

**First Nations, the Church, State, and Image:
Policy and Ideals Reflected in the Indian Act of 1876**

by

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ABSTRACT

First Nations peoples in Canada currently find themselves enmeshed in a legal bureaucracy which is largely the product of alien cultures and ideals. The genesis of these problems can be traced back to first contact between European cultures and Aboriginal peoples. Europeans, who brought with them not only their own culture(s) and values, but their zealously to impose these values upon Aboriginal peoples; values which inevitably found their way into the tools of Canadian politics and law.

One of the most prominent historical instruments of Canada's confining legal bureaucracy is the Indian Act of 1876. The Canadian government and its predecessors, in conjunction with a number of religious institutions, fostered and incorporated negative imagery of Aboriginal peoples into the Indian Act of 1876; much of which remains to this day.

Using Habermas' *Theory of Communicative Action* as a base, this thesis will explore how recurring negative imagery and policy fed off one another in terms of Habermas' notion of lifeworld and system. In addition, the concept of a distinct Aboriginal lifeworld will be introduced. It will be seen that the Aboriginal lifeworld has been colonized (in the sense of Habermas) to an even greater degree than the non-Aboriginal lifeworld. Some of the nature and content of the Indian Act and related legislation can then be understood in terms of the relationships between the system, non-Aboriginal, and Aboriginal lifeworld.

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Introduction

A. Overview

The meeting (or perhaps collision is more descriptive) of European based and First Nations cultures has had a formidable impact on the latter. The often catastrophic results can be seen throughout all aspects of Aboriginal society. The Canadian justice system has failed Aboriginal peoples and communities for centuries. Cultural blindness and distortions of the realities faced by Aboriginal peoples today have often resulted in a myopic understanding of Aboriginal peoples with regards to many areas of dominant society, the justice system in particular. To illustrate this point one need only turn to the Ottawa Citizen, July 8, 1996 to an article entitled "Canadians get tougher on natives". The article discusses a recent Federal poll conducted in February of 1996 which found that

40 per cent of Canadians believe Aboriginal Peoples have themselves to blame for their problems... In the area of land claims, a majority of Canadians feel Aboriginal Peoples are being unreasonable ...many reserves in Canada resemble Third World villages...Yet nationally 47 per cent of Canadians believe Aboriginal Peoples standard of living was better or equal to that of average Canadians. Two years ago this figure was 30 per cent.¹

Moreover, the study went on to reveal that in comparison with earlier polls the most recent survey found that "Canadian views have significantly hardened and are less tolerant towards natives than only two

¹ Ottawa Citizen, July 8, 1996

years ago."²

This thesis will, in part, explore the disjunction between the popular image of the "Indian" held by many Canadians and the reality of the Aboriginal experience, which may be understood, in part, as a product of those very same images. At the same time it will become obvious that image is but one of many by-products of a clash of many cultures. By images I refer to the portrayals and representations that have been created from first contact about Aboriginal peoples, who have been ascribed a broad unitary description as 'Indians' . The word "Indian" itself is the culmination of European categorization, not one which finds its roots within the discourse of self-representation indigenous to the original inhabitants of the country. The word Indian hails from Columbus' mistaken belief that he had ventured to the Indies on his exploratory voyage, in fact he had sailed to North America. That this term "Indian" is still in use when Columbus's geographical coordination was clearly amiss is indicative of the very nature of this discussion. It seems quite acceptable to ignore the fact that the use of the word "Indian" is not only inappropriate but quite certainly wrong. The use of the term "Indian" has undermined government-Aboriginal interactions on many occasions. As Leonore Keeship-Tobias, an Ojibway, stated:

"Indian" is a term used to sell things- souvenirs, cigars, cigarettes, gasoline, cars..."Indian" is a figment of the white

²ibid.

man's imagination."³.

Images ascribed to Aboriginal peoples have conveyed a system of communication, indeed a mode of signification, that has had a negative impact on interaction between Aboriginal peoples and dominant "white" society⁴. The earliest notions of Aboriginal cultures as "primitive" and "savage" in political, spiritual, and social organization set the parameters of profoundly pejorative views of Aboriginal peoples that have contributed to and supported the documented discrimination experienced by Native people within the Canadian legal system. Early stereotypical mosaics of Aboriginal peoples have fuelled legislation and discrimination which has not abated.

Looking at the construction of the image of the "Indian" is one means of investigating the very disturbing situation of Aboriginal peoples and the Canadian legal system. My contention is that some of the earliest images conceived and held by Europeans found their way, directly and indirectly, into formal policy, and in turn, the social meaning gained from policy created a form or mental image that is familiar in larger society, an almost automatic basis of referral. Once enshrined and entrenched in a "legal voice", these images were then returned to the society which was responsible, both through unconscious ascriptions and

³Ronald Wright, Stolen Continents (Toronto, 1993) p. x.

⁴By "white society" I refer to the EuroCanadian society in a general sense that is at the helm of political and legal control over the country rather than Aboriginal cultures in Canada.

conscious assumptions of cultural superiority, for their original forms and content. Through their restatement as official state policy (in particular The Indian Act⁵), these images became an important defining agent and justification for an interactive status quo. As framed by Berkhofer in The White Man's Indian

...In the end, to understand the White image of the Indian is to understand White societies and intellectual premises over time more than the diversity of Native Americans. ...It is ultimately to the history of White values and ideas that we must turn for the basic conceptual categories, classification schema, explanatory frameworks and moral criteria by which past and present Whites perceived, observed, evaluated and interpreted Native Americans whether as literary, and artistic images, as subjects of scientific curiosity, or as objects of philanthropy and policy. As fundamental White ways of looking at themselves changed, so too did their ways of conceiving of Indians.⁶

I plan to explore the relationship between the images conceived of 'Indians' by first European, and then Canadian, policy makers, and the legal images within Indian legislation. This analysis will be useful in elucidating some aspects of the question of Aboriginal peoples' sociopolitical, economic and legal position in Canadian society, and how these contribute to their inequitable position in the face of the Canadian justice system.

Collapsing Aboriginal cultures into a single unit of identity as

⁵R.S.C. 1985, c.I-5.

⁶ Robert F. Berkhofer, The White Man's Indian (New York, 1978) p. xvi.

"Indian" influences much of Canadian Indian policy, and especially the Indian Act, largely as a construction of dominant society:

Our peoples are culturally distinct and linguistically diverse. We are not "Indians." One must remember that here are many distinct indigenous peoples in Canada; there is not a singular category "indian". We have been indianized or classified by the government for administrative purposes.⁷

The first and most predominant European views of Aboriginal peoples as "uncivilized" provided "moral justification for imposing Western concepts of law and justice in an ever widening geographical and conceptual arc."⁸

The process of juridification⁹ (characterized by increased formality and density of Law) is one element of the larger operation of colonization¹⁰. The development and evolution of the Indian Act of 1876 is a primary example of this process and will be a focus of this discussion. It is the intention of this paper to explore the images and stereotypes that have fed into the process of juridification and colonization via the legislative

⁷M.E. Turpel "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women", (1993) Canadian Journal of Women and the Law 6. p 178.

⁸ Bridging the Cultural Divide: A report on Aboriginal People and Criminal Justice in Canada, (1996) p.14.

⁹ Juridification is the legal symptom of system encroachment onto lifeworld. Habermas describes the four stages of juridification from the Bourgeois State to the Democratic welfare state (see J. Habermas The Theory of Communicative Action (Boston, 1987) p. 357-362).

¹⁰in the sense of Habermas's "Theory of Communicative Action" -see *Methods and Assumptions* later on in this section.

act.

Law plays the role of an institution with ideals that originate in dominant society, thereby offering the dominant culture a shared language and behavioural code. If another group or groups do not conform "adequately" to such codes then they are destined to maintain a position of 'other' socially, politically, economically and legally. It is within this framework that the law as an institution offers a screening device which is used to determine "success" in a world constructed by the dominant society. Changes in law are consistent with the historical and current moral notions of the dominant Canadian society. The Indian Act of 1876 to present day, which remains remarkably true to its initial incarnation, embodies the juridification of the "Indian" within dominant society. In essence this connection can be seen as an infiltration of social values and laws inappropriately thrust into Aboriginal society.

As will be seen the Indian Act provides graphic illustrations of the bias and discrimination implicit in the popular imagery of Aboriginal peoples, however, the juridification of that imagery in the Indian Act was not simply reflexive or automatic- it did not simply manifest itself out of air - there is a process by which it came into being. It is my contention that a significant part of that process transpired when

... privately held absolute truths [were] made into public policies and then backed by political power, [and therefore] interpretations of life that [were] contrary to these ideals of

life and how to live it [were] thus potentially destroyed¹¹

It is this system and how it has evolved with respect to Aboriginal peoples through the Indian Act that is at issue here .

The historic notion and context of " Christianization"¹² of the Indian is paramount to the topic at hand, and is the focus of *Part I*, in which analysis turns to how the church and state shared a mutually-reinforcing ideology which became the dominant spiritual and secular means to shared policy. Christianization of Aboriginal peoples became a process of impact by not only viewing European cultures as superior to the Aboriginal ones they encountered, but also by viewing Aboriginal peoples as "in need" on at least two levels: 1) The need for 'legitimate' religious education or reckoning modeled after European, and 2) the need for "cultural civilization" of all Aboriginal peoples; the former being necessary to fulfil the latter, with assumptions of European superiority on both levels being taken for granted. By the realization of these ends the "Indian" might never be elevated enough to aspire to an equal position, but more importantly would be trained in the art of assimilation and servitude to the interests of the dominant society. A quote from 1888 in West Nor'

¹¹Barry D. Rosenfeld Ottawa Citizen (May 17, 1996).

¹²Throughout this essay I'll refer to many tragic and horrible things done in the name of Christianity. Despite this it is not my intention to "Christian-bash". People ascribing to virtually every religion in the world have perpetrated inhuman acts on their fellow human beings. Conversely most religions (including Christianity) profess treating people with respect and kindness. That people have done the former, should not retract from the nature of the latter. However, the nature of this essay tends to emphasize the gross indecencies done to Aboriginal people , sometimes in the *name* of Christianity, but certainly not in the *spirit* of Christianity.

West by Jessie Saxby perhaps sums up the sentiment of the time :

When Britain fully comprehends her mission on earth (that of a dominating race) she will undertake this noble business of emigration in a very different spirit from heretofore and the world as well as Britain herself will go forward on broader lines and on the more enduring basis of religious duty. ¹³

From here, *Part II* develops the ideology of early missionary work and documents how this became manifest in the political debates and discussions that influenced the development of Canadian Indian policy prior to confederation . This thread is followed as a continued influence that fed into the Indian Act of 1876. It is important to note that one of the fundamental principles of the Indian Act of 1876 was the idea that Indian peoples could and should be integrated into " white society" by a process of assimilation. This premise was based on the early notion of "protection", that would ensure that Indian people (who by direct implication were incapable of taking care of themselves) were not exploited by unscrupulous newcomers. This explanation, however, is precisely what resulted from government intervention in the long run. Such a position is in alignment with Berkhofer's theory of colonial Indian policy in that beneath the layers of images, Aboriginal peoples were ascribed a basic element which "assumed- demanded whites do something to or for Indians to raise them to European standards."¹⁴ Applying

¹³Jessie Saxby, West Nor West (London 1890) in A Flannel Shirt and Liberty, . (Vancouver, 1982) p. 67.

¹⁴Berkhofer, op .cit., p. 119.

Berkhofer's theory to the Canadian situation elucidates the increasing juridification of Aboriginal persons and their lands over time.

The policy efforts to 'civilize' "Europeanize" (by implication assimilate) the Indian as first French, second British and, finally Canadian citizens are well documented. Berkhofer sheds some light on the philosophy of this process in his assertion that

...only civilization had history and dynamics... Indianess must be conceived of as ahistorical and static. If the Indian changed through the adoption of civilization as defined by Whites, then he was no longer truly Indian according to the image, because the Indian was judged by what the Whites were not.¹⁵

Perhaps this explains the image of the 'Vanishing Indian'¹⁶ - a romanticized notion of great tribes "dying off". This can also be seen in the governments of Britain and Canada creating the definition of "Indian" and defining later legislative policy with respect to the elements of 'enfranchisement' and 'status' versus 'non-status' Indian categories.

In order to attain the objectives of civilization and assimilation, state policies concentrated on three areas including; lands, membership and local government.¹⁷ *Part III*, will deal in part, with the subject of how the Indian Act continues to extend these objectives and the

¹⁵ibid., p. 29.

¹⁶Berkhofer, op.cit., p. 88.

¹⁷John Leslie and Ron Maguire, "The Historical Development of the Indian Act" (Indian and Northern Affairs, 1978).

underlying misconceptions, and the related imageries upon which these policies are based, well into the twentieth century. As will be shown, the imagery of the "Indian" changes very little from the early missionary and settlement period to 1951- the juncture of the most recent "rethinking" of the Act and the point of conclusion of this analysis. Most aspects of the Indian Act remained intact until 1984, and many still exist today.

..The larger trends of a period in a White society not only determined Whiter perceptions of Indians and what was wanted of or from the Indians but also how the policy results were to be assessed...¹⁸

The scope of the Indian Act from 1876 to the present day is broad and covers a copious number of clauses and amendments. It is not my intention to discuss the minutiae of such a document, but rather to engage in a critical analysis of the historic popular imagery of Indian peoples and the definition of the Indian as it has been constructed and manipulated by the state. This imagery will be shown to have both fostered the Act, and received its juridical blessing in return. A process which has often been at the expense of those for whom the act was originally intended to "protect": Aboriginal peoples.

The work of Roland Barthes on mythology in society is relevant here. In Mythologies Barthes informs us that:

¹⁸Berkhofer, op.cit., pp. 113-114.

every myth can have its history and its geography; each is in fact the sign of the other: myth ripens because it spreads."¹⁹

It is these properties that allow myth to take hold in contemporary society. He begins with what he term "inoculation", which he defines as a process in which the negative deeds of society tend to be concealed- or at least to some degree ignored - so that governing institutions are not considered to be principally ignorant, but room is granted for some accidental ignorance. The outcome of this process is that people tend to blame chance for the failures and injustices of society rather than specific machinations of the powers that be. As will be seen, this process is evident in relation to the culmination of attitudes that lead to the Indian Act of 1876, as well as the evolution of changes that followed it.

The second element of Barthes' outline involves the "Privation of History, [whereby} Myth deprives the object of which it speaks of all History"²⁰ That is, an Aboriginal history evaporates.

it [myth] is a kind of ideal servant: it prepares all things, brings them, lays them out, the master arrives, it silently disappears: all that is left for one to do is to enjoy this beautiful object without wondering where it comes from.²¹

¹⁹Ronald Barthes, Mythologies (London,1985) p. 7.

²⁰Barthes, op.cit., p. 150.

²¹Barthes, op. cit. p. 151

This is illustrative in the government relationship with Aboriginal Peoples in Canada. The "Indian" is always 'around' when one thinks of Canadiana, perhaps as art, carvings, paintings and such, yet the image is convenient. It is similar to choosing the image of a polar bear for a two dollar coin. The bear is something that all Canadians relate to as coming from the 'great Canadian arctic' yet for the majority of the population it is a symbol, not a real part of everyday life in Canada.

B. Methods and Assumptions

To illustrate the link between images, social institutions, and legal legislation (in particular the Indian Act and related policies) I will be implementing two different approaches in this thesis. One will be a largely historical narrative punctuated with a contextual analysis paralleling the approach Berkhofer takes in "The White Man's Indian". This will provide the essential historical and political elements necessary to understand the birth of the Indian Act and the incorporation and reflection of *image* within this Act.

The second stream of thought will use Habermas as a basis for analyzing the interaction of the two societies²² mentioned above.

²²I'll make the categorization of "two societies" (or a similar one). Of course, this is incorrect from both perspectives. However, in order to utilize Habermas and keep this thesis from a predictable digression on every page I'll continue to use this approach.

Utilizing Habermas' fundamental notions of lifeworld and system (with some modifications-see below) I hope to give some causal understanding to the role of Law and image, particularly using the Indian Act and related policies as an example. Of particular importance in this discussion will be the concept of juridification.

Before proceeding it is reasonable to ask to what degree Habermas' *Theory of Communicative Action* provides a reasonable basis for discerning the nature of the construction of the image of First Nations peoples? To answer this question of course requires some reflection on the fundamental aspects of this ambitious theory.²³ Habermas attempts to understand the structure and operation of society by an analysis of what he conceives as its two main components - the system and the lifeworld. Before exploring some of these ideas and how they might pertain to the topic of the image of Aboriginal peoples I believe it is imperative to digress for a moment and address a potential criticism of such an approach. This concern could be loosely summarized in the following question: How can one justify using a "European-based"²⁴ theory (and all its associated biases) to explain the situation of a totally distinct

²³A full expose of this theory is beyond the scope and intent of this thesis. Since I will be using only certain aspects of this theory I intend to focus exclusively on those aspects.

²⁴I am aware of the obvious criticism that a labelling of "white male European" invokes the same sort of generalities that I so staunchly oppose in like labels of Aboriginal cultures - hence the quotation marks. However, I believe the gist of the criticism is relevant .

culture?²⁵

There is no simple answer to this question. But there is an *approach*. If this theory is considered as a tool for exploration rather than a means of exposing "reality" then I believe it is justifiable to utilize it. It will be seen in what follows that, as a tool, the theory of communicative action can be useful in understanding some aspects of the forces in law that drive and are driven by images of Aboriginal peoples in and the dominant culture as a whole, and in general some of the interactions between these cultures. There will also be some obvious limitations and cultural biases which arise. The theory, in this context, need not be viewed as right or wrong, true or false. Rather, it may be considered as one (of a myriad of possible) means of investigating a disturbing situation. With this understanding it is possible to proceed.

Although an intensive explanation of Habermas' theory is impossible within the confines of this discussion it is possible to present an overview of its main components for the purposes of understanding its application to the topic at hand. As mentioned above, Habermas views society as being composed of two main components - lifeworld and system. The former is the realm of personal relationships and hence the birthplace of communicative action. The lifeworld can be described as:

²⁵This question itself raise a cascade of related questions: What do we mean by a while male European theory? Is labelling a theory this way not a form of bias in of itself ?How do we validate or invalidate any theory? What is the nature of bias and what do we mean by cultural bias? However, obviously the digression has to end somewhere for the purposes of this essay. Hence the generality of the question.

The area of social life in which the formation of normative values takes place and which is oriented to mutual agreement through communication.²⁶

It is the assumption of the shared norms within the lifeworld which allows for communication to take place.

This definition is clearly consistent with the notion of an "Aboriginal lifeworld"²⁷ separate from the rest of societies' lifeworld (which I shall refer to in subsequent discussion as the non-Aboriginal or dominant lifeworld). While this complete division is clearly artificial²⁸ it will be seen, nevertheless, to provide a useful springboard for investigating many aspects of concern to Aboriginal peoples via Habermas' theory.

Habermas' second component of society is the system. This sphere is driven by instrumental action (work). Within this sphere are located the primary driving media of society -all those connected to power and money.

²⁶Personal communication Peter Swan, Feb. 12, 1995.

²⁷It is, of course, possible to construct a complimentary notion of "aboriginal system". Aboriginal peoples have had system elements in place throughout history. However, for this discussion I will not focus on them, as it will be seen that aboriginal system elements have been largely superseded by the system elements of the dominant culture.

²⁸.Of course one could argue that separating and defining anything is artificial. Its not as if society is really divided into lifeworld and system (even if we take a generous view of Habermas theory). These are conceptions we have placed on society to attempt to facilitate our understanding.

While distinct from the dominant lifeworld it is still largely a construction, whether directly or indirectly, of the dominant culture. While Habermas argues that all members of society (here Aboriginal and non-Aboriginal lifeworlds) are "colonized" via the system it will be seen that there is a difference in extent between the two lifeworlds - arising from the origins and organization of the current system.

Habermas views the system and the lifeworld as distinct yet connected. Part of this connection can be seen as an infiltration, or infestation, of system values which are inappropriately thrust onto the lifeworld. As an example consider monetary compensation for accident victims. The victim is "taken care of" by the money rather than the community. In fact the system hold is so strong that any other form of compensation is rendered impractical (even unthinkable). This general process of system infringement onto the lifeworld represents the colonization of the lifeworld. The role of Law in this can be seen, metaphorically, as a bridge connecting the lifeworld and system, through which these invasive ideals may traverse into the lifeworld. The process of juridification (characterized by increased formality and density of Law) is one example of the larger operation of colonization. The increased formality and density of legally driven compensation, can be seen in the previous example to clearly be restricting the latitude available for other, non-monetary, compensation. This can be made apparent by considering what would happen in the extreme counter example, that is, a

situation in which there is no written law whatsoever.²⁹ In this case the latitude for compensation would be dictated entirely (or almost entirely) by the flexibility and form of current lifeworld norms.

Habermas describes four stages or waves of juridification. From (in chronological order) the bourgeois state, through to bourgeois constitutional state, to democratic constitutional state, and lastly to the democratic welfare state³⁰. What is of interest, for the purposes of this discussion is not so much the particulars of each stage, but rather how the course of all four stages, all alien to the Aboriginal lifeworld, fed into the current state of Aboriginal, state relations. Habermas, reflecting on the final wave of juridification states:

The juridification of social situation-definitions means introducing into matters of economic and social distribution an if-then structure of conditional law that is "foreign"³¹ to social relations, to social causes, dependencies and needs. This structure does not, however, allow for appropriate, and especially not preventative, reactions to the causes of the situations requiring compensation. (emphasis mine)³²

While Habermas isn't specifically considering Aboriginal peoples-state

²⁹Therefore, by direct implication low or nonexistent formality or density.

³⁰J. Habermas, The Theory of Communicative Action (Boston, 1987), pp.358-361.

³¹Habermas is not referring to foreign in the conventional sense, but rather in a system lifeworld context. There is in that sense, an accentuated foreignness to this from the perspective of Aboriginal peoples.

³²J. Habermas, op.cit., p. 360.

relations with regard to compensation, it will become abundantly clear by the end of this thesis that this is a situation which fits the bill.

Habermas goes on to say

The implementing bureaucracies have to proceed very selectively and choose from among the legally defined conditions of compensations those social exigencies that can at all be dealt with by means of bureaucratic power exercised according to law.³³

By the end of the thesis it will become clear that this is the antithesis of a productive relationship between the state and Aboriginal peoples.

The Indian Act has been one of the major influential implementations of bureaucracy to confine, and define Aboriginal-state relations in the past 200 years, and which has therefore set the stage for the trap in which Aboriginal people (and to an extent the non Aboriginal lifeworld) currently find themselves. As Habermas alludes to (in a different, but applicable, context) Aboriginal peoples are trapped by a foreign, system driven bureaucracy.

On the more optimistic side Habermas' theory views Law as playing the role of an institution³⁴, whereby the ideals originating in the lifeworld may effect a change which is consistent with the current moral

³³ibid, p. 361.

³⁴The degree to which one considers this optimistic, would of course be highly dependent on the correlation between his/her value system and the current norms of the lifeworld as a whole.

notions of the lifeworld. A recent example of this resides in the *Charter of Rights and Freedoms* both as an entirety, and in as some of its contents. In Principle The *Indian Act* could be viewed similarly (depending on whose lifeworld you “inhabit” and to which norms you subscribe).

Although I have postulated the existence of an Aboriginal lifeworld, I have still not addressed precisely what falls within the Aboriginal lifeworld. One reason for this gap is that defining an Aboriginal lifeworld, is in a sense contradictory to its nature and the nature of its members; that is, defining it partially succumbs to a Eurocentric viewpoint, as the process of defining and categorization are inherently non-Aboriginal. There is, however, a possible compromise here, where it is possible to utilize Habermas³⁵ and his notions without completely giving in to the societal bias which generated it³⁶. The Aboriginal lifeworld provides us with an opportunity in this regard. Rather than trying to define what the Aboriginal lifeworld *is*, I will describe what it is *about*. There is, of course, an immediate further difficulty with this compromise; it views Aboriginal culture as a single unit, which is largely a construction of the dominant society. As observed by Turpel,

Our peoples are culturally distinct and linguistically diverse.
We are not "Indians". One must remember that there are many

³⁵I'll often use "Habermas" to imply Habermas in the Theory of Communicative Action. The meaning should be clear from the context.

³⁶Or at least help nurture the social biases which generated Habermas' theory.

distinct indigenous peoples in Canada; there is not singular category "indian" . We have been "Indianized or classified by the government for administrative purposes.³⁷

Aboriginal culture both historically³⁸ and currently exhibits a diversity akin to that of European cultures. However, just as there are enough commonalities in the latter to justify treating them , under certain circumstances, as a single entity, it can be useful (if not entirely correct) to do the same with the First Nations peoples.

One prevalent characteristic of First nations peoples is a holistic approach to living that manifests itself in many ways-spirituality, government, education, "law", and more. For example, the community as a whole is seen as more important than considerations for any one individual.³⁹ Aboriginal "law" therefore, does not focus so much on individual rights as the collective good. If you consider the previous hypothetical example of someone injured in an accident the consideration of assigned fault would be secondary to its effect on the community. Until that person regained his or her health the community would share responsibility for that person and their functions. Another way in which

³⁷M.E. Turpel "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women", (1993) Canadian Journal of Women and the Law 6. p. 178.

³⁸ In fact, at the time of first contact there were about "2000 different cultures"(see Berkhofer, op. cit., p. 3.).

³⁹It is important not to equate this with repression of individuality . In fact individuality is celebrated, just not in the form of individual rights.

this holistic approach can be seen in Aboriginal explanations of the workings of the universe, in which social theory, cosmology, and biology are not delineated as separate undertakings. The interconnection of people and their environment (both on a small and large scale) is not separated into component forms.

Some of these ideas are expressed by Patricia Monture

These holistic teachings involve education, spirituality (you say, religion), law (we say, living peacefully), family, and government. Holistic means to be connected...The traditions in no way involve a hierarchical ordering⁴⁰.

Yet another tenant of many native cultures is the absence of a European notion of hierarchy. An example of this and the consequences of the dominant cultures lack of understanding of this notion was apparent in the recent Oka crisis. During negotiations different members of the Mohawk community were sent to speak with police/government representatives. There was no member of the native community with a special "chief negotiator" status. Unfortunately the response of the government was anger, caused by a misinterpretation of these actions. A misinterpretation caused by assigning their own cultural norms to the situation. This is a common cause of injustice and tension between the Aboriginal and dominant lifeworld.

⁴⁰P. Monture " A vicious Circle: Child Welfare and the First Nations" (1989), 3 Canadian Journal of Women and the Law, p. 5.

With regards to images it is easy to see how, even under the best of circumstances, where norms and their associated images are transferred from the lifeworld into law, a conflict is created between norms from the Aboriginal lifeworld and norms from the non Aboriginal lifeworld. Whose norms are transferred into law? I suspect the reader already knows the answer. Part of this thesis will explore how images from the non-Aboriginal lifeworld are evident in the law of the Indian Act , whereas norms from the Aboriginal lifeworld are conspicuous in the Indian Act only by their absence.

These notions of non hierarchical structure and holistic approach are quite obviously philosophically related. An interesting point here is that, in terms of Habermas, there are ramifications with respect to the means of communication and hence communicative action within the lifeworld. Clearly non-hierarchical structure alters the form of intersubjective relations with regard to resulting actions and evolving norms. However, the notion of communicative action stills persists, only the nature of the underlying catalyst(s) has changed.

Exactly how communicative action functions in a holistic and non hierarchical society is clearly different from what Habermas imagines in European - based or more obviously power centred cultures. Even his discussion of "tribal societies",while acknowledging a certain amount of lifeworld autonomy, relies heavily on hierarchical ideals, as seen when he refers to

Status means here one's position within a group formed along the lines of legitimate descent.⁴¹

While his discussion of these societies does uncover some characteristics of Aboriginal societies it is still tied to the idea of hierarchy or status. His need to introduce the notion of "primitive"⁴², demonstrates an inability to divorce himself from the idea of hierarchy when considering social structure.

To understand this point more clearly it is helpful to have a real life example.⁴³ Children in native communities are treated in a manner consistent with the holistic philosophy of most native societies. The responsibility for their upbringing is more focused on the community as a whole than on the parents in particular. Lack of understanding of this notion of an extended family by the dominant culture can lead to misinterpretation of the actions of parents. I was personally a witness to such a situation while working as a nurse in a maternity ward of a large hospital. A native mother left her child for a few minutes in a room with other mothers and children. Many of the staff interpreted this as neglect.

⁴¹Habermas, op.cit., p. 157.

⁴²Habermas, op.cit., p. 66.

⁴³While this is a bit of a digression from the core topic of the thesis it is useful to have a few concrete examples of cultural differences in hand while considering some of the more abstract notions of this analysis.

Children's Aid was immediately and unjustifiably involved. However, her actions were completely in accord with her notion that the "community" would look after her child for a few minutes while she was gone.⁴⁴

It is useful to consider the different perspectives of this incident within the context of Habermas and the notion of two different lifeworlds. Perhaps from the view of the nurses in the ward Children's Aid was acting as an effective extension of the Law as an institution; appropriately reflecting the norms of their lifeworld and helping the child. At the other extreme the norms of the Aboriginal lifeworld were being ignored. In fact its not hard to imagine (though I concede I speculate here) that it is possible that this woman could be trapped by the infiltration of juridification. Even a empathetic judge might feel compelled by the word of law to inflict some form of punishment. This example is worth keeping in mind throughout the essay when considering other situations, as this conflict between lifeworlds arises again and again.

Clearly there are dramatic differences between the two cultures and in particular the two lifeworlds. Since the initial intersection of these cultures dates back hundreds of years it is natural to ask how these differences have changed during this time period. The breadth of this question makes an answer to it far beyond the scope of this paper. What can be noted in a historical context is how Habermas characterizes the

⁴⁴I think that its important that the point be made that evaluation of attitudes towards children in this regard not be considered better or worse. Community and individual philosophies both have advantages and disadvantages. The issue is awareness, not superiority.

emergence of juridification. One of the defining characteristic of the four stages⁴⁵ leading to the democratic welfare state is the role rights play at each stage, from loosely defined property notions to democratic and social rights. There is no reference to, or use of, norms discussed above that seem to be connected to those of the Aboriginal lifeworld. This motivates the question: where was the Aboriginal lifeworld I have described during this time period?

There are two key points to answering this question. One is that the Aboriginal lifeworld as I have described it is the *essence* of what was and has survived and not the system infected lifeworld which exists today. Secondly, although the Habermas' view of lifeworld-system social evolution does not necessarily paint a happy picture, there is a semblance of co-evolution in it, wherein there has been an uneasy tension between the system and lifeworld characterized by punctuated crises. I don't believe this has happened with regards to the lifeworld of Aboriginal peoples, which has simply been dragged along for the ride. Aboriginal peoples have been forced to play by the rules of an alien culture. You don't have to look hard to find everyday examples of this. Consider a recent Ottawa Citizen headline. "Financial woes threat to Aboriginal groups"⁴⁶. The article discusses the tenuous financial situation of many groups

⁴⁵Bourgeois state, Bourgeois constitutional state, democratic constitutional state and democratic welfare state respectively.

⁴⁶Jack Aubry, Ottawa Citizen, December 7 1993, A3

representing Aboriginal peoples, the seriousness of which threatens their continued existence. Here is a perfect example of a system value (money) squelching the voice of the Aboriginal lifeworld via its very structure. The phrase "money talks" has an ironic and sad meaning when you consider how it reverberates with the desperate situation the lifeworld finds itself in when trying to "talk".

Aboriginal people clearly have a peripheral influence on the present structure of the system, which reveals one of the basic weakness of Habermas theory. The idea of a lifeworld already has a built in hierarchy of the mainstream values associated with it. The interconnection between the lifeworlds and system will be seen to be largely one sided , and the effects on native community and the evolution of image predominately negative.

These differences between the native lifeworld and dominant lifeworld may be illuminated when the idea of colonization is considered, both in the standard sense and within Habermas' theory. The traditional notion of colonization embodies three major characteristics when considering the relationship between the colonizer and the colonized.⁴⁷ The first attribute is that the power rests with in the hands of the oppressor. Secondly, the values of the oppressed group are given little if any merit. Thirdly , as well as external racism, an internalized racism is often created.

⁴⁷B. McKenzie, "Indian Child Welfare Studied" Perception Jan/Feb 1991

We will see many examples of the first two characteristics in the Indian Act. The third merely reflects the tendency of people to adopt values which are continuously presented to them as correct. Such images of "correct" or "proper" lifestyle are among the strongest and most profound of ways of presenting ideas, whether those images be literal, visual, or legislative.

Habermas proposes that in fact all people in society are colonized.⁴⁸ It is no accident that he uses this terminology. If you consider the above description of colonization the parallels are obvious. The system has the power and its values are prioritized by society over the lifeworld. The parallel with the third attribute of colonization is a little more subtle but it exists. By adopting system values (for example material wealth) the lifeworld is committing a kind of "internal racism", if the analogy is made that lifeworld inhabitants and system inhabitants are two races. Of course there are no separate people living in the lifeworld and the system in the sense of two different races, but as a metaphor it has some merit.

These two notions of colonization are compatible. The values of the oppressed are not given any inroads into the system; they are contained, if they are to survive at all, in the Aboriginal lifeworld. The dominant lifeworld, on the other hand, can effect change in system values via communicative action. As well, general values such as individual notions are prioritized in the system via the dominant lifeworld. The construction

⁴⁸Habermas, op. cit., p. 367.

of the Indian Act and its predecessors provide excellent examples of the effects and nature of colonization.

Before proceeding one might ask, at this point, what is it that Habermasian theory adds to this discussion, what is the tangible benefit of its introduction? There are two levels on which to answer this question. One specific to Habermas, one more generic to a number of theoretical approaches.

A strength (and weakness) of a theoretical approach such as Habermas' *Theory of Communicative Action* lies in its ability to depersonalize aspects of social interaction. Not in the sense of removing the role of people, but more in the sense of eliminating (or at least lessening) the roles of victims and villains as such. Conflict may come about, as in this case, more out of incompatibilities of organization structures, or ideals, than out of malice.

A second strength of this particular theory is its insight into the shortcomings of the present day democratic welfare state policies to "benefit" people in difficult or unwanted positions. Although Habermas is referring more specifically people who are impoverished, disabled (or perceived to be in need of some form of what has been referred to as the "social safety net"), there are definite parallels, rooted both in perception and reality, in the position of many Aboriginal people.

As Habermas points out

The negative effect of this--to date, final, --wave of juridification do not appear as side effects, they result from

the from of juridification itself. It is now the very means of guaranteeing freedom that endanger the freedom of the beneficiaries.⁴⁹

The point made here is that not only are Aboriginal peoples subverted by those who do so intentionally, but by those (perhaps the majority) who seek to *benefit* Aboriginal peoples (or society as a whole) , but do so within the confines of the current democratic welfare state. In order to appreciate this point⁵⁰ within the context of this thesis it is necessary to explore some of the historical background with at least some understanding of the situation from a Habermasian perspective.

The structure of the remainder of this thesis will be as follows: Part I will deal with the relation between the Church and State (in particular the early missionaries policies) and its influence on Aboriginal cultures and image. Part II will deal with State policy immediately preceding the Indian Act.

With regards to the image of the Indian throughout Part I and Part II I will be relying on an approach similar to Berkhofer. Emphasizing the importance of maintaining an awareness of the major themes and issues which are invoked time and time again. Because of this I will not follow a strictly linear chronological approach in my analysis.

I haven't specifically decoupled image from other topics in *Part I*

⁴⁹Habermas, *op. cit.* p. 362.

⁵⁰ A *full* critical connection is beyond the scope of this thesis.

and *Part II* because of the inherent contextual importance. Furthermore, *Part I* and *Part II* will implement only enough of Habermas to form the basis of the analysis in *Part III*.

Part III will demonstrate how many of the images and related social forces alluded to in Parts I and II are manifested in the Indian Act and related policies. Habermas provides a theoretical interpretation of this effect. In particular Habermas provide a basis for investigation for understanding the nature of interaction of law and image. Is law a reflection or creator of reality in this sense?

Part I: The Role of the Church and State

In the 16th and early 17th centuries devil language was the rule. The Dutch, Swedes, Englishmen Samuel Purchase, Roger Williams and Cotton Mather - all good Protestants - separately and independently put the devil into the savages' religion, however much they differed in observed detail. In this respect they were members of a great company and in full agreement with the Jesuit missionaries of New France.⁵¹

A. Overview

European-based social, political and religious institutions in North America have undergone numerous changes through the centuries. Yet there are common themes and ideologies that have pervaded these years with minimal change.

The seeds of North American Christian missionary education, sown during the 16th and 17th centuries, developed into a broad reaching and influential force, which swung into the development of Canadian Indian Policy of the nineteenth and twentieth centuries. Missionaries played a

⁵¹Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest. (New York, 1975), pp. 47-48.

significant role in shaping the political, social and economic ideals that fed into the construction of Canada's overall Indian policy. More specifically, this zeal to Christianize the Indian found its way into the early stages and subsequent development of the Indian Act.

As Tobias states:

Much of the propaganda in North America was made by Protestant sects which were in the throes of Evangelical and Revivalist movements stressing the need to Christianize all men. Many of these sects established missions among the Indians, similar to those of the Jesuits and other Catholic orders... such missions were intended not only to teach the Indian new religion, but also to encourage him to adopt European or American values.⁵²

Christian missionaries trekked across North America from east to west spreading the notions of Christianity, civilization and, eventually, with the onslaught of European trade and settlement, assimilation.

The areas of missionary experience I wish to highlight involve Christian denominations from French Catholic Jesuits and Recollects to British protestant Anglicans and the Church of England. The parameters which are of greatest concern here are largely, although not exclusively, confined to the time period ranging from 1830 to Confederation. During this time period some of the most significant influences in the political, social and educational environments (prior to the creation of the Indian

⁵²John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada Indian Policy" (Toronto, 1991) pp. 40-41.

Act of 1876) were taking place⁵³. Their roots , however, date as far back as first contact.

Missionary involvement aided in fostering the familiar yet wholly misguided notions of the Indian as “unenlightened heathen”⁵⁴ in which Christian educators rescue the wretched souls from their godless existence, elevating them to one of “enlightened” and “wholesome” living. As Roberta Greyeyes asserts, this kind of position “takes credit for rescuing Indian people from havoc and despair, while taking little responsibility for creating these same conditions.”⁵⁵ These issues are of importance in looking at the broader construction and notions of the “image” of the Indian ; particularly since the Indian Act of 1876 is still in existence. Although this act has been amended over the years it still controls the political, social, educational, and economic constraints placed on First Nations by the Canadian government.

The church and state played a significant role in the construction of a negative image of the Native peoples already thriving in North America. Denying this would allow a completion of colonial propaganda and myth-making that discourages questioning the morality of European

⁵³see for example Whiteside (1980)

⁵⁴Hines, Rev. J. (1915) “The Red Indians of the Plains: Thirty Year’s Missionary Experience in Saskatchewan London:Society for Promoting Christian Knowledge”.

⁵⁵Roberta A. Greyeyes. St. Michael’s Indian Residential School 1894-1926: A Study Within a Broader Historical and Ideological Framework. Carleton University, 1995.

invasion. Condoning the idea that perhaps the devastation wrought to Indian peoples was somehow less devastating than it really was and continues to be. As Jennings states:

The invaders anticipated, correctly, that other Europeans would question the morality of their enterprise. They therefore made preparations of two sorts : guns and munitions to overpower Indian resistance and quantities of propaganda to overpower their own countrymen's scruples. The propaganda gradually took standard form as an ideology with conventional assumptions and semantics. We live with it still.⁵⁶

As Europeans invaded North America in search of a broader land base for their own expansion and profit, it was necessary to find a way of putting the issue of the Indian into a some form of controllable capsule so as not to interfere with European plans.

If the Europeans hoped to harness, or at least neutralize the numerically superior natives, they could ill afford to tolerate behaviour that was as unpredictable as it was potentially dangerous.⁵⁷

The Christianizing quality which is imbued in the Indian Act, coupled with the legislative changes in the 1920's onward regarding education helped to ready a fertile ground to continue the long history of church and state alliance. The ramifications of state and church cohesion

⁵⁶Frances Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest (New York, 1975),p. v.

⁵⁷ James Axtell The European and the Indian: Essays in the Ethnohistory of Colonial North America (New York, 1981) p. 41.

powered mechanisms for further political control.

It is within this aspect of political control and the associated power with which Habermas *Theory of Communicative Action* may be implemented as an interesting tool to consider how these power mechanisms factored into the interaction between the two lifeworlds. Before proceeding there is a limitation that bears consideration here. Habermas makes it clear that assigning a quantitative value to power (i.e. Europeans had 90% , Aboriginal peoples 10%) is not possible:

even a non numerical assignment of measuring units is no simple matter. As a substitute for more precise measurements of power we find a hierarchy ordering of formal competence to decide, a recourse to status ordering in general . As we know from everyday experience and from empirical investigations these indicators are often misleading.⁵⁸

I therefore won't attempt to assign a value to the power as it impacts between white and Indian. Nevertheless, there is an aspect of power that is particularly germane to the discussion

....power can be exercised at a societal level only as organized power...
Before power was differentiated out under the modern conditions of legal domination and rational administration as a medium that could circulate within limits, it appeared in the form of an authority of office tied to certain persons and positions. ⁵⁹

⁵⁸Habermas, op. cit. p. 269.

⁵⁹ibid. p. 270.

What happened as lifeworlds collided? Power in many instances was tied to the Church and or its administrators. To see this one need only reflect on the Church's influence in setting up education - not only organization but content, both with regard to organization and content.

By attempting to infiltrate the Aboriginal lifeworld via education, the Church attempted to usurp norms at the core of the Aboriginal lifeworld. Worse, it tried to propagate these norms by influencing those most easily influenced- Aboriginal children. This , of course, was not the only means of influence perpetrated by the church and state.

The other important steering media in Habermas theory is money.

He describes the ways in which the two media are normatively anchored in the lifeworld.

Money is institutionalised via institutions of bourgeois civil law such as property and contract, power via the public legal organization of offices. ⁶⁰

Now if we consider 16 or 17th century Europeans showing up in North America, the two media are normatively anchored in *their* lifeworld, but not at all in Aboriginal lifeworld. It is this normative anchoring of power in non Aboriginal lifeworld and the lack of parallels that provides the basis for many of the problems in attempts at a co-existence of the two lifeworlds.

⁶⁰ibid, p. 270.

B. First Contact Saviours and Symbiosis

The earliest recording of Christian teaching to Aboriginal peoples of North America occurred at Gaspé' on the 20th of July 1534.

Jacques Cartier erected a cross and indicated as well as he could to visiting Iroquoians from Stadacona, that they should look to it for their redemption. In the following year his crew harangued the villagers of Stadacona on the folly of their beliefs and elicited in response what they interpreted as a mass request for Baptism ⁶¹

This record reveals that Eurochristian notions concerning Indians were less than egalitarian. In the first place Cartier's erection of the cross and his assumption the Iroquoians should look to it for their redemption assumes that they were in need of redemption and therefore presupposes they had no spiritual avenues of their own. In entertaining the speculation that they did have spiritual guidance in their culture, Cartier's actions delineated that it was inferior to what the Europeans offered. This inference is illustrated by the point that Cartier's "crew harangued the villagers of Stadacona on the folly of their beliefs". Finally, the Europeans simply believed that they requested a mass Baptism, whether or not they did is a secondary issue, since the crew were unprepared to learn of Amerindian spirituality and instead put their

⁶¹The Voyages of Jacques Cartier trans and ed H.P. Biggar (Ottawa: King's Printer 1924) 24f; Collection de manuscrits...relatifs a la Nouvelle France 1 (Quebec: A. Cote et Cie 1883) 30.

own values first. Whether or not there was a belief by the newcomers that there was value in Amerindian spirituality, is largely irrelevant in terms of the outward actions that were taken towards the Amerindian populations with respect to the lack of observance of their systems by Europeans. Historically these Eurocentric actions manifest themselves over and over again. Assumptions of Eurochristian moral, educational and political superiority intertwined with a convenient paternalistic position of doing what is best for those incapable of looking after their own interests or the interests of their children.

There were several Christian missionary groups arriving in North America at the time of European invasion who found their roots in both British Protestantism and French Catholicism. Christian missionaries' spiritual goals lent themselves to the colonizing objectives of Europeans. This is illustrated by the fact that the educational systems that were set up by the state were run on models of Christian education and values imbued with Christian work ethics and spiritual roles of the sexes. As Jaenen states:

True conversion for the Amerindian meant a renunciation of their culture and a loss of their identity, a fact which the French missionaries and civil officials, without realizing the full implications of social disorganization, found quite normal because the French and Catholic qualities of their own civilisation were rarely dissociated or conceived as separable. ...as conversion ... proved to be a very disruptive experience in the native communities, religious conversion and cultural assimilation became more closely entwined. Unless the whole community converted and the whole apparatus of French

institutions and life-style were adopted, divisions became acrimonious, reversion was likely and social disorganization always ensued.⁶²

This link between church and state, the melding of Christian ideals and state colonizing objectives, overlapped in the views of Indians being in need of 'civility'. The best way for Europeans, both French and English, to pave the road to Eurocentric notions of civility was via Christian re-education. The French Recollects, Sulpicians and Jesuits all believed the Indians were lacking in "Order, Industry and Manners",⁶³ and sought to rectify these omissions via religious education.

Nearly all the colonial charters granted by the French and English monarchs in the sixteenth and seventeenth centuries assign the wish to extend the Christian church and to save savage souls as a principal, if not the principal, motive for colonization.⁶⁴

During the late 1600's, as more Europeans arrived in North America , the British Parliament felt the need to pass legislation that would effectively provide a framework for conduct with Indians . There was little distinction given to various clans or tribes, Aboriginal peoples were generally seen as groups to be dealt with in uniform fashion. The

⁶² B. Jaenen, Friend and Foe, (Toronto, 1976) p.193.

⁶³Axtell op.cit., p. 45.

⁶⁴J. W. Grant, Moon of Wintertime: Missionaries and the Indians of Canada in Encounter Since 1534. (Toronto, 1984) p.43.

reasoning for this is not complicated; Indian peoples regardless of variety still represented the same predicament to the settlers- how to expand military, political, or economic influence. Distinguishing between groups of Aboriginal cultures was apparently deemed needless and complicated.⁶⁵ If the Europeans had taken the time to make such distinctions it might also have introduced the possibility of legitimizing a wide variety of social structures and political systems already well in place-or provided a basis for a more rational and effective means of dismantling them.⁶⁶

The Jesuit missions , headed by Fathers Pierre Briard and Enmond Masse, can be traced in Canada to May of 1611, and the context of Port Royal. The Jesuits were initially identified in their home land as controversial. The Dominicans in particular believed them to be aligned with counter-reformation . The search was on for a new land where they could pursue new curriculums based on the “knowledge necessary to a good Christian, the humane sciences, from rudiments of grammar to the highest branches of study...” ⁶⁷ They founded a college in Quebec in 1635 to further establish these criteria. Eventually the Jesuits received legal recognition in Paris and the support of the Crown, which went hand in

⁶⁵This is somewhat of a generalization. Distinction was made, on the basis, of say language.

⁶⁶see for example J. Reed “Myth Symbol & Colonial Encant” (Ottawa,1996)

⁶⁷S.R. Mealing, The Jesuit Relations and Allied Documents (Ottawa,1990).

hand with financial backing from wealthy segments of French Catholic society.⁶⁸

For the French who remained at home, the missionaries abroad were paving the way by settling into land that would hopefully be hospitable for more French settlement in the future, ultimately fostering the growth of political power internationally. Therefore in addition to seeking out a military alliance for issues of trade it was beneficial to them, for contention of British settlements, to strengthen their alliance with Indians. Conversion of souls by Jesuits to Catholicism would hopefully meet the economic and political needs of the priests as well as the ambitions of France to maintain a hold on British competitions in these areas. In 1634, Father Le Jeune's relation of missionary strategy sets out the following:

...the plan establishing permanent mission statements to which Indian converts could be attracted both by the consolations of religion and the protection of French power, where they could be taught the elements of European civilization.⁶⁹

The race for conversion of Indians to Catholicism became evident in the failed attempts to build missions among the Mohawks. A number of these Eastern Iroquois saw the Jesuits as rivals for spiritual authority as well as a hinderance to their way of life. Undaunted, the Jesuits continued in their efforts to secure converts. As Mealing notes

⁶⁸ibid., p.viii.

⁶⁹ibid., p. ix.

...as the mission moved southeast in a refuge for the Abenakis, it became a strategic point in the vicious border war between New France and New England. The mission station was as apt an instrument for consolidation as for expansion.⁷⁰

Both the British and French had alternative agendas to simply saving souls in the name of Christianity. Political, social and economic expansion were the prizes they were vying for in increasingly competitive trade markets both domestically and internationally.

During the sixteenth and seventeenth centuries, a link between the church and state existed in monarchs who based their governance on religious laws and doctrines. As Axtell states:

Christian missionaries, who had come to America in the earliest phases of invasion, espoused a set of spiritual goals which coloured but ultimately lent themselves to the more material ends of their countrymen. ... Christianity envisioned was not a disembodied spiritual construct but a distinct cultural product of Western Europe. Conversion was tantamount to a complete transformation of cultural identity.⁷¹

Even though the Jesuits in New France had great conflicts and quarrels with the French colonial authorities, the French and English experience was nevertheless based in religious teaching. The major social and educational institutions of their cultures became models and methods of instruction for Indian peoples. It made sense then, that religious

⁷⁰ibid., p. ix.

⁷¹Axtell, op.cit., p. 42.

institutions via the missions were to take a large portion of responsibility in the tasks of education and civilizing of the Indian. Eventually, the

...great failure of the French in seventeenth-century America was their inability to integrate the native peoples in appreciable numbers into a new social order, thereby overcoming the continuing stresses of cultural clash and the nefarious consequences of social disorganization⁷²

Europeans were attempting to move Indians from what they saw as “disordered riotous rowtes and companies to a well governed common wealth”⁷³; the Missionaries were attempting to manage to serve Christ *and* conquest without apparent contradiction .

Although the French and British had different methods of going about “civilizing” Indians there was overlap in terms of pursuing younger and younger members of Native populations. The British had little success in achieving success with the conversion of adult Natives and turned their attention to children, on the assumption that they could “prevent the hereditary strain of savagism”⁷⁴ The additional merit in targeting a younger population was that they could be brought up to become preachers, teachers and interpreters to “take over the goals of

⁷²Jaenen, op cit. p.195.

⁷³Ibid., p. 46.

⁷⁴Leslie & Macguire, op. cit.

civilizing and 'Bring them up English' ".⁷⁵ The French also favoured attempts to convert youngsters and agreed with the boarding school-style education of the British, since the "consciousness of being three hundred leagues distant from their own country makes these young men more tractable."⁷⁶

Both the French and English States and religious styles were steeped in patriarchal affirmations. It is not surprising then that male Indians were to be groomed to lead their future communities as newly organized governments. In contrast young girls were taught religion and a domestic capacity of "house wifery" by the French colonists. The Recollects and Jesuits established French style seminaries, eventually, however lack of funds, students and wavering success motivated a turn towards Native settlements to be built close to major centres of French populations.⁷⁷

The British government of 1670 legislated jurisdiction over Indian relations into the hands of assorted colonial governors.:

As you are to consider how the Indians and slaves may be best instructed and invited to the Christian religion, it being both for the honour of the Crown and of the Protestant religion itself, that all persons within any of our territories, though never so remote, should be taught the knowledge of God and be

⁷⁵Ibid, p. 66 .

⁷⁶Axtell, op.cit., p. 43.

⁷⁷Grant, op.cit., p. 71.

made acquainted with the mysteries of salvation. ⁷⁸

The coupling of the state and religion is clear and revealing. Additionally there is an obvious lack of mutual respect for a variety of social communities and governments. That the Amerindian peoples and slaves are discussed synonymously and are both invited to the Christian religion to be “acquainted with the mysteries of salvation” suggests that they did not have knowledge of Christianity as well as having obvious implications for the perceived status of First Nations peoples. There was no suggestion that perhaps they were already acquainted with Christianity but chose to dismiss it in favour of their own spiritual practices. The point being that from a Crown perspective there should be no choice in the matter, furthering a Eurocentric notion that was paternalistic, it is written in a manner which sounds “politely protectionist” rather than authoritarian. This policy and its assumptions illustrate not only a paternalistic attitude but also serves as a reminder that the British position, as the earlier exposition of the French, was steeped in assumptions of Eurochristian superiority . There was little consideration given to the morality of what was happening to “Indians or slaves”; that land was being divided up and taken away from people who had been there for centuries, with their own cultures and governments. Given the Eurocentric hegemony of superiority such a question would be , at worst,

⁷⁸Canada. Parliament. Journals of the Legislative Assembly of Canada. Appendix EEE (8 Victoria, 20 March 1845)], Report on the Affairs of the Indians in Canada(Montreal: Rollo Campbell, 1845) .

rarely formed, and at best, eventually dismissed, amongst dominant governing bodies of Europeans.

C Trade, Alliance & Land

During the decades to follow, the colonial government of New York exercised control over what became Indian Affairs.⁷⁹ Throughout the 1700's the Governor of New York appointed various officers to oversee this department. By the time the 'Seven Years War' came to be, the British needed to maintain the Aboriginal military support; reenforcing the importance of the department to the colony. In these times the objectives were fairly clear: "to maintain the various tribes as military allies ... and pursue the goals of protection and civilization."⁸⁰

The mandate of protection was echoed within the Royal Proclamation of 1763 which followed the fall of New France. In this latest era, the impetus of Indian policy changed somewhat in order to gain control over Indian hunting grounds. The Royal Proclamation of 1763 was an internal document established by the Crown and has no substantive significance in terms of international law. Although it regulated affairs

⁷⁹ *Ibid.*, p.3.

⁸⁰ *Ibid.*, p.3.

between Indians and private persons, it was -and is - useless in terms of rights the Indian peoples may wish to enforce against the Crown.⁸¹ The justification for the specifics of the Proclamation was that it would supposedly benefit the Indian people under the notion of protection. This “protection”, however, involved, in part, the settlement of these lands by more Europeans. :

..We do further declare it to be our Royal Will and pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection and Dominion for the use of the said Indians, all the Land and Territories not included within the Limits of the Territories not included within the Limits of our Said Three New Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;

And we do hereby strictly forbid, on Pain of our displeasure, all our loving Subjects from making and Purchase or Settlements whatever, or taking possession of any of the Lands above reserved, without our especial leave and License for the Purpose first obtained. ⁸²

From the Crowns point of view the desire was to prevent “unjust Settlement & Fraudulent purchase”⁸³. In reality it was also a means of slowing down settlement in order to keep peace in the Frontier.

The Crown reserved itself the right to extinguish “Indian title”

⁸¹LC Green, The Law of Nations and the New World. (1989),p.100.

⁸²Canada. Parliament. Revised Statues of Canada. 1952. Volume 6. pp. 6495-6496.

⁸³ Olive Patricia Dickason, Canada's First Nations (Toronto,1992) p. 188.

which was equated with rights of occupancy and use, not ownership in fee simple.

The British were, in their minds, the possessors of the underlying sovereign title to the lands of British North America; as the Proclamation indicates: it was “our” lands (that is British lands) that were being reserved for Amerindians to whom the Crown was extending its protection. This proclamation and its concomitant assumptions reveals a paternalistic attitude on several fronts.

First the assumption, Amerindians needed protection, second, this could best be achieved by voluntarily giving over lands to the Crown. Implicit here is the premise that Aboriginal peoples were incapable of looking after themselves and were not capable of negotiating for themselves.

According to Leslie and Macguire , the most noteworthy section of the Royal Proclamation was that “...it specified a procedure for acquiring Indian Hunting grounds for settlement. Thus early on the Crown assumed an active role as a protector of Indian People, particularly in matters involving land.”⁸⁴ The Proclamation of 1763 also served as a political document :

its sections relevant to Indians were primarily designed to allay fears of the western Indians with respect to encroachments upon their lands...the Proclamation created an Indian Country outside the borders of the colonies...

⁸⁴Leslie and Macguire, op.cit., p.5.

therefore... Indian lands within the colonies constituted an implicit recognition of Indian title to those lands by the Proclamation.”⁸⁵

The Proclamation failed however, in its efforts to distinguish which portions of land were reserved for Indians on lands that were within the colonies.⁸⁶

The British Protestant churches provided little support to Indians. By the mid eighteenth century, with the exception of the Church of England, “Ecclesiastical government maintained ministry to those specifically called by an individual congregation of the elect.”⁸⁷ Since the conversions of Indians was not particularly successful, the ministry was unwilling to put further effort into such ventures.

The French Jesuits, by contrast, were organized hierarchically in international order and had the support to seek out “pagan conversion” as their central goal⁸⁸. They had expanded into remote corners of New France, west to Lake Superior, north to the Hudson’s Bay and south to Louisiana. ⁸⁹ Christian conversion may not have furthered the original

⁸⁵Cumming and Mickenberg, Native Rights in Canada. (1971) pp.86-87.

⁸⁶ibid.

⁸⁷ibid. p.68.

⁸⁸Private communication, J. Dickson Gilmore, Sept. 15, 1996.

⁸⁹Cumming and Mickenberg op.cit., p 68.

goal of Eurocentric civility but it did help to provide the French populations with hunting, trapping and military alliance.

In 1755, the structure of British policy towards Indians was broadened to include a “hierarchy of Superintendents, Deputy Superintendents, Commissaries, Interpreters, and Missionaries”⁹⁰. This group was appointed to manage the system of Indian affairs, and it was during this time that the ...”Superintendents of each Tribe were empowered to act as justices of the peace.”⁹¹ . At this time, the Indian Department was split into a Northern and Southern portion. Sir William Johnson lead the North while John Stuart was responsible for the South. The two ultimately reported to the Commander of British Forces in North America.⁹² It is significant to that the Missionaries were incorporated into the administration of Indian policy as active participants. Their contributions were anticipated in terms of organizing education and furthering the goals of civilizing the Indians. The Christianizing efforts of the British were extended into the early mandates of the Royal Proclamation of 1763, in the Articles of Capitulation surrendering Montreal and Quebec:

...the Savages or allies of His Most Christian Majesty [France]

⁹⁰ibid, p.6.

⁹¹Arthur G. Doughty et al. ed., Documents relating to the Constitutional History of Canada (1981) 1759-1791 p.615.

⁹²Leslie and Macguire op. cit., p. 3.

shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence whatever for having carried arms and served His Most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries.⁹³

This broadening of the legislative powers to directly include the management of Indians by Missionaries was then assimilated into the legal system by supplying the superintendents with the power of justices of the peace. The implication being: Indian peoples were now under the jurisdiction of the Crown, which thereby took a further step to gain greater political control over First Nations.

Christian conversion, however, was neither permanent nor universal in nature. The eventual failure of the French and English at conversion occurred for a variety of reasons, including disease, war delineated from European trade competitions, “false Christians” (that is those who espoused to be working under the framework of Christian values but in actuality their mandates were guided by self interest and greed) and an acute underestimation of Europeans of the strength of Native spirituality itself and its cultural permeation.

A variety of languages also stood in the way of the Europeans, although the British and French only encountered four, there were still

⁹³Adam Shortt and Arthur G. Doherty, eds. , Documents Relating to the Constitutional History of Canada 1759-1791, 2 vols. (Ottawa: 1918), 1:33.

several different dialects that could be found among them. 94.

Another reason for European failure in the area of conversion included

pretending that Christians professed the one true faith when missionaries from many denominations hawked their spiritual wares;...being obsessed by death and the afterlife, especially by the palpable threat of eternal torture by fire ...and the assertion that baptism conferred everlasting life when it was often followed by death..95.

While these inconsistencies may not have been apparent to the missionaries, they would be glaringly apparent to people encountering Christianity for the first time. Moreover, as the A Micmac asserted "You have your way and we will have ours; everyone values his own wares." 96 Spiritual beliefs were already strongly entrenched in Aboriginal cultures. In 1745 the Iroquois at Shamokin told Reverend David Brainerd that

We are Indians and don't wish to be transformed into white men. The English are our Brethren, but we never promised to become what they are. As little as we desire the preacher to become Indian, so little ought he to desire the Indians to become preachers.97

It seems that tolerance for difference was accepted to a degree in

94Axtell, op.cit., p. 69.

95Axtell, op.cit. p.78.

96Axtell, op.cit. p. 72.

97William M. Beauchamp, ed., Moravian Journals Relating to Central New York, 1745-66 (Syracuse, NY.: 1916),p.7.

Amerindian cultures. Contrast that with the Europeans method of removing children from their families to re-educate them in Eurocentric ways. As Axtell states : “Christianity sought to cajole or strong-arm the natives into spiritual submission.”⁹⁸ This “re-education” is a perfect example of a Church initiative rooted in a pejorative and bigoted image which was seized upon by the state to pursue avenues of action consistent with their own prejudices and policy.

The acceptance of Christianity that did take hold among some groups such as the coastal Algonquins of southern New England occurred at a time when they were vulnerable from plague and overrun with social dysfunction and religious revitalization.

The English sense of cultural superiority - which was coloured by racism before the eighteenth century- helped the Indians to maintain their crucial ethnic core at the heart of their newly acquired Christian personae.⁹⁹

That Christianity managed to meet spiritual needs for some Aboriginal peoples is not in question, but this was the case for a small minority of people rather than a majority, as hoped by early colonists.¹⁰⁰

The church and state still held a great deal of power that was difficult to separate. Given that the historical nature of the church and

⁹⁸Axtell, op.cit. p.86.

⁹⁹Axtell, op.cit., p.85.

¹⁰⁰Axtell, op.cit., p. 63.

state was based upon the rise of strong monarchies, and a path of secularization, Christianity had become a recognized, privileged and established religion in Europe well before contact.

The state expected to regulate the temporal affairs of the church, administer its endowments and make use of the political and diplomatic talents of its clerics...it became possible to speak of Christianity as a part of the common law, so that anyone who did not profess it had either to be excluded or to be treated virtually as a foreigner.¹⁰¹

An underlying (and not unimportant) observation is the economic union of the church and state. During the nineteenth century many missions survived on small gifts from various sources. For example, in *Moon of Wintertime* - a study of missionaries and Indians of Canada by John Webster Grant, Grant writes

John Wesley established the practice among the Methodists of assigning the raising of money to local officials who would be responsible for collecting dues from eight to ten people, and soon the missionary mite box was a familiar sight in Protestant homes¹⁰².

In 1822 l'Oeuvre Pour la Propagation de la Foi (The Society for the propagation of Faith) "became a major source of income for the Roman Catholic missions around the world. "¹⁰³. Grant goes on to write that .

¹⁰¹(Tertullian, Apology 21; Max J. Kohler 'The Doctrine that "Christianity is Part of the Common Law" Publications of the American Jewish Historical Society 31 (1928) 105-34)

¹⁰²Grant, op.cit., p. 74.

¹⁰³ibid, p. 74.

..beginning in the late eighteenth century a succession of reformers in both Britain and the U.S. sought to remedy social ills, appealing at first chiefly to individual consciences but increasingly seeking to mould public policy.¹⁰⁴

In 1799 the London Missionary society made their way to Canada. The Trappists landed in Nova Scotia in 1819 to attempt salvation of the Micmac, and met with limited success. In 1820 the lieutenant governor of Canada, Sir Peregrine Maitland, chose the Grand and Credit Indian communities to initiate schools that would teach a curriculum of reading, writing, arithmetic, agriculture and industry based on a program designed to integrate “a moral sense to ensure ...a Christian missionary ... as an internal part of each educational team.” ¹⁰⁵

D. From Warriors to Wards

The end of the War of 1812 also marked the end of the need for alliance of British and Amerindians based on military support for the British Crown. According to Dickason, this is reflected in governmental reorganization:

¹⁰⁴ Grant, op.cit. p.74.

¹⁰⁵ Grant, op.cit. p.82.

... in 1830, Indian administration was shifted to the civilian arm. Settler expansion was dramatic- the population rose threefold from approximately 750,000 in 1821 to 2.3 million by 1851; in Upper Canada it rose by a factor of ten, to reach 952,000....Amerindians east of the Great Lakes were already a minority in their own lands. It has been estimated that by 1812 they only formed better than 10 percent of the population of Upper Canada.¹⁰⁶

The fur trade, for a large part of the century, continued to be a viable source of fairly cognizant interaction between Amerindians and Europeans.¹⁰⁷ However, in the wake of increasing settlement by immigrants and an upswing in agricultural development, new methods of interaction in social and political realms would be found.

Even though senior British officials at Whitehall protested the need to maintain the distribution of gifts and supplies to the tribes via the Indian Department this practice was maintained for a variety of reasons. The impetus for this was actually quite broad and ran the gamete from the advisement that the Amerindians were “dependent on the King’s Bounty”,¹⁰⁸ - to a wish not to offend the Amerindians with the potential of being seen as ungrateful for their assistance in the preservation of Upper

¹⁰⁶Dickason, p. 224 and Journals of the Legislative Assembly of Prince Edward Island, 7 January 1812, pp.11-12; cited by Upton, Micmac and Colonists, p.118.

¹⁰⁷Ibid, p.224.

¹⁰⁸Robert S. Allen His Majesty’s Allies: British Indian Policy in The Defence of Canada, 1774-1815 (Toronto, 1992) p.174.

Canada^{109, 110} . Perhaps more the point was that the British still feared the “possibility of renewed difficulties with the United States,”¹¹¹ and this is what finally influenced the imperial authorities to maintain some contact with their Indian allies. Therefore, the distribution of presents continued on for a few more decades, but at a greatly reduced rate.¹¹²

One of the goals of the British was to reduce military and monetary involvement from the Crown towards Amerindians, and more notably to accelerate the process of settlement and seek out Indian land surrenders. These undertakings were to be carried out through the ‘civilization’ and eventually ‘assimilation’ of the Indian people and the goal as Lord Glenelg stated was to “protect and cherish this helpless Race...[and] raise them in the Scale of Humanity”¹¹³

In this time period it is not difficult to see why the image of ‘the vanishing Indian’ was rife . Parallel to this vision were two themes, the first being that those Amerindians who remained would be better off left

¹⁰⁹Dickason, op.cit., p. 142.

¹¹⁰These gifts were seen by First Nations peoples as symbols of the formal relationships with the Crown. Both the French and British tried to use these as leverage at various times to attain AmerIndian allies (see for instance Dickason, op. cit. p. 160).

¹¹¹Allen, op.cit. p.174.

¹¹²Ibid

¹¹³Cited by L.F.S Upton, “The Origins of Canadian Indian Policy.” *Journal of Canadian Studies*,X,4 (1973),p.59.

to themselves unhindered by further white settlement, and secondly, that those who stayed should be educated in the manner of 'civilization.'¹¹⁴ The former segregationist position was echoed in Sir Francis Bond's Heads' platform as Lieutenant Governor in 1836 . The latter governments' policy was to attempt to get migrating Amerindians to 'settle down' into a civilized farming lifestyle. The "Civilization" process was deemed to be carried out via education and in turn proper education was to be procured via missionaries.

I have said little at this point about the particulars of image as it relates to Habermas' Theory of Communicative Action. Some discussion on this point is now relevant before a consideration of the Indian Act. Colonization in Habermas theory is an encroachment of system driven values onto the lifeworld. However, aspects of the lifeworld can maintain its integrity and also influence the system (indirectly through communicative action). In the case of the Aboriginal lifeworld however, civilization amounts to not only colonization in the sense of Habermas , and the imposition of *system* driven values , but colonization from the dominant non Aboriginal *lifeworld* (adopt "English or French", "believe in Jesus", etc..). To the extent that the system is influenced by lifeworld norms at all, these come from the non-Aboriginal lifeworld. This is

¹¹⁴Dickason op. cit. p. 225.

evident throughout North American society, now and in the past.¹¹⁵

It is this dichotomy of norms which can feed image. Any perspective, any manner of viewing people or things needs some standards of comparison. If one believes in God, then people who do not are, by implication, “heathen”. If one answers to the King, then one expect other cultures to answer to a “King” (or chief¹¹⁶). If other people don’t understand “obvious” norms than you might view them as childlike or at least “unsophisticated”.

While this is somewhat simplistic, if it is fundamentally sound then one would expect to see aspects of non Aboriginal norms and evaluations from the non Aboriginal lifeworld reflected in the system it feeds into, much more prevalently than Aboriginal norms. We will see in the case of the Indian Act and related policies that this is indeed the case.

¹¹⁵A British parliamentary system, individual rights vs. community based thinking, hierarchical structures etc... More specific examples will be discussed in the context of the Indian Act in Part III.

¹¹⁶Similarly, you might expect the chief to serve a parallel role to that of your King.

Part II : Policy Towards the Indian Act

A litany of new missions set to work in Canada¹¹⁷ . The Canadian Methodists established themselves at Ancaster near Hamilton in 1823. In 1825 the methodists spread out among the Mississaugas and Ojibwas. By 1826, Egerton Ryerson along with Jones and John Sunday- Indian Preachers became extremely successful in their mission work at Newmarket and as a result by 1828 Methodism was well established on Lake Simcoe.¹¹⁸ These preachers had initially been chosen and coached by William Case, the superintendent of the *Canada Conference* who was “acclaimed by American Methodists as their most successful recruiter of Indian leadership.” ¹¹⁹

By 1830 the ‘*Society for Converting and Civilizing Indians and Propagating the Gospel among Destitute Settlers in Upper Canada*’ was formed. This title alone reveals a great deal about the ideals that Europeans held towards the Indian peoples. As has been discussed the idea that Indians were lacking in “civil” behaviour was not new, and has been seen, may be traced back to the 16th and 17th centuries.

In 1836, Anderson and Elliot, proponents of the *Society for*

¹¹⁷Primarily north eastern America.

¹¹⁸Grant, op.cit., p.76.

¹¹⁹Christian advocate 6,no 13 (1831) 50.

Converting and Civilizing Indians, an Anglican organization, arrived on Manitoulin Island to set up a mission with the purpose of melding the efforts of the church and state, promoting Christianity and civilization. 120. It was also in this year that Sir Francis Bond Head became Lieutenant Governor of Canada and expressed great concern over Anderson and Elliot's plans. Bond Head believed that the Indians would best be served if they were left to spend their last days without white interference on Manitoulin Island.

He reasoned that since hunters showed little, if any inclination, to become farmers and model villages implanted more vices than they eradicated, it followed that the 'greatest kindness we can perform towards these intelligent, simpleminded people is to remove and fortify them as much as possible from all Communication with the Whites.'¹²¹

His plan clearly supported ideals of segregation -and potentially extinction- leaving little role for Elliot and Anderson to play. The following year, Bond Head was replaced by Sir George Arthur , a Roman Catholic who was happy to help remove the Indians from white contamination by Europeans. The plan to use Manitoulin Island as a last stop for Indians on the way to extinction may have fuelled a growing romanticism of Indian people via the 'Vanishing Indian ' and "Noble Savage" ; images popularized in the 19th and 20th century arts and

¹²⁰Grant, op.cit. p. 85.

¹²¹Francis Bond Head, A Narrative, second edition (London: Murray, 1839), in Canada's First Nations by Olive Patricia Dickason (1992),.p. 237.

literature by such authors as James Fenimore Cooper, and portrait artist Charles Bird King. The plans designed by Bond Head never materialized for Manitoulin Island; Catholic missions had already established themselves on this parcel of land.¹²²

The 19th century surge of missions to North America set the stage for the development of residential schools based on Christian principles. During the 1830's the British established several such experiments in an attempt to procure an element that they considered both essential and fundamentally lacking - the "civilized" Indian. These attitudes are still deeply embedded with English culture. The policy of "civilizing" Indians was well in place and emerged in a variety of government legislation. The experiments amounted to creating reserves (plots of land) in isolated areas. Here, the 'Indian' was

encouraged to gather and settle in large villages where they would be taught to farm and to receive religious instruction and education. These endeavours became the basis of the reserve system. ¹²³

It didn't seem to be of much significance to governing officials that many Amerindian nations, such as the various nations of the Iroquois confederacy, and the Huron, had long and successful histories¹²⁴ of

¹²²Leslie and MacGuire op.cit., p. 16.

¹²³Tobias, op.cit. p.41.

¹²⁴see Dickason, op. cit. p. 100.

farming; exemplified by the various nations of the Iroquois Confederacy, as well as the Huron. Apparently it was not sufficient that there was a certain amount of overlap with regard to European and Amerindian lifestyles, the issue appears to be that various aspects of lifestyle (in this case farming) had to be carried out in the same manner or the approach was deemed to be lacking and inferior. It is difficult to argue that the Amerindian peoples were lacking in agricultural expertise given the fact that some (such as the Huron) were already successful in these endeavours. What is revealed is that the underlying ideology with respect to culture and lifestyle were not congruent with European goals of social and political organization.

The development of missionary schools can be traced as far back as Jesuit missionaries and more recently to 1804 by Gideon Black, a Presbyterian missionary. His theory was that 'practical education', reading , writing, prayer and financial self sufficiency would be effective means to encourage Indians to adopt European ways, which were quickly taking their hold as more settlers poured into the country. Manual labour was favoured, which should come as little surprise since it would clearly benefit the mission and the government, both of which were trying to establish themselves in unsettled territory and prepare for the advance of the railways that would eventually link the country from East to West. So manual labour, coupled with the removal of young Indian people from parental influence, language and culture, were seen, in part, as

opportunities to turn Indian people into christian emissaries.

In 1836, the 'friends of Aborigines' created the *Aborigines Protection Society*. An alliance of 'Friends' of Aborigines gave recognition to those who had worked together on a parliamentary select committee to further the "civilizing" of Indians. Their success supported the goals of Christianizing and Civilizing Indians by the state. Justification of this posture was part of the moral responsibility of British people, backed by the support of the Anglican missions. This is a yet another typical example of the link between Church and State.

The Indian Protection Act of 1850 took the position that the Indian Department was looking to protect the Indians' land as well as seek their further cultural advancement, this platform was hardly new. This act was the culmination of the 1839 Crown Land Protection Act, which was passed for the protection of Indian lands against trespass. Further to this were acts and ordinances concerning sale of liquor. A position widely known to be supported by the churches of the time, which still holds true today, was to prohibit the sale of liquor to Indians. This disturbingly parallels the current and long standing prohibition of the sale and distribution of liquor to minors. While the historical reasons for prohibiting the sale of alcohol to Indians were multifaceted and dependent on a number of political factors, a common thread through time has been the treatment of Indians as children. Society needs to protect those who are deemed to be lacking the maturity of adult members of society. Incapable of looking

after themselves , making decisions that will keep their own best interests (as well as others) in mind, they cannot yet be trusted to execute mature, rational judgement involving the use of alcohol. This attitude enabled the government to extend scolding and punishment to those who did not comply to their rules and continue to treat Amerindian peoples not only as children, but as lacking in moral judgement as defined by European values.¹²⁵

It seems that the manifestations of government policy towards Indians were sending several messages. Indian peoples, on one hand, were largely considered to be uncivilized and were being groomed to adopt a European lifestyle, yet the side-effects of such a lifestyle produced undesirable social evils.¹²⁶ Concerns relating to the civil character of the 'Indian' would prevail well into the twentieth century having enormous repercussions with respect to Aboriginal peoples and the criminal justice system.

The 1850 "*Act for the Better Protection of the Lands and Property of the Indians in lower Canada*" and "*An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property occupied or enjoyed by them from Trespass and Injury*"¹²⁷ further bound the power of

¹²⁵Leslie and MacGuire, op.cit., p. 36.

¹²⁶This is exactly what one might expect from the *Theory of Communicative Action* when alien values are shoved down the metaphorical throat of the Aboriginal lifeworld.

¹²⁷(C.P. J.L.A.C. 14 Vic, 28 June 1850).

the government to control Indian people. A Commissioner of Indian Lands was appointed to oversee these acts and make sure they were carried out as intended. The Commissioner could

...exercise and defend all rights pertaining to the landowner, having full power to lease lands and collect rents. ¹²⁸

In this colonial period property qualifications relating to Aboriginal people assumed that the land was under control of the Crown, and even if the land was to be protected for the Indians from trespass and injury, it is ironic that the legalities imposed on Indian peoples by the Crown effectively amounted to the same thing. The difference here being , that the offenders were confined to the Crown and punishment was not of issue. Another example of the differential treatment of Aboriginal peoples was evident in many aspects of enfranchisement. Legislation may not have explicitly denied franchise to Aboriginal people but a litany of restrictions regarding qualification for property effectively did so.¹²⁹

Enfranchisement was dependent upon

A proof of literacy, education, Morality and solvency. ...The requirements for enfranchisement constituted discriminatory conditions imposed on Indians to qualify for the right to vote. Furthermore, enfranchisement required the abandonment of reserve rights and the right to live with one's family and

¹²⁸ Leslie and MacGuire, op. cit. , p.23.

¹²⁹ Leslie and MacGuire, op.cit. p. 117.

culture.¹³⁰

One of the early goals with respect to this legislation required the creation of a working definition of who was qualified to be recognized by the Crown as an "Indian" :

First- All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands and their descendants.

Secondly- All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.

Thirdly - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe. or entitled to be considered as such and

Fourthly - All persons adopted in infancy by any such Indians, and residing in the village or upon the lands of such Tribe or Body of Indians and their Descendants.¹³¹

This definition set a precedent for later legislation.¹³² The government was gaining more specified control over Indian people complete with a definition of who was and who was not considered to be Indian, without any input from Indian people. The act of even postulating a definition of an 'Indian' is problematic in a myriad of ways. It assumes a position of superiority from the outset (simply by being in the position of defining), and maintains this position by the manner in which it is carried

¹³⁰Wendy Moss and Elain Gardner-O'Toole Ibid. Aboriginal People: History of Discriminatory Laws,(Ottaw, 1991) pp.3-4.

¹³¹Reserve policy in Upper Canada"); CP, J.L.A.C.App.21 (21 Vic, 31 May 1858).

¹³²Leslie and MacGuire, op.cit. p.24.

out. Amerindian peoples were certainly not predisposed to use the word "Indian" as a method of self definition. You'll notice that there is nothing in the above definition of "Indian" which provides for self-definition as an individual or group, this power is succinctly reserved for the discretion, and more pointedly, the benefit of the Crown. Moreover, this definition is informed by European value systems that have a centuries old history of judging and moralizing Amerindian ways of life as the antithesis of civilized life. In Berkhofer's The White Man's Indian the author writes that using the word "Indian" to define Amerindian peoples

generalizes from one tribe's society and culture to all Indians... it conceives of Indians in terms of their deficiencies according to White ideals rather than in terms of their own various cultures...¹³³

A powerful dichotomy of right versus wrong, of European versus "other" is put in place, limiting and out rightly ignoring the vast array of different cultures ,languages and political forms of Amerindian nations ; in essence it telescopes entire societies for the convenience and organization of the Crown. It reinforces the image of an Indian as a *single* stereotypical entity. The power to define other peoples and further entrench that definition into legislation resulted (and still results) in dividing and alienating Amerindian peoples from their own value systems and methods of social interaction, not only from the point of view of various communities, but also from the individual self. An

¹³³Berkhofer, op.cit.,p.25.

alien forum of understanding of who you are as an individual is created from the outside, setting up a position of 'outsider' or 'other', even to yourself. Part of the legacy is reflected in the present by the high rates of suicide , depression , substance abuse, high rates of incarceration and hospitalization in various 'mental health' facilities among Aboriginal peoples in urban and rural communities across Canada¹³⁴ . Moreover , by 'creating' a definition of an 'Indian' a greater position of power for those already in the dominant position ensues, - the power to eliminate what has been invented. Eventually the government intended to eliminate the 'Indian' completely by doing away with the Department of Indian Affairs, the reservation and the Indian act once the economic toll on the government was deemed too great.¹³⁵

The definition of an "Indian" was amended on August 30 1851 and as a result was one of the first pieces of legislation to differentiate between "status" and "non-status" Indians.¹³⁶ Imposing a notion of "Indianess" externally rather than allowing a more self-directed representation.

In another step towards assimilation, on June 10, 1857 the

¹³⁴I'm not claiming that identity is the lone (or most outstanding factor) in this regard, but I concur with Habermas on the point that , at least partly, "individuals owe their identifications as person...to identification with or internalization of , features of a collective identity" (Habermas op.cit., p.58)

¹³⁵Leslie & MacGuire, op. cit.

¹³⁶Leslie and MacGuire, op.cit. ,p.27.

government unveiled an *Act for the Gradual Civilization of the Indian Tribes in the Canadas* ¹³⁷. At this point it is safe to say Bond Head's ideas of segregation were squarely abandoned, and the strategic benefit to the government is not difficult to deliberate. The time period in question covers an influx of immigration into the country, the advancement of technology and cross country travel, an increasingly competitive interest in natural resources and hunting lands which created greater competition with respect to trade. The 1854 *Reciprocity Treaty* with the Americans would extend "The Province of Canada the opportunity to increase its natural products exports to the large American market." ¹³⁸

As part of the 1857 Act for the Gradual Civilization of Indian Tribes in the Canadas¹³⁹, the following excerpt illustrates the government's desire to assimilate Amerindian peoples rather than the more established legal rope of exclusion:

Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such individual Members of the said Tribes as shall be found to

¹³⁷Leslie and MacGuire, op.cit. p.26.

¹³⁸Leslie and MacGuire, op.cit., p. 24.

¹³⁹Leslie and MacGuire, op.cit., p. 27.

desire such encouragement and to have deserved it...¹⁴⁰

Many factors were in play. The American civil war of 1861-1865 was felt as a threat to British colonies at a time of commercial expansion of product export, especially since the *Reciprocity Treaty* was supposed to ease trade to American markets. Immigration further pushed economic development and it was becoming more and more evident that political settlement was necessary. Given the vulnerability of the colonies at this juncture, the importance of keeping the 'Indians under control' was essential for political, economic, and social stability.

The issue of enfranchisement was preserved within the Gradual Civilization Act and spelled the means and method with which the government intended to put an end to the existence of the "Indian". The parameters set out for the suitability of an individual to be enfranchised were strict and discriminatory against Amerindian peoples.

Enfranchisement simply removed all distinctions between the legal rights and liabilities of Indians and those of other British subjects. It did not in itself, grant an entitlement to vote. Enfranchisement did require the abandonment of reserve rights and the right to live with one's family and culture. Further, it was dependent upon proof of literacy, education, military and solvency. Consequently, the requirements for enfranchisement constituted discriminatory conditions imposed on Indians to qualify for the right to vote. ¹⁴¹

¹⁴⁰ibid, p.27.

¹⁴¹Moss, op.cit., p. 4.

Included in these conditions was notice that if any unenfranchised Indian who tried to pass him/herself off as enfranchised when he/she would be liable to imprisonment for up to six months.¹⁴²

The motivations for Indians to seek enfranchisement included monetary compensation and property compensation that amounted to up to fifty acres of reserve land. ¹⁴³ The message being sent by government officials amounted to a reward, for as Leslie and McGuire put it “adopting the lifestyle and customs of “civilized” citizens.”¹⁴⁴

From the viewpoint of the *Theory of Communicative Action*, the motives for Enfranchisement were primarily system driven. From this perspective it is not surprising that they were a dismal failure, given the completely alien nature of the system and lack of input from Aboriginal societies.

By the middle of the 1850's the government was recognizing that the 'Indian experiments' of the 1830's were failing drastically, noting specifically that the Manitoulin Island experiment was “practically a failure”. In 1858 the following remark on the Imperial Government Indian policy was registered ..

As the object of this system was gradually to wean the Indians from perpetual dependence upon the Crown, successive years

¹⁴²Leslie and MacGuire, op.cit. p28.

¹⁴³ibid. p. 28.

¹⁴⁴ibid. p.28.

show an increasing loosening of the ties to which the Aborigines clung. Many of the officers appointed to watch over their interests were removed, vacancies were not filled up, the annual presents were first commuted, and subsequently withdrawn and the Indian department is being gradually left to its own resources.¹⁴⁵

The above portion of transcript illustrates the continued debasement of Amerindian peoples by the government. To suggest that there was a need to “wean the Indians from perpetual dependence” and that there was an “ increasing loosening of the ties to which the Aborigines clung”, perpetuates a negative imagery of Amerindian peoples. The historical trend tending more and more towards an image of Amerindian inferiority and the implication of required guidance. In addition it also makes quite explicit how financial retrenchment was a primary consideration in “good Indian policy”. At the same time, they ignore the cumulative effects of liberties taken for the express satisfaction of the Crown in military, political, and economic realms at the enormous expense of Amerindian peoples. Considering that the government at this point issued a statement that amounted to an optimistic outcome concerning eventual civilization and assimilation of ‘Indians’ sets up a dismal backdrop for the impending Indian Act of 1876.

The onset of confederation produced the newly formed Federal government with the authority to legislate on matters “relating to Indians

¹⁴⁵ibid, p.29.

and Lands reserved for Indians”¹⁴⁶. At this point the Secretary of State for Canada became Superintendent-General of Indian Affairs. One of the changes that came about after these shifts was that the Commissioners of Indian Affairs suggested combining smaller bands to further welfare and reduce separate hunting grounds. Ultimately this would benefit the Crown since they would be able to decide what was to be done with these ‘excess’ hunting grounds. A dominant view held by the government at this time was that the ‘Indians’ were not progressing as quickly as they had hoped with respect to mastering animal husbandry and farming. As an earlier reflection of this position, the Land Act of 1860 surrendered Indian lands to the Crown, which included the management of timber on these lands. These changes exemplify the continued paternalistic relationship the government had fostered between Amerindian peoples and themselves.

It is useful to attempt to understand the causal forces driving a parent-child perception of the relationship. Drawing from Mead Habermas¹⁴⁷ notes that part of the delineation between adult and child in society is the latter's lack of understanding (or limited understanding) of cultural norms. If these norms are sufficiently embedded they are not thought of as norms, as such, but as “truths”. These “truths” can range from the appropriateness of shaking hands and making eye contact to

¹⁴⁶ibid. p.37.

¹⁴⁷Habermas, op. cit., p. 39.

strong religious beliefs. From this perspective it is understandable (if not necessarily acceptable) that on an individual basis , as well as a collective basis, members of the dominant lifeworld could perceive members of the Aboriginal lifeworld as “childlike” and that legislation (i.e. system components) would reflect this, as indeed they do.

By 1869 a life estate in a reserve and enfranchisement were offered to any

Indian male who from the degree of civilization to which he has attained, and the character and integrity and sobriety which he bears, appears to be a ‘safe’ and suitable person for becoming a proprietor of land.¹⁴⁸

These kinds of stipulations were not only restricted to Indians -and occasionally other immigrants- but they were also based on a platform that gave the ultimate power to the government to make subjective determinations of the appropriate, and potentially changeable, terms “safe”, “suitable”, “character” and “integrity”. Furthermore, setting up these stipulations also implies that Indians were lacking in these areas and had to aspire to attain them. The judgemental character of the government demonstrates a superior position with sexist, classist and racist overtones. As Bartlett states “ the provinces continued to restrict the franchise to males possessed of substantial property, Aboriginal

¹⁴⁸An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act, 31st Victoria, Chapter 42, S.C. 1869, c.42, s.33.

people were again for all practical purposes, excluded.” 149

Although British Columbia was the first province to pass racist legislation that provided “no Chinaman or Indian” could vote in 1875, this kind of blatant discrimination was not an isolated incident.¹⁵⁰ New Brunswick followed suit in 1889 and also disqualified Indians from voting¹⁵¹, while Saskatchewan and the Yukon made the same stipulations in 1908 and 1919 respectively.¹⁵² As Moss notes “by not defining the word ‘Indian’ these provisions may have excluded enfranchised Indians as well” ¹⁵³. Ontario prevented all but enfranchised Indians from voting ¹⁵⁴ However, those enfranchised Indians who were living on a reserve were also disqualified. Manitoba disqualified “Indians or persons of Indian

¹⁴⁹Bartlett (1980); Malcolm Montgomery, “The Six Nations Indians and the Macdonald Franchise,” Ontario History, Vol. 57, No. 1, March 1965, p. 164.

¹⁵⁰ An Act to make Better provision for the Qualification and Registration of Voters, S.B.C. 1875, c.2.

¹⁵¹The New Brunswick Elections Act of 1889, S.N.B. 1889, c.3, s.24.

¹⁵²The Saskatchewan election Act, S.S. 1908, c.2, s.11 An Ordinance Respecting Elections YT 1919, c.&. S. 35.

¹⁵³Moss, op.cit. p. 5.

¹⁵⁴An Act to Further Amend the Laws Affecting the Elections of Members of the Legislative Assembly and the Trial of such Elections, S.O. 1874, c.3, s.15.

Blood receiving an annuity from the Crown (!886).¹⁵⁵ Alberta disqualified “all person of Indian blood who belonged or were reported to belong to any band of Indians¹⁵⁶. For Manitoba and Alberta to exclude anyone with Indian blood would sweep away all Métis from voting as well, these two provinces had and still have large populations of Métis, known pejoratively as ‘halfbreeds’. Quebec’s position was a reflection of those of the other provinces and disqualified Indians and individuals of Indian blood domiciled on land reserved for Indians¹⁵⁷As for Prince Edward Island, their election Act of 1922, S PEI c.5, section 32 “excluded Indians ordinary resident on an Indian reservation”.

The North West Territories echoed the sentiment excluding unenfranchised Indians¹⁵⁸

The position of the Federal government was clarified in 1885 via the Electoral Franchise Act. Although this act extended the vote in federal elections to some Indians , by declaring “person” to mean a male person, and also an Indian but it also excluded

Indians in Manitoba, British Columbia, Keewatin and the North-West Territories, and any Indian on any reserve

¹⁵⁵The Election Act, 1886 S.M. 1886, c. 29, s. 130.

¹⁵⁶The Alberta Election Act, S.A. 1909, s. 10.

¹⁵⁷An Act to Amend the Quebec Election Act, S.Q. 1915, c 17, s.5.

¹⁵⁸ Proclamation Relating to Electoral districts and Elections in the North West Territories, ONWT. 1881, s. 17, 18.

elsewhere in Canada who is not in possession and occupation of a separate and distinct tract of land in such reserve, and whose improvements on such separate tract are not of the value of at least one hundred and fifty dollars, and who is not otherwise possessed of the qualification entitling him to be registered on the list of voters under this Act.¹⁵⁹

The outcome of the Métis Indian rebellion further excluded any outstanding Métis and gave rise to several comments by the members of the opposition in the house of Commons debate in attempting to support the exclusion of all Indians from the vote. The following comments are quite illuminating with respect to the general feeling towards Indians in 1885 and reflect a vast array of negative imagery:

Indians were incapable of exercising franchise...Indians were not capable of civilization and would eventually become extinct...Indians were utterly incapable of managing their own affairs...extending the vote represented an encroachment on the rights of the white men.¹⁶⁰

Indians were also variously described by individual members with the following language: “low and filthy Indians of the reserves”, “barbarians,” “ignorant and barbarous,” “brutes,” “dirty ,filthy, lousy Indians,” “savages.” ¹⁶¹

It is difficult to argue that the government was genuinely interested

¹⁵⁹The Electoral Franchise Act, S.C. 1885, c.40, ss. 2, 11.

¹⁶⁰Members of parliament as cited in Moss op.cit. p. 5.

¹⁶¹ Bartlett (1980); Malcolm Montgomery, “The Six Nations Indians and the Macdonald Franchise,” Ontario History, Vol. 57, No. 1, March 1965, p. 169, 172,175.

in protecting Indians, rather than dealing with them so they wouldn't interfere with the rest of their agenda of building the new Canada. There is clearly no loss of affection in this relationship, wherein the positions of superiority and ethnocentrism are hardly hidden. It would be naive to expect that the air of racism towards Indian people apparent in the House of Commons of 1885 did not spill over into legislation concerning Aboriginal peoples, including most notably the Indian Act of 1876 as well as many subsequent amendments to the act to at least the late 1800's.

An example of this seeping of pejorative images can be found in the Indian Advancement Act of 1884. In it, the government sought limited self-government for those groups of Indians who were deemed capable of managing their own affairs, through their demonstration of an increase in education, knowledge and skills. Of course, education, knowledge and skills in this instance were defined by the government and were applicable only to those which reflected the dominant culture. This Act was revoked due to the growing public sentiment that since Indians did not pay taxes and were therefore not property owners, it was not possible that they were either responsible or serious-minded. ¹⁶²

¹⁶²Leslie and MacGuire, *op.cit.*, p.51.

Part III: The Indian Act

In a very broad sense the Indian Act was an attempt to define the terms and conditions under which people affected by the Act should be treated. Ideally a consensus or mutual understanding of all terms and conditions of the all parties involved should be reached. Habermas gives valuable insight to just how difficult this is when even just two parties are involved, notwithstanding complications of system infringement or multiple parties or distinct lifeworlds.

The doubly contingent process of reaching understanding rests on the interpretive accomplishments of actors who--so long as they are not oriented egocentrically to their own success, but to mutual understanding , and so long as they want to achieve their goals by way of communicative agreement--must endeavour to arrive at a common definition of a situation. It might be well to remind ourselves here that actions can be coordinated via consensus formation in language only if every communicative practice is embedded in a lifeworld context defined by cultural traditions , institutional orders, and competences. Actors interpretive performances feed on these lifeworld resources.¹⁶³

We have seen in parts one and two many instances where the church or members of the church or individuals in other positions of power circumvented the first criteria-they were clearly motivated egocentrically to their own success (or at least the success of the

¹⁶³Habermas, op.cit p. 262.

institution they represented).

The last statement in the above quote is particularly important. With “actors” (here European and Indian) drawing on different cultural traditions and institutional orders reaching an agreement between two individuals is extreme challenge. The collective extension of this is reaching an agreement between two lifeworlds drawing on completely different norms, compounded by the complications of system infringement. The dominant cultures means of dealing with Aboriginal peoples relies on norms of the dominant lifeworld, as well as system values which co-evolved with this lifeworld. “Communication” between the lifeworlds is then virtually uni-directional. A typical example being legislations such as the Indian Act.

Law, to the extent that it is an institution in the sense of envisioned by Habermas, is being fed from the norms of the non Aboriginal lifeworld . This is evidenced even in the *naming* of some of the Acts discussed so far (The Indian *Protection* Act, the Act for the Gradual *Civilization* of the Indian tribes of Canada) The perception of Aboriginal peoples from the system or lifeworld is therefore filtered through that vantage.

Once image is incorporated into law, it can make its way back to the lifeworld through colonization either directly or indirectly. We’ll see this is evidenced in the *definition* -as well as the act of defining -Aboriginal peoples. The lack of norms and values of the Aboriginal lifeworld in policy is evidence of the flow of values from the system to the

lifeworld. However, this flow is one way. Aboriginal peoples are still bound by the terms and conditions of this legislation today.

As mentioned the scope of the Indian Act of 1876 to present is broad and covers a copious number of clauses and amendments. However throughout, both directly and indirectly it is clear that the definition of the Indian that has been constructed and manipulated by the government for their own benefit. Often at the expense of those for whom the act was originally supposed to “protect”.

It is my intention to demonstrate that a familiar theme regarding the Indian is played out decade after decade; the position of the dominant white society was and is superior, and maintains the best vantage point from which to define the lives of Aboriginal peoples. As has been seen, the underlying Aboriginal stereotypes nurtured the Indian Act were enhanced and reified by it. From its many incarnations right up until the major changes that the Indian Act underwent during 1951 negative images of the Indian peoples aided the government in blaming Aboriginal peoples for supposed lack of ambition, poverty, failed socio economic independence and so forth. The government, and Canadian society, took little if any responsibility for these conditions and continue to place much of the blame at the feet of Aboriginal peoples.

The Indian Act of 1876 is the most comprehensive piece of legislation developed by the Canadian government to dictate and control the lives of Aboriginal peoples in this country. Although it has been

amended variously over time, this legislation is still in place and has resulted in a continuity of power and control over Aboriginal peoples lives, spirituality, educational, legal, economic, political, cultural and linguistic relationships. It has governed the relationship between Aboriginal peoples and the Canadian government, relationships among and between Aboriginal nations and communities across the country, and to a certain extent, internationally.

As has been seen one of the fundamental principles of the Indian Act of 1876 was the idea that Indian peoples could and should be integrated into white society by a process of assimilation. This premise was based on the age old notion of “protectionism” that would ensure that Indian people (who by direct implication were deemed incapable of taking care of themselves) were not exploited by unscrupulous newcomers. This is precisely what resulted from government intervention in the long run. Such a position is in alignment with Berkhofer’s theory of colonial Indian policy in that beneath the layers of images Aboriginal peoples were ascribed a basic dimension which “assumed - demanded whites do something to or for Indians to raise them to European standards.”¹⁶⁴ . The outcome resulting in greater and greater legal jurisdiction over Aboriginal persons and title over Aboriginal lands.

The government’s proposed plan to legislate the “civilization” of the Indian implies the Indian was uncivilized and fixed into a position

¹⁶⁴Berkhofer, *op. cit.*, p.119.

that supposedly rendered these peoples vulnerable and incompetent, and therefore in need of government intervention. A further assumption was that the moral character of the Indian people was lacking because their methods of doing things did not mirror those of the dominant and “more civilized” society.

That the government took the position of *defining* Indian peoples created a dominant and powerful position that remains today. On one hand, the government espoused the goals of self-determination, self-sufficiency and independence for Indian peoples, yet at the same time thwarted these very goals by taking control of defining who was and was not an Indian and further subdivided it into status, and non status. The government also seriously undermined economic growth by inducing dependence on rationed food supplies. The Indian Act overhauled methods of Aboriginal government that had been in place in some Aboriginal communities for thousands of years before first contact.¹⁶⁵ The government also redefined the value systems of communities, alienated people from themselves and their families, separated children from their homes, and redefined parenting, which has resulted in enormous difficulties in terms of child welfare in Aboriginal communities today. All of this , supposedly to create harmony for Indian peoples and larger

¹⁶⁵According to such sources as Ronald Wright(op. cit. pg 5) and Olive Patricia Dickason(op. cit. pg 2) Aboriginal peoples are believed to have been traced back between 15,000 and 35, 000 years ago, at any rate a significantly longer time period than European settlers

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In order to attain the objectives of civilization and assimilation three areas were pinpointed to make the greatest impact towards this end, they were: Lands, membership and local government. 167

In the initial Indian Act of 1876, the Canadian government was concerned with the consolidation of some of the earlier 1868-69 legislation , which had lacked both effectiveness and clarity. The main issues to which they were to be applied involved Indian status, Property rights and the illicit sale of liquor.¹⁶⁸

It is interesting to note one of the fundamental aspects of juridification (present in the first wave-The Bourgeois State) centres around the legal notion of a person tied ,partially, to property rights:

...one who can enter into contracts, acquire, alienate, and bequeath. The legal order is supposed to guarantee the liberty and property of the private person¹⁶⁹

There are a few points to keep in mind here regarding the definition of Indians and the Indian Act. Does the definition of an Indian amount to

¹⁶⁶Ass. Superintendent J. Keating 1844 "Report to the Baget Commission" CP, JLAC, App. T (IIVic,24 June 1847) Minutes of Evidence, App. 2 : Supplementary Report to the questions proposed by the Commission on Indian Affairs

¹⁶⁷Leslie and MacGuire, op. cit. , p. 51.

¹⁶⁸PAC, RGIO, R.S., Vol. 1925 , file 3108: 1871 Indian Act drafted by Chief J.S. Kerr enclosed in a memorandum addressed to Deputy Supt. -Gen. Vankoughnet, 1874.

¹⁶⁹Habermas, op.cit., p. 370.

that of a “legal person” in the sense above? Does the legal Indian have the protection of a “private person” as referred to above. It is interesting to consider that even today that reserve land is “owned” by the government. System aspects of juridification are still evident, yet institutional aspects of law from the Aboriginal lifeworld are clearly missing.

To give some additional context to the Indian Act of 1876 it is worth reflecting upon how in 1872 a registry citing proof of possession of reserve lands was set up. The following comments by David Laird, then Minister of the Interior and Superintendent-General of Indian Affairs aptly demonstrates common sentiment towards Indians at the time. His comments were made in the House of Commons March 2, 1876 and since his remarks were not met with resistance of the House , I must conclude that they therefore elicited approval (or minimal disapproval at best) from the other members present :

the Indians must either be treated as minors or as white men...he cautioned other members they should not attempt to act in any way contrary to the views of the Indians, at least as far as their rights to property were concerned¹⁷⁰

Vankoughnet, then Deputy Superintendent-General later concurred with Laird’s comments and duly noted that “the legal status of the Indians of Canada is that of minors, with the Government as their

¹⁷⁰CP, H. of C. Debates, 3 sess., 3 Parl., 1876, p. 342: The Indians, 2 Mar. 1876.

guardians.” 171

This is just one of many examples of the recurring theme of Indians as children or people in need of guidance (originating as guidance from the Church). Ideas that started in the non Aboriginal lifeworld as norms (i.e. religious norms) eventually permeated into the system, culminating in statements such as the above.

It was also during this time period that the government added several clauses to the act which would for the first time invoke legal definitions of “band”, “Irregular band”, “non-treaty Indian,” “enfranchised Indian,” “Reserve,” “Special Reserve” and “Indian Lands”.¹⁷² This policy growth is significant in that it created a greater dimension of power for the government in controlling the Indian and by a further subdivision of definitions. This process of subdivision created a further enmeshed individual peoples within the restrictions of government and Canadian legal frame of reference. This accentuates the difficulty Aboriginal people have in being taken seriously external to their own communities, by imposing external (at times irrelevant) concepts onto Aboriginal cultures. By the same token it undermines efforts to teach a new generation of Aboriginal youth the laws and value systems of their ancestry.

¹⁷¹PAC, RG10 R.S., Vol. 1995, file 6886: L. Vankoughnet, Memorandum to the Indian Branch, Department of the Interior, relative to the Policy of the Government of the Dominion in their administration of Indian Affairs, 22 Aug, 1876.

¹⁷²CP, Statutes of Canada (39 Vic, cap. 18), pp. 43-45.

One of the most revealing aspects of the Indian Act of 1876 which undermined traditional Aboriginal values involved defining an Indian. Subsection 3 of the Indian Act defined the term Indian as the following:

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such person.

The development of such a definition places the Aboriginal person squarely within the Canadian legal framework, value system and socio political construction. The definition is not only sexist¹⁷³ but also serves to denote membership based on blood lines¹⁷⁴.

Moreover, the need to make this definition implicit places Aboriginal peoples social systems further down the ladder than people of European ancestry. It dismisses any possibility of individual freedom and tackles the situation as though Aboriginal peoples are a set of things to be owned by the government, reducible to a set of standardized terms.

Such terminology is characteristic of juridification. Even if the non Aboriginal lifeworld doesn't ascribe to this the system driven aspects of law inevitably lead to this type of definition.¹⁷⁵

¹⁷³Contrary, of course, to many Aboriginal cultures which were matrilineal in descent and inheritance.

¹⁷⁴That is, emphasizing genetic makeup rather than adherence to a particular value system.

¹⁷⁵Habermas, op.cit., p. 356.

The act of defining is, then, representative of juridification, but where are the driving norms of the non Aboriginal lifeworld? Even in this somewhat confined definition there are many. The definition is dependent on male lineage. Consider the implication of “lawfully” married. There’s the self reverential dependence on the legal institution as well as an implied dependence on European religious institutions. There are , of course, further reliance on definitions - band for instance.

The government had already established a law which forbade non-Indians from living with Indians, this segregationist policy was also arrived at in the name of protection for the Indian . At the same time there was an emphasis from 1869 onward to realize a system of gradual enfranchisement rather than absolute assimilation. Legislation was to remove all legal distinctions between Indians and Euro-Canadians but it would appear that the opposite was emerging and definitions of who was and was not an Indian actually served to establish a multitude of legal distinctions.¹⁷⁶ The articles of the following portion of this section set up criteria which excluded a variety of people from band membership and Indian status. The goal of exclusion and absolution of responsibility on behalf of the government cannot be overlooked as a motive for the following categories. The additional considerations revolving around definition were:

¹⁷⁶This type of seemingly endless defining and redefining is characteristic of juridification.

a) Provided that any illegitimate child, unless having shared with the consent of the band in the distribution of moneys of such band for a period exceeding two years, may, at any time, be excluded from the membership thereof by the band, if such proceeding be sanctioned by the Superintendent-General:

b) Provided that any Indian having for five years continuously resided in a foreign country shall not be permitted to become again a member thereof and shall not be permitted to become again a member thereof, or of any other band, unless the consent of the band with the approval of the Superintendent-General or his agent, be first had and obtained; but this provision shall not apply to any professional man, mechanic, teacher or interpreter, while discharging his or her duty as such:

c) Provided that any Indian woman marrying any other than an Indian or non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents; but this income may be commuted to her at any time at ten years' purchase with the consent of the band:

d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged and become a member of the band or irregular band of which her husband is a member:

e) Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or

entitled to be admitted into any Indian treaty.¹⁷⁷

As well as the obvious types of values alluded to in the first definition (reliance on legal institutions, male based lineage) there are some other interesting points that can be illuminated with help from Habermas' theory. For instance what becomes important is not necessarily personal characteristics but system interaction (i.e. the exchange of moneys)

...any illegitimate child, unless having shared with the consent of the band in the distribution of moneys of such band for a period exceeding two years, may, at any time, be excluded ..

That is system values become so important that they becomes part of the definition of a person. Implicit here is the linkage between the importance , or recognition, of an individual and his/her interaction with money. This in addition to the assumed universality of "illegitimate". Again, even if Indians accept these definitions their actions are subject to approvals of their "parental protectors" (Superintendent General) robbing the person(s) of their own identity.

The goal of reaching and settling Indians on isolated reserves in the Upper Canada in the 1850's was concluded to be impractical. Instead of

¹⁷⁷ CP, Statutes of Canada (39 Vic, cap. 18), pp. 43-45.

reserves being too far from 'civilized' European communities attempts were now made to move smaller settlements closer in. They could be close, but not too close. There was an air of mistrust of Indian communities being within close proximity of European settlements. In order to create greater cohesion for the Aboriginal peoples the Governor in council was given the power to impose Euro-Canadian political ideals of elected government on Indian bands and remove whoever the Governor in council deemed inappropriate.

Aboriginal nations were not simply accepting government plans without comment or action.

Councils across the colony remained pro-development. They wanted education and agricultural and resource development but would not participate in a system designed, as an Oneida petition said, to "separate our people."¹⁷⁸

Enfranchisement was not running as smoothly as government officials would have liked, in essence it was a dismal failure. Between 1857 and 1876 only one single application for enfranchisement was accepted, that of Elias Hill.¹⁷⁹ The government had underestimated the influence and forethought of Aboriginal leadership, such as the Six Nations Council, who made it known that they were "wholly adverse to

¹⁷⁸PAC, RGIO, vol. 258, Part 2 , Memorial to His Excellency Sir Edmund Walker Head from the Oneida Indians of Muncey Town and other Bands on the River Thames, 1858.

¹⁷⁹(PAC, RGIO, col. 519, R.J. Pennefather to the provincial secretary, 31 March 1859.)

their people taking the advantages offered”¹⁸⁰ by the act.

Unrest of the Métis and Aboriginal groups who were being pushed into smaller parcels of land to keep up with the settlements of growing numbers of immigrants was taking its toll. Great strain was placed on buffalo populations which had been a mainstay of many Aboriginal and Métis communities. A volatile combination of harsh winters, decreasing government imposed rations, famines and epidemics along with the clearing of land on reserves for the advancement of the Canadian Pacific railway created enormous strain and dissention among numerous Aboriginal peoples. The geographical location of land, the accessibility of resources and economic diversity all had implications with respect to the details of hardship endured, which certainly varied from community to community. However, in response to these crises the government , rather than recognizing the failure of their policies, stepped up goals of enfranchisement and acculturation . Model farms, agricultural programs, and industrial trade schools were all supposed inducements to enfranchisement. Vankoughnet supported the efforts of enfranchisement and civilization by limiting rations and reducing agricultural aid. ¹⁸¹

The removal of natural resources such as timber, once important enough to require the consent of the band before removal , no longer was

¹⁸⁰PAC, RGIO, vol. 242, D. Thorburn to R.J. Pennefather, 27 May 1858.

¹⁸¹Stanley, *Birth of Western Canada*, pp. 270-272, 280; John L. Taylor, “Indian Policy in the North-West,” unpublished thesis, pp. 236-37, 240..

required consent; as, in the eyes of the government, reserve lands that were not being put to adequate use. Eventually, by the turn of the century, the government would deal with this issue by helping themselves to 'undeveloped' Indian reserves, as is noted in the following comment by the Minister of the Interior Frank Oliver:

So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.

Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demands as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve pro tanto the country of the burden of their maintenance, it is in the best interest of all concerned to encourage such sales.¹⁸²

This type of statement illustrates a point in Berkhofer's theory of The Colonial Foundations of White Indian Policy. He writes:

Title and rights in the land and in political power offered no problem in White opinion, but the degree of vacancy was often a matter of differences in European and native land usage. What to White eyes appeared empty or under utilized according to European practices was seen as owned and fully utilized according to tribal custom and economy.¹⁸³

¹⁸²Annual Report of Deputy Supt.-Gen. Pedley to Oliver, Nov. 1906, p. xxxix.) (CP, Sessional Paper No.27 (8-9 Edward VIII, 1906-07).

¹⁸³Berkhofer, op. cit. p.120.

This is also a good example of the relation between the two lifeworlds and system. The assumptions in the term “under utilized” reflect the values of the non-Aboriginal lifeworld , whether originally “human” values or colonized values, is secondary. Clearly Aboriginal norms were not represented, and the means to subvert them were in place in the system structure.

Provincial policy regarding Indian communities was influenced by immigrant settlers who had been given the power of the vote. Yet people and their ancestors who had been here for thousands of years were not given the vote. In fact, the best chance an Indian might have to vote was to emigrate, then immigrate. This luxury was afforded only to Aboriginal populations if they were enfranchised, having met the lengthy standards related to such subjective issues as moral behaviour. There were no such standards for European settlers. In 1877 British Columbia, the Reserve Commission was viewed by the public as catering too much to the Indians, and as a South Thompson River settlement put it, the Indians were “ a constant source of annoyance”. This was a reaction to difficulties of Bison herds that took to wandering . The settlers surmised that the problem was related to “the well known thieving proclivities of the Indians themselves.”¹⁸⁴

¹⁸⁴ in Leslie and MacGuire *op.cit.* p. 75. from Robert Fisher, *An Exercise in Futility: The Joint Commission on Indian Land in British Columbia, 1875-1880*, Canadian Historical Association, Historical Papers, 1975. [Petition of A.M. Bryan to Chief Commissioner of Lands

Not only is this image very negative and debasing ;generalizing theft to entire Aboriginal populations, but it was also met without any objections from the Commission . By their silence one must assume that the Commission was either in agreement with such an accusation or lacked the fortitude necessary to stand up to this statement. The influence of the public perceptions of Indian peoples was strong enough to sway the government into taking actions which accommodated the new settlers. This provided the government with a convenient point of unity for the settlers; a view which could only work in their favour in maintaining majorities in settled areas.

By 1884 the Indian Advancement Act was initiated to remove tribal regulation, completely restructuring the diverse systems of Aboriginal governments in favour of systems of elected government. This was initially started in 1876 but the Advancement Act sought new stipulations towards implementing municipal laws in an apparent attempt to show band councils a “proper” system of self government. What it did was to hasten the removal of centuries old systems of self government in order to implement Euro-Canadian models of political organization. The result was an overhaul of governments that continues to have a tremendous impact on the methods of communication, trade, education , justice and spirituality of Aboriginal lifestyles. It reframes a variety of cultures into a Euro-Canadian political and judicial system

and Works, 29 September 1877, RGIO B.S., Vol 3668, file 10, 334.]

so as to be unrecognizable to the Aboriginal peoples forced to live in it. It is utter nonsense to attempt to disguise these tactics as a method to introduce and support self-government among Native peoples as was suggested in a debate prior to the drafting of the Indian Advancement Act.¹⁸⁵ . They already had it¹⁸⁶. What is entirely more plausible is that it was a means of using Euro Canadian standards, cultures and political frames of reference to alienate Aboriginal peoples from their own cultures and systems of governance. It was hoped to step up enfranchisement, reducing the governments' responsibilities and promises. What was happening was borne of a European belief in their own superiority, presuming that whatever was good for Euro-Canadian settler society was unquestionably good for Aboriginal societies. As Berkhofer states:

“The negative images of the Indian rationalized conquest ...Beneath both good and bad images used by explorer, settler, missionary, and policy maker alike lay the idea of Indian deficiency that assumed...Whites do something for Indians to raise them to European standards, whether for crass or idealistic motives...European policy makers took not only a possessive view of the Indian but also a possessory view of him and his lands as the means proper to the “higher” ends all Whites agreed upon.¹⁸⁷

¹⁸⁵Leslie and MacGuire, op.cit. , p. 77.

¹⁸⁶What of course they didn't have was simply *European* government.

¹⁸⁷Berkhofer, op.cit., p.119.

Jennings concurs:

White laws, customs and courts existed to prove them (Indians) wrong and to decide the matter of emptiness and title in favour of the invaders.¹⁸⁸

In 1884, the *Indian Advancement Act* was supposed to help train Indians in Canadian politics even though the response the government had been receiving from Aboriginal communities suggested clearly that they were not interested. The *Advancement Act* stressed the electoral system. The official mandate of the act speaks volumes in terms of what the government thought of the Indian peoples:

An Act for conferring certain privileges on the more Advanced bands of Indians of Canada with the view of training them for exercise of Municipal Affairs.¹⁸⁹

Given the failure of the government in matters of Indian Affairs, this act was sought as a means of directed civilization.

One of the points of this act was that it extended powers to band councils in order levy taxes on real property of band members. The Superintendents powers increased over the band's political affairs. The Superintendent could now call elections, supervise them, call meetings, preside over them, record them, advise the council, everything short of having the so call right to vote.¹⁹⁰ Was this withheld so that it would

¹⁸⁸Francis Jennings, *op.cit.*, p. 75.

¹⁸⁹RGIO, vol. 3947, file 123, 764-2; S.C. 1884.

¹⁹⁰Tobias, *op.cit.*, p. 46.

look to the public as though the Indian peoples were governing themselves?

This act also provided that anyone deposed from office could not stand for immediate re-election ¹⁹¹ The superintendent of course had the power to depose any member they deemed inappropriate.

Under the 1876 Indian Act legislation concerning the electoral system of the bands and the powers vested with the Chiefs, the Governor-in-council would maintain final say and veto power with respect to decision making. The decision arrived by traditional leaders¹⁹² amongst various Aboriginal nations had to be carried out in an electoral manner :

that in the event of His Excellency ordering that the chiefs of a band shall be elected, then and in such case the life chiefs shall not exercise powers of chiefs unless elected under such order to the exercise of such powers.¹⁹³

The entire issue of attempting to instill self government, that dated back to the 1830 Indian Department of creating "civilized, Christianized and self-governing native communities"¹⁹⁴ looked more unlikely. In 1881 the government was concerned with trying to get the

¹⁹¹RGIO, vol. 3947, file 123, 764-2; S.C. 1884.

¹⁹² The traditional leaders in this case had be nullified to a certain extent since the women who had maintained a variety of politically powerful positions had been removed from this arena as a direct result of the Indian Act.

¹⁹³CP, Statutes of Canada (43 Vic, cap.28), p. 223.).(CP, Statutes of Canada (43 Vic, cap.28), p. 223.

¹⁹⁴ PRO, CO 43/27, no. 95, Sir George Murray to Sir James Kempt, 25 January 1830.

Western Aboriginal groups and the Métis to revoke their traditional ways of life. Traditional leaders were seen as throwing a wrench into the advancement of enfranchisement policy and Gilkison recommended that “a Governor and a sufficient number of magistrates and officers” should be sent out on reserves to deal with such “petty chieftainship[s]”¹⁹⁵.

The resulting legislations amounted to the following:

... the officers of the Indian Department were made ex-officio Justices of the Peace, magistrate jurisdiction in towns and cities extended to reserves, and the Governor-in-council was empowered to appoint a number of Assistant Indian Commissioners to co-ordinate better the activities of the increased number of officials in the area.¹⁹⁶

This was not a method of creating self government, this was a method of controlling Aboriginal peoples to make sure they adhered to the systems of government that had been imposed with greater force via the Indian Act.

One might argue that the state was providing communities with an opportunity to retain their traditional leaders, if they so chose, simply by articulating their support for those leaders through elections. The point here, however is that , in general, traditional Aboriginal systems of government ruled by consensus, rather than majority, and were not

¹⁹⁵PAC, RGIO, vol.239, Part1.

¹⁹⁶PAC, RGIO RS, Vol. 2136, file 27298: J.S. Dennis, Deputy Minister of the interior Dept. to the Deputy Supt,-Gen., 2 Mar. 1881; marginal notation thereon, signed L. Vankoughnet, 5 Mar. 1881

restricted to patriarchal forms of government.

When demands and complaints for greater adherence to stipulations made by the government in various treaties were voiced by Aboriginal communities Vankoughnet again made his views of Indian peoples clear. He maintained that the Indians had “no good reason for serious complaint”...that they were most generously treated by the government far beyond any expectation they could have entertained under the most liberal interpretation”¹⁹⁷ of the treaties. He went on to blame the bands themselves for not being sufficiently advanced to take full advantage of the promised tools, livestock and schools.¹⁹⁸

Vankoughnet’s arrogant view of the situation speaks for itself and echoes sentiments of other individuals wielding policy influence. For example: Rev. J. Musgrove sought to “make it obligatory upon parents to keep the child at school until 20 years of age.”¹⁹⁹ Gilkison wanted legislation to give the department control over “on reserve activities from the power to imprison Indians for drunkenness to that of compelling them to cultivate land”.²⁰⁰

Gilkinson further remarked, in his comments to the Supt.-Gen

¹⁹⁷Leslie and MacGuire, op.cit. p. 66.

¹⁹⁸ In Leslie and MacGuire op.cit. Stanley, Birth of Western Canada, p. 292; PAC RGIO B.S., Vol 3697, file 15423: Asst. Commissioner Hayter Reed to the Supt. Gen., 23 Jan, 1885.

¹⁹⁹PAC, RGIO, vol. 258, M.Musgrove to F. Talfourd, 2 April 1861.

²⁰⁰ PAC, RGIO, vol 288, J. Gilkison, Brantford, to W. Spragge, 30 September 1861.

regarding suggested amendments to the Indian Acts, that there was a need to curtail “Indian fondness for petty litigation”.²⁰¹ Given that it was Vankoughnet who had dismissed the Indian complaints regarding unfilled treaty promises, how could they have a fondness for litigation if it was illegal for the Indian to do so? At any rate, what was at issue for the government was how to rectify the constitutional agreements of the Royal Proclamation and treaties with the developmental logic of enfranchisement.

Another government vehicle for implementing colonial ideals was the location ticket(1918). Introduced as a means for the government to monitor whether or not the concept of private property was spreading among bands, tickets were issued to individual members of the band once the council had decided which plot of reservation land they were to receive. The issuing of the reserve into individual lots was stipulated by the government in order to ensure the entrenchment of Euro-Canadian value of private property. The only way a band member could get the final issue of the location ticket was to prove himself worthy within the criteria of enfranchisement. Women were excluded from the location tickets and enfranchisement was limited to men, who could qualify for these “privileges” upon reaching the age of twenty-one.

Several problems arose with these government goals. For one thing,

²⁰¹Leslie and MacGuire, op.cit., p.81 Gilkinson to the Supt.-Gen., 26 Feb. 1884 with encl. of suggested amendments to the Indian Act,p.2.

Western Indians had long been considered “inferior” to the Eastern Indians and were not thought sufficiently “civilized” to take advantage of the Indian Act itself. As far as Eastern Indians were concerned they sought to reject the Act, as has been discussed. The issue of elected band councils was also in jeopardy because “Many Eastern bands clearly stated they would never request an elected band council because they did not wish to be governed and managed by the Government of Canada”.²⁰² The governments method of dealing with these problems was more of the same. They stepped up the Governor-in-Council’s power over Indian life. 1879 produced legislation that enabled the Superintendent to allot reserve land, removing this authority from the band council. ²⁰³

The *Electoral Franchise Act* of 1885 was set up so that Indians East of Lake superior would be able to participate in the politics of the band off reserve and on. It was not warmly accepted by bands and in 1896 franchise was withdrawn. ²⁰⁴

The remainder of the 1880’s and 90’s produced greater and greater power for the Superintendent. In 1884 he could lease reserve lands for revenue without permission from the band.²⁰⁵ This meant that anyone

²⁰²In Tobias, op.cit. (S.C. 1876; RGIO, vol. 2077, file 11,432).

²⁰³S.C. 1879.

²⁰⁴Tobias, op.cit. p. 46.

²⁰⁵Tobias, op.cit., p.47.

with a location ticket could lease their land . In other words, if you had a location ticket in the eyes of the Canadian government you were more civilized and would not be held back by a less advanced Indian. The benefit to the government, of course, was that they were reducing costs of government aid.

Sale of produce and livestock by Aboriginal people residing on Reserves on the prairies was rendered illegal in 1890. ²⁰⁶ At the same time the government accused the Indians of retarding education in their children by taking them into the bush to hunt rather than attend government sanctioned schools. As a consequence game laws of Manitoba and the Northwest Territories became applicable to Indians. ²⁰⁷

In 1898 the Superintendent was given the power to expend band funds for whatever expense was necessary to carry out police and public health matters that bands had been refusing . ²⁰⁸

The Plains Nations and Indians of British Columbia were making great efforts to retain and preserve their traditional spiritual and cultural ways in spite of missionaries and government goals to the contrary. In order to try force Euro-Christian values on the Indians the government outlawed the Sun Dance, and Potlatch ceremonies, which

²⁰⁶1890 RGIO, vol. 2446, file 93,503; vol 2497, file 102,959.

²⁰⁷S.C. 1890; RGIO, vol 2497, file 102,950.

²⁰⁸S.C. 1898; RGIO, vol. 6809. file 470-2-3, vol. 11, part 4.

they claimed promoted pagan beliefs. The outlawing of the Potlatch and Sundance festivals brought with it a penalty of two to six months jail time for anyone who was found participating in them ²⁰⁹ These ceremonies were (and are) conducted by a variety of West coast Aboriginal and Métis communities in order to celebrate the members of the community, family, and culture and to provide a method of wealth distribution and equalization. Obviously from the government point of view they did little to support the concepts of private property so pivotal to the “civilization” processes being undertaken.

By 1900, in a stunning recognition of the obvious, the government was starting to realize their policies were missing their mark on assimilation.²¹⁰ As Tobias asserts, perhaps it was being questioned, whether the reserves were preventing rather than fostering assimilation. The goal appeared to be shifting to one of forcing the Indian off the reserve, a change which marked the beginning of the erosion of reserves in Canada.

Eventually the government offered to extend enfranchisement to those living off the reserves as well as on without enforcing the previous stipulation of land ownership. However, boards of inquiry were set up in the early part of the 1900's to examine the fitness of the Indian for enfranchisement. Enfranchisement was met with tremendous protest and

²⁰⁹Leslie and MacGuire, op.cit., p. 81.

²¹⁰ It was an issue , of course, for Aboriginal people long before this.

a revision was made to modify this plan just a few years later ²¹¹

Why did enfranchisement fail repeatedly? Habermas can provide a helpful interpretation. Most of the “perks” of enfranchisement were not only values of a different culture, but implicitly contained system driven values, that is access to money (opening a business for instance) and what people enmeshed in these values would consider prime motivators. However, Aboriginal peoples’ exposure to system-driven forces were primarily negative-whether it was through law, education, or religion.

Once again, the Superintendent power over the intricacies of Indian life was increased, and included the authority to end ceremonial practices particularly for the Plains Nations. Even though Indians were appearing at various country fairs wearing ceremonial dress to entertain the masses, this was considered dangerous enough by the government to warrant outlawing this practice unless consent was provided courtesy of the Indian Department.²¹²

Moreover, the Superintendent was given the powers to regulate amusement and recreational pursuits on reserves. It was strictly forbidden to engage in any such practices on Sundays, the Euro-Christian day of worship. This is an example of the governments hypocritical and discriminatory position against Aboriginal peoples. On one hand they were not to engage in the so called ‘evils’ that may be tempting at

²¹¹S.C. 1922, 1933; RGIO, vol 6810, file 470-2-3 vol 12 part 7-9.

²¹²Tobias, op.cit., p. 50.

dances, rodeos and exhibitions because of the potential of fostering paganism. Yet it was alright for dominant society to participate in such events and somehow their behaviour was not considered unChristianlike.

Prior to the first World War an amendment was made to the Indian Act which gave the government the power to take whatever they wanted from reserve lands. The excuse provided was that the Indians were not making use of these areas the way the government thought appropriate:

The Indian reserves of Western Canada embrace very large areas far in excess of what they are utilizing now for productive purposes...We want to be able to use that land in every case; but of course, the policy of the department will be to get the consent of the band wherever possible...in such spirit and with such methods as will not alienate their sympathies from their guardian, the Government of Canada...We would only be too glad to have the Indian use this land if he would; production by him would be just as valuable as production by anybody wise. But he will not cultivate this land, and we want to cultivate it; that is all. We shall not use it any longer than he show a disinclination to cultivate the land himself.²¹³

This demonstrates the manipulation of the treaties by the government to get whatever they deemed necessary for their own needs. As far as the image of the Indian is concerned it implies that the Indian was being stubborn by not cultivating the land to government standards. Moreover, it implies a laziness as well the idea that the Indian is insubordinate to a government that is sympathetic to them. It reinforces the governments position that the Indian is in need of guidance and

²¹³CP, H. of C. Debates, 1 Sess., 13 Parl., 1918 Vol. 1, pp. 1048-49: Indian Act Amendment Bill, 23 Apr. 1918.

surveillance. This is also an example of the power one wields if given the opportunity to write and rewrite the law, and define how and to whom it should be applied.

In 1924 the Superintendent general received the power to impose "penalties for soliciting funds from Indians without his written consent"²¹⁴ This would prevent various non-native lawyers from prosecuting cases against the Crown without first procuring consent from the Minister of Justice. This step would suggest that the government was trying to protect itself from litigation, and that the possibility was sufficient enough to invoke such an amendment.

The definition of the enfranchised Indian changed somewhat in 1920. It included any Indian who had been enfranchised via an order in council rather than issuing a voluntary inclusion . Deputy Superintendent Scott made his case in January of 1920 that it was in a woman's best interests to sever her ties to the reserve and band when she married a white man so that her financial interests could be commuted for her :

...and the purpose of this section was to enable us to commute her financial interests. The words "with the consent of the band" have in many cases been effectual in preventing his severance as some bands are selfishly interested in preventing the expenditure of their funds. The refusal to consent is only actuated by stupidity because the funds are not really in any way impaired. The amendment makes is the same direction as the proposed Enfranchisement Clauses, that is it takes away

²¹⁴ W.Stuart Edwards, Deputy Minister of Justice to D.C. Scott, 25 Oct. 1927; C.P. Statutes of Canada (17 Geo. V, cap. 320, 31 Mar. 1927, p. 158: An Act to amend the Indian Act, sec. 149A.).

the power from unprogressive bands of preventing their members from advancing to full citizenship.”²¹⁵

Scott's letter once again makes certain allegations as the character of Indian people is general. He implies that they are selfish, untrustworthy, and incapable of looking after themselves. He also takes it a step further by accusing Indians in such a situation of being stupid, not to mention that they should be suspect of organizing themselves to hold other members back from becoming fully participating members of Canadian society. Again, the governments position is entrenched as being correct and above question. This type of language used to describe an entire race of people is pompous and patronizing at the very least.

By 1922 we can see that the same prejudice remains against Aboriginal peoples when Senator Fowler made the following remark:

This Indian question is apparently becoming somewhat acute, and it is rather important. The Indians, particularly those belonging to the Six Nations, have an idea that they are not subjects of this country at all...Now, the sooner they are taught that they are not allies of Canada, but subjects of Canada, and that they are Canadian citizens so far as the moderate kind of citizenship they have, without the franchise, is concerned, the better, because we do not want any such anomaly in this country. We have troubles enough about our immigration, without having contention with our Aboriginal inhabitants. It seems to me that the Indian Department has not handled those people with sufficient firmness...This is the conditions now, and...any legislation tending towards easing up on those people

²¹⁵ PAC, RGIO, Vol. 6810, file 470-2-3, vol. 7: annotated memorandum of Scott to Meighen, 12 January. 1920 re amendments to sec. 14, subsecs. 1 and 2 .

makes them think that they are masters of the situation,...²¹⁶

The senator made these comments with a number of inferences. Aboriginal peoples are grouped together, and discussed as though they are owned by the Government. It is as if there have never been treaties and that they have no right to self government. To discuss the above with such phrases as “not handling those people with sufficient firmness” seems to go further than a parental relationship in terms of imposing punishment. He states the need for them to be taught they are not allies, as though they are lacking intelligence and remain under a false presumption about exactly where their position is. All of these comments are made under an air of losing patience, that the government is getting tired dealing with the rebelliousness of Aboriginal peoples and that their issues are petty and unimportant, the government has more important things to do.

The onslaught of the second World War seemed to bring Indian policy and its regulation to a screeching halt. According to Tobias:

from 1933 -1945 the government and the civil servants appear not to have had any policy...government Indian relations were left in a state of flux and made only ad hoc decisions.²¹⁷

A litany of comments such as the ones observed can surface again and again with respect to Aboriginal peoples and their relationships with

²¹⁶CP, Senate Debates 1922 p, 557: Indian Bill, 23 June 1922.

²¹⁷Tobias, op.cit. , p. 51.

the government. It is clear that a negative and particularly damaging image has been reinforced by the government- decade after decade. That there was little if any protest made by other members of the House of Commons, to the pejorative positions of their colleagues, implies tacit approval and a widespread acceptance of discrimination. Protests raised by Aboriginal leaders themselves have largely fallen on deaf ears. With respect to enfranchisement Chief Paul Jacobsen contended that: “ compulsory enfranchisement without holding our presents rights under the Indian Act could soon lead us to complete extinction.”²¹⁸

The massive participation of Aboriginal peoples in the second World War facilitated a somewhat changed view of Aboriginal peoples after the war. The Indian Act was revised in 1951 repealing many discriminatory amendments. Although this was an improvement it still left much to be desired and continued to treat Aboriginal peoples as second class citizens who had to be regulated by the Federal government. This air of distrust still continues in the wake of numerous studies inquiries and millions of dollars spent studying the ideas of self government and the larger issue of self-determination. It would appear that the patronizing paternalistic relationship is still a part of the package that has been around since first contact. Look in the prisons, in welfare lines, at suicide and deaths rates particularly among the younger populations of Aboriginal peoples, not to mention the infant mortality rates that are up

²¹⁸Leslie and MacGuire, op.cit. pp. 124-125.

to four times higher for Aboriginal than for non- Aboriginal babies, and you will bear witness to the reification of pejorative images into codified law.

Conclusion

The image of the Indian (or indeed any group in society) is fundamental to the role they play in that society. Historically the image of the Canadian "Indian" has both fed into, and been shaped by, economic, social, political, religious, scientific and legal institutions of non-Aboriginal society.

Images feed off one another as well as off other sociological factors. Stir up a few - uncivilized, or godless-and certainly untrustworthy or perhaps even criminal will follow. An Indian walking into a bar or a courtroom carries the collective consciousness of the dominant society with him or her. These are not minor inconveniences or intrusions that can easily be removed or dealt with, even by the most well-meaning, concerned parties.

The "child like" nature of the Indian made it excusable (indeed desirable) to restrict freedoms in education, parenting, ownership of property, religious and cultural freedoms. Like virtually all the images of the Indian this removes Indians from the "peer" group and allows for rationalization of many policies on the basis of external exigencies.

The "savage, uncivilized" nature of the Indian made it acceptable and necessary to implement such perversely Euro-centric policies as Enfranchisement. You start off by measuring the values of cultural norms, by using those of a particular culture and end up with a policy

which emphasizes assimilation. That is, a policy that places emphasis on the value of the cultural norms that you *assumed* were superior in the first place.

When policy makers can combine “Child like” and “savage” (or uncivilized) they serve a pernicious purpose. The former allows one to make self-serving decisions in place of the Indian, while maintaining a shroud of intended kindness. The latter allows for the revocation of this kindness if deemed necessary for self protection. Together, virtually any political or legal action is justifiable. One needs merely to invoke the appropriate image at the proper time.

The history of legislation and policies regarding education is an excellent example. In 1894 Hayter Reed amended the Indian Act to make education compulsory even though the likes of Clifford Sifton Superintendent General in 1896 felt industrial schooling was probably a waste of time since Indian did not have the “physical, mental or moral get-up” to compete with whites on equal terms. This combination of attitudes had germinated by 1920 to Enfranchisement and by 1930 to the “committing” of Aboriginal children between the age of 7 & 15 to boarding schools. Subsequently they were kept there to the age of 18 on the authority of Indian agents.

It is easy, when you’ve already assumed your own superiority, to justify forcing people into and education and yet exclude them from contributing to school curriculum or incorporating their own languages &

religions. It is also easy to feel good about doing it since you are passing on the benefit of your wisdom. Some Educators, at least, sincerely believed that Indians were using the best that the white man had to offer “and were out their plans and their own self determination.”

The legal history regarding alcohol and Indians provide another excellent example of image and law feeding off one another. The “drunken Indian” may be one of the most ubiquitous negative stereotypical images in North American society. In an attempt to bring more Aboriginal people into “civilization” the Western Canadian ban on the sale of liquor to Amerindians was extended to Canada East After confederation it was extended to the whole country

Certainly these well marketed, and well ingrained notion of a inferior, devious, godless savage eased the collective conscious of a society. It is easy to justify the many blatantly discriminatory provisions of the Indian act when this is the cultural mindset. Perhaps most vividly illustrated by the fact that in 1996 the archaic defining of an “Indian” incorporated in the Indian Act remains at the heart of the current government standard.

In virtually every example I have cited in this paper there is , of course, a “chicken and egg”/cause and effect aspect to the hypothesis concerning effects of image on legal policy (or any institutional policy for that mater). Is policy driven by image or vice versa? To expect simple answer would naive. Both are clearly the result of a complex

interaction of a myriad of factors. Image and policy evolve as a continuum of ideas embedded in a intricate social fabric. In some cases clearly image is more causal in other cases less so. But what is clear is that image and policy exist in a mutually reinforcing symbiosis, one which has devastating consequences for the first Nations peoples of Canada.

The greater the passage of time , the more difficult it becomes to extricate this image from the fabric of Canadian culture. The seeding , reaping, and sowing of images have been both tools and signposts in the assault on Aboriginal cultures. The essence of what defined Aboriginal cultures 500 years ago becomes harder to access on a personal level.

It is as if there is little point in giving credence to the essence of Aboriginal culture(s) at all, it becomes a convenience that is taken out to entertain tourists , highlight a promotional ad campaign, or be adapted into the latest Hollywood screenplay as a movie blockbuster for half a season. Ultimately however, Aboriginal governments, customs, traditions and spiritual methods of thousands of years that once helped define a variety of peoples becomes as expendable as last years Halloween costume. The shift then away from self determination is greatly reduced as the Indian person is further embedded into a Canadianized social, economic and political legal conscious.

From the earliest contact of explorers and missionaries to the contemporary depictions of journalists and Hollywood producers the image of the North American Indian has played a key role in his/her status, freedoms and constraints in society. As Aboriginal cultures struggle toward self determination it is imperative that a new image reflect more of Aboriginal people's ideals and beliefs and less of the larger society's biases and apprehensions. The stronger the identity of Aboriginal society the stronger the positive ramifications of the images which will be induced .

Images can be powerful; they can be negative, positive, or both. Individuals, groups, societies, and organizations can form them and be formed by them. They are a part of our existence. Aboriginal identity and definition is not about suppressing negative images, or even, about trying to create positive images. It is about allowing images to emanate from Aboriginal peoples meaningful way to enhance the ability of Aboriginal peoples to obtain self determination.

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Appendix A: A Visual Overview of Communicative Action

