Genealogies of the Land: Aboriginality, Law, and Territory in Vancouver's Stanley Park

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Abstract

Between 1998 and 2003, Canadian courts were confronted with two cases that have held significant legal and political consequences for Aboriginal peoples. The cases, *R v Gladue* (1999) and *R v Powley* (2003) raised pressing questions about Aboriginal identities and the rights and material resources that follow from legal recognition. In one form or another, these cases have generated important legal, political, and theoretical questions that require some exploration: How has 'Aboriginality' been legally constituted within Canadian jurisprudence? In what ways have these racial-legal definitions changed temporally and geographically? And finally, and most importantly, who can legitimately make claims to Aboriginal identities and to the legal rights and material resources that accompany the law's recognition of difference? In this article, I historically contextualize these contemporary debates around the juridical construction of Aboriginal identities in Canadian jurisprudence. My substantive focus is two trials that took place between 1923 and 1925 and which centered on competing territorial claims to Stanley Park, an urban park in Vancouver, British Columbia. The cases involved eight mixed-race families of Aboriginal and European ancestry who had lived on the land in question for three generations, and whose ancestors had been there since time immemorial. A central question that emerged throughout the juridical and extra-juridical discourse is if these people were 'Indians' (or 'squatters') and whether they could make territorial claims through Native title. Through these cases I suggest that the current controversies over Aboriginality evident in *Gladue* and *Powley* are deeply rooted in colonial legal processes and practices that require some historical analysis. Ultimately, historically grounded questions about the law's constitution of Indigenous identities may provide us with important insights into the many facets of colonialism and its residual legacies.

Key Words

Aboriginal people; colonialism; land rights; racial identity

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INTRODUCTION

ABORIGINAL IDENTITIES have long been a focal point of social, political, and legal debate in Canada. Over the past several years, Indigenous alterities have received renewed attention as the courts have now been forced to decide crucial questions about who constitutes an Aboriginal person. Specifically, between 1998 and 2003, Canadian courts were confronted with two cases, *R v Gladue* (1999) and *R v Powley* (2003), each of which generated important political and legal questions about Aboriginal identities and the rights and material resources that follow legal recognition. Although distinct in terms of facts and legal issues – *Gladue* dealt with reparative sentencing and *Powley* with hunting rights – what both cases clearly illustrate is the complicated, fractured, and contested nature of Aboriginal identities in Canada. In each instance, the judiciary, and ultimately the Supreme Court of Canada, determined whether the accused could make claims to 'Aboriginality' and how this category was to be legally defined. In *Gladue*, the trial judge contemplated racial belonging through the prism of culture: did Tanis Gladue live on a reserve? Did she belong to and participate within a First Nations community? In *Powley*, racial membership was contemplated through familiar nineteenth-century colonial discourses of blood quantum: how much blood was necessary for one to legally qualify as Metis? Taken together, these cases raise pressing legal, political, and theoretical questions that require some exploration: How has 'Aboriginality' been legally constituted within Canadian jurisprudence? In what ways have these racial definitions changed temporally and geographically? And finally, and most importantly, who can legitimately make claims to Aboriginal identities and to the legal rights and material resources that accompany the law's recognition of difference?

The objectives of this article are to historically contextualize these contemporary debates surrounding the legal construction of Aboriginal identities in Canada, a topic that has been unevenly explored within socio-legal studies (Backhouse, 1999; Mawani, 2000; Povinelli, 2002; Lawrence, 2003; Miller, 2003). Focused on early twentieth-century British Columbia, I consider how the Canadian government constituted and managed First Nations peoples, and importantly, their rights to land and resources, by limiting their access to juridically defined identities. I argue that the current controversies surrounding legal constructions of Aboriginality – evident in *Gladue* and *Powley* – are deeply rooted in colonial legal processes and practices that require some historical analysis. To elaborate, these struggles over identity are situated in the law's search for an authenticity that is expected to predate the colonial settler nation as well as an historical continuity that is expected to persist into the present day (Clifford, 1988; Miller, 2003: 67). Yet, the legal pursuit for an Aboriginal essence is (im)possible for a number of reasons. For one, the law, backed by state power, has historically been central in determining who constitutes an Aboriginal person and a recognized community and in doing so, has created an otherness that can never fully be (Povinelli, 2002). In turn, these colonial definitions and classifications have complicated

Aboriginal identities, making the law's search for historical continuity unattainable. My interest here is not simply to trace the ways in which definitions of Aboriginality have been legally formulated in early twentieth-century western Canada, but to show how these debates over colonial categories continue to underpin and shape contemporary legal debates about who constitutes an Aboriginal person in Canadian jurisprudence. Ultimately, historically grounded questions about the law's production of Indigenous identities may provide us with important insights into the variegated effects of colonialism and its legacies.

The substantive focus of the article includes two trials that were heard between 1923 and 1925, and which centered on land rights in British Columbia. In each, the City of Vancouver and the Attorney General of Canada initiated joint actions to remove eight families – of European and Aboriginal ancestry – from the land that is now famously known as Vancouver's Stanley Park. A central question that emerged throughout the juridical and extra-juridical discourse was whether these people were 'Indians' and thus able to make lawful claims to Stanley Park through Native title. As I show, the courts' contemplation of Aboriginal identity and legal title was neither direct nor straightforward. Instead, the families were constituted as 'squatters' who lived like 'Indians' but who were inauthentic due to their impurity of blood. Because of their racial in-between-ness, colonial authorities placed the families in a liminal zone – a discursive and material space that rendered them neither 'Indian' nor 'white'. Eventually, after a lengthy and unpredictable legal battle, the racial ambivalence of the families enabled the courts to regard them as 'illegal occupiers' of government land and thus subject to removal without compensation.

Postcolonial scholars have long argued that the regulation of desire in the colonies was about much more than simply managing sex (Ballhatchet, 1980; Young, 1995; Stoler, 2002). In her important work on colonial Indonesia, Ann Laura Stoler (2002) reminds us that the colonial preoccupation with governing sexuality, intimacy, and reproduction was always infused with bigger questions of political power. She elaborates that in the Indies, colonial authorities expressed concerns about interracial domestic arrangements and the mixed-race progeny that these relations produced, precisely because these conjugal relations and their end products could potentially unsettle and subvert the 'boundaries of rule' (p. 14). But is it possible that concerns about interracial sex and racial hybridity could carry alternative meanings and implications within settler colonies? This is a question that I consider throughout.

On Canada's west coast, the mixing of blood and the ambiguously defined subjects it produced went far beyond the protection of European racial purity – although this was certainly part of the colonial project. Instead, I argue that colonial rule was not simply about securing white privilege but also about restricting access to colonial alterities and the land and resource rights that accompanied legal recognition. In other words, questions of racial hybridity were more troubling than Homi Bhabha's (1994: 92) 'not

quite/not white'. The in-between-ness of mixed-race people in British Columbia and Canada meant that they could go *either way*, to mimic the colonizer *or* the colonized. It is this second movement that I am concerned with: an in-between population who could undermine colonial governance precisely by making claims to indigeneity. Thus, the colonial government's anxieties about interracial heterosexuality and mixed-race progeny were fueled by distinct political and material objectives: territorial control. In other words, it seems that colonial agents on Canada's west coast were concerned with reducing the numbers of racial-legal subjects who could make legitimate claims to Indian-ness and to the valuable commodities of colonialism – land and natural resources. It is this crucial link between colonial alterities and land rights that I develop throughout.

In the first part of the article, I briefly sketch out some of the late nineteenth- and early twentieth-century epistemological debates about racial purity and hybridity. In this contextualizing section, I point to ways in which global scientific and anthropological discussions about inter-racial heterosexuality and mixed-race subjects have informed and influenced colonial legal discourse. Here, I suggest that theories of hybridity implicitly underpinned the production of a new racial subject in Canadian law – the 'half-breed'. Unlike other colonial settlements, where the racial designation Metis never became a legal category (Stoler, 2002: 80), colonial authorities in Canada created a new legal subject to account for the sizeable mixed-race population. As we will see, the 'half-breed' could make few legal claims to land and resources. In the second part of the article, I will discuss the Stanley Park trials more concretely. In this section, I map out the complicated ways in which the courts contemplated Aboriginality and mixed-race identity. Here, I show how the courts situated the families *in between* colonial categories and the material implications that followed from these juridical-racial classifications. In the third part, I will examine how the families tried to negotiate their ambiguous colonial identities and the ways in which they asserted their genealogical and proprietary claims to the land in question. In the conclusion, I shall return to the present-day contestations over Aboriginality in Canada. Specifically, I argue that the legacies of colonialism continue to shadow and structure contemporary discussions about Aboriginal identities in Canadian jurisprudence which make the law's desire and quest for an authentic alterity (im)possible.

LEGISLATING COLONIAL CATEGORIES: CREATING THE 'INDIAN' AND THE 'HALF-BREED' IN CANADIAN LAW

> 'Hybridity' is the nineteenth century's word. But it has come to be our own again. In the nineteenth century it was used to refer to a physiological phenomenon; in the twentieth century it has been reactivated to describe a cultural one. (Young, 1995: 6)

During the late nineteenth and early twentieth centuries, an important feature of colonial rule was its dependence upon the fixity of 'otherness' (Bhabha, 1994: 66). In other words, colonial cultures and the hierarchies implicit within them were contingent upon racial, cultural, and historical conceptions of difference. Increasingly, these differences were observed, measured, 'known', and naturalized through the emergence and development of racial science. By the turn of the century, racial theories of European (and specifically Nordic) superiority were supported by scientific epistemologies and came to be regarded as 'factual' and common sense (Barkan, 1992: 2). Yet, '[r]acial theory', as Robert Young (1995) reminds us, 'cannot be separated from its own historical moment: it was developed at a particular era of British and European colonial expansion in the nineteenth century' (pp. 91–2). In other words, colonial discourse and scientific and cultural knowledges about the colonizer and colonized formed the discursive basis of empire. Epistemologies of 'race' and their corresponding intimations about (British) moral superiority came to justify European conquest and legitimized variegated coercive and violent systems of colonial rule (Brown, 2001: 346).

The fixity of colonial otherness which developed out of racial science and that underpinned empire was never a foregone conclusion, however. On the contrary, as Bhabha and others remind us, colonial otherness was neither fully established nor disestablished (Bhabha, 1994; Thomas, 1994; Young, 1995; Stoler, 2002). Colonial power was itself structured by a deep ambivalence of desire and disavowal that manifested itself in various ways. To be more specific, colonialism produced multiple hybridities in the form of cultures, languages, knowledges, and bodies. In various colonial contests, greater cross-racial contact and interracial domestic arrangements created a range of 'others', while at the same time calling into question the founding concepts of empire, including the races and their corresponding epistemological place in the 'Family of Man' (McClintock, 1995: 50). During the mid-nineteenth century, when questions of racial hybridity became especially pertinent, anthropologists and scientists engaged in heated debates about the accuracy of competing theories of racial ontology – monogenesis versus polygenesis. Discussions about racial intermixture provoked critical and unsettling questions about the epistemological basis of racial science, forcing many experts to question and revise nineteenth-century assumptions about polygenesis, that the different *races* were in fact difference *species* (McClintock, 1995: 49–51; Young, 1995; Goldberg, 2002: 24–5).

While these circuits of knowledges traveled across metropole and colony, raising fears about the future and fate of empire, it is important to remember that theories of racial hybridity also took on a *particular* geographical and temporal significance. In other words, discussions about colonial alterities were locally and temporally articulated within emerging colonial states. Interracial heterosexual arrangements and the progeny they produced did indeed raise global questions about the origins and orders of races, but they also produced *specifically located and particular* anxieties about colonial rule.

In British Columbia, for example, concerns about people of mixed-race ancestry did not simply rest on the protection of white privilege. While hybridity certainly represented 'dominant concerns that white or European-based purity, power, and privilege would be polluted, and in being polluted, diluted' (Goldberg, 2002: 26), it also had to do with otherness and its in/exclusion in the making of the modern nation (Mawani, 2000). In western Canada, then, the colonial state's preoccupation with racial hybridity was underpinned by *several* political objectives including the discursive and material protection of whiteness *and* Indian-ness. To put it another way, colonial rule was contingent upon maintaining *both* of these categories as unambiguous and pure.

By the mid-nineteenth century, many of these scientific debates about racial inter-mixture became increasingly evident within law. In what is now Canada, anxieties about racial transgressions, taxonomies, and mixed-race progeny surfaced in much of the early colonial legislation aimed at governing Aboriginal people. It seems that the links between identity and territory were a primary concern from early on. In 1850, one of the early statutes, the *Act for the Better Protection of the Lands and Property of Indians in Lower Canada* which legislated the creation of Indian reserves, was where the colonial government first attempted to juridically define who is an 'Indian' (Backhouse, 1999: 21). Under this particular law, administrators constituted Indian-ness as a broadly defined category. Racial identity was based on one of four factors: blood; intermarriage; residence; and/or adoption. But with the expansion of permanent European settlement and the growing appropriation of land and resources, particularly in the West, authorities became dissatisfied with such a sweeping category and evoked competing definitions of 'Indian' throughout the late nineteenth century. Between 1850 and 1869, the colonial and later Dominion government revised their juridical definition of Indian-ness almost every year. The end result was a restrictive and exclusionary category that was further contemplated and revised under Canada's *Indian Act* and in subsequent federal and provincial legislation (p. 21).

Colonial governments across the globe managed their Native populations through violence, segregation and the appropriation of land, as well as by way of assimilationist policies. From violent dispossession and genocide in the Americas, to forced evictions from cities to black townships in South Africa, colonial rule was backed by racial violence, terror, and coercion (Fanon, 1965; Goldberg, 1993: 199; Churchill, 1998). However, colonialism also depended on more subtle processes and practices of governance, including access to legally constituted identities, but which carried with them grave material consequences (Miller, 2003: 207). For example, in their efforts to limit racial membership through the category 'Indian', Canadian authorities repeatedly revised the *Indian Act* and other federal and provincial legislation. Fluctuating uneasily between blood quantum and culture, government administrators defined Indian-ness in restrictive terms through patrilineal descent. The effects of these juridical definitions have been devastating for First Nations communities. Aboriginal women who married non-Aboriginal

men (and their children) were forced to relinquish their ties to their communities, a process that significantly reduced the number of 'Indians' who could live on reserves. Between 1876 and 1985, because of these gendered provisions, approximately 25,000 Native peoples were denied Indian status and were forced to leave their communities (Lawrence, 2003: 9). Racial classifications under the *Indian Act* have served as yet another technology of colonial governance – a strategy aimed at destroying Aboriginal identity, land ownership, and culture – the effects of which continue to reverberate both within Native communities and within law.

Fanon (1965) long ago recognized the spatial imperatives of colonialism when he argued that, the 'colonial world is a world divided into compartments' (p. 37). What he spent less time exploring, however, was how (often) these compartments or spaces were crossed, transgressed, and subverted. The crossing of boundaries – be they geographical, racial, cultural, or epistemological – were historically visible in the hybridization of colonial cultures, interracial domesticity, mixed-race progeny, and in the proliferation of colonial alterities. In many ways, British Columbia was a typical colonial setting, as interracial relations between European men and Aboriginal women were widespread from early on. As several scholars have noted, these domestic arrangements were initially regarded as acceptable unions in the newly proclaimed British settlement (Barman, 1998; Van Kirk, 1998; Perry, 2001; Mawani, 2002). But by the late nineteenth century, colonial administrators expressed growing concerns that interracial sexual arrangements would potentially undermine the visions and trajectory of empire. While Canadian authorities tried to legally prevent interracial desire through proposed legislation,[1] they also expressed a particular interest in governing the mixed-race progeny that interracial (hetero)sex produced.

In addition to their careful deliberations as to who legally qualified as 'Indian', authorities began contemplating how to classify the growing population of mixed-race people. By the late nineteenth century, the ongoing debates about hybridity that unfolded among scientists and anthropologists (would racial intermixture result in infertility?), were introduced into the realm of law. In 1876, when Canada passed its first *Indian Act*, federal authorities defined the 'Indian' in narrower terms. More importantly, they also created a new legal subject, the 'half-breed'.[2] The 'half-breed' was not only a newly formed juridical category, but was also conceived as a distinct species, whose existence was defined in contrast to the homogenous and fixed racialized categories of colonizer and colonized. Although the legal classification was itself left undefined, one thing was certain: the 'half-breed' occupied a liminal zone – 'not quite/not white' to borrow again from Bhabha (1994: 92), but also 'not quite/not Indian'. Despite the flourishing scientific debates about racial hybridity that I briefly sketched out earlier, knowledge about this new legal subject was based on what Mariana Valverde (2003) has termed, 'a mixed epistemological bag' – a hybrid set of knowledges constituted by legal, cultural, and physical 'facts' (p. 203). In other words, colonial authorities spent little time contemplating scientific and anthropological

theories of hybridity. Notwithstanding this lack of scientification, the restrictive legal definition of 'Indian' and the new category 'half-breed' did have a purpose; they were aimed at preventing peoples of mixed-race ancestry from asserting their legal claims to land, resources, and reserve communities. Clearly, the imperative for a new category of hybridity was not only biological/cultural but also political/economic. Since reserve lands were contingent upon the number of residents, the federal government had a material interest in reducing the population of Indians who could make potential claims to land.

The federal government was not the only one preoccupied with juridically defined racial identities. Rather, these discussions were also evident at the provincial level (Backhouse, 1999: 21–7). In British Columbia, provincial legislators, like their federal counterparts, encountered many difficulties in their deliberations of who was an 'Indian'. In 1903, in a provision aimed at preventing Aboriginal people from voting, Indian-ness was defined broadly to include any person of pure Indian blood and any person 'of Indian extraction having his home upon or within the confines of an Indian reserve' (p. 22). In 1922, in legislation that barred Aboriginal peoples from voting in public school meetings, Indian-ness was defined as 'any person who is either a full blooded Indian or any person with Indian blood in him who is living the Indian life on an Indian reserve' (p. 22). Juridical definitions of Indian-ness created serious challenges for the federal and provincial governments. What these examples also illustrate is that the criteria that colonial administrators used for deciding racial membership were shifting, contingent, and protean, expanding in some historical moments and contracting in others. Importantly, for those who fell beyond Indian-ness, the effects were devastating.

In many other colonial locales, mixed-race people were sometimes able to exploit racial ambiguity to their advantage. South Africa is a case in point. Under apartheid, for example, racially mixed peoples occupied an unstable social position and had fewer rights than whites, but for the most part, experienced better social and living conditions than blacks (Goldberg, 1997: 68). In Canada, racial hybridity often led to fewer rights. Without Indian status, Native people were not lawfully allowed to live on reserves nor were they able to participate in community life. In some Canadian jurisdictions, where the state entered and signed treaties with Aboriginal people, government officials often made arbitrary distinctions between 'Indians' and 'half-breeds'. If mixed-race people 'lived as Indians', they were often included in treaties (Lawrence, 2003: 10). However, in locales where treaties were not signed, including mainland British Columbia, 'half-breeds' were altogether excluded from definitions of Indian-ness. While the *Indian Act* and other legislation set out the parameters of racial identity, judges often used creative ways to interrogate and adjudicate legal-racial categories (Valverde, 2003: 213). The next section explores how the courts navigated through and determined racial membership and Native title in what is now Vancouver's Stanley Park.

CREATING RACIAL SUBJECTS IN VANCOUVER'S STANLEY PARK

> Hybridity represents that ambivalent 'turn' of the discriminated subject into the terrifying, exorbitant object of paranoid classification – a disturbing questioning of the images and presences of authority. (Bhabha, 1994: 113)

In 1858, when the mainland of British Columbia was officially named a colony, the Imperial government created a military reserve on the land that is now Stanley Park. James Douglas, the colony's first Governor, set aside the peninsula for national defense, to protect British interests if the newly acquired territory was ever threatened by American expansion. During this period, a war between Britain and the USA seemed probable, making the newly proclaimed British colony a likely target. The imminent assault was predicted to be a naval one, and the line of attack was thought to be through Burrard inlet. The peninsula, surrounded by water on all sides, was thus believed to be a strategic look-out point, and was included with other coastal areas that eventually made up the British west coast defense system (Steele, 1993: 11–12). Although a war between Britain and the USA never took place, the land remained a military reserve until 1888, when it was leased to the City of Vancouver for park purposes.

The region that is now known as Stanley Park can be traced to three Coast Salish communities who have jointly occupied the territory since time immemorial and have never relinquished their ties through treaties or otherwise. The Coast Salish, a linguistic group including the Musqueam, Tseil-Watuth, and Squamish Nations, inhabited the region, using the land for hunting, fishing, and ceremonial purposes. In fact, Xw'ay Xw'ay (also known as Whoi Whoi), which has since been (re)named Lumberman's Arch, was recorded by anthropologists as one of the oldest Indian villages in Burrard Inlet (Hill-Tout, 1978: 52–4; Mather, 1998: 26–7). During the 1860s, two years after the Imperial government appropriated the land, many First peoples still sought refuge there. The village was the chosen venue for several large gift-exchange ceremonies; also know as *potlatches*, and the site of sacred burial grounds. Yet, despite the long presence of First Nations communities, the Imperial government reterritorialized the land under the auspices of *terra nullius,* as an area that was 'vacant' and open for development (Culhane, 1998: 48).

The links between land, law, and identity were (and are) critical to colonial appropriations. 'Western law', Richard Mohr (2003) points out, 'may define land as "cultivated land", "*terra nullius*" or "occupied territory" based on alternative legal interpretations of the space in question.' He elaborates that, '[e]ach of those descriptions of geographical area implies a different view of the identity of the people in it: industrious, negated, or subdued' (p. 55). The identities of Aboriginal peoples and their relationships to land figured prominently in colonial reterritorialization. While the colonial government made several references to the 'Indians' who had lived in the area prior to colonization, authorities continually emphasized that their inhabitance was

temporary. Although First Nations were there, officials argued that they came seasonally – to fish and perform traditional ceremonies – uses that did not qualify as *permanent* or *fixed* and were not in keeping with the 'long occidental romance between law and agriculture' that was so central to modern sovereignty (Fitzpatrick, 2001: 158). Discourses of temporality then became significant, enabling the Imperial government to 'discover' the territory as 'empty' and holding promise for colonial security.

From 1858 onwards, various other logics were evoked to render the landscape vacant. Nearly a century later, commentators referred to the 'ancient inhabitants', a story that remains pervasive even today. In a pamphlet entitled, *Stanley Park and its Environs*, C. Roscoe Pound (1936) wrote about 'The Mysterious Midden' of the Indians:

> Near under trees, of age half a thousand years, lie hidden
> In layers of broken clam shells termed a midden
> The remains of pre-historic people. It is altogether likely here
> Humans of ancient days of Marpole Midden, visited with club and spear,
> Or came on peaceful mission bent, palavers to hold benevolent;
> Would you their weapons and utensils see, at City Museum many there be,
> With skulls and bones of ancient men, two thousand years agone, they lived here then. (p. 9)

Ultimately, the Imperial government's territorial encroachment on First Nations' land originated in and was legitimized through the doctrine of 'discovery' – an articulation of Western law and notions of private property that were contingent upon the discursive and material erasure of Aboriginal peoples. They were here (once upon a time), but now they are gone. In many colonial contexts from Africa to Australia, British imperialists used the doctrine of 'discovery' to acquire lands that were believed to be in *uncertain* occupancy, renaming them Crown lands and then legitimizing these illegal pre-emptions by turning to law. As Peter Fitzpatrick (2001) explains, 'discovery initiates and maintains the asserted factuality of primal acquisition of territory and its proprietal holding. These then provide the unquestionable ground of law, of "the law of the land"' (p. 169).

As many scholars have told us, colonization – including the annexation of territory through law – always began with and was perpetuated through multiple forms of violence (Fanon, 1965; Blomley, 2003). At the time the military reserve was created and the law of the land asserted, colonial authorities *physically* emptied the newly created reserve by uprooting and relocating many of the Aboriginal peoples from their ancestral territories to reserves on the North Shore and up Howe Sound. Despite these displacements, there remained a small group of Coast Salish who continued to live in the area now known as Brockton Point. The exact size of the community is hard to know. In his 1876 report, Malcolm Sproat, one of the Joint Reserve Commissioners, wrote that there were 'thirty or forty Skwamish [*sic*] squatting on the Government reserve between Coal Harbor and First Narrows, Burrard Inlet'. Sproat explained that the Indians 'had been there for several

years and have made some improvements', including the building of houses and fences.[3] The Commissioners refused to establish a reserve at this spot, which had been their policy in other locales occupied by Aboriginal peoples. Their rationale was that the land had already (albeit illegally) been set aside for national defense (Mather, 1998: 42). However, they assured the Indians that although they had no juridically recognizable territorial claims, 'the Provincial government would probably not insist on any summary removal of their houses and fences' and might in fact compensate them for their improvements.[4] The City expressed particular concern about eight mixed-race families who were among those constituted as 'squatters' and who refused to be relocated from their homes at Brockton Point. The families, as we will see, were displaced by another colonial logic; they were not *real* Indians and thus had no legitimate and/or palpable claims to the land.

In 1886, when the City of Vancouver was incorporated, the first civic action taken by City officials was to petition the federal government to lease the military reserve for use as a public park. In 1888, the lease was granted by order-in-council and was eventually replaced by a 99-year lease in 1908 (Steele, 1993; Mather, 1998; Mawani, 2003). At this point, the park was remade from Coast Salish land to a new civic site intended to cultivate the minds and bodies of Vancouver's British settlers. The opening of Stanley Park was a celebration of empire that was commemorated by a civic holiday and a procession that ended with an exaltation of the Union Jack and a performance of the national anthem. At the opening festivities, Mayor Oppenheimer described the park as a 'necessity', a 'place of recreation in the vicinity of a city where its inhabitants can spend some time amid the beauties of nature away from the busy haunts of men' (Matthews, 1954: 9–10). The 'inhabitants' referred to in Oppenheimer's speech clearly did not include the mixed-race residents of Brockton Point. The City began improvements to the land almost immediately. A park road was built in 1888, the construction of which symbolizes another form of colonial violence, as it was partially paved by a midden found at Xw'ay Xw'ay. Road construction and other improvements became non-juridical methods of removal. The City tried to deracinate the mixed-race families through the creation of various recreational sites, including a civic sports field and cricket pitch that were formally opened at Brockton Point in 1890 (Steele, 1988: 11).

Despite these colonial displays, the Brockton Point residents lived relatively undisturbed until the early twentieth century. Although City authorities often did complain that the families were 'trespassers' who were 'wrongfully and illegally occupying the land and should be evicted' (*Gonsalves*, 1925: 3), because of jurisdictional battles between the federal and provincial governments, nothing was formally done to remove them. By the 1920s, however, things changed. City officials became increasingly anxious about the families, fearing that at least some of them would be able to claim adverse possession under the 60-year requirement of British common law. At this same moment, the new city was celebrating Stanley Park as an imperial icon that would enable authorities and citizens to promote and

develop the *British-ness* of British Columbia. This civic playground located in the center of the city was hailed as an important site of moral, physical, and imperial advancement.[5] Any legal claims made by the Brockton Point residents would not only amount to a loss of valuable land, but would also be an affront to British settler colonialism. '"Landscape"', as W. J. T. Mitchell (2002) argues, 'must represent itself . . . as the antithesis of "land", as an "ideal estate" quite independent of "real estate"' (p. 15). The Brockton Point residents and their 'weather beaten homes' also disrupted the discursive geography for Vancouver's citizens. The 'poetic' properties so central to landscape (p. 15) were interrupted by a presence and physical visibility of otherness that haunted the space and shadowed photographs taken by park goers at cricket matches and on Sunday afternoon drives.[6]

In 1923, these protracted territorial battles were formalized when the City and Attorney General of Canada initiated a legal action aimed at evicting the Brockton Point residents. Three separate lawsuits were filed against eight defendants and their families. Included were the cases of Alfred Gonsalves, Edward Long, Peter Smith, Tommy Cole, and Mary DeCosta; a case involving Agnes Cummings and Maggie West; and an action against Mary Dunbar.[7] The City and Attorney General argued that all of the families were trespassing on Crown lands and should therefore be evicted. All three cases were heard in the BC Supreme Court, the BC Court of Appeal and finally, the Supreme Court of Canada. The central issues raised by the City and the Attorney General had to do with the duration and continuity of the families' tenure at Brockton Point. Although several witnesses testified that they had seen houses there, dating as far back as the Fraser River Gold Rush of 1858, City officials argued that the residents moved to the area *after* the land had already been 'discovered' and claimed by the Imperial government and then transferred to the Crown by order-in-council (*Gonsalves*, 1925: 11). Prior to that time, the land was assumed to be vacant. The second issue had to do with the *length* of time the residents had lived on the land in question. The City and Attorney General challenged the families' claims to continuous occupation. Briefly, the authorities argued that none of the residents could adequately prove the necessary 60 years of continuous inhabitance as their homes and fences had been moved at numerous points. Once again, temporality figured centrally in the City's argument. The City explained that when the park road was built in 1887, 'any shack, fence, or other structure or erection on the said lands and premises' was (re)moved (p. 12). The implication here was that the families had *no* rights, as they could not prove an uninterrupted residency, a point I elaborate further on.

Although the testimony of several Aboriginal onlookers corroborated and confirmed that the families had long resided at Brockton Point, Murphy J., who heard the case in the BC Supreme Court, disregarded this testimony, describing the witnesses as 'old' people who 'contradicted themselves' (p. 173). But, when the case was heard in the BC Court of Appeal, Justice Martin, one of the three presiding judges, disagreed with the lower court. He acknowledged the word of Aboriginal witnesses and described their

testimony as 'remarkable and beyond expectation precise' (p. 190). Based on this evidence, the Court of Appeal ruled in favor of the families. More importantly, Justice McPhillips, another appellate court judge raised insightful observations about identity, territory, and Native title:

> I am clearly of the opinion that ample evidence was led and adduced at the trial upon which it can reasonably found that title was acquired by the Defendant to the land in question by continued possession adverse to and in derogation of that of the Crown. There being no express extinguishment of the Indian title in British Columbia the question whether there was earlier possession in the Crown than that of the Defendant and those under whom he is entitled to claim possession, is brought up somewhat graphically and it might reasonably be said that there could be no prior possession of the Crown to the possession shewn [*sic*] by the Defendant. (pp. 200–1)

The ongoing battle finally ended in 1925, when the Supreme Court of Canada like the BC Supreme Court, described the Indian testimony as 'indecisive' and overturned the Court of Appeal's decision (*Cummings*, 1925: 2). What is particularly interesting and important here is, not only the outcome of the case, but the ways in which the various courts negotiated their way around the question of Aboriginal identity and title. Although the Court of Appeal questioned Native title directly, the BC Supreme Court and the Supreme Court of Canada were much more cautious and tentative in their deliberations about racial membership and territorial ownership.

Throughout the government correspondence that preceded the trials, the families' racial designation and colonial otherness were neither fully established nor disestablished. In some of the discussions, the families were referred to as 'a family of Indians', then 'Indian squatters', 'half-breeds', and finally 'squatters'.[8] It seems that these discussions about Aboriginal identity were critically bound up with concerns around property. For example, the Chief Inspector of Indian Reserves had this to say about the Brockton Point residents and their territorial claims: 'While there are at least eight families living on the park property, there is only one of pure Indian blood, the balance being either half-breeds or whites, therefore the Department [of Indian Affairs] has no particular interest in the other seven families.'[9] Here, 'interest' was defined materially through compensation. The ninth family – Aunt Sally and Howe Sound Jim – were described as 'full-blooded Indians'. Their claim never went to trial as Aunt Sally passed away. However, the courts recognized Aunt Sally's claim, as her home was believed to have been surveyed in 1863, by George Turner of the Royal Engineers. Hers was the only 'occupation' recorded on a map as an 'Indian House' (*Gonsalves*, 1925: 20–1). In exchange for relinquishing her land, the Parks Board Commissioner paid Aunt Sally's daughter Canadian $14,000. But the other families had a different fate. By the time the trials began, the eight mixed-race families were described definitively as 'trespassers' and 'squatters' who were 'wrongfully and unlawfully' occupying the land they were residing upon (p. 3). The City and Attorney General requested the courts to order an eviction and injunction, preventing the families from asserting any future claims.

Throughout the trial and appeals, there is an ambivalence that characterizes the racial identity of the Brockton Point residents. Although the courts asked each of the witnesses who testified for both sides about their 'nationality' – a strategy that was later used by several judges to discredit Aboriginal testimony, as I discussed earlier – there was little *explicit* discussion about the racial membership of the defendants themselves. Witnesses and other onlookers did comment that the men who first came to the Point and built houses were mainly of Portuguese ancestry and were known as 'Portuguese Joe' number one and two and 'Portuguese Pete' (p. 58). And other than an initial description of a marriage or partnership, there was little or no mention of their Aboriginal wives (Barman, 2004). This is not to suggest that the question of race did not emerge, it certainly did, but in ways that were complex and provisional.

Several witnesses made comments about the racial ambiguity of the Brockton Point residents. For example, George DeBeck, an Indian Agent who had worked for years in Alert Bay on the Northern tip of Vancouver Island, testified that in 1868, he had seen a 'couple of houses . . . shacks' at Brockton Point. However, he explained, 'I don't know if there were any persons living there or not permanently.' De Beck described the two houses as, 'something like most Indian houses' that were built 'right on the water practically – on the edge' (p. 34). In subsequent correspondence on the matter, the Inspector of Indian Reserves observed that the houses were 'dirty and untidy . . . and were a disgrace'.[10] Despite their Portuguese ancestry, colonial authorities placed the families outside colonial categories of European-ness. The Portuguese fishers and others who lived at Brockton Point in the 1860s and 1870s were seen by the courts and by government officials to have betrayed their European heritage by marrying Native women and living 'Indian' lives. Ultimately, the courts situated the Brockton Point families awkwardly between colonial categories. On the one hand, they did not recognize the families as 'European' nor did the courts describe them as 'Indians'. Authorities may have seen the men as racially tentative to begin with – the fact that they were Portuguese and not *British* may have raised questions about their racial proclivities and civility. Although Europeans were also racially hierarchized, with Northern Europeans at the top and southern Europeans at the bottom, it is interesting to explore how these racial lineages were translated in colonial locales outside of Europe.

'In the colonies', argues David Goldberg (2002), 'all Europeans presumptively were more or less white.' He elaborates as follows:

> This presumption is revealed by the contrast of the moralizing phrase, 'he's gone native'. The 'gone' in 'gone native' is of course ambiguous. Literally, it meant the person referenced had become native, had assumed the codes and mores, the lifestyle, of the indigenous. More extensively, though, it also indicates a moral judgment expressed about the person having 'gone', having abandoned Europeanness or whiteness. This identification of Europeanness and whiteness reveals that whiteness here is considered a state of being, desirable habits and customs, projected patterns of thinking and living, governance and self-governance. (p. 171)

These slippages of 'having gone native' were evident throughout the juridical and extra-juridical discourse. The underlying assumption was that these European men who lived at Brockton Point were race traitors who had betrayed their ancestry and *proper place* to live 'Indian' lives.

The men's 'Indian' ways were thought to be especially evident in their conjugal and domestic relations. When Peter Smith, Joe Silvey, and Joe Fernandez first arrived at Brockton Point in 1860, following the Fraser River Gold Rush, they all married Aboriginal women. Smith married Shwuthchalton's daughter, Kenick, and lived with her family in what is now Stanley Park. Joe Silvey married Khaltinaht, the granddaughter of Chief Kiapilano, and the two were married according to Indian custom (Barman, 2004: 16). Joe Manion, a Scotsman, married Takood and lived with her father, Klah Chaw (also known as Dr Johnson), and brother, Ambrose. Race betrayal was also observed elsewhere. For example, in 1862, onlookers at a potlatch saw several bearded white men participating in the festivities. These men were later identified as Portuguese sailors, probably Fernandez and Smith (Steele, 1993: 34).

Importantly, 'going native' was also articulated and understood through western understandings about property. Not only did the Brockton Point residents live with and among Indians, but, authorities insisted that they did not fully grasp the values that underpinned Western property regimes, including individual ownership. Throughout the trial, their racial inferiority was further inscribed through an inability to understand European conceptions of private property. Joe Gonsalves and his family had lived in Stanley Park since 1874. Known as 'Portuguese Joe No. 2', he claimed that his home had long been at Brockton Point and had been given to him by Joe Silvey, one of the first Portuguese residents to live in the area. At the trial, the City's lawyers raised questions about how Gonsalves acquired his home. Gonsalves explained that he 'got the place from Joe Silva'. The courts pressed on: '*Q*. Did you pay him anything for the place? *A*. No, he says he didn't want anything, it never was no place he said, he was a friend of my uncle's so he would give me the place' (*Gonsalves*, 1925: 98).

Colonial authorities perceived this redistribution of property – that was reminiscent of *potlatches*, which were eventually criminalized by the Canadian government – as an affront to European cultural sensibilities (Loo, 1992). Gonsalves insisted that although he did not pay for the property, he did make improvements to it and it was his 'home'. Although Joe Silvey had cleared the land before he left, Gonsalves claimed that he too had cultivated the soil by building a fence and growing a garden (*Gonsalves*, 1925: 99). He elaborated that the original home 'was so old, all falling to pieces', so he 'built a house back about 30 or 40 feet from this places on the same lot' (p. 97). However, the City's lawyers were dissatisfied with this response and were even more disturbed by the fact that there was no blood relation between Gonsalves and Joe Silvey. How could Silvey have just given away his property? How could this be Gonsalves's home when he 'didn't take any writings [deeds/wills] from Joe Silva?' When the courts questioned him about the validity of his ownership, Gonsalves replied, 'we reckoned that to

be our home, and I have my furniture there, I have a stove and everything in the place – the place has never been abandoned, I always lived there, we reckoned that to be our home' (p. 99).

Like Gonsalves, the lawyers insisted that the other residents also did not comprehend western property regimes. For starters, none of the other families had deeds or wills. Peter Smith's father did leave a will, but 'that paper was destroyed' when the safe it was stored in was 'blown open' (pp. 117–18). Unsurprisingly, references to deeds and wills were also used to undermine the defendants' claims and raise questions about their racial civility. For example, the City's lawyer used this as a basis to interrogate Agnes Cummings about the legitimacy of her territorial assertions:

> *Q*. Well, you have said you have heard from others that both your father and Manion were there. Now, what did they tell you – how long were they there, when they came and when Manion left? You must know something about that? *A*. Oh, I have never heard how long they were there. *Q*. Well, you claim the property now, do you? *A*. Yes. *Q*. And you claim it on what reason and on what grounds? Have you got the deeds to show for it? *A*. No. *Q*. Well, on what ground do you say you are entitled to be left there undisturbed? *A*. I could not say. (*Cummings*, 1925: 65)

The uses of property are interesting. Improvements, including renovations, gardens, and additions, as well as enclosures, in the form of fences, were characteristically associated with Occidental understandings of private property. However, in the Stanley Park trials, improvements became yet another strategy of displacement. In an interview with the Vancouver City Archivist, Major Matthews, Timothy Cummings who was also born in Stanley Park, explained this contradiction accordingly. The 'Park road was made around Stanley Park, and ran right through our house; we had to move our house back to let the road go by'.[11] These contradictions between property and improvements were also evident within the cases. In his reasons for judgment at trial, Murphy J. argued that the defendants could not 'show possession for sixty years' (*Gonsalves*, 1925: 173). He elaborated that their homes were not recorded on the 1863 survey and 'it is absolutely impossible for me to say from this evidence that there has been any satisfactory proof – not alone of fences, but of any clearing that dates back sixty years' (p. 174). Here, the courts ruled that new fences and additions, which were the result of the City's coercive actions, did not signify enclosure and continuous ownership as we may think. Rather, for the courts, new fences and walls signified a temporality, a *lack* of continuity, and a disruption. This temporality was then turned upon the families to unsettle both their racial identity (were they civilized?) and their claims to ownership. 'Any imperial occupation', as Peter Fitzpatrick (2001) observes, 'surpassed anything the savage did upon the land' (p. 158).

Despite numerous attempts by the courts to portray the Brockton Point families as lacking racial civility, they were very careful not to overstate their affiliations with Aboriginal peoples. For example, Lucy Cummings, the

mother of two of the defendants – Agnes Cummings and Maggie West – who was an Aboriginal woman from Bella Coola, was not ascribed any racial designation (although at one point the entire family was defined as 'white', but only momentarily). Yet, Lucy was an Indian 'who came with her parents in one of those big canoes, paddled all the way from Bella Coola, to work in the salmon cannery at Ladner on the Fraser'.[12] Nor was there mention that her daughters, or any of the other defendants for that matter, were of mixed-race ancestry. Similarly, there was no discussion of the fact that Agnes Cummings (along with her brother Tim) 'was educated at the Coqualeetza Indian School at Sardis'. These details about her life were revealed long after the trial had ended and just after her death in 1953 (*Province*, 1953: 1; on Tim Cummings, see Mather (1998: 107, note 84)).

Throughout the trials and in government correspondence, the families were situated awkwardly in what Homi Bhabha (1994: 50) has termed an 'in between space' – a liminal zone that precluded them from making explicit claims to European-ness or to Aboriginal identity and land title. Here, the links between law, identity, and territory are reconfigured and are once again central to displacement. Although the courts recognized that the land was inhabited, it was occupied by a community – who manifested both an excess and lack of difference – individuals who were then transformed from 'Indians' to 'squatters' with no legitimate territorial claims. Although Justice Martin and Justice McPhillips from the BC Court of Appeal did recognize the families' claims, they too characterized the defendants as in-between – as neither fully European nor fully Indian. In his 'Reasons for Judgment', Martin J. recognized the Indian testimony but ruled in favor of the families based on squatter's rights. Unlike his counterpart McPhillips, who questioned Aboriginality and Native title directly, Martin did not consider racial identity and its materiality. Rather, he described the families as 'ancient pioneers of Stanley Park' who should (like other squatters) be 'favorably regarded by the powers that be as a settler who was assisting in the building up of the country though in an irregular matter at the start' (*Gonsalves*, 1925: 197).

Despite the outcome of the cases, however, the families did continuously resist and attempt to subvert the City's encroachment on their territories. Although Native title rests on the ability to make a genealogical connection to prior occupants and continued occupancy, throughout the trials and appeals, the Brockton Point residents used their racial uncertainty to engage and assert their proprietary claims in other ways, by evoking competing conceptions of property and by exploiting legal ambiguities about exactly who owned the land. It is to these acts of resistance that I now turn.

RESISTING DISPLACEMENTS: HYBRID IDENTITIES AND TERRITORIES

> Resistance is not necessarily an oppositional act of political intention, nor is it the simple negation or exclusion of the 'content' of another culture, as a

> difference once perceived. It is the effect of an ambivalence produced within the rules of recognition of dominating discourses as they articulate the signs of cultural difference and replicate them within the deferential relations of colonial power. (Bhabha, 1994: 110)

In his brilliant analysis of the Mashpee, James Clifford (1988) captures many of the problems surrounding the law's demands for 'authentic' Indigenous identities and the ways in which Aboriginal peoples negotiate these juridical requirements in their attempts to (re)claim ancestral lands. Like the Mashpee, the Brockton Point residents were also thought to be inauthentic, 'a creation of the colonial encounter' (p. 294), the product of sexual affiliations between European colonists and Aboriginal women that have been characteristic of all 'contact zones' (Pratt, 1992: 6). Although the City of Vancouver used juridically defined racial identities and Western conceptions of property to try and displace them, the families responded to these encroachments in several ways. For one thing, the families pressed authorities to address the legality of Imperial reterritorialization. Most land claims focus on the rights of Aboriginal peoples and not the sovereignty of the Crown. In the case of Brockton Point, however, the lawyers representing Agnes Cummings and Maggie West raised critical questions about the Crown's title to Stanley Park, requesting copies of deeds and transfers. They argued that while the Crown may legally own the territory, the lands claimed by the families were not included within the military reserve designation. The City reacted to these allegations armed with colonial documents. The colonial archive clarified that while 'no formal deed appears to have been made', Governor James Douglas had the power and authority to 'make reserves in British Columbia'. Douglas not only set aside Indian Reserves, but also government ones. And as authorities on Downing Street explained, 'it has always been considered that reserves made by him were valid and became effectual without confirmation by the Secretary of State' (*Cummings*, 1925: 77). Although the Brockton Point families required deeds for their own claims to be palpable, these same rules were not applicable to the Imperial and colonial governments.

The families' lawyers also challenged the Crown's title in other ways by evoking competing conceptions of property, for example. In his book, *Unsettling the City*, Nick Blomley (2004) argues against the ownership model of property, suggesting that people have multiple and diverse relationships to land that do not fall within western juridical formations. The Brockton Point residents did propose alternative views of property by linking their own occupation to earlier owners, who did not sell or pass down their land in ways that adhered to the rule of Occidental law, but who could make claims to Aboriginal title on far more certain racial terms. Establishing genealogical connections to previous owners is indeed a requirement for land rights and is thus not extraordinary here. What is interesting in these cases, however, is how the families articulated their racial identities through their blood relationships with other Coast Salish residents.

The lawyers representing the families asserted title not through their clients' blood but through the less ambiguous racial identities of previous

occupants. These earlier residents were seen as 'authentic', since they were regarded as racially 'pure' bodies who lived on the land prior to colonization. At least two of the occupants – Agnes Cummings and Maggie West – argued that they could trace their ownership back to Klah Chaw, their grandfather and local medicine man and his 'co-villagers'. Their lawyers argued that this continuity exceeded the 60-year requirement of adverse possession. They explained: 'The Indian title in which the Respondent's title is rooted has never been disturbed by any legislation' and in fact, 'antedates the establishment of the new colony' (*Cummings*, 1925: 12–13). The lawyers for Cummings and West argued their lineage as follows: 'The Respondents' father, James Cummings, successor to one Joseph Manion and his wife; and Joseph Manion's wife and her ancestors are alleged to have "held or enjoyed", in the sense of the statute, "from time immemorial"' (p. 13). As mentioned above, the Court of Appeal did take this seriously, observing that Indian title was never extinguished in BC and thus recognizing the families' claims. However, the Supreme Court of Canada reversed the decision. Interestingly, Canada's highest court did not engage with the issue of Aboriginal identity and title directly, but instead, argued that the residents could not prove 60 years of continuous occupancy, since the original homes deteriorated, fell down, and were rebuilt; and the building of the park road in 1887 also required several of the residents to move their fences.

In addition to these strategies, some of the witnesses also directly and indirectly raised questions about the legalities of the park-making process. For example, when the courts asked Tom Abraham, 'an Indian' who lived on the Squamish reserve in North Vancouver if there were 'any Indians living in the park', he responded as follows. 'There were people living there all the time . . . there were people living at Why Why [*sic*] – for a long time – for generations' (*Gonsalves*, 1925: 67–8). He elaborated that there were in fact Indians living in the area now called 'Stanley Park' long before the land was reterritorialized as a park. During his examination, Peter Smith also raised questions about the land:

> *Q*. Where were you born? *A*. I beg your pardon? *Q*. Where were you born? *A*. Born at Brockton Point. *Q*. In Stanley Park? *A*. It was not Stanley Park at that time. *Q*. It is what we call Stanley Park now? *A*. Yes, but Brockton Point is where I was born. (p. 131)

The responses of both Abraham and Smith could be interpreted as intentionally aimed at unsettling imperial territorial claims (Blomley, 2004: xii–xxi). Notwithstanding these attempts, however, the courts evicted the Brockton Point families. Interestingly, the decision to deracinate the residents generated negative responses from local colonists. Several white residents argued that the families had lived there for a long time and should be permitted to stay.[13] Despite the Supreme Court of Canada's ruling, the City allowed the residents to remain in the Park for several years to come.

Finally, in 1931, the families were told they must vacate their premises. Even at this point, years after the trials had ended, City authorities were still

preoccupied with racial membership. According to the *Star* (1931), a daily newspaper, 'the [Parks] Board was puzzled somewhat as to the nationality and origin of the five families. Mr. Holland said he believed they were descendants of Indian families who had occupied the spot for more than sixty years'. However, 'Commissioner E.G. Baynes thought Mr. Holland was wrong. They were either Spanish or Portuguese families'. Although their racial designation was still in question, one thing was sure, the families would now be required to relocate. Four of the five families moved into city tax-sale housing, rent-free for three years, and the other made alternative arrangements. The houses at Brockton Point were promptly burned down to provide a 'new and attractive night view of the harbor' (*Province*, 1931). Timothy and Agnes Cummings somehow managed to evade this last eviction and continued to live in Stanley Park until their respective deaths. Agnes died in 1953, at the age of 69, and Tim passed away five years later in 1958, at the age of 77 (*Vancouver Sun*, 1958: 13).

Although racial in-between-ness may have opened up access to some (white) places and privileges, it certainly closed off access to others. It is important to note that the court's discussions of racial membership in the Stanley Park trials had deeper material implications for those displaced. In April 1925, when the Supreme Court of Canada was hearing the cases, Arthur Paul, a delegate of the Squamish Nation wrote to the Deputy Superintendent of Indian Affairs, Duncan Scott. Paul was writing on behalf of one of the defendants, Tommy Cole, and was challenging the courts' constitution of 'race'. In his letter, Paul pleaded that the Department recognize Tommy Cole's status as a legitimate member of the Squamish Nation and thus cancel the legal proceedings against him. In the letter, Cole was described as 'a Squamish Indian' who 'has participated in the sale of Reserves at Howe Sound . . . and in every disbursement of funds since the amalgamation of the Squamish Indians'.[14] Arthur Paul insisted that Tommy Cole was an 'Indian', and deserved not only the 'protection of the Indian Department' but who also had 'a just right to compensation' for the plot he occupied in Stanley Park. Cole had inherited the land from his grandfather, 'whose ancestors had resided in the disputed area from time immemorial'.[15]

Yet, when the Deputy Superintendent asked BC's Indian Commissioner about Cole's racial membership, he was assured that despite any arguments by the Squamish, Tommy Cole was not an Indian and thus was 'not entitled to any payment'.[16] Although Cole's mother was an Indian, his father was described as a white man. Under the *Indian Act*, Cole's mother and her children lost any legal claims to Aboriginality. More importantly, the Indian Commissioner for BC reported 'it was not until the 19th of June, 1923, that the Squamish Band really voted him [Tommy Cole] into their membership'.[17] The impurity of Tommy Cole's blood precluded him from receiving compensation for his displacement. Moreover, the government's decision also restricted him from living on the Squamish reserve and from actively participating in community life. The Indian Commissioner explained Tommy Cole's situation as follows: 'It is difficult . . . to see that he could be residing

off a reserve all that time and afterwards claim to be an Indian or vice versa'.[18] Despite his attempts to perform authenticity – through linkages to blood and soil that predated colonization – in the specter of law, Tommy Cole was not a 'genuine Indian' but 'a creation of the colonial encounter' (Clifford, 1988: 294).

CONCLUSION

> Indigenous peoples have been neither fully excluded nor fully included. In a sense, their indigenousness is sufficiently 'present' for them to be able to claim rights, as well as sufficiently 'absent' to make their claims to rights necessary. (Perrin, 1999: 29)

The focus of this article has been on what Ann Laura Stoler (2002) has recently called 'taxonomic states', states 'whose administrators were charged with defining and interpreting what constituted racial membership, citizenship, political subversion, and the scope of the state's jurisdiction over morality' (p. 206). Specifically, my aim has been to trace the *particular* anxieties that racial hybridity provoked for colonial administrators on Canada's west coast. Rather than asking the now fairly standard question about whiteness – and the possible ways in which mixed-race heterosexual relations and progeny could destabilize European privilege and power in the colonies – my purpose has been to provoke another set of questions about alterity that have received less scholarly attention. Why was the category 'Indian' policed as closely as it was in late nineteenth- and early twentieth-century British Columbia? What was at risk if the category was defined more broadly? Why is Aboriginality still as persistent a concern in the twenty-first century as it has been historically? And, finally, how have colonial constitutions of Indian-ness informed current contestations over Aboriginality?

The law is always in search of an (im)possible authenticity. When the stakes increase – material demands for land, resources, and rights – Aboriginal peoples as individuals and collectivities have been (and are) required to perform what Elizabeth Povinelli (2002) has termed an 'authentic difference' (p. 6). In other words, Aboriginal peoples are obliged to stage a 'genuine' alterity as a precondition to reparative legislation, yet authenticity itself is an (im)possibility. This is especially so given the colonial state's active role historically, in legally defining and categorizing Aboriginal subjects, communities, and their respective rights. I have argued here that, through the constitution and enforcement of racial taxonomies, the Canadian government has played a significant role in diminishing the number of peoples who could historically make legitimate and legal claims to Aboriginality. But how is the colonial past constitutive of the (post)colonial present?

In his book, *Colonial Desire*, Robert Young (1995) makes the following observation about colonial histories and the present. 'The interval that we assert between ourselves and the past', Young argues, 'may be much less than we assume. We may be more bound up with its colonial categories than we

like to think' as the 'nightmare of the ideologies and categories of racism continue to repeat upon the living' (p. 28). Young's argument is illuminated in contemporary legal discussions about Aboriginal identities in Canada, with which this article began. Colonial initiatives from the late nineteenth and early twentieth century, that were aimed at juridically classifying and defining Aboriginal people, continue to reverberate both inside and outside law. Residues of Indian-ness continue to shape the contours of Aboriginality as a juridical category. These debates evoke contradictions within the Canadian nation – a colonial past that can never be fully remembered nor completely forgotten.

The distance between the past and present may indeed be much closer than we think. In Canada, the government's concerns with and attempts to circumscribe Aboriginality are as persistent today as they were at the height of colonial expansion. In addition, the familiar debates about blood and culture – and their links to land and resources – continue to circulate within contemporary Canadian jurisprudence. Today, to be granted reparations and redress for colonial harms, Aboriginal peoples are required to fulfill a racial otherness that is demanded and then carefully examined by the state (Povinelli, 2002). However, Aboriginality can never live up to its expectations of authenticity, as the inspection of alterity always constitutes Aboriginal peoples as 'failures of Indigeneity' (p. 30). In the twenty-first century, land claims negotiations and reparative legislation in Canada has reactivated colonial residues of Aboriginality. However, these contestations are not only unfolding within the specter of law but also on the ground, within Native communities. While the courts are faced with the difficulties of adjudicating Aboriginal identities, many communities are also contemplating similar questions. Because of colonial practices and their legacies – including the *Indian Act* and other legislation – and due to limited economic resources, many Aboriginal communities are now restricting access to band membership. In some communities, criteria including blood quantum, have been put into effect (Dickson-Gilmore, 1999; Lawrence, 2003: 16–17). Paradoxically, these practices serve to reinscribe the colonial processes that First Nations communities have so actively resisted (Lawrence, 2003; Miller, 2003; Darian-Smith, 2004). It is only when we understand these complexities – of how the colonial past lingers in the (post)colonial present – that we can navigate through these juridico-political contradictions and can seek out social, political, and legal strategies for change.

NOTES

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1. In 1921, the Canadian parliament debated a provision making it a criminal offence for any white man to have 'illicit connection' with an Aboriginal woman. However, because some authorities feared that Native women could potentially use this law to blackmail white men, this provision was not passed. *Canada House of Commons Debates*, Session 1921. Volume 4 (26 May 1921): 3907.
2. R.S.C. Indian Act 1876, chapter 18 at 3(3).
3. Sproat to Elliot, 27 November 1876, p. 17–18. British Columbia Archives and Records Service [hereinafter BCARS], GR 0494, Provincial Secretary Indian Reserve Commission Records, 1876–8.
4. Sproat to Elliot, 27 November 1876, pp. 17–18.
5. BC Electric Company, 'The Vancouver Park System,' *The Buzzer*, vol. IX, 48: 1. City of Vancouver Archives [hereinafter CVA], Vancouver Parks and Recreation Board Clipping File. 50-F-1-File 2.
6. There are several pictures of park goers at Brockton Point that also captured several of the homes. See Vancouver Public Library Special Collections Historical Photographs Database.
7. Because all of these cases were based on the evidence given in the *Gonsalves* case, I make little distinction between them. I also make few references to the *Dunbar* case since the case itself has little information.
8. There is a series of correspondence called 'Stanley Park Squatters'. See National Archives of Canada [herein after NAC], RG 10, Reel 10186, Volume 4089, File 521,804.
9. Ditchburn to Scott, 28 July 1919. NAC, RG 10, Reel 10186, Volume 4089, File 521,804.
10. Ditchburn to Scott, 28 July 1919.
11. Major Matthews Topical Files, 'Squatters', City of Vancouver Archives [hereinafter CVA]. 504-C-4, File 266 Fiche #AM0054.013.04 313A: 'Park Road Squatters'.
12. 'Squatters', CVA – 504-C-4, File 266 Fiche #AM0054.013.04 313A: 'Lucy Cummings'.
13. Perceval to Stevens, 23 April 1923. NAC, RG 10, Volume 4089, File 521,804.
14. Paul to Scott, 8 April 1925. NAC, RG 10, Volume 4089, File 521,804.
15. Paul to Scott, 8 April 8 1925.
16. Lian to Ditchburn, 30 April 1925. NAC, RG 10, Volume 4089, File 521,804.
17. Ditchburn to Scott, 29 May 1925. NAC, RG 10, Volume 4089, File 521,804.
18. Ditchburn to Scott, 19 May 1925.

CASES CITED

Canada (Attorney General) v *Cummings* (1925) National Archives of Canada, Ottawa. RG 125, Volume 523, 5074, 5076

Canada (Attorney General) v *Dunbar* (1925) National Archives of Canada, Ottawa. RG 125, Volume 523, 5075

Canada (Attorney General) v *Gonsalves* (1925) Vancouver Public Library Special Collections, Vancouver

R v *Gladue* (1999) 1 SCR 688

R v *Powley* (2003) 2 SCR 207

REFERENCES

Backhouse, Constance (1999) *Color Coded: A Legal History of Racism in Canada, 1900–1950*. Toronto: Osgoode Society for Legal History/University of Toronto Press.

Ballhatchet, Kenneth (1980) *Race, Sex, and Class Under the Raj: Imperial Attitudes and the Policies and their Critics, 1793–1905*. London: Weidenfeld and Nicolson.

Barkan, Elazar (1992) *Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States Between the World Wars*. New York: Cambridge University Press.

Barman, Jean (1998) 'Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850–1900', *BC Studies* 115/116: 237–66.

Barman, Jean (2004) *The Remarkable Adventures of Portuguese Joe Silvey*. Madeira Park: Harbour Publishing.

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

Blomley, Nicholas (2003) 'Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid', *Annals of the Association of American Geographers* 93(1): 121–41.

Blomley, Nicholas (2004) *Unsettling the City: Urban Land and the Politics of Property*. New York: Routledge.

Brown, Mark (2001) 'Race, Science and the Construction of Native Criminality in Colonial India', *Theoretical Criminology* 5(3): 345–68.

Churchill, Ward (1998) *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present*. Winnipeg: Arbeiter Ring Publishing.

Clifford, James (1988) *Predicament of Culture: Twentieth Century Ethnography, Literature, and Art*. Cambridge, MA: Harvard University Press.

Culhane, Dara (1998) *The Pleasure of the Crown: Anthropology, Law, and First Nations*. Burnaby: Talon Books.

Darian-Smith, Eve (2004) *New Capitalists: Law, Politics, and Identity Surrounding Casino Gaming on Native American Land*. London: Thomson/Wadsworth.

Dickson-Gilmore, E. J. (1999) '*Iati-Onkwehonwe:* Blood Quantum, Membership and the Politics of Exclusion in Kahnawake', *Citizenship Studies* 3(1): 27–43.

Fanon, Frantz (1965) *The Wretched of the Earth*. New York: Grove Press.

Fitzpatrick, Peter (2001) *Modernism and the Grounds of Law*. New York: Cambridge University Press.

Goldberg, David T. (1993) *Racist Culture: Politics and the Philosophy of Meaning.* Oxford: Blackwell.

Goldberg, David T. (1997) *Racial Subjects: Writing on Race in America*. New York and London: Routledge.

Goldberg, David T. (2002) *The Racial State*. Malden, MA: Blackwell.

Hill-Tout, Charles (1978) *The Salish Peoples: The Local Contributions of Charles Hill-Tout*, Volume VI. Vancouver: Talon Books.

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

Loo, Tina (1992) 'Dan Cranmer's Potlatch', *Canadian Historical Review* 73: 125–41.

McClintock, Anne (1995) *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest.* New York: Routledge.

Mather, Susan (1998) 'One of Many Homes, Stories of Dispossession from "Stanley Park"', unpublished MA thesis, Simon Fraser University.

Matthews, Major J. S. (1954) *The Naming and Opening and Dedication of Stanley Park 1888–1889*. Vancouver: City of Vancouver Archives.

Mawani, Renisa (2000) 'In Between and Out of Place: Racial Hybridity, Liquor and the Law in Late 19th and Early 20th Century British Columbia', *Canadian Journal of Law and Society* 15(2): 9–38.
Mawani, Renisa (2002) '"The Iniquitous Practice of Women": Prostitution and the Making of White Spaces in British Columbia, 1898–1905,' pp. 43–68 in C. Levine-Rasky (ed.) *Working Through Whiteness: International Perspectives*. Albany, NY: SUNY Press.
Mawani, Renisa (2003) 'Imperial Legacies/(Post)Colonial Identities: Law, Space, and the Making of Stanley Park, 1859–2001', *Law/Text/Culture* 7: 98–141.
Miller, Bruce (2003) *Invisible Indigenes: The Politics of Nonrecognition*. Lincoln: The University of Nebraska Press.
Mitchell, W. J. T. (2002) 'Imperial Landscape', pp. 5–34 in W. J. T. Mitchell (ed.) *Landscape and Power*. Chicago: University of Chicago Press.
Mohr, Richard (2003) 'Law and Identity in Spatial Contests,' *National Identities* 5(1): 53–66.
Perrin, Colin (1999) 'Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples,' pp. 19–38 in E. Darian-Smith and P. Fitzpatrick (eds) *Laws of the Postcolonial*. Ann Arbor, MI: The University of Michigan Press.
Perry, Adele (2001) *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849–1871*. Toronto: University of Toronto Press.
Pound, C. Roscoe (1936) *Stanley Park and its Environs.* Vancouver: The University of British Columbia.
Povinelli, Elizabeth A. (2002) *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*. Durham, NC: Duke University Press.
Pratt, Mary Louise (1992) *Imperial Eyes: Travel Writing and Transculturation*. New York: Routledge.
Province (1931) 'Squatters' Houses in Park Destroyed', 25 June.
Province (1953) 'Lifetime Resident of Stanley Park, Agnes Cumming [*sic*] Dies at 69 Years', 25 July.
Star (1931) 'Stanley Park Squatters To Be Evicted', 27 February.
Steele, Richard M. (1988) *Vancouver Board of Parks and Recreation: The First 100 Years.* Vancouver: Board of Parks and Recreation.
Steele, Richard, M. (1993) *Vancouver's Stanley Park: The Year Round Playground*. Guildford: Heritage House.
Stoler, Ann Laura (2002) *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule.* Berkeley: University of California Press.
Thomas, Nicholas (1994) *Colonialism's Culture: Anthropology, Travel, and Government.* Princeton, NJ: Princeton University Press.
Valverde, Mariana (2003) *Law's Dream of a Common Knowledge*. Princeton, NJ: Princeton University Press.
Vancouver Sun (1958) 'Ashes of Park Squatter to Be Scattered', 13 March.
Van Kirk, Sylvia (1998) *Many Tender Ties: Women in Fur Trade Society in Western Canada, 1670–1870*. Norman: University of Oklahoma Press.
Young, Robert J. C. (1995) *Colonial Desire: Hybridity in Theory, Culture, and Race*. London: Routledge.