (also the plaintiffs in the *Grismer* case, above) challenged the *Indian Act* rules for determining Indian status that had been enacted by Bill C-31 in 1985. They argued that the amendments to the *Indian Act* regime contained in subsections 6(1) and (2) discriminate on the grounds of sex, or a combination of sex and marital status, by providing a preferential status entitlement under subsection 6(1)(a) to persons born prior to April 17, 1985 who are entitled to registration as status Indians through male ancestors, and through marriage to a male status Indian.⁵⁰ The complainants claimed that, by incorporating the discriminatory pre-1985 regime

challenge to the exclusion of off-reserve band members from voting under a band custom election code, the residency-based exclusions have been found to be unconstitutional. This, reasonably enough, leads one to wonder whether any residency-based distinction among Aboriginal people could be found to be constitutional.

⁴⁷ This category has involved six court decisions to date, though none of these has been a decision of the Supreme Court of Canada. See *R. v. Watier*, [2000] 2 C.N.L.R. 269 (Sask. Provincial Court), *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 F.C. 513, [2000] 1 C.N.L.R. 205 (F.C.T.D.), *Grismer v. Squamish First Nation*, 2006 FC 1088, [2007] 1 C.N.L.R. 146 (F.C.T.D.), *Ochapowace Indian Band v. Saskatchewan (Department of Community Resources)*, [2007] 2 C.N.L.R. 261 (Sask. Q.B.), *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, and *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2009 BCCA 153 (B.C.C.A.), appealing 2007 BCSC 827, [2007] 3 C.N.L.R. 72 (B.C.S.C.).

⁴⁸ This group consists of four cases. In two of these cases, the Supreme Court of Canada's decision in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 and *Micmac First Nation v. Canada (Minister of Indian and Northern Affairs)*, 2007 FC 1036, [2008] 1 C.N.L.R. 65 (F.C.T.D.), the courts found that there was no discrimination in excluding some Aboriginal communities from the benefits available to Indian bands established under the *Indian Act*. Both of these cases are open to criticism, however, for their confused logic and the questionable way in which the equality rights jurisprudence developed by the Supreme Court of Canada was applied in these cases. On the other hand, the Federal Court of Appeal decided in the case of *Misquadis v. Canada (Attorney General)*, 2003 FCA 473, [2004] 2 F.C. 108, that the federal government's refusal to sign Aboriginal Human Resources Development Agreements with non-status Indian groups did constitute discrimination. The Alberta Court of Queen's Bench also decided in *Callihou v. Canada (Minister of Indian Affairs and Northern Development)*, 2006 ABQB 1, 56 Alta. L.R. (4th) 301, [2006] 4 C.N.L.R. 20, that there was at least an arguable case that the federal government's refusal to reinstate Indian band status to an Aboriginal group that had lost status in the 1950s constituted discrimination. The *Misquadis* case, in particular, demonstrates the risk that treating Aboriginal communities differently will be found to be unconstitutional. As well, it is important to note that the *Lovelace* case was a challenge to the Ontario government's use of *Indian Act* band status as a means of determining what communities could be beneficiaries of a provincial benefit program (the distribution of casino profits); it may be that the courts are more tolerant of provinces using federally-created distinctions as an administrative convenience than they are of the federal government making those distinctions in the first place.

⁴⁹ 2009 BCCA 153 (B.C.C.A.), appealing 2007 BCSC 827, [2007] 3 C.N.L.R. 72 (B.C.S.C.).

⁵⁰ *McIvor* (B.C.S.C.) at para. 166.

into the post-1985 regime as the starting point for determining entitlement to status, Bill C-31 did not eliminate discrimination, but continued the gender discrimination of the pre-1985 regime.⁵¹

The Court of Appeal pointed out that Mr. Grismer's children would have Indian status if his status had been transmitted to him through his father, as he would have had status prior to 1985 and maintained it under the current subsection 6(1)(a), rather than through his mother, as was the case.⁵² Because of the operation of the Bill C-31 regime, Mr. Grismer only has status under subsection 6(2), so his children cannot acquire status if their mother does not have status under subsection 6(1). While the federal government argued that the differential treatment was solely the result of events that occurred before section 15 of the *Charter* came into force, the Court of Appeal observed that continuing governmental action may violate the *Charter* even if it began before the *Charter* came into force and therefore did not accept the government's characterization of the situation.⁵³ In fact, the Court of Appeal concluded that, "the most important difference in treatment between Ms. McIvor's grandchildren and those of her male analogue was a creation of the 1985 legislation itself, and not of the pre-*Charter* regime."⁵⁴

In determining that Mr. Grismer had been denied a benefit of the law, the Court of Appeal also agreed that the right to transmit Indian status to one's child should be recognized as a benefit. Groberman J., for the Court, commented that, "it seems to me that the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value."⁵⁵ The Court of Appeal also agreed that Bill C-31 created differential treatment on the basis of the enumerated ground of sex.⁵⁶ Thirdly, the Court of Appeal determined that the differential treatment was discriminatory, commenting that,

The historical reliance on patrilineal descent to determine Indian status was based on stereotypical views of the role of a woman within a family. ... The impugned legislation in this case is the echo of historic discrimination. As such, it serves to perpetuate, at least in a small way, the discriminatory attitudes of the past. The limited disadvantages that women face under the legislation are not preserved in order to, in some way, ameliorate their position, or to assist more disadvantaged groups. None of the distinctions is designed to take into account actual differences in culture, ability, or merit.⁵⁷

Turning to the question of justification of the law under section 1 of the *Charter*, the Court of Appeal also concluded that the law could not be saved as a reasonable limit on equality. While the Court agreed that preserving the rights of those who acquired Indian status and band membership before 1985 was a pressing and substantial governmental objective behind Bill C-31 and that the legislation was proportional to the objective it sought to serve, they did not consider the legislation to minimally impair the rights of the claimants. They concluded this because the

⁵¹ *McIvor* (B.C.C.A.) at para. 11.

⁵² *Ibid.* at para. 45.

⁵³ *Ibid.* at paras 46, 48, 57.

⁵⁴ *Ibid.* at para 61.

⁵⁵ *Ibid.* at para. 71.

⁵⁶ *Ibid.* at paras. 83,87. Groberman J. did, however, comment, in obiter, that he found the proposition that section 15 of the *Charter* extends to all discrimination based on pre-*Charter* matrilineal or patrilineal descent to be "a dubious one" and questioned whether matrilineal or patrilineal descent could be considered an analogous ground. See *Ibid.* at para.99.

⁵⁷ *Ibid.* at paras 111-2.

legislation actually made the disadvantage of those in Mr. Grismer's situation worse, compared to those who lost status because both the mother and grandmother were non-Indians, by reinstating the comparator group to full section 6(1) status while only reinstating those in Mr. Grismer's situation to section 6(2) status.⁵⁸ Thus, the Court of Appeal declared subsections 6(1)(a) and 6(1)(c) of the *Indian Act* to be of no force and effect, though they suspended this declaration for a year.⁵⁹ Based on this decision and the other case law to date, one would be wise to consider legislated restrictions on the acquisition of status that would accord with self-declared identity, and the passage of that status on to their descendants, vulnerable to *Charter* challenge. These issues will be clarified as these and future cases make their way to the Supreme Court of Canada.⁶⁰

The case law to date on discrimination against off-reserve Indians and non-status Aboriginal individuals and communities does not yet provide a clear direction. Overall, however, despite the fact that the courts have not yet decided whether Indian status (or lack thereof) is itself an analogous ground of discrimination, the case law suggests that there is a significant likelihood that federal reliance on status and residency rules will continue to be found to be discriminatory.

Abiding Implications for Health and Well-being

Despite both the RCAP report and recent court decisions, the federal government has no immediate plans to bring its legislated classification of Aboriginal people to an end; nor does it aim to provide Métis with access to the programs and services that the federal government provides to status Indians. The official website for the Federal Interlocutor for Métis and non-Status Indians stated in 2005:

The *Powley* decision deals solely with Métis Aboriginal harvesting rights and does not affect current federal programs and services provided to status Indians. The Government of Canada is committed to implementing the *Powley* decision in good faith, while facilitating responsible hunting and helping to ensure public safety. To clarify the long-term implications of the Supreme Court's decision, federal, provincial and territorial governments, along with Métis organizations and other stakeholders, are working toward a common understanding of the issues involved. Various consultations and initiatives are underway, including the Canada-Aboriginal Peoples Roundtable process.⁶¹

Thus, as an offshoot of the federal government's assimilation policy, Métis have been denied state recognition of their Aboriginal identity and have been forced to assimilate and deny that identity or be marginalized by a racist Canadian society for much of Canada's history. Those Aboriginal people whose Aboriginal identity was never officially recognized by the federal government or who lost their Indian status but did not identify as Métis have also faced the same dilemma.

Many have noted that this denial has real, tangible effects on the lives of Aboriginal individuals. In 1996, RCAP noted that the history of assimilation affected all Aboriginal people and the

⁵⁸ *Ibid.* at para. 143.

⁵⁹ *Ibid.* at para. 161.

⁶⁰ While the Crown chose not to seek leave to appeal the British Columbia Court of Appeal decision in *McIvor* to the Supreme Court of Canada, Sharon McIvor did seek leave to appeal, though at the time of writing no decision had been made on her leave application.

⁶¹ Indian and Northern Affairs Canada, <http://www.ainc-inac.gc.ca/interloc> (accessed September 17, 2005).

results are evidenced in their poor health status. They state: “Aboriginal people are more likely to face inadequate nutrition, substandard housing and sanitation, unemployment and poverty, discrimination and racism, violence, inappropriate or absent services, and subsequent high rates of physical, social and emotional illness, injury, disability and premature death.”⁶² Moreover, the poor health status of Aboriginal people is complex as poverty, family breakdown, overcrowded housing, and lower education levels contribute to the on-going inequities.

Similarly, the Canadian Institute for Health Information (CIHI) notes: “On virtually every health status measure and for every health condition, the health of First Nations, Inuit and Métis is worse than that of the overall Canadian population ... [moreover] the social and economic status of Aboriginal Peoples is lower than that of non-Aboriginal Canadians on virtually every measure.”⁶³ CIHI attributes the ill-health of Aboriginal people to the broad historical and social context and points to the need for addressing the root causes of ill-health, suggesting the recommendations made by RCAP be instituted by the federal government.

The available health and socio-economic data paints a grim picture. While most of the existing Canadian data regarding Aboriginal people is derived from the Registered Indian (mainly on-reserve) population, CIHI was able to produce a custom tabulation based on 2001 data that compares First Nations, Inuit, Métis and non-Aboriginal socio-economic status. The CIHI custom tabulation compared education (highest degree, certificate or diploma – per cent 15 years and over); work status (per cent 15 years and over); and income (per cent 15 years and over). The report found that, overall, Aboriginal people were disproportionately under-represented and continued to experience disparities in all categories when compared to non-Aboriginal Canadians, despite modest gains from 1996. Educational attainment was lower within the Aboriginal population, fewer people were working and average incomes were lower than those of non-Aboriginal Canadians. The same report found that, although Métis fared better than their First Nations and Inuit counterparts in several categories, there was still a large gap between Métis and non-Aboriginal Canadians. Métis people had lower income, higher unemployment rates, lower employment rates and lower educational attainment than non-Aboriginal Canadians.⁶⁴

CIHI also outlined Aboriginal health status by examining life expectancy at birth (female and male); infant mortality (per 1,000 live births); deaths by suicide (deaths per 100,000) and self-rated health status (%). There are no available Métis-specific data regarding life expectancy at birth, infant mortality or deaths by suicide. In terms of self-rated health status, Métis self-rated health was higher than First Nations, only slightly higher than Inuit self-rated health, and slightly lower than non-Aboriginal Canadians. Fifty-eight per cent of Métis respondents rated their health as “excellent/very good”, while 40% of First Nations, 56% of Inuit and 61% of non-Aboriginal Canadians did so. Twenty-five per cent of Métis respondents rated their health as “good”, while 33% of First Nations, 32% of Inuit and 27% of non-Aboriginal Canadians did so.

⁶² Royal Commission on Aboriginal Peoples, Vol. 3, at 107.

⁶³ Canadian Institute for Health Information, *Improving the Health of Canadians* (Ottawa: Canadian Institute for Health Information, 2004), 80, 85.

⁶⁴ *Ibid*, 85. (Please see Table 1- Appendix A for details)

Seventeen per cent of Métis respondents rated their health as “fair/poor”, while 27% of First Nations, 12% of Inuit and 12% of non-Aboriginal Canadians did so.⁶⁵

CIHI also compared rates of chronic and infectious diseases between Aboriginal and non-Aboriginal Canadians, noting much higher rates of obesity, diabetes, arthritis and rheumatism, heart problems, high blood pressure, tuberculosis, Chlamydia, and smoking.⁶⁶ The report concluded: “The poorer conditions faced by Aboriginal Peoples could be contributing to their lower health status relative to non-Aboriginal people in Canada.”⁶⁷ The key factors in socio-economic status (education, employment and income) were part of the complex explanation for lower health status.

It is also worth noting that, in Australia, a study regarding Aboriginality and poverty revealed that “Aboriginality, as a causal element, is primarily unaddressed ... ethnicity or culture are only briefly considered within the broader social determinants of health literature.”⁶⁸ The authors note that more study must be undertaken to analyse the centrality of Aboriginality, or Aboriginal identity. However, statistically speaking, Aboriginal people had poor health across all income distribution levels, leading the authors to believe that Aboriginal identity was linked to poverty and poor health outcomes.

While much of the literature examining Aboriginal identity and health and well-being has focused on women because they face the highest rates of poverty and poorest health outcomes, certainly Aboriginal men also experience poorer socio-economic status and health outcomes. It is reasonable to argue that the construction of Aboriginal identity and the attempted assimilation and stripping of Aboriginal identity plays a role in contemporary health status.

It should be noted that there is a paucity of Métis-specific data and, in particular, health data. For example, there are no mortality or birth rates and only limited morbidity rates.⁶⁹ The data available are gleaned primarily from the Aboriginal Peoples Surveys (APS) conducted in 1991

⁶⁵ *Ibid*, 81.

⁶⁶ 23% of Métis, 24% of First Nations, 22% of Inuit and 14% of non-Aboriginal Canadians were obese; 6% of Métis, 14% of First Nations, 2% of Inuit and 4% of non-Aboriginal Canadians had diabetes; 20% of Métis, 21.5% of First Nations, 9% of Inuit and 16% of non-Aboriginal Canadians had arthritis and rheumatism; 7% of Métis, 12% of First Nations, 5% of Inuit and 4% of non-Aboriginal Canadians had heart problems; 13% of Métis, 24% of First Nations, 8% of Inuit and 9.5% of non-Aboriginal Canadians had high blood pressure; 5.6/100,000 Métis, 30/100,000 First Nations, 92/100,000 Inuit and 1.3/100,000 non-Aboriginal Canadians had tuberculosis; 1,898/100,000 First Nations, 2,164/100,000 Inuit, 138/100,000 non-Aboriginal Canadians had Chlamydia (Métis rates not available); and 37% of Métis, 38% of First Nations, 61% of Inuit and 22% of non-Aboriginal Canadians smoked. *Ibid*, 83.

⁶⁷ *Ibid*, 84.

⁶⁸ Ian Anderson, Fran Baum, Michael Bentley. *Beyond Band-aids: Exploring the Underlying Social Determinants of Aboriginal Health: Papers from the Social Determinants of Health Workshop*. (University of Tasmania: Australia, 2007, 82-83).

⁶⁹ *Ibid*, 78; J. Lamouche, *Environmental Scan of Metis Health Information, Initiatives and Programs* (Ottawa: National Aboriginal Health Organization, 2002), 5; R. Romanow, Commission on the Future of Health Care in Canada (Ottawa: Health Canada, 2002), 218; J. Smylie, “A Guide for Health Professionals Working with Aboriginal Peoples: Health Issues Affecting Aboriginal Peoples” *Journal of the Society Of Obstetricians and Gynaecologists of Canada*, 23 (1) (2001), 56. The paucity of Métis health-specific data is a concern considering that all other Aboriginal sub-populations in Canada have adequate health data. Without key health data such as infant mortality rates, birth rates, and mortality rates it is impossible to know exactly how the Métis fare compared to the rest of the Canadian population. Moreover, the paucity of data is linked to the lack of recognition of Métis people.

and 2001, as well as the basic census data available from 1991, 1996 and 2001.⁷⁰ There are also limited data collected at local, regional and provincial levels, and this varies from province to province. For example, the province of Manitoba relies primarily on the available census data, while noting the absence of a Métis registry and of an organization to deliver, monitor and fund health services for Métis.⁷¹ Despite the absence of a Métis registry, Manitoba did track Métis health utilization rates through a pilot study published in 2002, while the Métis Nation of Ontario recently developed a survey in an attempt to understand what health issues Métis people in Ontario face. Nonetheless, Métis health-specific data are insufficient – a reality that results directly from the lack of recognition of Métis as a people.⁷²

While there is a paucity of data with regard to Métis people, the health and socio-economic data with regard to off-reserve First Nations and non-status Indians is virtually non-existent. Statistics Canada notes:

“Much of the research on Aboriginal health has focused on Aboriginal people living on reserve, Registered Indians, and the Inuit. In contrast, relatively little is known about the Aboriginal population (including Registered and non-status) living off reserve in cities and towns across Canada. Furthermore, research that compares Aboriginal health with that of the rest of the Canadian population usually controls only for differences in age and does not account for differences in socio-economic status.”⁷³

The best sources of information for off-reserve Aboriginal people are the Aboriginal Peoples Surveys (APS) and Canadian Community Health Surveys (CCHS). The available information suggests that the off-reserve Aboriginal population is growing, in particular the urban off-reserve population. Métis people are the fastest growing and most urban Aboriginal people. It also shows that off-reserve Aboriginal people have lower self-rated health status, higher rates of chronic disease, lower socio-economic status, higher smoking rates, higher levels of heavy drinking and are more likely to cite an unmet health care need more frequently than non-Aboriginal people.⁷⁴ While on-reserve First Nations suffer the poorest health status, all Aboriginal people have poorer health outcomes compared to the general population.⁷⁵

⁷⁰ Lamouche, *Environmental Scan of Métis Health Information, Initiatives and Programs*, 6; Smylie, *Journal of the Society of Obstetricians and Gynaecologists of Canada*, 56.

⁷¹ Manitoba Aboriginal Affairs Secretariat, “*Aboriginal People in Manitoba*” <http://www.gov.mb.ca/ana/apm2000/> (accessed June 15, 2007)

⁷² The federal government does not recognize Métis people as “Indians” within federal jurisdiction and, although the federal government asserts that the provision of services to Métis is supposed to be a provincial responsibility, very few jurisdictions collect Métis-specific data. However, it would be prudent for all jurisdictions to pay more attention to the Métis – one of the fastest growing demographics in Canada. According to the 2006 Census, 389,785 people identified themselves as a Métis person. This represents nearly a 91% growth in the size of the Métis population since 1996. By way of comparison, the First Nations and Inuit populations grew 29% and 26%, respectively, over the same period and the non-Aboriginal population grew by 8%. Statistics Canada speculates that higher birth rates and a greater tendency to self-identify as Métis on the census underlie this increase in the Métis population over the past decade. Statistics Canada, *Métis in Canada: Selected Findings of the 2006 Census* (Ottawa: Statistics Canada, 2008), 1.

⁷³ Statistics Canada, *2001 Census Handbook – Reference* (Ottawa: Statistics Canada, 2002), 2.

⁷⁴ Statistics Canada, *Métis in Canada: Selected Findings of the 2006 Census*, 6; Statistics Canada, *2001 Census Handbook – Reference*, 2-6.

⁷⁵ In face of this finding, the federal government launched the Aboriginal Health Transition Fund in 2004 with the goal of adapting existing health programs and services to better serve the needs of Aboriginal people, improve access to health services and increase the participation of Aboriginal people in the design, delivery and evaluation of

If all Aboriginal people were allowed to participate fully in our society and our economy, and achieve equitable education and income levels and have access to programs that are meaningful, the gap between Aboriginal and non-Aboriginal people would disappear. As this data indicated, the construction of identity through various colonial processes has created unhealthy Aboriginal communities. RCAP declared:

Government policy, which was originally developed mainly to deal with Aboriginal people living in Aboriginal communities, has not kept pace. Policy has developed in a piecemeal, uncoordinated fashion, leaving gaps and disputes over jurisdiction and responsibility. Urban Aboriginal people have felt the effects socially — through unemployment, low wages and the like — and culturally, through systemic racism and a weakening or erasing of Aboriginal identity. The combination can be deadly.⁷⁶

If we accept that there is a real possibility that the distinctions the federal government creates among Aboriginal peoples on the basis of status and residency cannot be sustained – and that they ought not to be sustained because of the harm they have created among Aboriginal peoples – a reasonable, foresighted question would seem to be “What are the alternatives?” It is to that question that we will now turn.

III. Toward a Suitable Definition of Aboriginal Identity

The reclaiming of Aboriginal identity through self-determination, including reconceiving notions of identity, is a key factor in beginning to address the social ills that continue to plague Aboriginal people today. Luckily, there are some examples of Aboriginal peoples reconceiving notions of identity and reclaiming traditional modes of understanding who they are as Aboriginal people and how that was determined prior to the imposition of colonial definitions.

Comparisons from Other Settler States

In contrast to Canada’s continued reliance on determining identity by reference to the status rules of the colonial state, many other settler states have either never used the notions of race and descent to define who is an Aboriginal person or have long ago abandoned such notions. The only settler state with a comparable legislative regime – and comparable problems – to Canada’s is the United States.⁷⁷

existing health programs and services. All AHTF funded projects must be partnerships between the province’s regional health authorities and First Nations, Inuit or Métis organizations. Many of the funded projects have the goal of making the existing programs more culturally responsive to Aboriginal needs and priorities. Health Canada, 2008. Downloaded Oct. 23, 2009 from http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2008/2008_09bk1-eng.php

⁷⁶ Royal Commission on Aboriginal Peoples, Vol. 4, 612.

⁷⁷ As Margo Brownell describes it, “There is confusion at the core of efforts to define ‘Indian.’ The Census, for example, takes one approach; it allows individuals to self-identify as Indian by checking the racial category ‘Native American/Alaska Native.’ Other laws are more restrictive, requiring membership in a federally recognized Indian tribe, ‘Indian descent,’ one-half or one-quarter Indian blood, and/or residence on a reservation. This definitional landscape is further complicated by the fact that these criteria often conflict with tribal membership provisions. The untenable result of this situation is that an individual may be an ‘Indian’ for the purpose of receiving educational grants but not health benefits. Or, he may be eligible to be chief of this tribe but yet not an ‘Indian’ for the purposes of obtaining a Bureau of Indian Affairs (BIA) loan or an Indian scholarship to a state university.” Margo Brownell, “Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law” 34 *University of Michigan Journal of Law Reform* 275, at 277.

As is the case in Canada, there have been concerns about the constitutionality of these distinctions in the United States, thereby leaving the United States government with the same challenge as the Canadian government: to reconcile its concern with upholding the Constitution yet limiting its fiscal responsibilities, Aboriginal peoples' demands for greater self-determination, and the needs and rights of Aboriginal people who are not legislatively defined as "Indians" and have, therefore, largely been abandoned by federal Indian law.⁷⁸

On the other hand, the United States is more inclusive than Canada in most of its definitions of "Indian." As Brownell notes, the most influential definition of "Indian" is contained in the *Indian Reorganization Act* of 1934. This definition has three alternative ways in which an individual could be classified as an "Indian" for the purposes of the law: Indian descent and membership in a recognized Indian tribe, descent from any person residing on an Indian reservation on July 1, 1934, or anyone with one-half or more "Indian blood."⁷⁹ As well, due to concerns over the constitutionality of blood quantum rules and demands of Indian tribes for tribal sovereignty, the United States Congress, since the 1970s, has increasingly been using a purely political definition of "Indian" in which anyone who is a member of a recognized tribe is an Indian.⁸⁰

In contrast, neither New Zealand nor Australia legislate racial definitions of Aboriginality, so they do not encounter the conflicts that the Canadian and United States governments do. The New Zealand government, for example, has long accepted the Maori identity of anyone who self-identifies as Maori and either has a Maori ancestor or is accepted as Maori by their peers.⁸¹ Similarly, while the Australian government had widely used "blood quantum" criteria in defining who was an Aboriginal person in the nineteenth century and the first half of the twentieth century, these definitions were generally abandoned in the 1960s and 1970s.⁸² They were replaced first with a definition of an Aboriginal person as a person belonging to an Aboriginal race of Australia, the definition that remains most common in Australian legislation, despite its imprecision.⁸³ Later, a three part definition of an Aboriginal person as someone descended from the Aboriginal people of Australia, who self-identified as Aboriginal and who was accepted as Aboriginal by the Aboriginal community took root as the "working definition" of Aboriginal identity among Commonwealth departments and has appeared in some state legislation.⁸⁴ This definition was also accepted by the High Court of Australia to give meaning to the reference to

⁷⁸ *Ibid.* at 277-8.

⁷⁹ *Ibid.* at 284-5.

⁸⁰ *Ibid.* at 298-9. Though there are problems in the U.S. with federal non-recognition of some Aboriginal groups and the questionable exclusion of some individuals through restrictive tribal membership rules, as there are in Canada, a membership-based definition of "Indian" is generally more inclusive than the definition contained in the Canadian *Indian Act*.

⁸¹ Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: University of British Columbia Press, 1995), at 150-1.

⁸² John Gardiner-Garden, "The Definition of Aboriginality" *Research Note 18 2000-01* (Canberra: Parliament of Australia, 2000), <http://www.apf.gov.au/LIBRARY/pubs/rn/2000-01/01RN18.htm> accessed February 9, 2009.

⁸³ *Ibid.*

⁸⁴ *Ibid.* The same definition was used by the Supreme Court of Canada in the case of *R. v. Powley* to define who is a Métis, as will be discussed below.

“Aboriginal race” in the Australian constitution.⁸⁵ It should also be noted that the Australian courts have determined that the first part of this definition, descent, need not be proven by any strict legal standard, as identity is understood as a social construct.⁸⁶

The Definition of Métis

While these examples of “official” (i.e. settler state) recognition of self-determined definitions of identity provide useful guidance for imagining alternatives to the continued determination of who is an “Indian” by the Canadian federal government, one need not look that far afield for guidance. Because there is no statutory definition of Métis and no clear records (such as a registry) identifying who is included in the Métis community, both Métis people themselves and the Canadian courts have had to construct definitions of who is Métis. These definitions have generally been remarkably similar to the three-part definition that is increasingly being used in Australia to identify Aboriginal people.

Following the inclusion of Métis as an Aboriginal people in the *Constitution Act, 1982*, the Métis National Council (MNC) identified its criteria for determining whether a person was Métis in 1983 as follows:

- An Aboriginal people distinct from Indian and Inuit,
- Descendants of the historic Métis who evolved in what is now Western Canada as a people with a common political will. and,
- Descendants of those Aboriginal peoples who have been absorbed by the historic Métis.⁸⁷

In 2002, the Métis National Council adopted a working definition that was somewhat different from this original definition. It stated that Métis have a shared history, a common culture, a unique language (Michif, with various regional dialects), extensive kinship connections from Ontario westward, a distinct way of life, a traditional territory and a collective consciousness. They now define Métis as those people who self-identify as Métis; who are of historic Métis Nation ancestry (Ontario west); who are distinct from other Aboriginal peoples and are accepted by the Métis Nation.⁸⁸

Despite this national definition, provinces, regions and Métis locals continue to define Métis in different ways.⁸⁹ In addition, Métis communities do exist in central and eastern Canada and

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Métis National Council, 2002, <http://www.metisnation.ca> (accessed June 15, 2007).

⁸⁸ *Ibid.*

⁸⁹ For example, according to the Constitution passed in 1997, the Métis Nation - Saskatchewan, or MN-S defines a Métis person as “an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is one of the following: a descendant of those Métis who received or were entitled to receive land grants and/or Scrip under the provision of the *Manitoba Act, 1870* or the *Dominion Lands Act*, as enacted from time to time; or a person of Aboriginal descent who is accepted by the Métis Nation and/or Métis community. Any Métis who is a member of a duly registered local is a member of the Métis Nation – Saskatchewan.” Métis Nation – Saskatchewan, 1997, <http://www.metisnation-sask.com> (accessed June 22, 2007). The MN-S, to date, has not adopted the MNC national definition in its entirety, though the 1997 MN-S definition contains the same elements of ancestral connection, community acceptance and (at least implicitly) self-identification as the MNC definition. In contrast, the provinces

these communities reject the MNC's definition, largely because the MNC definition of Métis is limited to those communities that developed in the West as a consequence of the fur trade.⁹⁰ These definitions, too, focus on self-identification and ancestral connection to an Aboriginal identity distinct from Indians and Inuit.

More recently, a Supreme Court of Canada decision affirmed a three-part definition of Métis.⁹¹ The decision was the result of a long court battle beginning in 1993 when two Métis men in the Sault Ste. Marie area killed a moose without a licence and out of season. They asserted that they had a Métis right to hunt under section 35 of the Constitution. The two men were charged for hunting without a licence and unlawful possession of moose contrary to Ontario's *Game and Fish Act*. In 1998, the trial judge ruled that the accused had a Métis right to hunt according to s. 35 of the *Constitution Act, 1982*. The Crown appealed the decision in January 2000, and the Ontario Superior Court of Justice upheld the trial decision. The Crown then appealed to the Ontario Court of Appeal where the court unanimously upheld the earlier decisions, and confirmed that Métis people have an Aboriginal right to hunt. The Crown finally appealed to the Supreme Court of Canada where, in 2003, in a unanimous judgement, the court ruled that Métis people do have a right to hunt that is protected by s. 35 of the Constitution.⁹²

Although the Supreme Court's decision is restricted to the geographical location surrounding Sault Ste. Marie, it was the first time that Métis rights were affirmed by the Supreme Court of Canada and it thus sets a precedent for future challenges. Further, in their decision, the Supreme Court did not legally define "Métis" but they did note that the term Métis does not encompass all of those individuals with Indian and European ancestry, but refers to those "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears."⁹³ They go on to note: "In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance."⁹⁴

IV. Recommendation: A Three-Part Definition

Given the frequency with which this three-part definition of Aboriginal identity seems to appear, it is reasonable to assume that it provides a robust model to follow in developing an alternative to the current situation of the federal government defining who is an "Indian" and dividing Aboriginal people on the basis of, essentially, racial criteria. What would such an alternative look like, though? What are the policy implications for the federal government?

of British Columbia, Manitoba and Ontario have all adopted the MNC definition and have posted it on their websites.

⁹⁰ The Métis Nation in Quebec simply defines Métis as those who self-declare, who have both Aboriginal and non-Aboriginal ancestry and are from the province of Quebec; The Labrador Métis Nation recognizes those with Inuit, Métis and European ancestry who are from Labrador. Métis Nation of Quebec, 2006, <http://www.othermetis.net/Quebec/Quebec.html> (accessed June 22, 2007). Labrador Métis Nation, 2005, <http://www.labradormetis.ca/home/blog.php> (accessed Sept. 12, 2007).

⁹¹ Powley.

⁹² Powley, at paras. 7, 53.

⁹³ *Ibid.* at para. 10.

⁹⁴ *Ibid.* at para. 30.

For the federal government, the underlying principle should be to put an end to defining and dividing up Aboriginal people through the *Indian Act* and, instead, treat all Aboriginal people equally – except when differential treatment is justified because of the particular commitments made by the Crown to a particular group of Aboriginal people in the period between contact and effective European control of the territory.

The decision of the Newfoundland Court of Appeal in *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*⁹⁵ suggests that this may be a wise approach. In that case, the Labrador Métis Nation (LMN) challenged the refusal of the Government of Newfoundland and Labrador to consult with them on a highway construction project, claiming that this violated their aboriginal rights. The question of whether LMN members were Inuit, and therefore the holders of Inuit rights, or Métis, and therefore the holders of Métis rights, was raised but the Court decided that,

definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown's obligation to consult arises. All the respondents had to do was establish, as they did, certain essential facts sufficient to show a credible claim to aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not the case.⁹⁶

This conclusion suggests that distinctions made by governments among Aboriginal people need to be grounded in the Crown-Aboriginal relationship and not based on artificial definitions of people created by bureaucrats for administrative convenience. The federal government's obligations have their root in the relationship between the Crown and Aboriginal collectivities. A policy that recognizes, supports and encourages Aboriginal self-determination would provide that it is up to these collectivities themselves to determine who their members are.

This logic would lead the federal government to repeal those sections of the *Indian Act* that define who is a status Indian, to commit to providing all members of Aboriginal communities – whether Indian bands (both *Indian Act* bands and communities that are currently not recognized as bands), self-governing First Nations or Métis communities – with access to the programs, services and benefits provided by or funded by the federal government.⁹⁷ In conjunction with this approach, the federal government would turn over responsibility for defining membership to Aboriginal communities themselves, as an exercise in political self-determination. Because Aboriginal peoples have access to section 25 of the *Charter* to protect their exercise of Aboriginal rights from being undermined by the application of the *Charter*, they would have greater scope for defining community membership than does the federal government.

Section 25 of the *Charter* states that,

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to

⁹⁵ 2007 NLCA 75, 272 Nfld. & P.E.I.R. 178, 288 D.L.R. (4th) 641, [2008] 1 C.N.L.R. 48 (leave to appeal to Supreme Court of Canada refused, May 29, 2008).

⁹⁶ *Ibid.* at para. 39.

⁹⁷ The federal commitment to provide access to programs, services and benefits to all members is essential to avoid perverse incentives for Aboriginal communities to exclude people from membership in exercising their rights.

the aboriginal peoples of Canada including

- a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Bastarache J., in his concurring judgment in the recent *R. v. Kapp* case, has provided the first extensive analysis of the operation of section 25 from the Supreme Court of Canada.⁹⁸ While the majority signaled its concerns with aspects of Bastarache J.'s reasoning and cautioned that, "prudence suggests that these issues [of section 25 interpretation] are best left for resolution on a case-by-case basis,"⁹⁹ Bastarache J.'s judgment is helpful in reviewing section 25 jurisprudence to date and thinking about an approach to section 25 interpretation. He notes that, "[t]here is little case law on the issue, but the recent trend has been to see the protective feature in s. 25 as a 'shield' [against the finding of a *Charter* violation], as opposed to an 'interpretative prism' [which would interpret the meaning of *Charter* rights in an Aboriginal context]."¹⁰⁰ In support of this view, he quotes the British Columbia Supreme Court judgment in *Campbell v. British Columbia (Attorney General)*,¹⁰¹ noting that,

In *Campbell*, Williamson J. summarized the case law at that point as showing that "the section is meant to be a 'shield' which protects Aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*": para. 156. He further suggested that a purposive approach to s. 25 should be taken and that "the purpose of this section is to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*" (para. 158).¹⁰²

He also notes that virtually all academic commentators agree that section 25 operates as a shield.¹⁰³ If section 25 of the *Charter* is, indeed, a shield, an Aboriginal community that develops a membership code as an exercise of its section 35 aboriginal rights may be able to avoid some of the equality rights challenges to which the *Indian Act* status provisions have been subject.

As noted above, however, this shield is not absolute. Bastarache J., for his part, notes that section 28 of the *Charter* guarantees that all *Charter* rights are available equally to men and women, notwithstanding anything in the *Charter* (including section 25).¹⁰⁴ As well, section 35 of the *Constitution Act, 1982* itself ensures that Aboriginal and treaty rights are guaranteed equally to male and female persons.¹⁰⁵ Further, for a membership code to be a valid exercise of

⁹⁸ 2008 SCC 41, 294 D.L.R. (4th) 1, [2008] 3 C.N.L.R. 347. While Bastarache J.'s judgment is only a concurring judgment, it is the only extensive analysis of s. 25 from the Supreme Court of Canada. The majority judgment addressed s. 25 only briefly, suggesting that only rights of a "constitutional character" would benefit from s. 25 protection and expressing uncertainty over whether s. 25 constitutes a bar to a *Charter* claim or an interpretive provision, but without coming to a conclusion on this question. See paras. 63-4.

⁹⁹ *Ibid.*, at para. 65.

¹⁰⁰ *Ibid.* at para. 96.

¹⁰¹ [2000] 4 C.N.L.R. 1 (B.C.S.C.).

¹⁰² *Kapp*, at para. 96.

¹⁰³ *Ibid.* at para. 94.

¹⁰⁴ *Ibid.* at para. 97.

¹⁰⁵ Subsection 35(4) of the *Constitution Act, 1982* states that "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

an aboriginal right, it would have to have its source in pre-contact (or at least pre-“effective European control”) practices of the Aboriginal community.¹⁰⁶ This is likely to exclude an aboriginal rights justification for those membership codes, all too common since the passage of Bill C-31, that are designed primarily to limit the group with a right of membership in the community, as it seems unlikely that such limitations could be demonstrated to have a pre-contact source. If, however, Aboriginal communities were to develop membership codes that treated males and females equally, were grounded in the traditions of the communities and reflected the three factors of self-identification as a community member, ancestral connection to the historic Aboriginal community and acceptance by the modern community that the Supreme Court of Canada identified as indicia of Métis identity in the *Powley* case, s. 25 of the *Charter* would make it difficult for a Canadian court to overturn it in the name of protecting the general *Charter* right to equality.

This does not mean that the federal government or Aboriginal communities could no longer make distinctions among Aboriginal people in determining who could qualify for targeted federal programs. The critical difference between the proposed approach and the current approach is that, under the proposed one, the distinctions would have to be genuinely connected to the purpose of the program, the particular circumstances of the fiduciary or treaty relationship between the Crown and Aboriginal communities, or the needs of certain groups of Aboriginal individuals compared to others. The current formalistic distinctions that are made among Aboriginal peoples on the basis of “status” or residency could not continue to be used in limiting access to federal programs, services and benefits. This new approach would require federal officials to engage in greater analytical rigor in designing programs for Aboriginal peoples. Not only would it be more likely to be *Charter*-compliant, however, it could actually serve to slowly reverse the effects of colonialism, by supporting Aboriginal peoples in rebuilding their communities and recovering their traditions (and, in particular, re-establishing the traditional equality of men and women in Aboriginal societies).

Conclusion

If we accept that the effects of colonization and the inherent process of constructing identities has affected the health and well-being of Aboriginal people, then it is reasonable to assume that the process of reclaiming identity through reconceiving notions of identity will facilitate the healing of Aboriginal people. In fact, as noted above, reconceiving notions of identity can be seen as a form of self-determination – something guaranteed to Aboriginal people in the Constitution. Moreover, RCAP notes “The *Indian Act*, the centrepiece of federal legislation, continues to interfere profoundly in the lives, cultures and communities of First Nations peoples today. We believe there can be no real change within the confines of this act.”¹⁰⁷ RCAP goes on to say that whole health and well-being are linked to the ability to become self-governing and recommends forging new relationships and implementing the right of Aboriginal peoples to self-determination and self-government. We argue that reconceiving notions of Aboriginal identity is an act of self-determination and a necessary part of health and well-being both on individual and community levels.

¹⁰⁶ See, for example, *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 26-47; *Powley*, at paras. 15-18.

¹⁰⁷ Royal Commission on Aboriginal Peoples, Vol. 1, 601.

As can be seen from the evidence of connections among identity, self-determination and health presented above, some scholars are now turning to solutions to address the health and social disparities among Aboriginal people rooted in a process of reclamation of identity. Many scholars such as Johner, Carrier, Bourassa and Wilson argue that the reclaiming or reconceiving of Aboriginal identity is in itself a healing process. In order to become healthy or “whole,” Aboriginal people must restore balance and harmony to their lives and to their communities.¹⁰⁸

While part of this process is an individual healing journey, it must be guided and supported by good public policy. We argue that there are many national and international examples that can guide the reclamation process. Healing and reclamation of identity is starting to occur among Aboriginal people across Canada. This is an act of self-determination but, in order to be successful, colonial remnants that can hinder this process at the community level must be removed. Canada is coming to a crossroads and action must be taken soon. We know that Aboriginal health and well-being continues to lag behind non-Aboriginal Canadians’ and the gaps we see between Aboriginal and non-Aboriginal people have not been closed, despite many attempts by all forms of governments, including Aboriginal governments, to do so. It is clear to us that the only path to health, well-being and equality for Aboriginal people is through this process of reclamation – this process of reconceiving Aboriginal identity. It is also becoming increasingly likely, as distinctions among Aboriginal peoples are subject to constitutional challenges – many of which are succeeding – that the process of state imposition of definitions of identity through legislation will prove to be unsustainable. It is the government’s responsibility to bring this colonial process to an end and assist the process of achieving self-determination and, ultimately, improved health and well-being by upholding the Aboriginal and treaty rights entrenched in the Constitution. It is time to forge a new relationship based on mutual respect and equality. This cannot be achieved so long as colonial structures continue to affect the daily lives of Aboriginal people.

¹⁰⁸ J. Carriere, “Maintaining Identities: The Soul Work of Adoption and Aboriginal Children”, *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 6(1), 2008, 69-70; C. Bourassa, M. Hampton and K. McKay-McNabb, “Racism, Sexism and Colonialism: The Impact on the Health of Aboriginal Women”. In *Canadian Woman Studies: An Introductory Reader* (Toronto: Inanna Publications, 2006), 542-544.

Appendix A

Table 1. CIHI Custom Tabulation: Education, Work Status, and Income, Aboriginal and Non-Aboriginal Canadians (based on 2001 Census data).

	Aboriginal Peoples	Non-Aboriginal Canadians	First Nations	Inuit	Métis
Highest Degree, Certificate or Diploma (% 15 Years and Over)					
No Degree, Certificate or Diploma	52	33	55	66	46
High School Graduation Certificate	18	23	17	11	20
Trades or College Graduation (or Univ Cert. Below Bachelor's)	25	29	24	21	28
Bachelor's Degree Graduation	4.4	16	4.1	1.9	5.3
Work Status (% 15 Years and Over)					
Unemployment Rate	19	7	22	22	14
Worked Full Year, Full Time	26	37	23	23	31
Income (% 15 Years and Over)					
Low Income in 2000	34	16	40	24	28

Source: *Improving the Health of Canadians*, Canadian Institute for Health Information (CIHI) 2004, p. 85.

Bibliography

Archival sources:

An Act for the better protection of the Lands and Property of the Indians in Lower Canada, S. Prov. C. 1850, c. 42 (13 Vic., c. 42).

An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, S. Prov. C. 1857, c. 26 (20 Vic., c. 26).

An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada, S. Prov. C. 1851, c. 59 (14 Vic., c. 59).

Indian Act, 1951 (Can.), c. 29.

Printed sources:

Adams, Howard, *Tortured People: The Politics of Colonization (Revised Edition)* (Penticton: Theytus Books Ltd., 1999).

Adelson, Naomi, *Reducing Health Disparities and Promoting Equity for Vulnerable Populations. Aboriginal Canada: Synthesis Paper*. (Toronto: York University, 2004).

Andersen, Chris, "The Formalization of Métis Identities in Canadian Provincial Courts," *Expressions in Canadian Native Studies* (Saskatoon: University of Saskatchewan Extension Press, 2000), 95-115.

Anderson, Ian, Baum, Fran, and Bently, Michael. *Beyond Band-aids: Exploring the Underlying Social Determinants of Aboriginal Health: Papers from the Social Determinants of Health Workshop*. (University of Tasmania: Australia, 2007).

Armitage, Andrew, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: University of British Columbia Press, 1995).

Bourassa, Carrie, Hampton, Mary and McKay-McNabb, Kim, "Racism, Sexism and Colonialism: The Impact on the Health of Aboriginal Women". *Canadian Woman Studies: An Introductory Reader* (Toronto: Inanna Publications, 2006).

Bourassa, Carrie, "Colonization, Racism and the Health of Indian People". *Prairie Forum*, 2004, 29, No. 2, 207-224.

Bourgeault, Ron. 1988. "Race and Class Under Mercantilism," in Bolaria, Singh B. and Li, Peter S. (eds.) *Racial Oppression in Canada* (Toronto: Garamond Press, 1988), 45-70.

- Brownell, Margo, "Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law" 34 *University of Michigan Journal of Law Reform* 275.
- Callihou v. Canada (Minister of Indian Affairs and Northern Development)*, 2006 ABQB 1, 56 Alta. L.R. (4th) 301, [2006] 4 C.N.L.R. 20.
- Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.).
- Canadian Institute for Health Information, *Improving the Health of Canadians* (Ottawa: Canadian Institute for Health Information, 2004).
- Canadian Research Institute for the Advancement of Women, "CRIAW fact sheet, Women's experience of racism: How race and gender interact," <http://www.criaw-icref.ca> (accessed Retrieved January 27, 2005).
- Carriere, Jeannine, "Maintaining Identities: The Soul Work of Adoption and Aboriginal Children", *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 6(1), (2008): 69-70.
- Cherland, M. and Harper H., *Advocacy Research in Literacy Education: Seeking Higher Ground* (New Jersey: Lawrence Erlbaum, 2007).
- Clifton v. Hartley Bay (Electoral Officer)*, 2005 FC 1030, [2006] 2 F.C.R. 24, [2005] 4 C.N.L.R. 161 (F.C.T.D.).
- Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
- Day, Tannis, *The Health Care Sector's Response to Woman Abuse: The Tip of the Iceberg* (London, ON: Centre for Research on Violence against Women and Children, 1995).
- Elias, Peter Douglas, *The Dakota of the Canadian Northwest: Lessons for Survival* (Regina: Canadian Plains Research Centre, 2002).
- Esquega v. Canada (Attorney General)*, 2007 FC 878, [2008] 1 F.C.R. 795 (F.C.T.D.).
- Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115, [2003] 4 F.C. 1133 (F.C.T.D.).
- Gardiner-Garden, John, "The Definition of Aboriginality" *Research Note 18 2000-01* (Canberra: Parliament of Australia, 2000), <http://www.aph.gov.au/LIBRARY/pubs/rn/2000-01/01RN18.htm> accessed February 9, 2009.
- Grammond, Sébastien, "Disentangling 'Race' and Indigenous Status: The Role of Ethnicity" 33 *Queen's Law Journal* 3.
- Green, Joyce, "Deconlonization and Recolonization in Canada", *Changing Canada:*

- Political Economy as Transformation* (McGill: Queen's University Press, 2003), 51-77
- Green, Joyce, "Towards a Détente With History: Confronting Canada's Colonial Legacy", *International Journal of Canadian Studies*, 12, 91-102.
- Grismer v. Squamish First Nation*, 2006 FC 1088, [2007] 1 C.N.L.R. 146 (F.C.T.D.).
- Health Council of Canada, *The Health Status of Canada's First Nations, Métis and Inuit Peoples* (Toronto: Health Council of Canada, 2005).
- Indian and Northern Affairs Canada, <http://www.ainc-inac.gc.ca/interloc> (accessed September 17, 2005).
- Johner, R., Gingrich, P., Jeffery, B., and Maslany, G. "Does Aboriginal Identity Make a Difference? Single Mothers and Exclusion in Health" *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 6(1), 2008, 140-142.
- Kelm, Mary-Ellen, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia 1900-50* (Vancouver: UBC Press, 2001).
- Kubik, Wendee, Bourassa, Carrie and Hampton, Mary. "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada" *Humanity & Society* (2009, Vol. 33, Nos. 1 and 2, Feb/May), 19, 22-27.
- Labrador Métis Nation, 2005, <http://www.labradormetis.ca/home/blog.php> (accessed Sept. 12, 2007).
- Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 272 Nfld. & P.E.I.R. 178, 288 D.L.R. (4th) 641, [2008] 1 C.N.L.R. 48 (leave to appeal to Supreme Court of Canada refused, May 29, 2008).
- Lamouche, James, *Environmental Scan of Métis Health Information, Initiatives and Programs* (Ottawa: National Aboriginal Health Organization, 2002).
- Lovelace v. Ontario*, [2000] 1 S.C.R. 950.
- Manitoba Aboriginal Affairs Secretariat, "Aboriginal People in Manitoba" <http://www.gov.mb.ca/ana/apm2000/> (accessed June 15, 2007).
- McIvor v. The Registrar*, Indian and Northern Affairs Canada, 2007 BCSC 827, [2007] 3 C.N.L.R. 72.
- Métis Nation – Saskatchewan, 1997, <http://www.metisnation-sask.com> (accessed June 22, 2007).
- Métis Nation of Quebec, 2006, <http://www.othermetis.net/Quebec/Quebec.html> (accessed June 22, 2007).

- Micmac First Nation v. Canada (Minister of Indian and Northern Affairs)*, 2007 FC 1036, [2008] 1 C.N.L.R. 65 (F.C.T.D.).
- Misquadis v. Canada (Attorney General)*, 2003 FCA 473, [2004] 2 F.C. 108.
- Métis National Council, *Canada-Aboriginal Peoples Roundtable Sectoral Sessions Policy Papers* (Ottawa: Métis National Council, 2005).
- Native Women's Association of Canada, *Background Paper – Aboriginal Women's Health Canada – Aboriginal Peoples' Roundtable Health Sectoral Session* (Ottawa: Ontario, 2004).
- Ochapowace Indian Band v. Saskatchewan (Department of Community Resources)*, [2007] 2 C.N.L.R. 261 (Sask. Q.B.); [2008] 3 C.N.L.R. 288 (Sask. C.A.).
- Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2007 ABQB 517, 81 Alta. L.R. (4th) 28, [2007] 4 C.N.L.R. 179.
- R. v. Kapp*, 2008 SCC 41, 294 D.L.R. (4th) 1, [2008] 3 C.N.L.R. 347.
- R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207.
- R. v. Watier*, [2000] 2 C.N.L.R. 269 (Sask. Prov. Ct.).
- Romanow, Roy, *Commission on the Future of Health Care in Canada* (Ottawa: Health Canada, 2002).
- Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Supply and Services Canada, 1996).
- Said, Edward, *Culture and Imperialism* (New York: Vintage Books, 1993).
- Schouls, Tim, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory and the Politics of Self-Government*, (Vancouver: UBC Press, 2003), 40.
- Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 F.C. 513, [2000] 1 C.N.L.R. 205 (F.C.T.D.).
- Smylie, Janet "A Guide for Health Professionals Working with Aboriginal Peoples: Health Issues Affecting Aboriginal Peoples" *Journal of the Society of Obstetricians and Gynaecologists of Canada*, 23 (1) (2001): 56.
- Statistics Canada, *Métis in Canada: Selected Findings of the 2006 Census*, (Ottawa: Statistics Canada, 2008).
- Statistics Canada, *2001 Census Handbook – Reference*, (Ottawa: Statistics Canada, 2002).

Warry, Wayne. *Ending Denial: Understanding Aboriginal Issues* (Toronto: Broadview Press 2007).

Wilson, Alex. *Living Well: Aboriginal Women, Cultural Identity and Wellness*. (Manitoba: Prairie Women's Centre of Excellence, 2004).

Wotherspoon, T. and Satzewich, V. (eds.), *First Nations: Race, Class and Gender Relations* (Regina: Canadian Plains Research Centre, 2000).