FROM THEORY TO PRACTICE: THE CANADIAN COURTS AND THE ADJUDICATION OF [POST-MODERN] IDENTITIES

by

CARA MCGREGOR

B.A. (Hons.), The University of Victoria, 2002

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in

THE FACULTY OF GRADUATE STUDIES

(Department of Political Science)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

September 2004

Library Authorization

In presenting this thesis in partial fulfillment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Cara McGregor — Name of Author *(please print)*

Sep 9/2004 — Date (dd/mm/yyyy)

Title of Thesis: From Theory to Practice: The Canadian Courts and the Adjudication of [Post-Modern] Identities

Degree: Master of Arts Year: 2004

Department of Political Science
The University of British Columbia
Vancouver, BC Canada

Abstract

In this work, I introduce the concept of identity, outline its importance, and argue in favour of a post-modern conception of identity, underpinned by the principles of contestation, anti-essentialism and hybridity. This notion of identity, which is supported by both theoretical and case evidence, is in tension with the practices of the courts, which are often asked to make determinations that impact identities. The court's conventions and practices privilege a modernist notion of identity; given these restrictions, how are post-modern identities, such as the Metis, to be recognized? Using the case of R v. Powley, *I explore the possibilities and openings for a post-modern concept of identity to be realized in the courts. While there are conflicts and restrictions, judges, courts and the law demonstrate sufficient flexibility to allow for post-modern principles to be realized. I conclude by arguing that the courts should go further in developing a post-modern conception of identity in their work, and explore the issues and implications of doing so. I also reflect on the broader question this work presents, namely the role of the law and the possibilities for change therein.*

Table of Contents

Preface

This is "me."[1] I am 24 years old. I am female. I am a Canadian citizen. My family's heritage is primarily Scottish and French (my father's side) and English (my mother's side). I also have some Aboriginal ties – my mother's father was part Cree, and my father's father also claims aboriginal familial ties by way of the Robillard name. I have an adopted uncle, who is Cree, an aunt who is Métis, and my two cousins are Métis also. I am not sure if these relations make me Métis, part Cree or just 'mostly' white. I am a student, a musician, and a person concerned with social justice. I am a feminist, a political theorist, a student, and I am temporarily employed. I am all of these things in no particular order.

Some of these things, like my family history, will never change. But some things might – my status as a student, my political views, or my citizenship. Which of these characteristics is most important to my identity? I'm not really sure. I know that right now, my political beliefs determine a lot about how I see the world around me, and my place within it. Then again, so does the experience of being female, being feminist, and being young. Maybe I have multiple identities? If I were to sit down 5-10 years from now and write out all of the things that I am (or see myself as being), how many of the qualities that I have outlined here will change? Again, I don't really know. But I hope they do – I see change as growth.

---

[1] At the outset of this substantial work, I feel it is important to locate myself, my privileges and my politics. In doing so, I acknowledge that these locations are important inputs into my perspective and my writing. Post-modern and post-colonial theorists, such as Edward Said, have highlighted this important element of claims to knowledge (Said, 5). Further, I accept that my thoughts and words on the matter of identity are only one possible exploration of these terms among many. Feminist authors such as Donna Haraway have written about such situated knowledges, "where partiality and not universality is the condition of being heard to make rational knowledge claims" (Haraway, 195). Finally, in identifying myself in this way, I do not purport to be representative of or essentialize these categories.

1. Theories of Identity: From Modern to Post-Modern

Introduction

Identity is the process by which we assert (and become) who we "are." This is a complex and multifaceted phenomenon, influenced by both internal and external factors, by ourselves and by Others. It is a concept that allows us to claim a space and a voice in the world, as well as a process by which we are located, grounded and spoken *of* (Hall 1995, 65; 1996a, 5-6). Identity is the ongoing practice of identifying meaning, experience, feeling, interaction, and intersection – it is as much about who we will become as it is about who we are. It is also a marker of who we are *not*, allowing us to distinguish ourselves from Others in both positive and negative ways. There are a wide variety of categories of identity that can be claimed or assigned, including gender, race, ethnicity, sexual orientation, class, disability, and all the intersections in between.

Growing attention has been placed on the concept of identity in recent years (Eisenberg, 48). An ever-increasing number of people perceive identity to be the primary site of struggle in today's world (Grossberg, 87). Further, in recent years identity has replaced class as the primary perspective through which political relations are viewed and interpreted (Du Gay et al., 1). Given these developments, it is not surprising that identity has become a major topic of interest in political science. Identity has proven itself to be both an interesting and fruitful concept, without which certain ideas could not be explored (Hall 1996a, 2). Indeed, the concept of identity allows us as theorists to ask interesting questions about the relationship between the self, society and the political. These questions range from issues of representation, recognition and intergroup dialogue

to questions of the cognition, formulation, structure and function of identities. It is this latter group of questions about the *nature of identity* that I wish to explore.

There are a number of theoretical perspectives on the constitution of identity, each proposing a particular conception of the self, from which notions of the nature and construction of identity emerge. In this chapter, I argue for the adoption of a *post-modern* conception of identity, which emphasizes the principles of contestation, anti-essentialism, and hybridity. I accomplish this by reviewing competing (modernist) notions of identity and outlining the challenge that post-modernism presents to these theories. Using the Métis as a case example, I will demonstrate how a post-modern notion of identity is both theoretically and practically relevant.

Theories of Identity: From Modern to Post-Modern

There are a number of different perspectives with regard to the constitution of identity. These conceptions vary from lifelong unified wholes to fragmented, volatile and fragile subjects. To review these ideas, I have adopted Stuart Hall's schema of identity theory, which consists of three categories: the Enlightenment, Sociological and the Post-Modern.[1] Each of these perspectives put forward a competing vision of the self and identity, which I will briefly explore. My focus, however, will be on elaborating on the post-modern approach and the challenge it poses to competing (modernist) notions of identity.[2]

---

[1] It is important to note that these categories, while helpful, are somewhat simplistic. Further, none of these categories are homogenous – there are debates within these groups regarding the constitution of identity. That being said, Hall's schema serves as useful and thorough guide for the purposes of my work.

[2] Hall's focus is on the historical and chronological development of these theories, emphasizing the ideas, challenges and social forces that allowed for development of new identity theory. He thus describes the fragmented, hybrid post-modern subject as a recent phenomenon – a product of late-modernity. Hall is correct to draw our attention to the emergence of the fragmented subject in this period, however, I argue

The Enlightenment subject is a centered, unified individual with the capacity for reason and action. With the concept of the sovereign individual as its foundation (Hall 1992, 282), the Enlightenment conception emphasizes a singular and indivisible person with identity at their innermost core. This means that identity is a single or unitary entity, with a focus on the internal processes of identity generation and development (275). Early modern philosophers, such as Rene Descartes and John Locke are prominent examples of this tradition.[3]

The Sociological approach proposes an alternative model to that established by the Enlightenment theorists. While sociologists accepted the notion of the sovereign individual, their focus was the relationship between that individual and the web of social and institutional processes that surround them (284). Moving away from the Enlightenment's focus on internal development, proponents of the Sociological subject argue that identity is the product of our *outside* interactions with the world; the values, signs and symbols to which we are exposed daily have a demonstrable impact on how our identity will unfold (275). The Sociological subject thus retains the unitary, inner core of identity, however their focus is the impact of social, economic and political processes on identity development. Hall emphasizes the role of sociologists such as G.H. Mead, Talcott Parsons and Charles Cooley in developing this notion of identity (284);

---

that the subject has *always* been hybrid and fluid; the fragmented, mixed and shifting self has been overshadowed, disciplined and regulated by forces such as science, religion, state and society. Post-modernity is merely a phase in which hybridity, fluidity and fragmentation has been drawn out and celebrated. Thus, while Hall's project is to describe these different phases of thought on identity, my project is single out post-modern identity theory and the reasons why it is the *correct* conception – one important reason being that identity has taken this shape all along.

[3] Locke's discussion of the "sameness of rational being" is an excellent early work in which Locke theorizes the essence of personal identity. See An Essay Concerning Human Understanding at Book II, Ch. 27, especially para. 9. (Hall, 283)

political theorists such as Charles Taylor have demonstrated the continued salience of this perspective.[4]

Both the Enlightenment and Sociological approaches represent a modernist approach to the self and identity in that they privilege universality, unity, rationality and truth (Best and Kellner, 5). Several consequences follow from this with regard to identity. First, in both the Enlightenment and Sociological conceptions, identity is theorized as the development of a subject's innermost self. This means that identity is on a fixed, singular and continuous trajectory that begins at birth and carries on until death. Second, their theories promote a unitary identity – in theorizing the existence of an inner core, the Enlightenment and Sociological perspectives conceive of identity as of a single, unified entity. Third, each of these theories is based on the concept of a rational and sovereign individual. This suggests that identity is based upon conscious processes and individual agency.

The Post-modern subject challenges each of these theories, and the modernist tradition they represent, by fundamentally reconceptualizing the nature of the self and identity. Post-modernists argue that the developments of the late 20th century, including globalization and rapid technological change, has produced both a fragmented and decentred subject (Best and Kellner, 3). Institutions and cultures to which we have attached our identities are shifting and, in some cases, falling apart. Further, we are confronted in modern times with a growing number of cultures, values and meanings;

[4] In his essay "Multiculturalism and the Politics of Recognition," Charles Taylor claims that identities are shaped by dialogues with external others: "Thus my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others ... My own identity crucially depends on my dialogical relations with others" (Taylor, 34). This is not to say that all of Taylor's work is consistent with the Sociological perspective – his broader work on identity can be interpreted as straddling the modern and post-modern categories.

subjects are faced with the choice of a "fleeting multiplicity of possible identities." (Hall 1992, 277) The result is an environment in which no institution or position is stable – in fact, post-modern identity appears inherently *unstable*. Post-modernism challenges the rational being at the centre of modernist theories, arguing that identities are shaped by processes beyond the control of the subject (286). The post-modern conception thus proposes an increasingly complex model of identity, characterized by fluidity, fragmentation, transformation and multiplicity. The notion of a fixed, essential or permanent identity is fantasy; post-modernists argue that identities are multiple, intersecting, and are continually undergoing deconstruction, reconstruction and change (277). Post-modern theories of identity have been influenced by a diverse number of theoretical traditions, including marxism, feminism, psychoanalysis and linguistics (286-88).

Post-modernism has challenged and displaced modernist theories by acting as a vocal critic of these theories while also proposing new and fundamentally different ideas (Best and Kellner, 32). This also holds true for discourses on identity; post-modern identity theorists push the boundaries of earlier conceptions and challenge us to embrace identity's rich and complex processes. Stuart Hall's discussion of identity is an excellent example of such an approach:

> ... [My] concept of identity does *not* signal that stable core of the self, unfolding from beginning to end through all the vicissitudes of history without change; the bit of the self which remains always-already 'the same', identical to itself across time. Nor ... is it that 'collective or true self hiding inside the many other, more superficial or artificially imposed "selves" which a people with a shared history and ancestry hold in common' and which can stabilize, fix or guarantee as unchanging 'oneness' or cultural belongingness underlying all the other superficial differences. It accepts that identities are never unified and, in late modern times, increasingly fragmented and fractured; never singular but multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions. They are subject to a radical historicization, and are constantly in the process of change and transformation. (Hall 1996a, 3-4)

Hall's description presents us with a complex notion of identity that represents fluidity, transformation, and change. It is resistant to any attempts to fix, bound or otherwise permanently locate identity. Further, it allows for the recognition of multiple, intersecting identities as well as the process of *becoming*, of taking on new identities and identity positions.

Some post-modern theorists, such as Judith Butler, develop these theories of identity in order to displace dominant modes of thinking. In her analysis of feminism and the norms of gender identity, Butler proposes a theory of performativity, which argues that identities do not exist outside of our actions in the world: "There is no gender identity behind the expressions of gender ... identity is performatively constituted by the very "expressions" that are said to be its results" (Butler, 25). The illusion of a coherent and continuous identity is perpetuated by the regulation of identity performance within cultures and societies, performances that are naturalized and subject to multiple matrices of power. (Butler, 23 and 151). Ultimately, Butler's theory of performative identities seeks to displace the stifling discourse on gender identity and open up alternate possibilities of identification beyond the binary categories of male and female. She thus challenges modernist thinkers (including some feminist theorists) to reconsider their conception of identity, proposing an alternative, transformative vision of identity for the future.

Still others have used post-modern concepts of identity and culture[5] to develop solutions for problems of the contemporary polity. In Strange Multiplicity:

[5] Seyla Benhabib provides us with an interesting discussion of the close relationship between these two terms: "Culture has become a ubiquitous synonym for identity, an identity marker and differentiator. Of course, culture has always been the mark of social distinction. What is novel is that groups now forming around such identity markers demand legal recognition and resource allocations from the state and its

Constitutionalism in an Age of Diversity, Jim Tully outlines the challenge of cultural recognition that faces contemporary constitutional states. A multitude of different groups are seeking recognition, including linguistic minorities, multicultural groups, women and aboriginal peoples (Tully 1995, 6). Their demands are seen to be competing and conflictual – how are they to be justly accommodated in contemporary constitutional frameworks? The traditional, liberal constitutionalism is resistant to this type of recognition for several reasons, including its erroneous modernist assumptions about the nature of cultural identity (10), and its belief that all cultural identities ought to be treated the same way in a constitutional forum (8). Tully argues for a reconceptualization of the constitutional relationship, emphasizing recognition of the diversity of cultural identities and experiences, and that a common ground between groups can be found, through which cross-cultural dialogue, understanding and most importantly, a just constitutional order can be achieved (14). Using Bill Reid's *Spirit of Haida Gwaii*, Tully demonstrates what such an order might look like, emphasizing the accommodation and understanding of different perspectives, stories, narratives, arguments and identities. Despite the multiplicity of views, goals and voices, the boat does not capsize; instead it moves in unison, gliding "harmoniously into the dawn of the twenty-first century" (28). This suggests that a renegotiation, with post-modern principles of culture and identity at the centre, is possible within the confines of a reconceptualized constitutionalism.

Seyla Benhabib's work, like Tully's, is focussed on the increasing demands for recognition based on cultural identity. Her concern, however, is with the ability of democratic processes to interface with complex cultural identities. Benhabib envisions

---

agencies to preserve and protect their cultural specificities. Identity politics draws the state into culture wars" (Benhabib, 1).

cultural identities as inherent sites of contestation, fuelled by competing narrative accounts from within (Benhabib, 5). These struggles spill over into the public sphere, where struggles over meaning translate into struggles for recognition and selfhood (8). Our current democratic model does not recognize these differences, focusing instead on the false fixity, coherence and unity of cultures. Cultural identities are thus falsely homogenized and unified, which restricts the democratic practices of those who do not conform to this understanding of culture and identity. Benhabib argues that democratic equality demands impartial public institutions, where these struggles and cultural differences can take place (8). In recognizing the fluidity of cultures and rejecting previous false assumptions, "new modalities of pluralist cultural coexistence can be imagined" (184). At the centre of Benhabib's challenge to democratic theory is the prevalence of modernist notions of culture and identity; in challenging these concepts, she opens up new possibilities for democratic dialogue.[6]

Elements of a Post-Modern Theory of Identity

It is clear from the above examples that post-modern identities are complex and multilayered conceptions. To some, they are also very elusive conceptions that are difficult to pin down. What makes a post-modern conception of identity post-modern? And what contribution do these conceptions provide to our understanding of identity? To provide some conceptual clarity, I will outline what I see as the three key principles that underpin post-modern theories of identity – contestation, anti-essentialism and

[6] For an excellent discussion of The Claims of Culture and its theoretical implications, see the exchange between Pensky, Peritz and Benhabib in *Constellations* 11:2 (2004) pp. 258-299.

hybridity.[7] To this end, I will provide an overview of these principles, examples from particular authors, and a discussion of their contribution to a post-modern theory of identity.[8]

Contestation

Contestation can be described as an emphasis on competing perspectives, such as narratives and counternarratives, with regard to the meanings associated with identity. When group members are challenged in claiming an identity, when members push for (or against) a shift in meaning, or when individuals claim unfair exclusion from an identity category, contestation of identity is likely a factor. While conflict over identity signals contestation, not all contestation is conflictual; contestation can also be identified as the *presence* of competing perspectives with regard to the meaning and practices associated with a particular identity. Contestation can thus be as subtle as the retelling of an important story or myth, or as strong as denouncing and/or modifying particular practices.

In her work, The Claims of Culture: Equality and Diversity in the Global Era, Seyla Benhabib proposes that contested narratives are at the root of culture. She argues that culture is realized through these narrative accounts for two reasons. First, "we identify *what* we do by an *account* of what we do" (6). In other words, all participants in a culture are engaged in interpreting both what they do and why they do it. These

[7] These principles, while each contributing to the post-modern conception of identity, are in tension. For example, conceptualizing of hybrid identities as unique mixings of cultures and identities conflicts with the principle of anti-essentialism. Similarly, a borderless, anti-essentialist conception of identity may impede the ability to discuss group identities. These are important tensions to expose and understand; despite these conflicts however, these principles come together to underpin the post-modern conception of identity.

[8] In outlining these principles, I am in no way suggesting that these are "essential" elements of a post-modern conception of identity. Instead, I am arguing that these principles, together or in combination, appear in the work of many post-modern identity theorists.

different accounts of what and why come into conflict; these conflicts help to shape the meanings and symbols of that culture. Second, we live amongst a web of narratives, of which we make evaluations (good, bad, pure, impure) daily. The exchange and conflict between these competing narratives culminate to form the "horizon" of culture and identity (7). Benhabib's theory casts culture and identity as the practice of competing perspectives, each of which has its own view of the meaning of particular symbols, acts and practices. Benhabib thus demonstrates the value of taking contestation seriously – it allows for the exploration of the very interactions that fundamentally shape cultures and identities.

Contestation is consistent with post-modern theory in that it promotes the principles of partial perspective and critical engagement. Theory and theorists, it is argued, can only provide for one particular perspective on an object or issue (Best and Kellner, 4). This is because within post-modernism, there is emphasis on how subjects are situated (and in some cases limited) by their historical, cultural or linguistic location. As such, their conception is only one among many possible others. This encourages people to be aware of their surroundings and locations, as well as avoiding attempts at universalization or generalization. It is also hoped that contestation and attention to contestation will encourage a transformation of knowledge. As Donna Haraway states: "...I want to argue for a doctrine and practice of objectivity that privileges contestation, deconstruction, passionate construction, webbed connections, and hope for transformation of systems of knowledge and ways of seeing" (Haraway, 191-92). For Haraway, bringing contestation forward is a move that allows for the transformation of knowledge – what we think we know about the world, and how it fits together.

Second, contestation is consistent with the principle of critical inquiry. In focusing on contestation, one promotes attention to the struggles for meaning and the relations of power that permeate these relationships. Contestation is one such mechanism for analysis of contests and dialogues, which can be critically examined with regard to the formulation and reformulation of identity. Focusing on contestation allows us to probe competing understandings/meanings (where is/are the challenge(s) located?), theorize about how these contests have played out (was there a 'winner'? What has changed?), and the consequences of reformulation (who is eligible to claim this identity? Who is not?). Further, this approach allows us to engage with the relations of power that inform this process – when a particular notion of identity or meaning prevails or is overtaken, we can ask "Who benefits?" or if (how?) dominant voices/forces played a role in the identity outcome.

Taking contestation seriously contributes to a post-modern conception of identity in that it promotes the idea of transformation and change, and supports the concept of heterogeneity of identities or communities of identity. Contestation is an ongoing practice that emphasizes continual shifts and change in both the content and meanings of identities. It also highlights how identity is not necessarily uniform across populations; there are important variations from within that promote a heterogeneous view of shared cultures and identities.

Anti-essentialism

Essentialism is the belief that there is something *essential, intrinsic* or *shared* about the experience of a person or group of persons; if any of those essential elements were removed, that person or group would no longer be the same. Anti-essentialism resists this impulse to define, pin down or otherwise fix concepts. It also entails resistance to universalizing or generalizing experiences (Squires, 67). For example, rather than discussing "women's experiences" or "women's issues," anti-essentialists instead focus on the different experiences, locations, identities and contexts of women, and how those particulars contribute to the issue at hand. An anti-essentialist approach to identity would resist labelling, taxonomizing or otherwise defining any central or essential components, instead emphasizing the nature of one's identity as a shifting and changing entity.

It is important to distinguish the anti-essentialist perspective from critics of essentialism. For example, in discussion of gender essentialism in feminist theory, essentialist thinking is challenged by social constructionism. Judith Squires provides a succinct description of the difference between these two perspectives: "Whereas the essentialist would assume the natural to be determining of social and political practices, the constructionist would argue the natural itself to be a construction of the social and/or political" (66). While social constructionists critique the perspective of essentialism in gender analysis, they may also be guilty of essentialist thinking themselves. Squires correctly points out how in theorizing the historical or social construction of female essence, constructivist theory is inconsistent with anti-essentialist principles (67). Thus, anti-essentialism is more than a critique of essentialist thinking – it is a commitment to

eschew categorical and universal analysis or assumptions, to resist the naturalization of identities, and to theorize without invoking central or essential claims against any identity, person or culture.

This is a challenging task, but it is not without its benefits; an anti-essentialist notion of identity provides for several important conceptual shifts. First and foremost, it obliterates the boundaries of identity. It eliminates the rigidity of definition in favour of fluid states of being, where identities are not required to adhere to particular standards or rules in order to be recognized. Second, it reinforces the idea of the heterogeneity of groups. At first glance, such a strategy may appear to be divisive to a community of persons; however, as Lily Mendoza points out, as anti-essentialists identify and engage with difference and critical analysis, they enable the political solidarity of groups and identities (Mendoza, 240). Third, anti-essentialism opens up the possibility of shifting and changing identities. There is no key notions, themes or practices that must be adhered to, thus an anti-essentialist perspective reinforces the capacity for change. In this sense, anti-essentialism and contestation go hand in hand – one promotes the openness to and possibility for change, the other provides one means by which to promote and enact those changes.

The above discussion reflects how anti-essentialism is consistent with post-modern accounts of identity; however, not all post-modernists are anti-essentialist. Some authors in this tradition believe in the value of *strategic essentialism*, a process by which individuals assume essentialist categories in order to challenge dominant modes of thinking (Macey, 115). For example, Gayatri Spivak argues that the current situation is one where essentialism is inescapable; and while it is good to be anti-essentialist, one

must also recognize that eradicating essentialism is an unattainable feat. As we are impossibly committed to these concepts, we ought to use these categories as departure points from which to critique the world around us: "Since the moment of essentializing ... is irreducible, let us at least situate it at the moment, let us become vigilant about our own practice and use it as much as we can rather than make the totally counter-productive gesture of repudiating it" (Spivak, 11). Spivak argues that those who insist on stripping themselves of essentialist positions gain theoretical purity at the expense of the struggle against dominant discourses (12).

Spivak and others[9] give the impression that adopting an anti-essentialist viewpoint results in disengagement from the political debates and struggles of the day. I disagree with this characterization; in taking up an anti-essentialist standpoint, one is fundamentally engaging with the political. In fact, I would argue that to naturalize the position of essentialism in identity politics, as Spivak does, takes us away from the most important and fundamental questions of identity – questions that are highly *political*. Critical engagement in these political struggles is thus required if anti-essentialist critiques of identity are to be recognized – for who will hear our criticisms if no-one is there to voice them?

9 See for example, Eisenberg, Avigail. "The Architecture of Cultural Accommodation: Why is Arguing for Identity Worthwhile?" in Diversity and Equality: Minority Rights and Fundamental Freedoms in Canada (Forthcoming, 2005) and Fraser, Nancy. "Multiculturalism, Antiessentialism and Radical Democracy" in Justice Interruptus: Critical Reflections on the Postsocialist Condition (Routledge, 1997) at 182-3.

Hybridity

The concept of hybridity is used in a number of contexts: in biology to refer to the mixing of different species; in linguistics to describe the duality of language (Bakhtin, 324); and still by others to highlight the exchange between (and intermixing of) cultures (Young, 21; Anthias, 621). In other words, hybridity is a term that references both mixing and meaning. For the purposes of post-modern identity theory, my emphasis is on hybridity as 'cultural mixing'.

Homi K. Bhabha is seen by many as one of the key writers on hybridity and identity. Bhabha's starting point is the postcolonial, his focus is on the migrant (Macey, 42). The migrant is in a state of diaspora, having been displaced from his/her position(s) in the world. This experience can be either a physical displacement, or a figurative force that relegates the migrant to the margins. This experience, it is argued, creates a sense of unhomeliness, where no place, culture or identity feels like it truly 'fits' (Bhabha 1994, 9). To navigate this landscape, migrants must learn to negotiate new experiences in culture and language, carrying with them their existing notions of culture, language and identity. They navigate the *interstitial* or in-between spaces between cultures, adapting their experiences and identities as they go. In bridging these experiences, the migrant creates opportunities for new identities and ideas (Bhabha 1997b, 31; 1997a, 434). Thus, from a situation of hybridity and diaspora come openings for new identities and identifications.

Bhabha's theory of hybridity is helpful in that it draws our attention to the multiplicity of cultures and identities and the possibilities for exchange between them. Further, the theory of interstitial space draws our attention to the displacement that

unitary notions of culture and identity produce. However, I am cautious in adopting his account of hybridity for two reasons. First, while hybridity is a useful concept with which to deconstruct unitary categories, Bhabha's theory may inadvertently reify them. The very idea of an 'in-between' space assumes that there are 'wholes' between which persons can move and around which subjects can navigate. In this way, Bhabha risks reifying the bordered, unitary and fixed notions of culture and identity he seeks to displace.

Second, Bhabha's theory of interstitial space, while compelling, promotes the epistemic privilege of the marginalized.[10] Bhabha's focus on the lives of migrants and the interstitial spaces they occupy is consistent with theorizing on the margins. He argues that these spaces, occupied by the displaced, marginalized, and diasporic, are *the* location where new identities and ideas are formed: "the truest eye is the migrant's double vision" (Bhabha 1997b, 30). By starting from these positions, we can listen to narratives and come to understand the displacement those at the margin experience. But in order for a position to be marginal, one must assume a coherent centre around which marginal perspectives are based (Bar On, 90). Bat Ami Bar On points out that oppression is almost never on a single axis – instead, there are multiple systems of oppression at work which impact on different groups differently. As such, there is no unified centre around which all groups can coalesce and determine their distance from (90). Further, this perspective assumes that the marginalized perspective is rooted in a singular identity, that of a marginalized person, and that this identity is informed solely by belonging to that

[10] For an excellent point/counterpoint discussion of epistemic privilege, see Harding, Sandra "Rethinking Standpoint Epistemology: What is 'Strong Objectivity?'" and Bar On, Bat-Ami. "Marginality and Epistemic Privilege," in Linda Alcoff and Elizabeth Potter, eds. Feminist Epistemologies. New York: Routledge, 1993.

marginalized group. Finally, in privileging the margins, attempts to affect change in alternate locations are undermined. Authors such as Benhabib emphasize how identities are created from both the inside and the outside - struggles over identity are occurring at the borders as well as within established liberal democracies (Benhabib, vii-viii).

Despite these theoretical difficulties, hybridity remains a useful concept with regard to identity and is an important input for post-modern conceptions of identity. There are three major reasons for this. First, hybridity draws our attention to the mixing of cultures; it highlights the interrelationships all cultures share, and demonstrates that there is no pure position from which one can speak. In this way, hybridity moves us towards loosening the artificial boundaries between cultures and identities that have been established. Second, hybridity highlights the locations at which new identities might emerge, reinforcing the concept of *becoming*. This generative aspect is important, as it connects up with ideas about the fluidity of identity and culture, and the capacity of individuals and groups for change. Finally, hybridity, through its ability to present double meanings, assists in the dislodging of dominant understandings. This can be done using the concept of identity as well as language – one can claim an identity for the very purposes of challenging the dominant understandings of what that identity represents.

Why Post-Modernism?

In the previous sections, I have endeavoured to elaborate on the post-modern conception of identity; its structure, the challenge it poses to modernist theory, and the principles that underlie it. Before moving on, I want to more explicitly draw out the reasons for adopting a post-modern approach to identity. Here I will present four major

arguments in support of its adoption: first, it reflects and incorporates important realities of our time. Second, it allows us to engage in critical reflection about identity. Third, it identifies openings for transformative politics. Fourth, post-modern identities can be observed in practice.

First, a post-modern notion of identity reflects and incorporates important realities of our time. The current time is one of increasing globalization and technological change (Hall 1992, 277). It is also a time of movement – movement of capital, of goods, and of people. The phenomenon of migration is ever-increasing due to war, refugeeism and immigration (Bhabha 1997b, 30). In such an environment, we are forced to consider our interrelations with others, and question our distinctiveness and purity in relation to other cultures and identities. We are forced to acknowledge how the world around us, and our relations to it, produces situations in which identities and cultures are changed, altered and displaced. There is a growing need to address the difficulties inherent in these situations with regard to identity – post-modern theories of identity fill this needed gap. It is especially important for theorists to develop their ideas based upon the realities of the time; to do otherwise risks building theory on weak foundations.[11]

Second, post-modern notions of identity allow us to engage in critical reflection of culture and identities. Donna Haraway notes how "The split and contradictory self is the one who can interrogate positionings and be accountable, the one who can construct and join rational conversations and fantastic imaginings that change history. Splitting, not being, is the privileged image for feminist epistemologies of scientific knowledge"

[11] Jim Tully argues that if we do not incorporate the reality of fragmented and contested identities into our thinking, we risk building weak theory (Tully 1995, 45).

(Haraway, 193). By conceptualizing of the self as fragmented, shifting and partial, post-modernism opens up possibilities for greater critical reflection and understanding.

Third, post-modern notions of identity are also favourable in that they identify openings for a transformative politics. There are a number of theorists whose conceptualizations, which have their beginnings in post-modern theories of culture and identity, promote a transformation of political and philosophical possibilities. In acknowledging the complexity of culture and identity, Tully offers an account of dialogue across differences that seeks to transform the nature of constitutional dialogue in Canada that respects different locations and identities (Tully 1995, 1). Seyla Benhabib's work, which centres on the transformation of the concept of culture, seeks to transform the public sphere so as to improve access to democratic processes (Benhabib, ix). Even Homi Bhabha's postcolonial theory of hybridity has a transformative vision – the elimination of cultural hierarchy (Bhabha 1994, 4). These transformations are valuable in that they seek to improve our relationships between one another, and transform the ways in which our cultures and identities are recognized and imagined, for the purposes of justice, equality and recognition.

There is some concern, however, with regard to the tools post-modernists employ in their critical engagement with the theories of the day. Some suggest that post-modernism goes too far in fragmenting and deconstruction, to the detriment of other theories. Tully argues that while the strength of post-modernism is to expose the erroneous assumptions liberal, national and communitarian theorists make about identity, it may reduce identity to "a homogeneous culture of contingent and dissolving differences" and bring about the demise of important concepts such as sovereignty and

constitutionalism (Tully 1995, 46). Tully's point is well taken, however, I do not shy away from post-modernism given this criticism. As Tully's own work (1995) demonstrates, there are possibilities of incorporating post-modern theories of culture and identity into political theory without obliterating other important concepts. Further, in the following chapters, I will demonstrate the possibilities of incorporating a post-modern conception of identity into the work of Canada's political institutions, specifically the courts. This can be accomplished in a manner that does not work to the detriment or destruction of those institutions; in fact, I would argue that it improves them.

The Métis: A Post-Modern Identity in Practice

The fourth major argument in favour of a post-modern notion of identity is that such conceptions are observable in practice. One of the most interesting examples of such a conception is that of the Métis, one of Canada's three aboriginal peoples.[12] The Métis have a fascinating genesis and history that speaks to the three principles of post-modern identity that I have outlined above.

The Métis are a distinct aboriginal group whose origins stem from the fur trade. In Canada's early colonial history, there was frequent partnering between European men and Indian women. These marriages brought certain benefits to foreign traders; women provided kinship links and knowledge of the terrain, as well as companionship in an otherwise male-dominated outpost. They also produced a sizeable population of persons of mixed ancestry, who lived and intermarried among themselves. By the early 18th century, numerous communities had developed around these populations, sharing several

[12] Section 35(2) of the *Constitution Act, 1982* reads: "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada."

distinct features, including dress, language, recreation and demeanour (LaRocque, 384; Burley 155). These features were seen as a distinctive blending of both the European and Indian traditions, producing a new ethnic group, and to some the birth of a "new nation" (Harrison, 14).

Persons of mixed ancestry were known by a number of labels, generated and used by Europeans in reference to these populations. Those with French and Indian origins who resided in the St. Lawrence area were known as *Métis,* while those of English and Indian origin from the Hudson's Bay trading region were known as *country borns* (Foster, 77; Burley, 13-14). The phrase *bois brulé,* French for "burnt wood," made reference to their dark complexions, while terms such as *mixed-bloods* and *half-breeds* emphasized their racial mixing. The application of these terms varied. For example, Jennifer Brown notes that the term half-breed came into use in the Northwest trading region and was later passed on to the Hudson's Bay traders as they came into contact during the early nineteenth century (Brown, 150). In recent years, the terminology identifying these populations has changed dramatically. The term 'half-breed' was in popular use through to the mid-twentieth century, however many objected to its use, noting that it was a derogatory term that implied that half-breeds were only half-persons (Harrison, 11-12). In search of an alternative, many began to refer to these populations, and indeed all mixed aboriginal populations, as Métis. (Sawchuk 2001, 74; Peters et al., 9).

There is much debate regarding whether the term Métis is appropriate for all peoples of mixed ancestry. The Métis National Council (MNC) takes issue with the broadening of the term to include those who are not of the historic 'Métis Nation'. From

their perspective, the Red River Métis, the largest concentration of Métis in the Northwest, are the authentic source of Métisness; those who wish to identify themselves as Métis in contemporary times must demonstrate how their lineage runs back to the Red River settlement, the Upper Great Lakes and other Northwest sites, otherwise they do not have the right to claim a Métis identity. Other groups, such as the Congress of Aboriginal Peoples, respond to the efforts of the MNC propose a broader definition of Métis, one that includes non-Status Indians with ties to Métis communities (Sawchuk 2001, 85). These struggles, both at the organizational and community level, suggest that the content of the Métis identity, including who can claim to be Métis and what it means to be Métis, is actively contested. As we will see, this contest has made its way through Métis communities as well as the Canadian courts.

Given this contestation and debate regarding who can claim a Métis identity, concerns about essentialism are also prominent in this case. The efforts of organizations such as the MNC represent an impulse to define and structure Métis membership in particular ways, the motivation being the protection of an essentialist identity. This approach comes under attack by other organizations, which critique these attempts to narrowly bound the Métis identity (Sawchuk 2001, 85). Others provide counterexamples to demonstrate the error of the essentialist impulse. Joe Sawchuk presents the case of the Manitoba Métis Federation (MMF), a voluntary political organization originating in the 1970s, whose purpose was to obtain economic aid for its community members from the Federal Government (Sawchuk 1978, 11). Their membership would have never met the definition of the Red River Métis, yet the existence of the organization promoted the revival of Métis identity and the successful provision of economic benefits. Sawchuk

argues that this shift away from the Red River Métis was for the purposes of survival of an ethnic identity:

> The factors that the Métis of today have in common with their namesakes of the nineteenth century are the Indian ancestry, their marginal status and a tradition from the past. This tradition, however, is being taken over by those who, in the strictest sense, cannot be said to be descendants of the *boise-brule* who roamed the plains in the last century. What has happened, in fact, is that the boundaries which defined the Métis as an ethnic group have been drastically changed to meet changing conditions. But in contemporary civilization, change is an ever-present fact of life, and survival depends in part upon a group's flexibility (Sawchuk 1978, 83).

The Métis thus struggle with attempts to define the Métis according to particular principles and ideas, and produce criticisms and alternatives to such essentialist conceptions in response.

Finally, the Métis are an excellent example of the phenomenon of hybridity. As the origins of the Métis stem from European and Aboriginal roots, the fact of cultural and ethnic mixing is well established in this case – term Métis itself literally means 'mixed'.[13] Their position in the world as persons of mixed ancestry has resulted in both displacement and innovation. The Métis have often been described as a culture "in between," fitting neither with First Nations nor Europeans. From this in between-ness, however, grew a unique Métis culture and identity distinct from both European and Aboriginal inputs.[14] Some of the practices of their ancestors were retained, but others were completely new – for example, Michif draws on French, English and Aboriginal inputs, building an entirely new and unique language. The Métis thus demonstrate the fact of hybridity, as well as the possibility of identity generation within a context of hybridity and diaspora.

---

[13] It is interesting to note the links between the Métis and the Mestiza, a mixed Spanish/European population. The words Métis and Mestiza both signal 'mixed' (Anzaldua, 5).

[14] A note about my use of the word "unique." Here, I am using unique in reference to the *products* of the Métis culture and identity, but not its *production*. There is nothing unique about the Métis as a hybrid group, in that *all* cultures are hybrid – there is no such thing as a 'pure' culture.

To this point, I have outlined three distinct definitions of identity, and proposed that a post-modern theory of identity with its emphasis on contestation, anti-essentialism and hybridity is the most theoretically and practically relevant conception, with particular reference to the Métis. In the following chapters, I will explore the tension between a post-modern notion of identity and the liberal institutions that attempt to define identity and identification, namely, the Canadian courts. In the second chapter, I outline how the traditions and conventions of the court promote a modernist conception of identity, and argue that such a notion conflicts with the dynamic, shifting and contested history of groups such as the Métis. Despite this conflict, however, I argue that a post-modern conception of identity can be realized in the work of the courts. In the third chapter, I present case evidence from *R v. Powley*, an aboriginal rights case involving the Métis of Sault Ste. Marie, within which possibilities for the recognition of contestation, anti-essentialism, and hybridity emerge. While the court and its justices operate within a framework of constraints and limitations, this case nonetheless demonstrates how these institutions, which have a discernible impact on identity, can take a post-modern notion of identity from theory to practice. In the final chapter, I explore the possibilities for taking this conception beyond its current and limited application, as well as the issues and implications of doing so. I also reflect on the broader question this work presents, namely the role of the law and the possibilities for change therein.

2. Identity in Conflict: The Courts and the Modernist Paradigm

Introduction

In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*[15], the Supreme Court of Canada was asked to reconcile the religious rights of the parents with a newborn infant's right to life and security of the person. At issue was the Children's Aid Society's temporary wardship of the child, during which a life-saving blood transfusion was administered. The parents objected to blood transfusions for religious reasons and claimed it was unnecessary – they did not consent to the procedure. The parents thus argued that the performance of the transfusion violated their rights under s. 2(4) of the Charter. The court agreed, but ruled that the violation was saved by the reasonable limits clause.

Kimberly Nixon is a male-to-female transsexual. After being diagnosed with gender identity disorder, Nixon underwent sex reassignment surgery in 1990 and has since been living as a woman. Following a case of physical abuse by a male in her life in 1992, Nixon decided to give something back by volunteering at Vancouver Rape Relief. At her first training session, Nixon was identified as a person who had not been female for her entire life, and was asked to leave. Nixon, who argued that she has "always been a woman," filed a complaint with the BC Human Rights Commission, claiming that she had been discriminated against on the basis of sex. The Commission agreed, and ruled that Nixon be compensated to the tune of $7,500.[16] Rape Relief appealed to the Supreme

[15] [1995] 1 S.C.R 315
[16] *Nixon v. Vancouver Rape Relief Society* [2002] B.C.H.R.T.D. No. 1

Court of British Columbia, who found that the Commission's ruling was unreasonable and set aside the compensation order.[17]

In *Trinity Western University v. British Columbia College of Teachers*[18] the Court had to reconcile the religious freedoms of TWU students with equality rights of students in B.C.'s school system. A central question at trial was whether the position of TWU on issues such as homosexuality, based on religious belief, constitutes discrimination on the basis of sexual orientation. The Court ruled that the University had the right to grant teaching certificates to its students, despite the school's condemnation of homosexuality.

In each of these cases, the courts delivered judgements that had a discernible impact on identity and membership of particular groups in Canadian society. Indeed, the court is often asked to adjudicate cases that impact, both explicitly and implicitly, on identity claims. The courts are not neutral bodies when it comes to making these rulings; as a liberal institution, their conventions, practices and precedents privilege a modernist conception of identity, with its roots in the assumptions of both the Enlightenment and Sociological subject. It is thus important to critically examine the court's orientation in order to determine whether it will impede the recognition and adjudication of post-modern identities.

In the first chapter, I argued in favour of a post-modern conception of identity that emphasizes contestation, anti-essentialism and hybridity. I also demonstrated how contemporary identities, such as that of the Métis, conform to these principles in practice. In this chapter, I will outline the conflict that arises when these post-modern identities are adjudicated by the Canadian courts. Essentially, there are three key practices of the

---

[17] *Vancouver Rape Relief Society v. Kimberly Nixon et. al.*, [2003] BCSC 1936
[18] [2001] 1 S.C.R. 772

court that privilege a modernist conception: the categorical approach to legal reasoning, the conventions of legal argument, and the individualistic impulse. I will explore these three practices, and consider the tension that arises when these practices meet the claims of the Métis.

The Courts and The Modernist Paradigm

The Categorical Approach to Legal Reasoning

The categorical approach is a method of reasoning that allows the courts to assess similar claims across cases. In practice, it requires that judges ascertain whether a claimant in a particular case has met an established general standard. For example, in antidiscrimination law, a number of protected categories have been established, including sex, race, and sexual orientation. Thus, at the outset of a discrimination case, judges determine to which (general) category the claimant belongs before proceeding with an examination of whether the case constitutes discrimination. By compartmentalizing claims in this way, the courts can ensure a systematic and consistent approach to the law, whereby all relevant and appropriate precedents are applied.

The categorical approach promotes a modernist conception of identity in two ways. First, judges have been shown to conceptualize these categories as mutually exclusive, a move that prevents the recognition of multiple, intersecting identities. Kimberle Crenshaw's analysis of U.S. antidiscrimination cases involving black women found that the court assessed claims of sex and race discrimination separately, despite the fact that it was the intersection of these traits that produced the discrimination the claimants experienced (Crenshaw, 322). Similar findings have been uncovered in the

Canadian context. Nitya Iyer found that in equality rights cases, claimants are forced to caricaturize their experiences – magnifying elements of their identity that are relevant to the case, and downgrade all other elements of identity – in order to fit the categories established by the court (Iyer, 192).[19] This suggests a hostility to multiple, intersecting and hybrid identities.

Second, the categorical approach essentializes the experiences of claimants. Judges assume that the experiences of claimants assigned to the same category are homogenous. As only one element of a claimant's experience is emphasized in categorical practice, the courts cannot see the differences *between* those claimants in a category. As such, the courts assume that remedies developed for one case in a category will fit all cases – an assumption that can hurt claimants (Iyer, 194). In utilizing the categorical approach, the court thus promotes a single-axis notion of identity and homogenizes the experiences of claimants based on this single-axis model. Such an orientation is clearly in tension with anti-essentialist principles, as well as the concept of fluid, multiple, intersecting identities.

The Conventions of Legal Argument

Legal argument is virtually a language all its own. Lawyers, judges, and other legal experts undertake specialized education in order to better understand the norms of legal argument, including terminology, precedents and the legal environment in which claims are made. To observers of court proceedings, one of the most prominent elements of this linguistic tradition is the emphasis on a particular kind of knowledge and reasoned argument. The discipline of law assumes a positivist conception of knowledge; the role

[19] Evidence of the single-axis approach was also found in Canadian human rights tribunals (Duclos, 40).

of judges and juries is to review the evidence before them and uncover the objective 'truth' held within. Given this conception, the capacity to reason is highly valued, while other inputs like emotion are "ruthlessly banished" (Razack, 37). Thus, the conventions of legal argument privilege a universal voice devoid of particularity and experience, relying on the capacity of reasonable argument to carry the case to a just outcome – moves consistent with modernist interpretations of identity and justice.

There are consequences to such an orientation. By insisting on a universal point of view, the experiences of those seeking justice are compromised or erased. Patricia Monture-Angus argues that law represents a monolithic voice, which restricts those who engage with it to speak only in the language that it has constructed, effectively silencing and excluding those speaking "in a different voice" (Monture-Angus, 32). Additionally, Iris Young points out that stripping such experiences from legal proceedings, the court "seeks to reduce differences to unity" (Young 1990, 97); enforcing a universal legal voice thus risks both erasing *and* homogenizing experience. Further, universalizing claims may result in a misinterpretation of terms and ultimately a miscarriage of justice. Leonard Rotman notes that in dealing with aboriginal and treaty rights, the courts separate claims from their circumstances, creating a "juridical vacuum." As a result, judgments made are inconsistent with aboriginal understandings of those rights, and do not reflect the "true nature of the claims being raised" (Rotman, 2). Finally, by enforcing a universal language devoid of experience and location, the courts assume the possibility of a universal perspective through which all persons can communicate. This is inconsistent with the concept of partial perspective and the importance of experience and difference in the negotiation of identities.

The Individualistic Impulse

As a liberal institution, the courts have taken an individualistic approach to its work. In cases involving both individual and collectivities, the court generally opts to focus on the specifics of the case at hand, rather than making judgments on the discipline and character of the law more broadly.[20] The benefit of individualism is that it allows the courts to consider arguments as they develop, and allow for the development of areas of law at an equally incremental pace. While this practice may result in temporary gaps or fuzziness in underdeveloped areas of law, it ensures that the law unfolds in a manner that is consistent and fair to future cases, which may bring unique or unforeseen challenges.

The individualistic approach has two major implications for identity claims. First, it allows the court to investigate disputes between individual claimants, rather than focus on the broader questions, such as questions of membership and identity, the case presents. Such a move diminishes the importance of debates within communities regarding the construction or content of identity, or the appropriate conditions for membership, debates that ought to inform the decisions of the court. In other words, the court's individualistic orientation risks silencing contestation. Second, by focusing on individual claimants, the court promotes the universalization of particular views. Focusing on evidence brought on behalf of individual claimants establishes what the contacts of that claimant think about membership and identity; however, it does not necessarily establish the community's view on those issues. This practice thus risks

[20] For an excellent discussion of the relationship between the court's individualistic orientation and the claims of collective rights, see Magnet, Joseph E. "Collective Rights, Cultural Autonomy and the Canadian State," McGill Law Journal 32 (1986) pp. 170-186. While this article focuses specifically on the Charter, I would argue that Magnet's observations could be applied to other areas of constitutional law.

generalizing and homogenizing views that may or may not be held in common by the community, and silences alternative conceptions. This is inconsistent with the post-modern principles of contestation, anti-essentialism and the heterogeneity of groups.

The Métis and the Courts: Points of Tension, Possibilities for Recognition

Having reviewed their practices and conventions, it is clear that the Canadian courts have a tendency to privilege a modernist notion of identity and resist particular elements of a post-modern conception. This places groups such as the Métis, who are seeking recognition in the courts on the basis of identity, in a difficult position. How will the courts perceive their claims? Will their identities be adequately recognized? Will they be transformed in a way that restricts their nature as fluid, boundless, contested entities? Most importantly, will justice be done by and to their identities?

The preceding analysis suggests that the courts' engage only in modernist thinking; however, that the reality is more complicated and recent jurisprudence has demonstrated that competing conceptions of identity can be realized. In the following chapter, I will explore the extent to which a post-modern conception of identity (contested, hybrid and fluid) has within the modernist parameters described above, begun to be recognized by the courts. To accomplish this, I will analyze the decisions on *R v. Powley,* a case involving the aboriginal rights of the Métis, and survey their decisions based on the three principles of post-modernism I have described above. In doing so, I hope to provide an answer to the following question: What opportunities are there for a post-modern identity to be realized in the Canadian courts?

3. Identity and the Courts: The Case of *R v. Powley*

Introduction

On October 22, 1993, Steve and Roddy Powley hunted and killed a moose near their hometown of Sault Ste. Marie. They did not have a valid hunting licence or outdoor cards, as required by Ontario law. Instead, Steve Powley asserted what he claimed to be his aboriginal right to hunt – he affixed a tag to the moose, detailing the date and time of the kill, his Métis Association membership number and a description of the kill as meat for the winter. Ontario conservation officers later arrived at the Powley residence to confirm that they had shot a moose. As they did not possess the valid permits, the Powleys were found in contravention of Ontario's *Game and Fish Act*. At trial, the Powleys argued that the Ontario law violated their aboriginal rights under s.35 of the *Constitution Act*. The trial judge agreed, affirming their right to hunt for food in the area of Sault Ste. Marie, and dismissed the charges. This ruling was later upheld by the Ontario Superior Court, the Ontario Court of Appeal and the Supreme Court of Canada.

The *Powley* case is important for several reasons. First, it marks the first time that the Supreme Court of Canada has affirmed the aboriginal rights of the Métis since their inclusion as aboriginal peoples under s. 35(2) the *Constitution Act, 1982*.[21] Second, it is a symbolic victory for the Métis, who have been largely invisible to the Canadian state. The federal government has no working definition of Métis, nor have they enacted

---

[21] While there have been previous cases regarding s.35 rights of the Métis, *R v. Powley* was the first case to reach an appellate court. Sharpe J.A. at para. 74 provides us with a list of lower court cases involving Métis rights under s.35: *R. v. McPherson* (1992), 82 Man. L.R. (2d) 86 (Prov. Ct.), reversed (1994), 111 D.L.R. (4th) 278 (Man. Q.B.); *R. v. Morin and Daigneault*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.), affirmed (1997), 159 Sask. R. 161 (Q.B.); *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.), affirmed [1994] 1 C.N.L.R. 117 (Alta. Q.B.); *R. v. Desjarlais*, [1996] 1 C.N.L.R. 148 (Alta. Prov. Ct.) 113; Compare *R. v. Blais*, [1996] 3 C.N.L.R. 109 (Prov. Ct.); affirmed [1998] 4 C.N.L.R. 103; leave to appeal granted [1999] 2 W.W.R. 445 (Man. C.A.).

legislation to deal with Métis populations (Sawchuk 2001, 75). With regard to the provinces, the record is mixed – the *Manitoba Act, 1870* allowed for the distribution of lands to the Métis, while Québec refuses to recognize the Métis altogether (Miller, 135).

Third, the *Powley* case establishes legal standards for future cases involving the Métis. In their deliberations, the courts developed two important tests that are to be applied to future Métis claims. First, the courts developed a three-pronged test of Métis identity, whereby individuals could be identified as legitimate members of the rights-bearing community. In order to be recognized as Métis, the claimant must demonstrate a genealogical ancestral connection, must self-identify as Métis, and must demonstrate acceptance in a contemporary Métis community. Second, the *Van der Peet* test was modified to account for the unique position of Métis. The court ruled that the appropriate window for eligible Métis practices is post-contact, pre-European control. These tests set the standard for future Métis claimants seeking recognition of their aboriginal rights.

Fourth, this case sets important standards for identity claims beyond aboriginal law. As was previously discussed, in *Vancouver Rape Relief Society v. Kimberly Nixon et. al.*, the Supreme Court of British Columbia found that the decision at the Human Rights Commission in favour of Kimberly Nixon unreasonable and set aside the compensation order. It was in fact the test of identity as established in the *Powley* case that proved to be the precedent that compelled the court to reverse the decision.[22]

R v. Powley is thus an interesting and pertinent case with regard to how the court deals with cases about identity, and indeed the concept of identity itself. Using *Powley* as a case example, I will now explore the degree to which the court can recognize a post-modern conception of identity – a conception that is consistent with the observed

[22] *Vancouver Rape Relief Society v. Kimberly Nixon et. al.*, [2003] BCSC 1936 at para. 94

characteristics of Métis identity. To accomplish this, I assess the court's decisions with regard to the three principles of contestation, anti-essentialism and hybridity. While my investigation will focus on the four written decisions presented by the court, I also consider the institutional openings and constraints that both help and hinder the realization of these concepts. Ultimately, the case findings suggest that the courts are essentialist institutions; however, on the principles of contestation and hybridity the findings are mixed, which suggests there is room for movement toward a post-modern conception of identity.

Contestation

As I argued in the first chapter, contestation is the presence of competing perspectives with regard to the meanings, symbols and practices associated with identity. In emphasizing contestation, one acknowledges the heterogeneity of groups and unveils one of the processes by which identities shift and change, namely the struggle over meaning. To overlook contestation risks homogenizing and otherwise fixing identity. Indicators of taking contestation seriously might include: acknowledging the presence of counternarratives; the consideration of alternative narratives within a given identity; acknowledgement and discussion of a disagreement or struggle over meaning; or promoting resolutions that take disagreement and contestation into account.

Recognizing contestation is especially important in the case of the Métis. As previously discussed, there is no universally accepted definition of Métis. Further, there is much debate regarding whether the term Métis is appropriate for all peoples of mixed ancestry. Through the *Powley* case, the courts have stepped into the centre this highly

contested debate. To manoeuvre such a sensitive topic, one would expect the court to be aware of the debates and the competing visions of Métis identity, and to take great care in considering these perspectives when making such judgments.

Looking to the case evidence, the courts' consideration of contestation can be grouped into three categories: 1) the trial court decision, authored by Justice Charles Vaillancourt; 2) the Ontario appeals, authored by Justice Steven O'Neill and Justice Robert Sharpe, respectively; and 3) the Supreme Court of Canada decision, authored by the Court. Each category represents a particular phase of the legal process – the trial judge establishes findings of fact, the appeals consider arguments regarding errors in findings of fact by the trial judge, and the Supreme Court provides for the final appeal, and in essence, the final word on the case. Each category also represents a different level of attention to and consideration of contestation with regard to Métis identity.

The Trial Court Decision

In outlining the process for determining the rights of the Métis, one of the first issues Justice Charles Vaillancourt addresses was the use of the term itself. He acknowledges both a definitional void and definitional conflict with regard to Métis identity. The definitional void is the result of the undefined inclusion of the Métis in s.35(2) of the *Constitution Act*, 1982, and a general lack of consensus by historians and Métis communities on a common definition of Métis. The definitional conflict emanates in part from this lack of consensus, as well as politicized activity around the term Métis (*R v. Powley 1999*, paras. 33 and 37). Vaillancourt highlights the difficulty of the courts in dealing with the Métis given this definition situation. He quotes extensively from *Re*

Lovelace et al.[23] and *R v. Blais*[24], which provide a summary of these challenges, including a lack of a universal definition, disputes over the correct meaning of the term, and changes to the *Indian Act*.

After reviewing the conflicts at hand, Vaillancourt asserts that "[as] long as the divisiveness remains a reality in the Métis equation, the question as to who is a Métis will remain unanswered" (para.44). Given the difficulty of defining the Métis, Vaillancourt supports a negotiated solution, whereby politicians and "key participants" dialogue in order to develop a workable definition, which can then be applied universally to all Métis seeking aboriginal rights (para. 37). However, given the immediacy of the case before him and the request by counsel to develop an "objective" test to determine who is and is not Métis (para. 33), Vaillancourt proceeds to develop a basic test of Métis identity. He reviews three competing definitions – the definition contained in the failed Métis Nation Accord, the definition proposed by the *Royal Commission on Aboriginal Peoples Final Report* (1996), and the definition incorporated into the by-laws of the Métis Nation of Ontario. He concludes by finding that a Métis is "a person of [genealogical] aboriginal ancestry; who self identifies as a Métis; and who is accepted by the Métis community as a Métis" (para. 47).

Vaillancourt's reasons for judgment in the *Powley* case at trial demonstrate a reasonably thorough consideration of contestation over Métis identity. He gives adequate consideration to the definitional conflict over Métis identity, and correctly identifies the paralysing nature of the debate with regard to progress on Métis rights. His open consideration of competing definitions, put forth by First Nations and Métis

---

[23] *Re Lovelace et al. and The Queen in the Right of Ontario et al. (Indexed as Ardoch Algonquin First Nation v. Ontario)* (1997), 148 DLR (4th) 126 (Ont. C.A.)
[24] [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.)

organizations, indicates a consideration of how these definitions might be reconciled. However, in proceeding with a definitional exercise, Vaillancourt prematurely closes off debate on Métis identity, a move that is inconsistent with taking contestation seriously.

The Appeals

The role of an appellate court is to consider arguments put forward by an appellant regarding the trial judge's findings of fact. This process requires that the courts trace previously established precedent relevant to the case, as well as the reasoning of the lower courts, in order to determine whether judgments have been made "based on palpable and overriding error" (*R v. Powley* 2000, para. 5). In other words, unless it can be demonstrated that the judge was clearly wrong, the appellate court serves as a mechanism of revision as opposed to change. In the *Powley* case, the major findings of the trial judge were reviewed and affirmed by both courts.

The two decisions on appeal, authored by authored by Justice Steven O'Neill of the Superior Court of Ontario (2000) and Justice Robert Sharpe of the Ontario Court of Appeal (2001), represent two different approaches with regard to contestation. The O'Neill decision represents a minimal engagement with Métis identity and the difficulties therein. In his reasons for judgement, O'Neill limits his discussion of Métis identity to a discussion of the lower court's findings. Where new information is introduced, specifically by way of intervenor factums, there is some discussion of their competing perspectives, however they are not discussed explicitly, and the degree to which they are taken up by Justice O'Neill appears to be based on legal principles rather than other considerations (*R v. Powley* 2000, para. 69).

The second appeal, authored by Justice Sharpe, proceeded in a manner similar to the first – the findings of the lower court were canvassed and affirmed. However, in his reasons for judgment, Sharpe goes beyond his role of review to make several interesting and valuable observations regarding contestation. First, in canvassing the facts of the case, Sharpe discusses some important underlying questions about Métis identity. For example, he notes that the representation of Métis interests is an unsettled question – the Minister of Natural Resources refused to sign an agreement with the Métis Nation of Ontario regarding hunting rights because not all Métis belong to the MNO, and representation for the Ontario Métis remains unresolved (*R v. Powley* 2001, para 10). Second, in his discussion of the definitional void of the Métis, Sharpe discusses both the motives and substance behind the various competing definitions. He argues that competing definitions may reflect different accounts and purposes – one group's definition might be satisfactory for nation-to-nation dialogue, but not for claims to aboriginal rights (para. 152). Finally, Sharpe's reasons for judgment reflect a consideration of both the similarities and differences between parties to the case, a move that is consistent with taking contestation seriously. For example, when discussing the proposed definition of Métis, Sharpe finds that all parties and intervenors in the case agree that "at a minimum, self-identification and community acceptance are required attributes of community membership for purposes of asserting a s.35 right" (para. 150). Here, Sharpe demonstrates that competing perspectives are not always divergent, and in doing so, underlines how at its foundation, contestation is about locating a constellation of perspectives, positive *or* negative.

Supreme Court of Canada

The Supreme Court's approach to contestation is markedly different from that of the lower courts. Five distinct shifts can be identified, which result in a downplaying of contestation of Métis identity. First, the Court asserts the following about the term Métis:

> The term "Métis" in s.35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forbears. (*R v. Powley* 2003, para. 10)

This is a very different approach than that which was adopted by the lower courts, which emphasized the different ancestral and historical patterns of persons of mixed ancestry, as well as the evolution of the term Métis. These details are essential to unveiling and understanding the conflict over the term Métis.

The second shift pertains to the Court's characterization of the broader Métis community. They state that:

> The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of "The Métis." However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis "peoples," a possibility left open by the language of s.35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada." (para. 11)

By interpreting s.35(2) in this way, the Court makes a dramatic conceptual shift. The move from Métis people to Métis *peoples* creates a new understanding of the relationship between Métis communities[25] – shifting from a single sphere of persons, within which contestation and competition over meaning occurs, to a multi-cellular model which emphasizes differentiation between communities regarding custom, history and tradition. In making such a shift, the Court changes the grounds on which contestation of Métis identity is perceived; it diffuses tensions that exist in the broader Métis community on

[25] Catherine Bell notes that there is disagreement among the Métis regarding their status as a *people* versus that of *peoples* (Bell, 355).

the issue of identity in favour of recognizing difference between communities, and imposes a homogeneity of values and meaning within individual cells.

Third, with regard to determining membership in a Métis community, the Court does not couch their terms in the language of contestation, dispute or conflict:

> While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. (29)

The Supreme Court does not discuss the lack of a universally accepted definition of Métis, nor the existence of multiple, conflicting definitions. Instead, the act of defining membership requirements for the Métis is seen as a surmountable legal task, rather than the difficult exercise of balancing competing interests.

Fourth, with regard to the definition of Métis identity, the Court claims:

> ...that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s.35. We therefore limit ourselves to indicating the important components of a future definition, while affirming that the creation of important membership tests before disputes arise is an urgent priority. (*R v. Powley* 2003, para. 30 emphasis in original)

This is a strategic shift away from the orientation of lower courts, which authored a "basic, workable" definition of Métis, toward *components* of a future definition. Such a move diffuses contestation by artificially lowering the stakes of the Court's assertions about Métis identity.

The fifth and final shift undermines arguments pertaining to the difficulty of pinning down Métis identity. In an address to the appellant of the case, who argued that the law justifiably infringes on s.35 rights given the difficulty defining the Métis, the Court stated: "the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada" (para.

49). It is difficult to say whether this statement reflects a dismissal of contestation as a legal strategy or merely the prioritization of Métis rights over the difficulties presented by contestation. Regardless, such a move is an important shift in terms of the contestation of identities.

Taken together, these five points signal a clear departure from the outlook and attention taken by the lower courts regarding contestation of Métis identity. It is my conclusion that the Supreme Court of Canada adjudicates the *Powley* case in a manner that is inconsistent with taking contestation seriously.

Upon examination of the case evidence, the following observations can be made. First, it appears that the further the case proceeds through the courts, active consideration of contestation of identity diminishes. This may be explained in part by the different roles of the court; however, given the dramatically different characterization of contestation by the Supreme Court of Canada, this explanation may not completely account for the developments observed in this case.

Second, with regard to the degree to which the court takes contestation seriously, I would argue that the results are mixed. The courts acknowledge the political difficulties of finding a definition of Métis, and in some cases offer interesting and thoughtful insights to the ongoing debates regarding Métis identity. However, given the about-face of the Supreme Court of Canada, and the decision by *all* levels of the court to move forward with a definition of Métis despite active contestation of Métis identity, I am hesitant to state that their rulings are consistent with taking contestation seriously.

It is important to acknowledge the constraints that exist which may discourage contestation of identities by the court. For example, the court's conventions regarding the introduction of evidence may impede on the consideration of alternative perspectives and narratives. *Palmer v. the Queen* established that the evidence may introduced on appeal only if the information is relevant to a decisive issue at trial, is credible, and would have affected the outcome of the case. It cannot be admitted if it could have been presented at trial (*R v. Powley* 2001, para. 51). These restraints on contestatory evidence are in place in the best interests of all parties to a case; restricting the introduction of new evidence is likely in the interests of fairness and the most equitable consideration possible. This does not mean, however, that such practices are risk-free with regard to identity. These legal conventions freeze not only the facts of the case and the evidence brought by the parties, but also the notions of Métis identity that are on the table. This is especially problematic when one takes into consideration the high level of contestation surrounding Métis identity and the length of time in which this case was before the court. The trial was heard over 14 days from April to September of 1998, the initial decision was released in 1999, and the final decision by the Supreme Court of Canada was delivered on September 19, 2003. If at any time, new developments regarding Métis identity or evidence thereof emerged, such evidence would likely not be used. Such conventions may thus impede on adequate consideration of contestation and have a negative impact on the full hearing of perspectives on Métis identity.

A second constraint specific to the case at hand is the ability of the court to interpret counternarratives across cultural locations. As Angelia Means argues,

> This process of learning to listen to others and recognize the arguments embedded in narrative frameworks is difficult enough if we assume a common culture, a web of human relations in which there is a shared storybook and system of signification; however, in the context of a democratic culture

> that is also multicultural, the task of learning how to think with others is all the more daunting. (Means, 226)

The court thus faces an interesting challenge when taking contestation seriously – different perspectives must be heard, but one must also come to understand them on the terms in which they are communicated. This may be difficult, given that judges are almost exclusively members of society's dominant culture (Iyer, 186). Means argues that if arguments, narratives and counternarratives from other cultural groups are to be taken seriously, the courts must learn "the art of cultural translation" (Means, 222). In other words, they must be able to communicate across culture in order to understand the essence of the arguments being put forward, and comprehend on their own terms the arguments these groups present. To accomplish this is a tremendous challenge; in the Canadian context, it is a challenge we must take very seriously.

To conclude, it appears that despite these constraints, there are possibilities for incorporating contestation of identities into the work of the court. I would point to the work of Justice Sharpe in particular as evidence of the possibilities in this regard. His considerations and insights demonstrate that contestation can be incorporated despite the constraints outlined above.

Anti-Essentialism

Essentialism, as defined above, is the belief that there is something *essential, intrinsic* or *shared* about the experience of a group of persons, such as women or a "racial" or ethnic group, and that those elements are integral to the experience of that group. As discussed, anti-essentialists argue that this approach erases difference between group members, creates false homogeneity within groups, prevents consideration of

multiple, intersecting identities, and promotes the flawed notion of a fixed and permanent identity. Should the court operate according to essentialist beliefs and assumptions, there is the danger that they will both homogenize and freeze identity, in this case, the Métis identity, against what is in reality a very diverse set of intersecting identities. Further, in the unnecessary practice of pinning down the essence of a person or group, an essentialist court risks excluding or alienating the identities of the very claimants they seek to protect.

The courts' approach to the Powleys' claim of aboriginal rights in *R v. Powley* is largely shaped by existing case law.[26] While adaptations specific to the Métis can be observed in *Powley*, the court has developed a framework for assessing all aboriginal rights claims made under s.35. In *R. v. Sparrow*[27], the court established a three-part test for aboriginal rights: first, the court must determine whether a claimant was acting pursuant to an existing (unextinguished) aboriginal or treaty right; second, whether the right claimed has been infringed, and; third, whether the infringement is justified (Funston and Meehan, 153).

While *Sparrow* establishes the broad framework, *R v. Van der Peet*[28] provides a definition of the scope of aboriginal rights: "In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" (*Van der Peet*, para. 46). The court set out a number of steps to apply this test. First, the characterization of the right – the court must establish what right is being claimed in order determine the appropriate evidence (para.

[26] For an excellent discussion of the challenges facing the Métis within aboriginal rights law, see: Bell, Catherine. "Métis Constitutional Rights in section 35(1)," Alberta Law Review 36:1 (1997) pp. 180-217.
[27] [1990] 1 S.C.R. 1075
[28] [1996] 2 S.C.R. 507

51). Next, evidence is brought to demonstrate the central position of that right in the aboriginal society. It must be demonstrated that the right claimed, "was one of the things that truly made the society what it was," and to remove it from that society would have a definite or clear impact (para. 55, emphasis in original). Finally, the right claimed must have been practiced more or less continuously, from pre-contact to the present day, in order to be seen as integral (para. 63).

This framework of identifying and testing aboriginal rights could be challenged from an anti-essentialist perspective on several fronts. First, the court's characterization of the right is problematic in that it risks homogenizing the claims of aboriginal people and erasing the unique experiences of claimants. Second, it is impossible to attempt to determine the central traits to any culture, given its complex, shifting and hybrid nature. What it means to belong to a particular culture or group changes over time, for example, by the ongoing construction of meaning from within that culture or by the interactions between different cultures. By assuming that one can isolate essential elements of a culture, the courts assert that culture is a concept that can be fixed, its components static and unchanging (Benhabib, 4). Moreover, to assume that one can determine which practices are central to aboriginal societies implies the simplicity of those cultures (Andersen, 9). Third, by requiring that aboriginal rights have their origins in pre-contact practices, the court freezes aboriginal cultures in a particular space and time. This means that aboriginal rights are only selectively protected; the court cannot recognize valuable or important cultural practices that have developed over time. For example, the court cannot recognize aboriginal practices generated in response to the pressures of European

contact (Rotman, 5).[29] Finally, the court's analysis of aboriginal rights does not consider *to whom* these practices are central or integral. For example, some of the practices deemed integral to aboriginal cultures by the court might be integral to the lives of aboriginal women, aboriginal youth, or the community at large. Anti-essentialist analysis would allow these elements to come to the surface, a move that facilitates the recognition of differences, and allows for intersection(s) of culture and identities to emerge.

It appears then, that the court's handling of aboriginal rights cases reflects a certain degree of essentialist thinking about aboriginal rights and cultures.[30] But this essentialist impulse goes beyond considerations of culture; the definition of Métis established in *Powley* demonstrates the court's essentialist thinking with regards to *identity*, an equally important concept in aboriginal rights law.

As the Supreme Court states, aboriginal rights are communal rights (*R v. Powley* 2003, para. 24). This means that in order to claim aboriginal rights under s.35, a claimant must demonstrate membership in the community in which those rights are held. In the case of First Nations, membership is regulated by the *Indian Act*[31], which establishes a Register for all Status Indians as well as band lists, whereby councils are required to keep a record of all band members.[32] In the case of the Métis, such regulation is clearly absent

[29] As post-contact Aboriginal peoples, this argument is less pertinent to the Métis; however, it may still be a relevant criticism depending on how the case law regarding Métis rights under s.35 unfolds.
[30] Michael Asch observes that through the analysis of aboriginal culture, the court has developed an essentialist approach to culture in general (Asch, 120).
[31] For an excellent discussion of the different regulatory mechanisms of Aboriginal identity, see Lawrence, Bonita. Gender, Race, and the Regulation of Native Identity in Canada and the United States: an Overview. *Hypatia* 18:2 (2003) pp. 3-31.
[32] The Indian Act defines "band" as: "with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart" (s.1, *Indian Act* R.S., c. I-6, s. 1).

– the federal government has no existing definition of who they consider to be Métis, as they do with First Nations.[33]

In the absence of a clear signal from either level of government with regard to who qualifies as Métis, the courts opted to construct its own definition for the purposes of claims under s.35. The court was somewhat reluctant to engage in this exercise. At the trial level, Justice Vaillancourt asserts that a definition of Métis was developed at the request of counsel involved in the case (*R. v. Powley* 1999, para. 33). At the Supreme Court of Canada, there was also a great deal of care in setting up the three-part test: "We emphasize that we have not been asked, and we do not purport to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s.35 ..." (*R v. Powley* 2003, para. 30) Regardless of their reasoning or posturing, at each level the court assisted in the shaping of a *definition* of Métis identity.

The definition of Métis developed by the courts underwent considerable scrutiny and review. In his deliberations at the trial level, Vaillancourt reviewed several definitions of Métis proposed by different non-governmental organizations, and concluded that a Métis is "a person of [genealogical] aboriginal ancestry, who self identifies as a Métis, and who is accepted by the Métis community as a Métis" (*R v. Powley* 1999, para. 14). This definition was upheld at the Ontario Superior Court; however Justice O'Neill broadened the definition slightly by dropping the requirement for genealogical proof of aboriginal ancestry (*R v. Powley* 2000, para. 61). At the Court of Appeal, Justice Sharpe was petitioned by the appellant to reinstate the requirement of genealogical proof. The court ruled against such a move, stating that the issue was not

[33] While the federal government regulates the membership and identity of First Nations, it is important to note that First Nations peoples of Canada have contested this practice. In other words, the identity of Status Indians is still debated.

fully explored at trial (*R v. Powley* 2001, para. 155). Finally, the Supreme Court of Canada affirmed the lower courts' definition of Métis, with a slight rewording: "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 (*R v. Powley* 2003, para. 30).

This three-part test contains several essentialist elements. With regard to the first requirement, self-identification, there appears to be an interesting point of tension. While the court acknowledges that self-identification "need not be static or monolithic," they assert that self-identification in the case of claims under s.35 "must not be of a recent vintage" (*R v. Powley* 2003, para. 31). Thus, while it appears that the court might acknowledge the fluidity of Métis identity in some cases, when it comes to claims under s.35, one's identity must be well established. Requiring a dated self-identification is inconsistent with the notion of *becoming* Métis and with the concept of a fluid identity in general.

The second part of the test, ancestral connection, is problematic on several fronts. First, the Supreme Court asserts that it does not wish to establish blood quantum[34] as a test for ancestral connection, however it appears that some sort of genealogical evidence may be required to ensure a "real link" exists between the claimant and the rights-bearing community (*R v. Powley* 2003, para 32). Such a move goes against the lower courts' discussion of the importance of other kinds of ancestral ties to these communities. In the case of the Métis, relationships between different communities (First Nation, Métis and

[34] Bruce Miller defines blood quantum as "a concept that refers to the degree of indigenous ancestry (colloquially, blood) and is now a standard component of American Indian identity" (155). The *Indian Act* does not require that First Nations track blood quantum of its members, however the RCAP found that as of 1992, 30 bands utilized blood quantum as a test for membership (Royal Commission on Aboriginal Peoples, Vol.4, Chap 2, Section 3.1).

non-Status Indians) are complex and varied. By requiring genealogical evidence, the court establishes rigid boundaries that may upset these shifting and complex relationships. Further, in setting up the test as "objective" and testing for "real" links, the court assumes that one can determine which kinship links *really* matter and which do not, and makes a decision that may please some Métis, but goes against others. Second, important questions remain regarding the scope of ancestral connection, such as the role of spouses and life partners. The court leaves these questions open for a future case to decide (*R v. Powley* 2003, 32), a move that creates much uncertainty in the present for these persons with regard to aboriginal rights. Third, ancestral connection is constructed as the ultimate test of Métis identity – regardless of the findings on the other two tests, if ancestral connection cannot be established, a person cannot claim to be Métis: "It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right" (*R v. Powley* 2003, para 34). Given the rigidity of this test, its structure and the aforementioned uncertainties, this requirement may result in exclusion or denial of Métis identity.

The final prong of the test requires that a claimant prove acceptance by the modern community, which continues from the historic community in which aboriginal rights are held (*R v. Powley* 2003, para 33). The Supreme Court defines what it terms the 'core' of community acceptance: "ongoing participation in shared culture, in the customs and traditions that constitute a Métis community identity and distinguish it from other groups" (*R v. Powley* 2003, para 33). A number of questions arise from this, including: What is a community? What constitutes a *Métis* community? Does community

acceptance require geographic proximity, a degree of social acceptance in that community? What if there is division in a community regarding a person's membership? Why are some elements of community acceptance considered "core"? Are there other, lesser indicators of community acceptance that are considered peripheral? Why must a Métis community demonstrate its difference from other groups in order to be recognized as a community? And how can one make such a determination? In posing these questions, the various essentialist assumptions about community and belonging that inform this third test surface. Each of these concepts needs to be unpacked and critically assessed, both by the court and those seeking to understand the court's notions of Métis identity.

Turning to the test as a whole, several important observations can be made. First, each prong of the test places emphasis on the past – ancestral connection as connections with the past, self-identification as a past event, and evidence of existing community acceptance that can be traced to a practice in the past. Such a move risks putting Métis identity in the past tense, making it hostile to the notion of shifting, changing identity. Second, and perhaps most importantly, authoring a definition of Métis identity is ultimately an essentialist act. The very notion that an identity can be tested on the basis of several objective tests, however flexible or reluctantly drafted, assumes that identity can be distilled to its most basic and essential elements, and that in verifying for the sum of its parts, that identity can be recognized and affirmed. Further, it assumes that those parts are immediately identifiable, observable and objectively and unproblematically verifiable.

Given the above evidence and case review, it appears that the court is acting in a manner inconsistent with the tenets of anti-essentialism, and in fact embraces essentialist assumptions about identity. Several questions arise from this state of affairs: first, does the court engage in essentialist reasoning out of necessity? Second, is the court compelled to use essentialist terms because claimants compel them to? Finally, is it possible for the courts to embrace an anti-essentialist account of identity, and if so, what might it look like? I will consider each of these questions in turn, arguing that the court need not resort to essentialism in order to be successful.

First, the courts' behaviour in this case might be explained by the *need* to engage in some degree of essentialism in order to complete their assigned tasks. It could be argued that the courts engage in essentialism out of the need to develop clear categories around which precedent and case law can be developed. As previously discussed, categorical reasoning allows justices to ascertain whether a particular case or individual has met a previously established general standard. By compartmentalizing claims in this way, the courts are able to approach an area of law systematically, facilitating the exercise of the law and ensuring that the relevant and appropriate precedents are applied. Thus, while the experiences of claimants may be simplified, homogenized and compartmentalized, to the detriment of their multiple, shifting identities, the practice of law is clear, concise and seeks to present the case in the best possible way in the interests of the claimant(s).

Categorical analysis does not necessitate essentialist analysis. As Nitya Iyer observed, it is not merely the fact of categorical reasoning that makes the court so resistant to notions of intersectional identities – it is the way in which those categories

have been so rigidly constructed by judges (Iyer, 183). Instead of dispensing with categorical reasoning, a tool that allows judges to approach cases in a manner that emphasizes equality and efficiency, these categories should be made more flexible, allowing them to interact and intersect (204). Generating awareness within the judicial system about how these categories have been constructed is also a valuable strategy. Iyer argues that the assumptions about which categories matter and how those categories are to be constructed are largely informed by the position of judges as members of the dominant social group, and as such are in a position of tremendous power (185). Iyer's observations and recommendations demonstrate that essentialism need not be coupled with processes such as categorical analysis, which facilitate and simplify the work of the court.

There is a related argument that must also be considered here – perhaps the court needs essentialist notions of identity to protect aboriginal rights. As the courts are charged with protecting the constitutional rights of Canada's aboriginal peoples, they must have tools by which to protect and secure those rights. One way of doing this is to construct categories and definitions with which to secure and protect the rights of eligible individuals to aboriginal rights. However, the essentialist path is not the only one open to judges – as Chris Andersen argues, the justices in *Powley* case chose to construct the Métis right to hunt as a cultural practice, a move which essentializes cultural difference and aboriginality. Andersen argues in favour of an alternative conception, one that sees Métis rights as political, social and economical as well as cultural (Andersen, 16). In doing so, we move away from the practice of essentializing distinctive culture and thereby preserving and maintaining aboriginal *societies* (16). Andersen demonstrates that

alternative avenues exist for the protection of aboriginal rights – avenues that avoid essentializing aboriginal identity.

The second major argument that accounts for the essentialist approach is that the courts engage in essentialism because claimants compel them to. When presented with individuals who seek recognition on the basis of a Métis identity, an aboriginal identity, or a gendered identity, perhaps the court has no choice but to engage with the claim in the terms that has been suggested to them. Further, perhaps court claimants see a strategic benefit in couching their claims in essential identities – it may make their arguments more compelling to the court. As previously discussed, this is the practice of strategic essentialism.

First, let me say that it is difficult to determine who initiates essentialist vocabulary in the courts – it is, in my opinion, akin to the problem of the chicken and the egg. However, if essentialism is indeed rooted in the terms of claimants, this phenomenon can be explained in a number of ways. First, the process of legal socialization may compel individuals to take on a particular relation to the law. Jim Tully discusses what he refers to as "a *process of* [legal] *subjectification*", wherein individuals are socialized to recognize themselves as subjects of the law, and to conduct themselves in particular ways within the legal framework. What follows from this is that the subject "take[s] on the form of subjectivity appropriate to the various forms of legal subject they bear, their defining normative attitudes and modes of conduct" (Tully 2004, 4). In other words, subjects recognize the ways in which they are subjectified by the law, and locate themselves according to those subjectifications when they engage with it. This means that their conduct and language is structured by their perceived position in relation to the

law, rather than their own perceptions of their position in the world. Thus, when a person stakes an essentialist claim with regard to his/her identity at the court, it may be explained by the legal norms surrounding that subject position, and by that person's understanding of how they ought to shape their position according to the norms of the law.

Second, with regard to cases involving aboriginal rights, the tendency of claimants to essentialize identity may be a product of Canada's colonial history. Taiaiake Alfred discusses this point in relation to First Nation populations:

> The imposition of labels and definitions of identity on indigenous people has been a central feature of the colonization process from the start ... The extent to which these divisions continue to characterize Native communities indicates how deeply people have internalized the colonial mindset. (Alfred, 84)

It is possible that persons involved in aboriginal rights cases feel compelled to present their case in terms of the identity categories that the Canadian state has established to accommodate their claims. Section 35(2) identifies Indian, Inuit and Métis as the three categories of persons who can claim aboriginal rights – individuals seeking those same rights look to the way in which those identities have been formulated by the state and recognized by the court and the law in order to best position themselves to be the recipients of those rights.

The above explanations suggest that it is not individuals or groups who bring essentialist assumptions to the court; it is the norms surrounding these legal claims that compel individuals to stake their claims in this way. These forces are not insurmountable. Both Tully and Alfred point to alternatives – Tully identifies points of freedom and resistance within the law (Tully 2004, 7), while Alfred points to processes inside communities for identity construction (Alfred, 85) as viable alternatives. Each of

these alternatives allows for challenging existing notions of identity and meaning within the law, and an alternative to framing identity claims in essentialist terms.

Throughout this section, I have attempted to highlight the numerous possibilities for anti-essentialism in the work of the court. However, I have yet to explain what such an approach might look like. The following are some possible indicators of an anti-essentialist outlook: first, the courts should demonstrate an understanding of the shifting and dynamic nature of identities, and provide for the reasonable accommodation of these identities. In the case of the Métis, this might include consideration of the position of non-Status Indians, whose identities are often shifting depending on geography, community ties and amendments to the *Indian Act*. Second, open consideration of the possibility of *becoming* Métis is needed. This might require a modification of the test of Métis identity to allow for a person to self-identify, and integrate into the community. It would also require either dropping or modifying the ancestral connection test with regard to genealogy. Third, if the courts insist on a "definition" of Métis identity for the purposes of clarity, consistency and precedent, that this test be made flexible in order to be more consistent with anti-essentialist principles, including that of multiple, competing notions of identity. Fourth, the courts ought to recognize and openly consider the relations of power that produce and reproduce dominant meanings of belonging and community for the purposes of membership. Finally, as the bearers of great power, the courts must also recognize and reflect on their own role as the creator of categories that legitimize and delegitimize identities, Métis or otherwise, and the impact that their decisions have on communities.

Hybridity

Hybridity is both the fact of mixing and a politicized act that challenges dominant notions of identity and culture. It is also a space from which new identities emerge – hybridity and the interstitial spaces it creates requires individuals and groups to negotiate and forge new identities in order to navigate their landscape(s). The *Powley* case represents an opportunity to explore the court's approach to such a complex and nuanced concept. To what extent does the court recognize the Métis as hybrid? Indicators of success in this regard might include explicit recognition of the fact of Métis hybridity, or evidence that discussions and decisions regarding Métis identity reflect a consideration of their hybrid nature.

In their deliberations on *R v. Powley*, the courts appear to have successfully recognized the Métis as a hybrid mix of two cultures. This can be seen in the court's narratives regarding the history of the Métis:

> In the mid 17th century, Jesuits and French traders appeared in the Upper Great Lakes region. The arrival of the French fur traders soon led to marriages between the Ojibway women in the area with the traders. The resultant family groups of mixed-blood families evolved into a new group of aboriginal people, now known as the Métis. Although the Métis shared many customs, practices and traditions of the Ojibway, they were distinctive and separate from the Ojibway. (*R v. Powley* 1999, para. 75)

In this passage, the court acknowledges how a distinct culture and identity emerges from two separate inputs, creating a new and unique identity. The Supreme Court of Canada delivered a similar account:

> Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. (*R v. Powley* 2003, para. 11)

These portrayals of Métis culture and identity also emphasized the conditions of displacement the Métis experienced as a result of their unique mix. At the trial level,

Vaillancourt quotes extensively from interviews with members of the Métis community of Sault Ste. Marie, who shed light on the "in between" experience of the Métis:

> When I first started there was two schools within Batchewana Bay. There was ... was for the Natives at the village and down the Bay was for the non-Natives. When me and my sister first started, we started down the Bay at the white school. We were told we were Natives. We couldn't ... we didn't belong there. Then we went up to the other school and we were told we were non-Natives. We didn't belong there and my mother said this is the problem with being Métis. You're almost a displaced person in your own homeland." (*R v. Powley* 1999, para. 83)

Finally, the courts draw on evidence from different organizations and experts on aboriginal and Métis issues to support the position of the Métis as hybrid aboriginal peoples. At the Provincial Court of Appeal, Justice Sharpe quotes the Royal Commission on Aboriginal Peoples, who stated that Métis culture is:

> derived from the lifestyles of the Aboriginal and non-Aboriginal peoples from whom the modern Métis trace their beginnings, yet the culture they created was no cut-and-paste affair. The product of the Aboriginal-European synthesis was more than the sum of its elements; it was an entirely distinct culture. (qtd. in *R v. Powley* 2001, para. 101)

These resources and comments demonstrate that the court acknowledged and understood the hybrid nature of the Métis – as an aboriginal group with a distinctive, mixed history – in their deliberations.

The acknowledgement of the unique position of the Métis meets certain tensions, however, when the courts move to the decision-making process in *Powley*. In assessing evidence of the existence of Métis rights, the courts discuss the practices of the Ojibway, the aboriginal ancestors of the Métis of Sault Ste. Marie. These discussions are not limited to the historical background of the Métis; evidence of Ojibway practices are introduced in specific instances alongside Métis evidence in specific tests of aboriginal rights claims. Such a move has serious consequences with regard to the adequate consideration of Métis hybridity and on aboriginal law.

Evidence regarding the historical practices of the Ojibway vis-à-vis the Métis was undertaken in relation to two of the tests for claiming rights under s.35: the characterization of the right being claimed, and evidence of existing and continuing practice by the community. With regard to the first test, Vaillancourt found that the appropriate characterization of the right was "hunting for food." The evidence to support this finding was "that the Ojibway and Métis had always hunted and that this activity was an integral part of their culture prior to the intervention of European control" (*R v. Powley* 1999, para. 93). In citing this evidence, Vaillancourt draws our attention to the similarities of the Ojibway and the Métis. However, what is most interesting about Vaillancourt's statement is his claim that hunting was a part of "their" culture. This begs the question: does "their" refer to Ojibway and Métis cultures as distinct entities, or is there an inference of sameness operating here?

The second instance where the practices of the Ojibway are introduced is in testing whether the right claimed is practiced by the Métis community. At trial, Vaillancourt provided the following evidence to test this claim:

> Dr. Ray testified that the economy of the Métis people in Sault Ste Marie historically was similar to the Ojibway economy. He pointed out that the relative importance of fishing or hunting or trapping or collecting would depend on a number of factors in any given year. Game cycles, fish cycles and fur cycles would impact on their activities." (*R v. Powley* 1999, para. 101)

In this case, it appears that the *only* evidence used to affirm the existing practice of hunting in the community of Sault Ste. Marie is its similarity to the Ojibway economy and practice. The appellant challenged this point on appeal, arguing that the trial judge did not adequately distinguish between the practices of the Ojibway and the Métis. Sharpe disagreed with the appellant:

> In my view, the trial judge did not err by placing some weight on the pre-contact Ojibway practice when considering the importance of hunting to their Métis descendants. On a purely factual level, the

> evidence supports the trial judge's finding that there was a connection and continuity in the practices of the two communities. (*R v. Powley* 2001, 119)

He goes on to say that as no culture is free from "the influence of those who came before," the Métis can be expected to be "heavily" influenced by their Ojibway ancestors (para. 120).

In utilizing the practices of the Ojibway as accompanying evidence to the *Powley* case, the court opens itself up to difficulties regarding the appropriate acknowledgement of hybridity. With regard to hybridity, by entertaining evidence of the Ojibway alongside the Métis, doubt can be cast on the degree to which the court is making decisions based on the hybridity of the Métis. In other words, it is unclear whether the courts' decisions reflect consideration of the *Métis*, or whether it is making these decisions based on the *aboriginal* element of Métis identity. This is a very subtle but important distinction. If *Powley* indeed reflects consideration of only those components of Métis identity that are aboriginal, then perhaps the court is not truly recognizing the hybridity of the Métis.

The use of evidence of both aboriginal and Métis practices also has profound implications on aboriginal rights law. While it can be argued that providing supporting evidence from the Ojibway provides extra support for Métis rights claims under s.35, this evidence endangers the ability of the Métis of Sault Ste. Marie to be recognized as distinct and independent rights holders from the Ojibway. It is not improbable that future claimants will look to the *Powley* case and the evidence it considered in determining the existence of hunting rights, and conclude that evidence of previous aboriginal practice would be an asset. In a case such as the Powleys', the parallels work in their favor. But what if there was a practice distinctive and integral to Métis society that came to the attention of the court, that was not integral to the aboriginal ancestors of the Métis, or

perhaps went *against* the practices of their ancestors? In considering the degrees of similarity between the Métis and Ojibway, the court is playing with a dangerous precedent that may preclude recognition of distinctive practices that depart from the Métis' ethnic origins. These considerations are especially important because the aboriginal rights of the Métis have yet to be substantially defined.

What is most interesting about the Métis-Ojibway comparisons in which the court engages is that it goes directly against the Supreme Court of Canada's assertions regarding the adjudication of Métis rights. As Lamer, J. argued in *Van der Peet*, existing law ought not to predetermine the shape or scope or nature of rights that the Métis are entitled to under s.35:

> Although s. 35 includes the Métis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises. (para. 67)

Yet it appears that the courts are doing just that by entertaining ideas and evidence that Métis rights are similar to or flow from aboriginal rights. For example, despite citing the above passage by Lamer, Sharpe states the following about the nature of Métis rights:

> As the Métis culture was not a mere "cut and paste" affair, it may well be difficult in some cases to determine whether a Métis practice, custom or tradition was inherently aboriginal in nature. There is, however, a discernible conception of aboriginal rights arising from the distinctive relationship the aboriginal peoples have with the lands and waters of their traditional territories, and one would expect the nature of Métis rights to correspond in broad outline with those of Canada's other aboriginal peoples." (*R v. Powley* 2001, para. 104)

At both the Provincial Court of Appeal and the Supreme Court of Canada, the court heard arguments that the Métis ought only to have those rights protected which flow from their aboriginal ancestors. The court rejected these claims, arguing that while the Métis of Sault Ste. Marie may be descendents of the Ojibway, their rights as aboriginal peoples are not derived from this connection. (*R v. Powley* 2003, para. 38) It is vital that this exercise in comparison does not overtake this ruling by stealth.

What makes this question even more complex is to recall that the Powley case is a case about *aboriginal* rights. As Chief Justice Lamer stated in *R v. Van der Peet*, "The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal" (para. 20, emphasis in original). As the Métis are aboriginal peoples claiming an aboriginal right, their aboriginality will likely be emphasized throughout the case.

That being said, the courts do have the power to engage with the Métis as hybrid and distinct from the Ojibway in their proceedings. This can be seen in the decision of the Supreme Court of Canada, who affirmed the rights of the Métis at Sault Ste. Marie without making reference to evidence and practices of the Ojibway:

> Rather than comparing Métis practices to those of their Ojibway neighbours – an element of the test fashioned by the Court of Appeal for Ontario – the SCC placed the issue directly in the headlights of an earlier SCC Aboriginal rights decision, R v. Sparrow ... Thus, the SCC's interpretation puts the Métis on equal footing with First Nations and, perhaps more cynically, in equally subservient competition with non-Aboriginal resource users. (Andersen, 14)

To conclude, it appears that the court's record on hybridity is mixed. The court has demonstrated an understanding of the Métis as a unique mix of European and Aboriginal cultures. Yet when it comes to decision-making, the court's focus almost

exclusively on the aboriginal inputs of Métis identity, a move that jeopardizes the adequate consideration of hybridity. It is unclear whether this failure signals the inability of the court to reconcile the concept of the Métis as hybrid with the Métis as an aboriginal peoples, or whether it marks a failure to compute hybrid identities in general. Further research is needed to make such a determination.

Conclusion

Having reviewed the reasons for judgment in *R v. Powley* according to the three underlying principles of a post-modern conception of identity, the following observations can be made. First, the court's actions are inconsistent with regard to anti-essentialism; in fact, the court appears to embrace essentialism as part of its practice of adjudicating identities. Second, the results are mixed with regard to contestation and hybridity. In some aspects, the court operated in a manner consistent with these principles, while in others, they were either overlooked or blatantly ignored. Third, there are numerous institutional structures and conventions that limit the ability of the court to embrace these principles fully. However, in most cases, there was evidence to suggest that judges working within these constraints can still produce an outcome that is consistent with post-modern principles. I will discuss the lessons, issues and implications that arise from these findings in the final chapter.

4. Possibilities for a Post-Modern Theory of Identity: Issues and Conclusions

In the first chapter, I argued for a post-modern conception of identity that emphasizes contestation, anti-essentialism and hybridity. I noted how such a conception is supported by theoretical evidence, as well as the case evidence of the Métis. As a highly contested, shifting and fluid entity, the Métis identity exemplifies the post-modern conception of identity in practice. In the second chapter, I explored how this vision of identity comes into conflict with the Canadian courts, which promote a modernist understanding of identity through their conventions and practices. The norms of legal reasoning, the conventions of legal argument and the individualistic focus promote a modernist conception of identity rooted in the values of rationality, unity, singularity and homogeneity. This is problematic for the Métis, who are seeking recognition of their aboriginal rights on the basis of identity in the Canadian judicial system. Using this conflict as a case study, I explored how or whether these modernist institutions could recognize post-modern identities such as the Métis.

In the third chapter, I introduced *R v. Powley*, a case in which the Supreme Court of Canada affirmed the existence of aboriginal rights in the Métis community of Sault Ste. Marie. I analyzed the reasons for judgment of the four decisions, authored by Justices Vaillancourt, O'Neill, Sharpe and the Supreme Court of Canada, on the basis of contestation, anti-essentialism and hybridity. My findings indicate that there are possibilities for the realization of a post-modern concept of identity in the courts. While particular conventions and practices of the court promote a modernist view of identity, it appears that they can overcome these restrictions and engage with post-modern

identities. In particular, there are numerous opportunities for the recognition of contestation and hybridity, however, the possibilities for anti-essentialist analysis are narrower and change would be more challenging to introduce.

While the above analysis demonstrates that there are a number of possibilities for the recognition of post-modern identity in the Canadian courts, it is important to note that these possibilities are not endless. Conventions, rules, precedents and other inputs threaten to constrain and restrict the court in *all* of its practices, including the adjudication of identity. As such, this case should be taken as evidence that such openings exist, however they are tempered by the ebb and flow of past, present and future practices of the court.

R v. Powley presents us with evidence that there are openings through which post-modern identities can be recognized in Canada's judicial system. We should not stop at the potential demonstrated by *Powley* – I argue that we can and should go further in promoting a post-modern notion of identity in the courts. Such a move does not require post-modernism to be explicitly adopted by the court or its justices. Nor should it require a dramatic revision or reconstruction of the courts. Instead, actors in the judicial realm ought to move incrementally toward the principles of contestation, anti-essentialism and hybridity in order to secure the best possible chance of incorporating post-modern theory into the work of the court.

This process could unfold in a number of ways. First, claimants who seek the recognition of the court on the basis of identity can present their claims in accordance with the principles of post-modern theory. This means emphasis on fluidity, intersection, transformation, contestation and multiplicity, depending on the issues at hand. There may

be some risk involved with this practice, as these descriptions of identity conflict with the conventions of legal argument and the modernist approach to identity. However, such a move may prompt judges to consider these claims on the (post-modern) terms in which they are presented. If the courts listen, other claimants may be compelled to present their claims in similar ways.

Second, judges can work to incorporate these principles into their work through their role as adjudicators of identity. As previously discussed, Justice Sharpe's reasons for judgement in the case of *R v. Powley* is representative of such potential. His consideration of contestation, hybridity and essentialism speak to the power of one person's ability to incorporate these concepts into the work of the court. However, there are other avenues for judges to affect theoretical change; Michael Asch and Catherine Bell argue that judges have the ability to interpret the law in such a way that allows for transformation and change from within:

> "...close examination of the role of precedent reveals that it is not necessary to perpetuate the status quo in order to be faithful to the discipline of law. Rather, numerous mechanisms are available which allow a judge to respond to changing social values within the confines of traditional legal analysis" (Bell and Asch, 38).

This means that judges can move beyond descriptive shifts and create, modify or apply new precedents that are sympathetic to or compatible with post-modern theories of identity. Such a move might accelerate the process of change within the judicial system. These strategies rely on the work of individual judges in a large, sprawling judicial system. Despite its size and structure, I would argue that positive examples from a handful of justices can permeate this structure, and will be read, cited and possibly even followed as precedent, promoting incremental theoretical change.

Third, academics, legal scholars and other interested parties can influence the court by submitting articles and other documents pertaining to identity in relevant cases. The presence of scholarly work endorsing a more fluid conception of identity may influence judges, who often consult scholarly works in their deliberation on the cases before them. Identity theorists, legal scholars and others concerned about the adjudication of identity can thus submit their work in the attempt to influence the court's outlook and approach.

Granted, this would be a slow and gradual process, whereby new theories of identity grow and begin to permeate the legal process and those who engage with it. Further, this process may not be visible to those on the outside of the legal process. Regardless, the important shifts begin with how the court and its judges *think* about identity; in time, as the court begins to act consistently with these principles, evidence will emerge by way of reasons for judgment, precedent and convention, that will demonstrate a strategic shift towards a post-modern theory of identity.

Issues and Implications: What About the Métis?

In the preceding chapters, the Métis have provided a unique and compelling example in the discussion of post-modern identity and the interface of such identities with the courts. In proposing that we go move forward with a post-modern notion of identity in the Canadian courts, it is important to reflect on the impact such a move would have on the Métis. While a fluid, shifting, unbounded theoretical approach stays true to the nature of Métis identity, such an orientation presents specific challenges. First, implementing a post-modern notion of identity raises questions regarding aboriginal and

treaty rights. The constitutional rights of the Canada's aboriginal peoples are protected on the basis of identity – only those who can demonstrate membership in a rights-bearing community can exercise these rights. As such, these constitutional entitlements rely on the ability to bound and regulate identities. Moving towards a post-modern notion of identity destabilizes and, in some cases, obliterates these identity categories. Thus, post-modern theories of identity allow for fluidity, transformation and change but also threaten to destabilize the protection of aboriginal rights.

A second and related issue is the impact destabilizing identities has on the ability of aboriginal peoples to remain distinct from other cultures and identities. In embracing an unbordered, fluid and hybrid world, in which no culture is pure and the themes of exchange and interrelation prevail, the distinctiveness of First Nations, and indeed all cultures and identities, ceases to exist. Thus the destabilizing of identity can contribute to the decline of distinction, as well as the threat of assimilation for some groups, including Canada's aboriginal peoples. The case of the Métis thus prompts us to consider whether the benefits of adopting a post-modern conception of identity outweigh the risks.

Freedom within the Law

The case evidence of *R v. Powley* also addresses a broader question, namely, the role of the law and the potential for change from within. The demonstrated flexibility of the justices in the *Powley* case suggests that while the law is system by which we are restricted, there are also opportunities to push back against it for the purposes of transformative change. Jim Tully's most recent work speaks to this phenomenon. He

draws our attention to the freedoms located within the law, and the power of individuals to work from within the law to promote transformation and change.

In a survey of theories of law, Tully demonstrates that the dominant perspective is one of subjugation; the law, as regulator, is seen as a restricting force and the opposite of freedom (Tully 2004, 2). Such a view is incorrect, Tully argues: there is a freedom intrinsic to the law that ought to be recognized. The law does not directly restrict our bodies and minds; instead, it establishes boundaries that we, as legal subjects, are socialized to recognize and navigate. Rather than seeing this framework as a subjugating and paralysing force, we ought to recognize it as an environment of possibilities – as a system within which individuals are constrained in certain ways by the law, but can still make decisions about how to act given those constraints (Tully, 11). Throughout this work, Tully pushes us to see the freedoms and opportunities for change within the law, and to challenge, reshape and transform the law, based on our understanding of the possibilities and what we, as legal subjects and authors, think *ought* to be the norm.

Tully's observations are consistent with the case findings as outlined in the previous chapter. Prior to the case being heard, *Powley* was framed by the court's liberal, modernist orientation with regard to identity. Yet, several openings were identified where a post-modern conception of identity could be realized, specifically, through the actions of particular judges. Thus, while the practice and conventions of the law constrains the conception of identity, it also provides for possibilities for transformation and change.

Final Thoughts

Throughout this paper, I have argued for a theoretical shift toward a post-modern conception of identity. In this regard, the case of *R v. Powley* represents a beginning: an opening among many, and an opportunity for change. We must resolve to take advantage of these openings, and to push for this conceptual shift in our work as theorists, as legal activists, as academics, as subjects of our own identities. We must assess our position(s) within the law and identify how we can work within what limited space we have to promote transformative change. It is my hope that this work is a contribution towards this critical shift, a movement toward the just adjudication of identity.

Throughout this process, I have also attempted to engage in a transformation of my own mind. I have challenged myself to think, write and reflect in a manner that resists essentialist assumptions, that embraces multiplicity, fluidity and change. It has not been easy – we are bombarded by modernist concepts and practices each and every day, and our critical dialogues are often silent in this respect. However, it is a valuable pursuit – I believe that in shifting the way one sees the world, one can begin to change it. And I see change as growth.

Works Cited

Alfred, Taiaiake. Peace Power and Righteousness: An Indigenous Manifesto. Don Mills, Ont.: Oxford University Press, 1999.

Andersen, Chris. "Residual Tensions of Empire: Contemporary Métis Communities and the Canadian Judicial Imagination" in M. Murphy, ed. Reconfiguring Aboriginal-State Relations. Canada: The State of the Federation, 2003. Montreal and Kingston: McGill-Queen's University Press, Forthcoming 2004.

Anzaldùa, Gloria. Borderlands: The New Mestiza = La Frontera. San Francisco: Aunt Lute Books, 1987.

Asch, Michael. "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*." *Review of Constitutional Studies* 5 (2000) pp. 119-137.

Anthias, Floya. "New Hybridities, Old Concepts: The Limits of 'Culture'" *Ethnic and Racial Studies* 24:4 (2001) pp. 619-641.

Bakhtin, Mikhail Mikhailovich. "Discourse and the Novel," in Michael J. Holquist, ed. The Dialogic Imagination: Four Essays by M.M. Bakhtin. University of Texas Press Slavic Series, No. 1. Austin: University of Texas, 1981. pp. 259-422.

Bell, Catherine. "Who are the Métis People in Section 35(2)?" Alberta Law Review 29:2 (1991) pp. 351-381.

Bell, Catherine. "Métis Constitutional Rights in section 35(1)," Alberta Law Review 36:1 (1997) pp. 180-217

Bell, Catherine and Asch, Michael. "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Legislation," in Michael Asch. ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference. Vancouver, UBC Press: 1997. pp. 38-74.

Best, Steven and Kellner, Douglas. Postmodern Theory: Critical Interrogations. Houndmills, Basingstoke, Hampshire: Macmillan, 1991.

Bar On, Bat-Ami. "Marginality and Epistemic Privilege," in Linda Alcoff and Elizabeth Potter, eds. Feminist Epistemologies. New York: Routledge, 1993. pp. 83-100.

Benhabib, Seyla. The Claims of Culture: Equality and Diversity in the Global Era. Princeton: Princeton University Press, 2002.

Bhabha, Homi K. The Location of Culture. London: Routledge, 1994.

Bhabha, Homi K. "Editor's Introduction: Minority Maneuvers and Unsettled Negotiations," Critical Inquiry 23 (1997a) pp. 431-459.

Bhabha, Homi K. "Life at the Border: Hybrid Identities of the Present," New Perspectives Quarterly 14:1 (1997b) pp. 30-32.

Brown, Jennifer S.H. "Linguistic Solitudes and Changing Social Categories," in Carol M. Judd and Arthur J. Ray, eds. Old Trails and New Directions: Papers of the Third North American Fur Trade Conference. Toronto: University of Toronto Press, 1980. pp. 147-159

Brown, Wendy. States of Injury: Power and Freedom in Late Modernity. Princeton: Princeton University Press, 1995.

Burley, David, Horsfall, Gayel, and Brandon, John D. Structural Considerations of Métis Ethnicity: An Archaeological, Architectural and Historical Study. Vermillion: University of South Dakota Press, 1992.

Butler, Judith P. Gender Trouble: Feminism and the Subversion of Identity. New York: Routledge, 1990.

Canada. Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples. Ottawa: The Commission, 1996. 05 Dec 2003. http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html

Coombe, Rosemary J. "Sports Trademarks and Somatic Politics: Locating the Law in a Critical Cultural Studies," in David Theo Goldberg , Michael Musheno and Lisa C. Bower, eds. Between Law and Culture: Relocating Legal Studies. Minneapolis: University of Minnesota Press, 2001. pp. 22-49.

Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," in Anne Phillips, ed. Feminism and Politics. Oxford: Oxford University Press, 1998. pp. 314-343.

Duclos, Nitya. "Disappearing Women: Racial Minority Women in Human Rights Cases," Canadian Journal of Women and the Law 6 (1993) pp. 25-51.

Du Gay, Paul, Jessica Evans and Peter Redman, eds. Identity: A Reader. London: Sage, 2000.

Easthope, Antony. "Bhabha, Hybridity and Identity," *Textual Practice* 12:2 (1998) pp. 341-348.

Eisenberg, Avigail. "The Architecture of Cultural Accommodation: Why is Arguing for Identity Worthwhile?" in Avigail Eisenberg, ed. Diversity and Equality: Minority Rights and Fundamental Freedoms in Canada (Forthcoming).

Foster, John E. "Some Questions and Perspectives on the Problem of Métis Roots," in Jacqueline Peterson and Jennifer S.H. Brown, eds. The New peoples: being and becoming Métis in North America. Manitoba Studies in Native History. Winnipeg: University of Manitoba Press, 1984. pp. 73-91.

Fraser, Nancy. "Multiculturalism, Antiessentialism and Radical Democracy" in Justice Interruptus: Critical Reflections on the Postsocialist Condition (Routledge, 1997) pp. 173-187.

Grillo, Trina and Wildman, Stephanie M. "Obscuring the Importance of Race: The Implication of making Comparisons between Racism and Sexism (or Other – isms)," in Richard Delgado, ed. Critical Race Theory: The Cutting Edge. Philadelphia: Temple University Press, 1995. pp. 564-572.

Grossberg, Lawrence. "Identity and Cultural Studies: Is that All There Is?" in Stuart Hall and Paul Du Gay, eds. Questions of Cultural Identity. London: Sage, 1996. pp. 87-107.

Hall, Stuart. "The Question of Cultural Identity," in Stuart Hall, David Held and Tony McGrew, eds. Modernity and its Futures. Cambridge: Polity Press in Association with the Open University, 1992. pp. 274-323.

Hall, Stuart. "Cultural Identity and Diaspora," in Patrick Williams and Laura Chrisman, eds. Colonial Discourse and Post-Colonial Theory: A Reader. New York: Columbia University Press, 1994. pp. 392-403.

Hall, Stuart. "Fantasy, Identity, Politics," in Erica Carter, James Donald and Judith Squires, eds. Cultural Remix: Theories of Politics and the Popular. London: Lawrence & Wishart, 1995. pp. 63-72.

Hall, Stuart. "Introduction: Who Needs Identity?" in Stuart Hall and Paul Du Gay, eds. Questions of Cultural Identity. London: Sage, 1996a. pp. 1-17.

Hall, Stuart. "New Ethnicities," in David Morley and Kuan-Hsing Chen, eds. Stuart Hall: Critical Dialogues in Cultural Studies. London: Routledge, 1996b. pp. 441-449.

Harding, Sandra. "Rethinking Standpoint Epistemology: What is 'Strong Objectivity?'" in Linda Alcoff and Elizabeth Potter, eds. Feminist Epistemologies. New York: Routledge, 1993. pp. 49-82.

Haraway, Donna J. "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective," in Simians, Cyborgs and Women: The Reinvention of Nature. New York: Routledge, 1991. pp. 183-201.

Harris, Angela P. "Race and Essentialism in Feminist Legal Theory," in Richard Delgado, ed. Critical Race Theory: The Cutting Edge. Philadelphia: Temple University Press, 1995. pp. 253-266.

Harrison, Julia D. Métis: People Between Two Worlds. Vancouver: Douglas & McIntyre, 1985.

Iyer, Nitya. "Categorical Denials: Equality Rights and the Shaping of Social Identity," Queens Law Journal 19 (1993-1994) pp. 179-207.

Jenkins, Laura Dudley. " Identity and Identification in India: Defining the Disadvantaged. London: Routledge, 2003.

Joseph, May and Jennifer Natalya Fink, eds. Performing Hybridity. Minneapolis: University of Minnesota Press, 1999.

LaRocque, Emma. "Native Identity and the Métis: Otehpayimsuak Peoples," in David Taras and Beverly Rasporitch, eds. A Passion for Identity: Canadian Studies for the 21st Century. 4th ed. Scarborough: Nelson Thomson Learning, 2001. pp. 381-400.

Lawrence, Bonita. Gender, Race, and the Regulation of Native Identity in Canada and the United States: an Overview. *Hypatia* 18:2 (2003) pp. 3-31.

Locke, John. An Essay Concerning Human Understanding. Peter H. Niddich, ed. New York : Oxford University Press, 1979.

Macey, David. The Penguin Dictionary of Critical Theory. London: Penguin Books, 2000.

Magnet, Joseph E. "Collective Rights, Cultural Autonomy and the Canadian State," McGill Law Journal 32 (1986) pp. 170-186.

Mendoza, S. Lily. "Nuancing Anti-Essentialism: A Critical Genealogy of Phillipine Experiments in National Identity Formulation," in Goldberg, David Theo, Michael Musheno and Lisa C. Bower, eds. Between Law and Culture: Relocating Legal Studies. Minneapolis: University of Minnesota Press, 2001. pp. 224-245.

Miller, Bruce Granville. Invisible Indigenes: The Politics of Nonrecognition. Lincoln and London: University of Nebraska Press, 2003.

Monture-Angus, Patricia. Thunder in my Soul: A Mohawk Woman Speaks. Halifax:

Fernwood Publishing, 1995.

Peters, Evelyn, Rosenberg, Mark and Halseth, Greg. The Ontario Métis: Characteristics and Identity. Native Issues 4. Institute of Urban Studies: University of Winnipeg, 1991.

Razack, Sherene. Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms. Toronto: University of Toronto Press, 1998.

Rotman, Leonard L. "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada," *Alberta Law Review* 36:1 (1997-1998) pp. 1-8.

Said, Edward W. Orientalism. New York: Vintage Books, 1994.

Sawchuk, Joe. The Métis of Manitoba: Reformulation of an Ethnic Identity. Canadian Experience Series, 6. Toronto: Peter Martin Associates Ltd, 1978.

Sawchuk, Joe. "Negotiating an Identity: Métis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality," American Indian Quarterly 25:1 (2001) pp. 73-92.

Spivak, Gayatri Chakrovorty. The Post-Colonial Critic: Interviews, Strategies, Dialogues. Sarah Harasym, ed. New York: Routledge, 1990.

Squires, Judith. Gender in Political Theory. Cambridge: Polity Press, 1999.

Taylor, Charles. "The Politics of Recognition," in Amy Gutmann, ed. Multiculturalism and "The Politics of Recognition". Princeton: Princeton University Press, 1992. pp. 25-74.

Tully, James. Strange Multiplicity: Constitutionalism in an Age of Diversity. Cambridge: Cambridge University Press, 1995.

Tully, James. "Subjection and Freedom in Relation to the Law." Green College Speakers Series. University of British Columbia, 4 Feb 2004.

Young, Iris Marion. Justice and the Politics of Difference. Princeton: Princeton University Press, 1990.

Young, Iris Marion. "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," in Anne Phillips, ed. Feminism and Politics. Oxford: Oxford University Press, 1998. pp. 401-429.

Young, Robert. Colonial Desire: Hybridity in Theory, Culture and Race. London: Routledge, 1995.

Cases cited

B. (R.) v. Children's Aid Society of Metropolitan Toronto [1995] 1 S.C.R 315

Delgamuuk'w vs. British Columbia [1997] 3 S.C.R. 1010

Nixon v. Vancouver Rape Relief Society [2002] B.C.H.R.T.D. No. 1

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

R v. Blais [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.)

R v. Sparrow [1990] 1 S.C.R. 1075

Re Lovelace et al. and The Queen in the Right of Ontario et al. (Indexed as Ardoch Algonquin First Nation v. Ontario) (1997), 148 DLR (4^{th}) 126 (Ont. C.A.)

R v. Powley [1999] 1 C.N.L.R. 153

R v. Powley [2000] 47 O.R. (3d) 30

R v. Powley [2001] ON C.A. C34065

R. v. Powley [2003] 2 S.C.R. 207

Vancouver Rape Relief Society v. Kimberly Nixon et. al., [2003] BCSC 1936

Statutes cited

Constitution Act, 1982

Manitoba Act, 1870 (33 Victoria, c 3 (Can.))

Indian Act (R.S. 1985, c. I-5)