

**Ethnicity in the Context of Multiculturalism:
Perspectives from the Courts of Canada 1950-2009**

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Thesis submitted in partial fulfilment of the requirements for a PhD in Sociology

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Abstract

An understanding of how ethnicity is interpreted by the courts and tribunals of Canada is important for any theoretical conceptualization of multiculturalism or any evaluation of multiculturalism policy implementation. This dissertation examines how ethnicity is defined in court judgments and what attributes were used to discuss it, and by whom? Specifically, this dissertation examines variations in the articulation and meaning of ethnicity since the term first appeared in Canadian case law in 1955. For the years 1950 and 2009, a search of the term “ethnicity” (ETHNIC*) in the Canadian Legal Information Institute database of cases revealed an astounding 2,358 federal-court and tribunal judgments/cases. For the purposes of this research, the number of cases was reduced to only 36 cases and 46 text segments, with the reference to ethnicity and examined via a qualitative “discourse analysis” technique. The dissertation applies a Bourdieusian theoretical framework postulating that ethnicity, which is an important ingredient of Canadian multiculturalism, is shaped in relation to power and meaning.

The sample revealed a nuanced multiplicity of discursive effects in juridical language, underlining the use of the concept of ethnicity. It highlights some aspects of the “excluding” dynamics of the concept of ethnicity in case law for the time period studied. It appears that when adjudicating cases where ethnicity is implied, judges were inclined to equate ethnicity with skin colour, ancestry, and regional location. Applying the sociology of the law to my empirical research results suggests that legal professionals may articulate ethnicity in such a way that a particular conceptualization is rendered legitimate. Within the limits of my sample,

such a process of rendering ethnicity legitimate often meant that the scientific knowledge and experience of others were disregarded. Furthermore, my empirical analysis suggests that even if the meaning of ethnicity in judgments was influenced by the ideology of multiculturalism, the influence, if viewed through the notion of ethnicity, was normative and prescriptive until 2009. By revealing the decision-making process associated with adjudicating the cases where ethnicity is mentioned, this dissertation offers a better understanding of how Canadian courts and tribunals understood ethnicity from 1955 to 2009. This is the dissertation's main contribution to the advancement of knowledge.

Acknowledgement

This dissertation would not have been possible without the guidance and the help of several individuals who contributed and extended their valuable assistance in the preparation and completion of this dissertation.

First and foremost, my utmost gratitude to Dr. Elke Winter, whose patience and steadfast encouragement I will never forget. Dr. Winter has been my inspiration as I hurdle aside all the obstacles in the completion of this research that spanned over a slightly unpredicted amount of time.

I would like to thank my committee, Dr. Sheryl Hamilton, Dr. Lori Beaman, Dr. José Lopez, Dr. Mireille McLaughlin, for the thought-provoking and inspiring discussion at the defence. Their valuable feedback helped me shape the final draft with much greater confidence. Dr. Beaman's simple question about where my dissertation is now at in the hallway of Heritage Canada, outside academia, helped me tremendously to put things in perspective and allowed me to make another leaps.

My colleagues and staff in the National Judicial Institute, without whom I would not have been exposed to the problematique of this research, have my deep gratitude.

Last but not the least, to my nucleus family here in Canada – Constantin, Valeriya, and Matvei, and to my dearest mother Nadiya in Ukraine: this would not have been possible without you!

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1. INTRODUCTION

1.1 How the Legal Realm Defines Ethnicity

As Constance Backhouse showed in her 1999 research, racial constructs were a central point of reference in hundreds of federal and provincial statutes enacted in Canada from 1900 to 1950. Legal documents—indeed, the entire legal system—have therefore contributed to the racial oppression and marginalization of minority groups, including Inuit, First Nations, black Canadians, Chinese Canadians, and even specific groups of white Canadians. Legislative and judicial sources document the central role of the Canadian legal system in the establishment and enforcement of racial inequality: “legislators and judges working in combination nipped, kneaded, and squeezed artificial classifications into rigid, congealed definitions of race under Canadian law” (Backhouse 1999: 15). Backhouse’s research motivated my empirical research. What has changed in Canadian courts since 1950—the first time that ethnicity as a concept appeared in a judgment?

Multidisciplinary research findings declaring that “race” is not a scientific concept were adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in the Declaration on Race and Racial Prejudice in 1978. In Canada, at least some evidence beyond the academic realm suggests that the notion of ethnicity must have evolved from the idea of “race.” For example, this change is obvious in the census. The 1901 Canadian Census classified

people by colour¹ (Backhouse 1999: 4), and until 1941, Canadians were asked to identify their race. After that, the “race” question was dropped (Carl & Belanger 2012). Instead, since 1951, the Canadian census asks people to identify their “ethnic origins”: In 1951, “European” was selected by 96.95% of the Canadian population, “Native Indian and Eskimo” by 1.18%, “Asiatic” by 0.52%, “Negroes” by 0.13%, and “Other” by 1.22% (Carl & Belanger 2012: 327). The change is further evident in the 2006 Census Ethnic Origins Reference Guide, which states that: “ethnic origin refers to a person’s ‘roots’ and should not be confused with his or her citizenship, nationality, language or place of birth.” It also provides the following example: “a person who has Canadian citizenship, speaks Panjabi (Punjabi) and was born in the United States may be of Guyanese ethnic origin” (Census 2006 Ethnic Origins Reference Guide).

The 2006 Census provides an explanation that ethnic origin responses reflect each respondent’s perception of their ethnic ancestry. Though equating the “ethnic origin” question with “roots” in the essence alludes to the concept of race, there is some difference. Specifically, the ethnic origin is perceived to be self-identified, whereas operating with the concept of race means that the attributes associated with race such phenotypical traits are imposed.

Importantly, the very first reference to “ethnicity” in the judgments accessed via CanLII was by a federal court in Canada made in 1955. The notion of ethnicity as a fundamental element of multiculturalism is manifest in the original policy’s reference to “other ethnic groups” (House of Commons 1971: 8545). Further, the 1982 *Canadian Charter of Rights and Freedoms* contains

¹ The 1901 Canadian Census classified Canadians by colour: “Whites” at 96.2% of the official Canadian population, “Reds” at 2.4%, “Yellows” at 0.41%, “Blacks” at 0.32%, and “Various Origins/Unspecified” at 0.66% (Backhouse 1999: 4).

an antidiscrimination clause and establishes the preservation and enhancement of the multicultural heritage of Canadians (Canada 1982). Given the fact that multiculturalism had already been an official policy in Canada since 1971 and was enshrined in law in 1988, the understanding of ethnicity is important.

As a normative framework tolerating and even encouraging the expression of ethnic diversity in the public space and protecting members of ethnic minority groups from ethnic and racial discrimination, multiculturalism can be expected to have influenced the ways in which ethnicity is referred to within the Canadian context. My research will attempt to reveal whether indeed multiculturalism can be expected to influence how ethnicity is in the courts and what are the decision-making process associated with adjudicating the cases where ethnicity is mentioned. It is inspired by the following questions: How is ethnicity defined by those who might have not been privy to the background or lived experiences of individuals whose life depends on this definition? Can those in the power of decision-making determine the ethnicity of another person by relying on self-identification?

This dissertation examines how ethnicity is defined in the legal realm and, in particular, in court judgments. It also wonders whether Canada's adherence to multiculturalism – as ethos, policy, and law – has any impact on how ethnicity is defined in the legal realm. Specifically, this dissertation examines changes in the articulation and meaning of ethnicity since the term first appeared in Canadian case law in 1955 (*Narine-Singh v. Attorney General of Canada*, 1955 SCC). However, my research questions do not follow a typical legal research logic, which is pre-defined on the type of law (common or civil) or the types of cases (criminal or civil) or jurisdiction (federal or provincial). Instead, I am interested in a sociological understanding of

ethnicity. My dissertation examines how ethnicity is defined in court cases, what attributes are used to discuss it, by whom, and what might be absent from the argument.

My personal and professional experiences are very much at the heart of this research. As an immigrant who arrived in Canada 20 years ago, I was fascinated with the notion of multiculturalism. I was lucky enough to engage professionally in the areas related to my dissertation research: National Judicial Institute from 2006 to 2016 and with the Department of Heritage working on multiculturalism programming and articulating the anti-racism strategy. Simply put, the dissertation emerged in response to a question I kept hearing: “Why do we need to discuss race and ethnicity? We are all multicultural now.” For me, his type of question, when asked by judicial decision makers signaled the possibility of a gap between the intent of multiculturalism policy and its implementation in the court room.

The dissertation has three major objectives. First, the dissertation examines the understanding of ethnicity in Canadian courts. Second, applying the sociology of ethnicity, the dissertation explores the power dynamics behind the understanding of ethnicity in Canadian courts. Third, drawing upon the sociology of law, the dissertation strives to understand, to the extent that this is possible, the relationship between the meanings of ethnicity and multiculturalism, and how this relationship has evolved over time.

Overall, written by a sociologist, the two theoretical frameworks guiding this research are sociology of ethnicity – used to explore the ways that ethnicity is defined –, and the sociology of law – used to acknowledge the particular demands of the legal context and of legal discourse.

For my research, I relied on an electronic collection of legislative and case law, the Canadian Legal Information Institute (CanLII) database. This database is used to investigate

variations in the notion of ethnicity in federal judgments. CanLII is a research tool, a database that provides open access to court judgments from all Canadian courts, including the Supreme Court of Canada, federal courts, and the courts in all Canada's provinces and territories. Using the search term ethnicity (ETHNIC*), the database reveals a total of 2,358 federal-court and tribunal judgments/cases between 1950 and 2009. The results show that the concept of ethnicity is invoked in a wide variety of cases, ranging from Refugee Board tribunals to criminal and family cases. At the end of the data collection process, including the filtering by relevance, there were only 36 cases remaining for the reasons I will explain in Chapter 5. I used sociological theories of ethnicity to construct a coding scheme for these 36 cases and correspondingly identified 46 text segments with references to ethnicity. I then reviewed the judgments and used the codes to examine the meanings of ethnicity examining a multiplicity of discursive effects, as per sociology of law theories.

1.2 Structure of the Dissertation

This dissertation is structured as follows: Chapter 2 problematizes the general issue of ethnic definitions in a multicultural society, and in Canadian courts in particular. If multiculturalism as policy and law prescribes certain definitions of ethnicity, then are they congruent with the definitions and understandings of ethnicity employed in the courts?

The literature review in Chapter 3 expands on this problem and highlights the gap in the understanding of how the wider ethnic relations in the Canadian context impact Canada's approach to multiculturalism and vice versa: how the understanding of ethnicity informs

multiculturalism. First, I describe the scholarship which assumes that the understanding of ethnicity in Canada has been evolving due to the implementation of multiculturalism and which treats multiculturalism as a step in the right direction. Second, I review the scholarship claiming that multiculturalism has no effect on understandings of ethnicity and rather describes it is an instrument of domination. Third, I review the legislative perspective from the scholarship on multiculturalism and ethnicity as well as race. Here, I also include the scholarship on equality and the Charter. Last but not least, in an attempt to identify any gaps in the legal literature, I review the existing scholarship on legalisms and judicial decision-making.

In Chapter 4, I outline my theoretical framework and argue that the sociology of ethnicity and the sociology of law are best suited to helping us understand the meaning of ethnicity in the judicial judgments reviewed in this research. First, largely borrowing from the sociology of ethnicity, I outline the ways in which Canadian courts determine ethnicity. I then develop the theoretical framework to include insights from the sociology of law, taking into consideration the particular demands of the legal context (which are neglected by most scholarship on the sociology of ethnicity).

Chapter 5 describes the methodology applied in this research, defines the process of case selection (the dissertation is grounded in 36 cases in total), and explains how I conducted the data analysis. I present how I examined the selected cases and explored the variations in the articulation of ethnicity by Canadian federal courts since 1950 by applying my theoretical framework. My goal here is to find out what is mobilized in the segments of case law where ethnicity is discussed meaningfully and to assess whether variation in the articulation of ethnicity in federal court cases is related to the specifics of legal culture; and if so, how.

Chapter 6 provides an analysis of this research and findings stemming from it. It starts with instances where ethnicity is categorised as blood. The chapter also reviews the findings for the data sample on the region-based category of ethnicity, including geography, area of origin, and territory. Guided by the sociology of law, this chapter also provides an analysis of the strategies used by judges in the same cases. It explores the legal language surrounding ethnicity by examining it through the lenses of neutralization and universalization. The chapter investigates framing of legal discourse by means of examining the legal language and its specific terms. Furthermore, I also examine the segments where ethnicity was found in association with language and traditions. The linguistic affiliations referenced here include French- and English-speaking Canadians, and the descriptors of ethnicity defined in terms of social organization, shared customs, beliefs, traditions and characteristics, and systems of clans and crests. In order to examine the “authority” granted to a judge by the state, I pose two questions: how do courts, tribunals, and panels address the concept of ethnicity? The chapter examines the epistemological authority observed in the blood-based category and in the geographical origin category. Finally, this chapter also provides the analysis of segments where ethnicity was found in association with and through the following concepts: human rights, humanity, vulnerability, disadvantageousness, changing nature, historical context, value of the past, totality, context, cross-cultural training, and multicultural values. I also discuss the discursive effects of universalization and neutralization.

Chapter 7 summarizes and discusses the main findings. My findings confirm that when adjudicating cases where ethnicity was implied, between 1950 and 2009 the courts’ understanding of ethnicity tended to be based on a “common knowledge” of ethnicity, often equating it with skin colour, ancestry, and regional location. The recourse to a “common knowledge” definition of ethnicity means that legal professionals can articulate ethnicity in a

way that a particular conceptualization is rendered as legitimate without necessarily relying on scientific² knowledge and the advice of experts. Hence, my research reveals that in the material examined within the limits of this dissertation ethnicity was sometimes referred to in ways that are no longer considered the state of the art in academic research, namely as background/racial origin, visible, physical characteristics, kinship, geographical area, residence, territory, beliefs, and traditions. In relation to refugee cases, my empirical research suggests that – in the empirical data analyzed here – there was an “excluding dynamic” surrounding the concept of ethnicity, specifically in instances when ethnicity was defined in terms of blood-relations or in reference to regions that are considered non-Western and with majority populations that qualify as non-white. Lastly, my finding suggests that even if the meaning of ethnicity in judgments may have been influenced by the ethos, policy and law of multiculturalism, until 2009, the last year covered by my empirical analysis, this influence was not profound. The chapter ends by outlining the limitations of this research.

Chapter 8 discusses the results of the research with the objective of outlining the contributions of this dissertation. Its main contribution is that it advances knowledge to a better understanding how courts and tribunals understand ethnicity—the empirical review is important to at least get a peak as to how possibly ethnicity is reflect in judicial decisions. Such empirical review of case law, in turn offers the identification of ethnicity per se and what factors are important in defining or conceptualizing ethnicity. Importantly, the research reveals the decision-making process associated with adjudicating the cases where ethnicity is mentioned and

² In this dissertation, scientific as an adjective refers to any a modern accepted scholar body of knowledge. It is understood, however, that “scientific” in relation to race and ethnicity is a problematic concept considering the historic past in Canada and elsewhere.

continues to question common understanding and social science evidence brought in the case law.

The relationship between multiculturalism and ethnicity in Canadian courts is understudied. The research findings are especially important in the absence of legal case that explicitly refers to both ethnicity/ethnic groups AND multiculturalism. The theoretical framework is a synthesis of disparate areas of research brought together to situate the research within a multi-disciplinary approach that integrates the sociology of ethnicity and sociology of law. Although the contribution is primarily of empirical nature, the dissertation also makes a modest contribution to socio-legal studies: (a) My research findings speak to previous socio-legal studies that focus on the limited significance of the Section 27 of the Charter and that although multiculturalism is often interpreted on the basis of pre-existing trends inherited in religious diversity disputes, religious and ethnocultural diversity is not treated the same way. (b) The research contributes to the argument that it is important to review how “ethnic others” are constructed and to question who has the legitimacy to decide what makes a “true” ethnic community. (c) The research findings further advance the argument that we must overlay the experience of the various ethnic communities for the legal system to stop functioning as a means to exclude and mask the condition of value-bias by postulating neutrality and disregarding or random selection of scientific knowledge. (d) Finally, a contribution also is made towards articulating and framing multiculturalism as a flow of variable practices and evolving ideals and multiculturalism negotiating of diverse identities making Canada more inclusive. A discussion on multiculturalism and practical recommendations concludes this dissertation.

2. PROBLEMATIQUE: The Puzzle of Ethnicity in

Canadian Courts

2.1 Ethnicity, Census, Normative Multiculturalism, and Policy

Canada is often labelled a multicultural country. That adjective can have several meanings. First, it may refer to a demographic reality (Satzewich & Lioudakis 2007: 123)—that is, the fact that Canada is home to individuals from heterogeneous cultural and/or national backgrounds. In accordance with the definition listed in the *2021 Ethnic or Cultural Origin Reference Guide, Census of Population*, ethnic or cultural origin refers to the ethnic or cultural origins of a person’s ancestors—it is often referred to as a person’s ancestral “roots,” ethnic or cultural origins, and should not be confused with citizenship, nationality, language or place of birth. The 2006 Canadian Census identified 223 separate ethnic origins: while 10,066,290 individuals considered themselves as having a “Canadian” ethnicity, the rest of the population—roughly two-thirds of Canadians—categorized themselves as belonging to one of the other 222 ethnic origins (2006 Canadian Census). In 2016, over 250 ethnic origins were reported and 41.1% of the Canadian population recorded more than one origin (Census of Population 2016). The revised approach for the 2021 Census, along with changing immigration patterns and increasing diversity in Canada, yields more varied and diverse responses than in past censuses. To better reflect the range of responses received, a greater number of origins have been disseminated for the 2021 Census. For 2021, data for over 150 additional origins have been included in the ethnic or cultural origins variable, resulting in a variable that now includes almost 500 detailed origins (Ethnic or Cultural Origin Reference Guide, Census of Population, 2021).

Second, multicultural—or better, “multiculturalist”—may refer to a normative description of how Canadian society ought to be in terms of social organization—policies, goals, and values that Canadian society ought to pursue (Satzewich & Liodakis 2007: 123). Normatively, multiculturalism is said to be grounded in liberal multicultural theory and ideology (Kymlicka 2001). In general, multiculturalism as an ideology encourages public expression of ethnic diversity and the accommodation of groups and/or individuals of various ethnic, “racial,” cultural, linguistic, and religious backgrounds. It recognizes that affording equal respect to citizens in a pluralist, democratic society may require differential treatment of citizens (Shapiro & Kymlicka 1997; Gutmann 1994). Some argue that in the alleged absence of a “race problem” and in contrast to US, Canada has provided a major justification for not pushing antidiscrimination toward an asymmetric and group-recognizing direction due to the unique strength and constitutional grounding of multiculturalism in Canada (Joppke 2017: 4498). According to some critics, multiculturalism as an ideological commitment took place in Canada in the late 1960s and early 1970s—at least among the political elite (Fleras & Elliot 1996: 335; Satzewich & Liodakis 2007: 124). Yet these authors mention political programming and hence, sometimes it is difficult to draw a line between multiculturalism as an ideological commitment and multiculturalism as policy or law.

Third, in the Canadian context, multiculturalism also refers to government initiatives that are framed as bringing justice to society. In Canada, multiculturalism as a policy was first announced in a statement to the House of Commons on 8 October 1971 by Prime Minister Pierre Trudeau. The policy grew out of the 1963–1969 Royal Commission on Bilingualism and Biculturalism, mandated to examine the tensions between the English and French founding nations. Historically, Canada was formed as a campaign following British victory on the Plains

of Abraham in September 1759, and formalized in the Treaty of Paris in 1763, according to which the British authorities were required to protect the rights of the Roman Catholic Church in the newly-acquired French speaking and Catholic territories. Relations had to be managed between the Indigenous Peoples, the French settlers, and the British colonizers. On its territory, French settlers first acted as colonizers and subordinated Indigenous Peoples; they were later colonized themselves, becoming British subjects following the conquest of “Canada.” The 1774 Québec Act created the newly-defined province of Québec—thereby guaranteeing French Canadians linguistic and religious rights. The British North America Act of 1867 which established the Canadian federation gave French Canadians residing in Québec their own government, with relative autonomy from the federal government. Over the years, English and French Canadians developed opposing ideologies of how they wanted “their” societies to be run. English Canadians viewed the Dominion of Canada within the larger project of British imperialism, while the French Canadian elites favoured a more narrowly defined nationalism based on culture, language, and religion (Lacombe 2002; Winter 2011). In the analysis of the report of the 1963–1969 Royal Commission on Bilingualism and Biculturalism, biculturalism was turned into multiculturalism to include the contributions of “other ethnic groups” (House of Commons 1971: 8545). It is widely accepted that the government decided to adopt the policy of “multiculturalism” largely in response to pressure from various ethnic communities—for example Ukrainian Canadians—who had strong cultural, social, and political networks across the country. The introduction of multiculturalism as policy is often described as a political shift (Wilson 1993: 656) away from Anglo-conformity to normative pluralism (Winter 2007, 2011). It was partially designed to obscure an emergence of a Quebecois “national” identity emerging during the Quiet Revolution (McRoberts 1997; Winter 2007). Not only francophones in Quebec,

but also Indigenous Peoples, opposed the policy of multiculturalism, seeing it as a strategy for undermining their own claims for rights and recognition.

In 1982, the Charter of Rights and Freedoms, Section 27 established the preservation and enhancement of the multicultural heritage of Canada. This section also states that the Charter will be “interpreted in a manner consistent with the preservation and enhancement of the ethnocultural heritage of Canadians” (Canada 1982). Although this section provides a constitutional legal framework for multiculturalism, the clause provides a symbolic affirmation of a public commitment to the goals of multiculturalism (Kymlicka 2007). The Charter also refers to the concept of “ethnic origin”—Subsection 15(1) reads as follows:

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

The 1971 multiculturalism policy was made law in July 1988 when the *Multiculturalism Act* was adopted by Parliament and received royal assent by the Governor General. Directed toward the preservation and enhancement of multiculturalism in Canada, the *Act* sought to assist in the preservation of culture and language, to reduce discrimination, to enhance cultural awareness and understanding, and to promote culturally sensitive institutional change at the federal level. The elevation of Canadian multiculturalism from policy to law set in motion changes to the government’s discourse of multiculturalism—although not always in predictable ways (Nash 2003: 77), and without precise definitions of concepts related to multiculturalism, such as race and ethnicity.

Aside from those two important legal documents—the Charter and the Multiculturalism Act—there is no overarching Canadian law on diversity. In other words, there is no law that provides a precise definition of multiculturalism, meaning definitions and understandings are dependent on judges’ interpretations—the case law. Will Kymlicka defines the so-called “super-frame of multiculturalism” as “flowing from human rights norms, as embodying those norms and as *enforceable through judicial institutions* whose mandate is to uphold them” (Kymlicka 2007: 40, my emphasis). Section 27 of the Charter has been used in court interpretations of fundamental freedom of conscience and religion (in conjunction with Section 2(a)), freedom of thought, belief, opinion, and expression (with Section 2(b)), equality rights (with Section 15), and minority language education rights (with Section 23). The Multiculturalism Act has been used much less frequently than the Charter, cited in only 4 cases³ between 1988 and 2013 at the federal court level. These cases involved issues of broadcasting (*Akinbobala v. Canada, Attorney General*, 1997 CanLII 5856 FC), peacekeeping operations (*Liebmann v. Canada, Minister of National Defence*, 1999 1 FC 20), federal institution jurisdiction (*Commissioner of the Northwest Territories v. Canada*, 2001 FCA 220), and freedom of religion (*Bruker v. Marcovitz*, 2007 SCC 54).

There were only two other Federal Court and tribunal decisions/cases that referred specifically to ethnicity between 1955 and 1970 (for a total of three). Since then, the use of ethnicity as a basis for decision has increased significantly. CanLII is an electronic collection containing a full set of legislative and case law and is established by the law societies of Canada to provide free continuous access to a virtual library of Canadian legal information and a

³ CanLII database, accessed October 5, 2013.

database of court judgments, tribunal decisions, statutes, and regulations from all Canadian jurisdictions. Between 2000 and 2010, ethnicity was referred to in 2,201 cases. In 2013 alone, a total of 131 cases dealt with in the Federal Court used the notion of ethnicity in the written decision of the judge. While these numbers seem to suggest that multiculturalism as policy/law and the concept of ethnicity are somewhat related, there is yet another possible interpretation: that Canada has become more diverse over time. Surprisingly, there has yet to be a legal case that explicitly refers to both ethnicity/ethnic groups AND multiculturalism, despite the increasing references to ethnicity in judicial rulings over the past two decades. The research of this dissertation is proposed in the absence of a case that could potentially clarify the role and understanding of ethnicity in a multicultural society.

2.2 Judicial Decision-Making, Impartiality and Ethics

Over time, the legal tradition has developed numerous concepts that could be seen as necessary for the process and nature of adjudicating but are of a discriminating nature. I am hoping to be able to question these concepts by building my methodology on the sociology of law theories. The subject of law—that is, the person before the law—is defined or imagined as a universal, abstract person. In an era of medical progress technologies, genetic engineering, corporate social responsibility, and smart technology, the definition of the person continues to be open to interpretation. For example, Sheryl N. Hamilton (2009) uses five different kinds of persons—corporations, women, clones, computers, and celebrities—to discuss the concept of personhood. By adopting the story as an epistemological strategy, Hamilton demonstrates that

these tales of personification take place in a variety of social locations and arenas, and through a variety of different social processes.

Although the law professes to act without affection or ill-will, it does so by abstracting people from their social contexts or locations—that is, the very aspects of their lives that might well make them different from each other (Ngaire Naffine 1990). In other words, to make individuals equal before the law, the law imposes upon them the characteristics of the abstract legal person so that they may be assumed, for legal purposes, to be free, capable, and competitive. For example, the legal concept of “the reasonable person,” which has long been a central figure in the law, is inherently male, privileged, and presumably white and Anglo-Saxon, which puts defendants from minority cultures at a serious disadvantage when participating in the legal system (Moran 1999; Young 2008; Devlin 1995). The reasonable person (historically, a reasonable *man*) is primarily a common law concept representing an objective standard against which any individual’s conduct can be measured. The standard holds that everyone should behave as a reasonable person would, under the same or similar circumstances. While the specific circumstances of individual cases may vary, and the appropriate conduct and degrees of care therefore vary by extension, the reasonable-person standard itself does not vary. From her analysis of cases in the United States, Alison Dundes Renteln (2004) reports that judges commonly refuse to hear expert witnesses testifying about the cultural context of a case, declaring this irrelevant to the facts under consideration. In these cases, the courts’ continued use of the reasonable person test fails to recognize that this supposedly universal icon simply reflects the norms of the dominant culture.

Arthurs et al (2018) seek to compare the legal professions of the Canadian provinces to those in the United States as they explore legal professionalism. The authors explore to what extent the differences suggest that containing societies contribute distinctive characteristics to their legal professions. Within the tradition of Critical Legal Studies, and closely related to the problematique of this study's research, Clair and Winter (2016) take on the question of how judges' beliefs and decisions in the United States affect and are affected by observed levels of racial disparities in the criminal justice system. Claire and Winter theorize how judges' decision-making may result in the disproportionate presence of blacks and Latinos in prisons. The authors utilize in-depth interviews with judges and field observations in upper and lower courts to better understand how judges think about and understand racial disparities in the legal system and how such beliefs may influence their decision-making at various stages of the court process (including arraignments, plea hearings, jury selections, trials, sentencing, and parole hearings). The research provides insights into the legal consciousness of judges, as well as their thinking about the discriminatory impact of their decisions. Most judges in the study's sample attributed disparities, in part, to differential treatment by themselves and/or other criminal justice officials. A minority of judges studied attributed disparities only to the disparate impact of poverty and differences in offending rates.

A body of literature on the legal profession covers judicial decision-making and also includes legal education. Cassels and Maloney (2014) explore the possibilities within Canadian legal education for the development of critical skills, attitudes, and practices. The authors examine the structure and organizational culture of law school and analyze the assumptions underlying the corresponding model of legal knowledge. The authors, not surprisingly, conclude that legal education teaches political values, and rewards personal characteristics that are

conducive to the preservation of the status quo. In turn, it serves to marginalize critical knowledge and practice. The efforts to make some room for critical analysis are still lacking in legal education.

In the context of decision-making, a Canadian lawyer provides insights borrowing from cognitive psychology in understanding how decision-makers think about the facts of a case. Emma Cunliffe's empirical research on judges and jurors (2014) is about the process that legal decision-makers use to decide the facts of a case. In her view, much about legal decision-making remains uncertain, including questions about how judges' reasoning processes might differ from jurors' when thinking through the facts of a case, and how well the insights of decision-making research translate into the noisy context of real criminal trials. My research will attempt to reveal the decision-making process associated with adjudicating the cases where ethnicity is mentioned and continue to question common understanding and social science evidence brought in the case law.

Last but not least, there are also legal concepts important in the context of this research: judicial impartiality and judicial ethics. Legal academic commentary on judicial impartiality following the landmark decision in *RDS* is complex (Devlin & Pothier 1999; Backhouse 1998; Graycar 2008 and Currie 2005).

Writing from the perspective of legal ethics, Adam Dodek (2019) describes that a transformation in the scholarship of legal ethics has occurred in Canada over the last decade. The author attributes the recent growth of Canadian legal ethics as an academic discipline to a number of interacting factors: a response to external pressures, initiatives within the legal profession, changes in Canadian legal education, and the emergence of a new cadre of legal

ethics scholars. Dodek's article chronicles the public history of legal ethics in Canada over the last decade and analyzes the first and second wave of scholarship in the area. It integrates these developments within broader changes in legal education that set the stage for the continued expansion of Canadian legal ethics in the twenty-first century. The author leaves aside the whole question of the gendered and racial conception of legal ethics and professionalism, acknowledging that it is itself a very fertile field of ethical inquiry.

To summarize, this research examines whether there was any change in the articulation and meaning of "ethnicity" in Canadian courts over time, and whether the implementation of multiculturalism as a government initiative can be found to have influenced this change (or lack of change). Put differently, I ask the following question: have interpretations and articulations of ethnicity by Canadian federal courts changed since the term *ethnicity* first appeared in Canadian case law in 1955? To recall the distinction between multiculturalism "from above" as official state policy and multiculturalism as a practice "from below" (Werbner 2012), we may say that the way ethnicity is interpreted by the courts reveals an interpretation of multiculturalism "from above," as judges are representatives of the judiciary, one of the three branches of power (with the legislature and the executive forming the two others). In addition, the judgments may also reveal some sense of multiculturalism "from below" pertaining to the daily life experiences of those who appear in front of the courts.

My research is also inspired by a critical strand of socio-legal scholarship that considers multiculturalism as purely symbolic and without much legal substance because it is considered to conceal, evade, or distort reality. These scholars argue that the law masks the condition of value-bias by positing neutrality and justifying legal outcomes in terms of a formal application of

statutes and precedents. According to this vein of research, judges and lawyers are influenced in their conduct by their personal ideological and political commitments.

The focus of this study is on ethnicity as a fundamental element of multiculturalism, as suggested in the original policy's reference to "other ethnic groups" (House of Commons 1971: 8545). With a normative framework of multiculturalism enshrined in law – in the Charter and the Act –, which is widely lauded as being progressive, it seems fair to believe that the way ethnicity is interpreted by the courts also evolved in that direction, reflecting progress in academic research and commentary, as well as the changing – albeit slowly and not consistently – social views on "race" and ethnicity. In other words, I start my research with the assumption that the implementation of "official" multiculturalism influenced the courts in a way that ethnicity would be articulated in ways that are congruent with, say, changes in the census, namely as a form of ethnic or even "racial" self-identification. The research proposed in this dissertation sets out to further explore this hypothesis (Hypothesis 1).

3. LITERATURE REVIEW: Multiculturalism, Ethnicity, Social Change and Law

This chapter explores various bodies of scholarship related to multiculturalism, ethnicity, and the law. Beginning in the late 1940s, a pluralistic understanding of diversity was being promoted by the newly created United Nations and Western governments as part of an effort to eliminate the type of racial thinking and discrimination that gave rise to the Aryan/Master Race philosophy of Nazism (Satzewich & Lioudakis 2007; Kymlicka 2001). This emphasis on tolerating and later celebrating diversity grew over time. Arguably, the high point of the “differentialist turn” (Brubaker 2001: 532) in the Canadian context was the passing of the 1988 *Multiculturalism Act*. Since then, multiculturalism has become a major part of the national dialogue.

As the focus of this study is on ethnicity as a fundamental “ingredient” of multiculturalism, the literature review attempts to capture whether it is fair to assume that the way ethnicity is interpreted by the courts evolves, reflecting the changing social views related in part to the implementation of multiculturalism. First, I describe the scholarship which assumes that the understanding of ethnicity in Canada has been evolving due to the implementation of multiculturalism. Though this group of scholars does not claim that multiculturalism managed to solve all problems, they treat multiculturalism as a step in the right direction. Second, I focus on the possible association of multiculturalism with ethnicity and outline the legislative perspective from scholarship on the Charter. I group together scholarship on religion and multiculturalism in attempt to highlight the fact that claims made in the name of religious groups are similar to but yet are differently treated than claims made in the name of ethnic groups. The third group of

scholars claim that multiculturalism (policy) has no effect on understandings of ethnicity and any sense of inclusion. They claim that multiculturalism is an instrument of domination as it promotes ghettoization and emphasizes the differences between groups. Here, I also include the critical race theorists who suggest that multicultural policies celebrate white tolerance of racialized groups and individuals.

Finally, I conclude the chapter by outlining academic scholarship pertinent to social change as the principal source of law.

3.1 Gaps in Interpretation of Ethnicity and Multiculturalism

3.1.1 “Liberalizing” Views on Multiculturalism

Multiculturalism in Canada has moved through several changes since its inception. According to Jack Jedwab in *The Multiculturalism Question: Debating Identity in 21st-century Canada*, published in 2014, the 1970s were marked by “ethnicity multiculturalism,” or the valuation of minority ethnic identities and the celebration of cultural differences. The 1980s saw the rise of “equity multiculturalism” through ethnic minorities participating more fully in the labour market as priority was given to removing institutional barriers to socio-economic participation (Jedwab 2014). According to the author, “civic multiculturalism” defined the 1990s, when the promotion of a sense of shared citizenship and a sense of belonging to Canada were prioritized. At the turn of the 21st century, the discussion addressed the question of how countries that receive immigrants can best integrate those newcomers while managing the impact of diverse cultures on a country’s national identity. This stage can be understood as “integrative multiculturalism” and is conceptualized as two-way learning, facilitated by the particular

economic, social, political, and institutional context of a civil society and state intervention (Jedwab 2014).

In this subsection, I discuss the scholarship that in general considers that multiculturalism assists in the integration of immigrants and minorities, leading to a stronger sense of belonging and pride in Canada (Berry 2013; Bloemraad 2012). While the scholarship is extremely vast, I only focus on those authors whose work pertains directly to my research question. One of the theories conceptualising multiculturalism on premises that every ethnic group member possesses a similar set of attitudes and beliefs belongs to earlier works of Will Kymlicka. Kymlicka's (2007) account of ethnicity is based on his theory of liberal multiculturalism that advances a general normative argument for minority cultural groups. He distinguishes different types of groups and offers a normative justification for group-differentiated rights: self-government rights to indigenous peoples and national minorities because their minority status is unchosen (coercively incorporated into the larger state); and "polyethnic rights" for immigrants as they are seen to be voluntary (economic migrants who chose to relinquish access to their native culture by migrating). Polyethnic rights are understood as a demand for fairer terms of integration through mostly temporary measures and not a rejection of integration (Kymlicka 1995: 113-115). States in their turn establish group-differentiated rights to provide some sort of cultural accommodation. Group-differentiated rights are afforded to members of minority groups in order to allow them to act or not act in accordance with their religious obligations and/or cultural commitments. In defence of group-differentiated rights, Levy (1997) argues that normative work on the rights of ethnocultural groups requires a way to identify the rights-claims which are morally and institutionally similar, and those which are not. He identifies eight clusters of rights-claims which seem to have a similar normative structure and similar institutional implications.

These are (1) exemptions from a neutral law which unfairly burdens a cultural minority; (2) assistance to overcome unfair disadvantages or burdens that prevent engagement in the same activities as the dominant group; (3) self-government, whether through secession or autonomy within a larger state; (4) external rules limiting the freedom of non-members in order to protect an endangered culture or cultural practice; (5) internal rules which limit the freedom of members and which must be obeyed for continued recognition as a member of a group; (6) recognition and enforcement of customary legal practices by the dominant legal system; (7) guaranteed representation for minority group members within government bodies; and (8) symbolic claims about nature of the polity and the representation of its constituent groups. He argues that this sort of typology is more useful than existing typologies, which tend to conflate different kinds of rights into two or three overly broad categories and which focus on the normal legal structure of rights-claims while neglecting their normative foundations and institutional implications.

It should be noted when it comes to religion, Rogers Brubaker (2015) identifies language and religion as the two most socially and politically consequential domains of cultural difference in the modern world. From the perspective of the political sociology of multiculturalism, any study of the accommodation of cultural difference would seem to require sustained attention to both. First, both language and religion are domains of categorically differentiated cultural practice that simultaneously unite and divide: both are understood by participants and observers as partitioned into discrete categories rather than as falling along a continuous spectrum of variation (Brubaker 2015: 86). Second, language and religion are basic sources and forms of social, cultural, and political identification. They are ways of identifying oneself and others, construing sameness and difference, and naming fundamental social groups. Third, language and religion are therefore often deeply taken-for-granted and embodied identifications, and both are

routinely represented as primordial though neither are, in fact, primordial or fixed. Like ethnicity, religion and language are powerfully shaped by political, economic, and cultural processes, and they change with circumstances. Finally, many of the claims made in the name of religious or linguistic groups are similar to—and again, also intertwined with—claims made in the name of ethnic groups or nations. These include claims for economic resources, symbolic recognition, equal representation, cultural reproduction, and political autonomy (Brubaker 2015: 87).

While it is difficult to dispute Brubaker's (2015) proposition, manifestations of religion have been accorded greater protection under human rights regimes than manifestations of culture (Phillips 2007: 58). Western democracy creates conditions of respect for religion, and it would be an error to reduce religion solely to its cultural dimensions (Wieviorka 2012). Indeed, religion is not akin to culture, even though it can be strongly dependent on it (Geertz 2007). In English, in its everyday usage, references considered to be differentiable along various lines are capitalized, as in the examples of Canada ("nation/" "society/" "state") and Jew ("religion/" "ethnicity/" "culture"). In current English usage, the bases for these differentiations are not marked, which causes philosophers, semioticians, and social scientists much grief. Day suggests that the simplest solution to the language problem would be to flag not only the names of the groups that are supposed to provide the content of human diversity, but also the terms that enable their differentiation, although it is clearly not possible to mark each instance of a contested term in every text. And yet, certain words are offensive because of a spreading awareness of their lack of any concrete referent and as a result of the power of words to consecrate (Day 2000: 13).

In Canada, Roman Catholicism and exemption policies accorded to various Christian sects, such as Hutterites and Doukhobors (Kymlicka 1998; Beaman 2012), led to a nuanced and multifaceted understanding of religion in Canada long before the policy of multiculturalism was introduced. Many Canadians accept the historical accommodations (such as exemption from military draft in the World Wars) made for these white Christian sects—accommodations that are genuinely separatist and marginalizing—while bitterly opposing the similar accommodations made for more recent non-white, non-Christian immigrant groups, even though these accommodations are integrationist in orientation rather than separatist (Kymlicka 1998: 52). Kymlicka (2014) argues that the longevity of multiculturalism policy in Canada, since 1971, is due to its evolutionary nature. He delineates shifts in multicultural policy over the past four-plus decades, from an emphasis on ethnicity to race, and then from ethnicity and race to religion. In his earlier works (1995), Kymlicka also states that the transition to multiculturalism was embraced because it seemed a natural extension of the way religious minorities were protected. Here, liberals felt that the separation of church and state offered a model for ethnocultural differences as well. In other words, the state could respond with “benign neglect” by allowing individuals to express their ethnic identities in their private lives. As already discussed from the perspective of Section 15(1) of the Charter, the understanding of religious accommodation and understanding of ethnicity may differ. Broadening the discussion beyond Section 15 (1) of the Charter, my research helps us in understanding whether and if courts readily treat religious diversity as a constituent element of multiculturalism. My dissertation (also) explores whether there is a difference between the way that religious cases are argued and the way that cases are argued which relate to ethnic and racial discrimination. My analysis of the cases related to ethnicity, I will also attempt to answer this question.

The second issue relating multiculturalism as group rights also stems from Kymlicka's *Multicultural Citizenship: A Liberal Theory of Minority Rights*, published in 1995. In this work he states that minority groups are, in increasing numbers, demanding recognition of their identity and accommodation of their cultural differences. Kymlicka states that diverse populations can give rise to a series of important and potentially divisive questions. He observes that "[m]inorities and majorities increasingly clash over such issues as language rights, regional autonomy, political representation, education curriculum, land claims, immigration and naturalization policy, even national symbols, such as the choice of national anthem or public holidays" (Kymlicka 1995: 1). He argues that finding ways to remedy these issues is the greatest challenge facing democracies today because the disputes over the rights of immigrants, indigenous peoples, and other cultural minorities are calling into question many of the assumptions which have governed political life for decades. Kymlicka attributes the historical development of multiculturalism as one response to increasing cultural diversity. He notes that after World War II, it was hoped that the new emphasis on human rights would serve to protect minority rights by guaranteeing basic civil and political rights to all individuals regardless of group membership. According to Kymlicka, these decisions have traditionally been left to the majority, which makes cultural minorities vulnerable to significant injustice at the hands of the majority and which can exacerbate ethnocultural conflict. He asserts that "we need to supplement traditional human rights principles with a theory of minority rights" (Kymlicka 1995: 2). He also stresses that it is important to recognize the limits on these rights, particularly as they relate to two considerations: equality between groups, and freedom and equality within groups. This belief underpins the ideology and policy of multiculturalism in Canada. Although Kymlicka's argument does not go further than stating that minority rights would need special or other than

human rights protection, his argument that traditionally these protections have been decided by the majority deserves a closer examination. However pertinent and timely these statements may have been at that time and remain now, how the majority makes decisions and whether the majority's principles became any different once that the multiculturalism as policy and law was introduced in Canada remains unclear. Kymlicka's statements have not been very helpful, for instance, in evaluating whether there would be any difference for a deciding majority to differentiate between human rights and group rights. Not only might this not be practically feasible, but the position of power of the deciding majority has not been sufficiently taken into account. My research will speak to this weakness of research in the Canadian context by concentrating on the judiciary.

Third, any discussion of multiculturalism would be incomplete without acknowledging the communitarian perspective. Traditionally, according to communitarian scholars of multiculturalism, the promotion of cultural diversity is seen to come at the expense of national unity. Multiculturalism policy is therefore interpreted as being divisive and as undermining Canadian society (and its identity and cohesion). For communitarianists, culture defines individual identities (Parekh 2000). Since the principles of justice could be shared by many countries, the attachment to a particular historical community might be impossible to find. As a result, any plausible account of social unity must be particularized. This mere particularization, in accordance with communitarian views, will challenge the principles of justice and would, in turn be an inadequate basis for social unity. The concerns about unity allow some critics to suggest that Canadian multiculturalism encourages immigrants to more fully engage with the questions and politics of their homeland rather than with Canada by developing dual political loyalties and "importing" conflicts. The authors argue that multiculturalism thus compromises

opportunities to develop a strong Canadian identity and a sense of allegiance to Canada (Nagra & Peng 2013). In other words, this kind of criticism is more about common allegiance to certain substantive ends or conceptions of the good life.

In response, Kymlicka (1998) notes that there is a problem with this account because there are no such shared ends in modern societies. According to him, the members of a political community do not share conceptions of the good or traditional ways of life. While the members of a national group share a language and history, they often disagree fundamentally about the ultimate ends in life” “Social unity cannot be based on shared beliefs because conceptions of the good are not widely shared within national groups, and principles of justice are too widely shared across them” (Kymlicka 1998: 172). While the social unity project may indeed be at the heart of multiculturalism, the argument that social unity cannot be based on shared beliefs does not strike me as an accurate one. Regardless of how fundamental the disagreements are within or across national groups, would it not be fair to expect that multiculturalism policy and its implementation would serve as an avenue to resolve these disagreements? If so, the case law review should provide the opportunity to find empirical evidence for such disagreement or, at least some kind of negotiation across national groups.

The importance of negotiation processes as a condition for multiculturalism project success is discussed by Richard Day in *Multiculturalism and the History of Canadian Diversity* (2000). Using Foucault’s method of genealogical analysis, Day creates a framework to offer a different view on unity and highlight the importance of negotiation. While at large Day’s position is similar to those of the scholars discussed in the next section (multiculturalism as domination), he argues that multiculturalist theory and practice must traverse the fantasy of fullness associated with the modern nation-state. Precisely where diversity has seemed most

problematic, where the symptoms of lack of unity have been most intense, we can see the outlines of three necessary affirmations. According to this scholar, Canadian multiculturalism must: (i) explicitly admit the impossibility of full identity; (ii) affirm the value of difference, the value of the Other; and (iii) recognize the necessity of a negotiation of all common perspectives, including that of the nation-state (Day 2000). In other words, Day argues that Canada's multicultural policies are driven by a fantasy of unity and based on the nation-state model, but in fact, the legislation, policies, and practices do not move us towards equality and reciprocity, he reveals, because they are rooted in a European drive to manage and control diversity. To escape the limitations of the modern-colonial nation-state, Day argues, those who would be Canadians must traverse the fantasy of unity which underlies both the problem of diversity and its solution via state "recognition" of a system of official identity categories. Only then can the potential of multiculturalism as radical imaginary, which tends towards spontaneous emergence, be separated from multiculturalism as state policy, which tends towards management, discipline, and uniformity (Day 2000: 4). My research will extend Day's argument by empirically shedding some light on whether it is even possible to "negotiate" diverse identities within the courtroom.

Fourth, there is an ongoing debate whether ethnicity is a fluid notion since multiculturalism is believed to reduce every ethnic group (member) to possess a similar set of attitudes and beliefs that shape and predict behaviour. Even though the meaning of "ethnic diversity" may appear relatively straightforward, ethnicity no longer means what it once did in light of changes to the world and how we see it (Hollinger 2006). Minorities were once mandated into predetermined identity boxes in which identities were deemed to be stuck, static, and singular (Matejskova and Antonsich 2015). In this regard, Will Kymlicka's (2012) theory is that ethnicity continues to matter as a marker of personal and group identity or as a valued

resource, particularly since those ideologies that once stigmatized and devalued ethnicity no longer hold sway. In “*Relational Group Autonomy: Ethics of Care and the Multicultural Paradigm*,” Fiona MacDonald (2010) critiques Kymlicka’s conception of multiculturalism. Specifically, she suggests that rather than rejecting the concept of autonomy altogether, a relational conception of group autonomy better meets the requirements of a politically active, public approach to multicultural citizenship. MacDonald’s primary critique is that regardless of various degrees of self-determination granted by the state, these groups remain part of large processes of socialization and dialogue; they remain in relationships with other citizens, other groups, and most significantly with the state. Citing political theorist Iris Marion Young, MacDonald suggests that rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. The problem with existing models of group autonomy lies in the failure to acknowledge and theorize the continued influence and authority of other agents, particularly the state. Recipients of group-differentiated rights not only become subjects with autonomous agency but also become subjected to the particular responsibilities and expectations associated with those rights. When these groups do not achieve autonomy, they are blamed for their lack of success to make use of the freedom so visibly entrenched in legal discourse. This in turn disrupts the group’s power to hold the state accountable for its role. MacDonald observes that it is a dangerous mischaracterization to suggest that these groups are “autonomous,” as they are prevented from exercising important practices of democratic agency.

As Augie Fleras puts it, multicultural discourses are often rooted in an almost essentialized understanding of immigrant ethnicity as primordial and immutable, with members locked into hermetically-sealed silos of separation (Fleras 2019). Citing Anne Phillips (2007),

Fleras outlines the theoretical difference between European and Canadian multiculturalism. European multiculturalism appears to be an imposed ethnocultural straitjacket of exaggerated internal unity and homogeneity, solidified fluid and contested differences, reified culture marked by the removal of agency and experience, and exoticized cultural otherness to the point of stereotype or caricature. In the name of multiculturalism, minorities are allowed to stray from mainstream ideals to the point where they reconstitute themselves into self-segregated silos of values and lifestyles in conflict with liberal-democratic axioms. Extending the argument of MacDonald (2010) and Fleras (2019), my research attempts to unveil whether the courts' conceptualisation of rights based on the preservation or protection of an ethnocultural identity assumes that personal identity has fluid characteristics.

Fifth, the critique of multiculturalism as an ideology is that it essentializes differences and does not address the root cause of inequality. For instance, Elke Winter (2014) shows that economic and political competition in ethnically diverse societies cannot be fully removed from multiculturalism. The process of competition among members of different cultural groups for economic and political resources, rights and recognition is intrinsic to demographic aspects of multicultural societies. In her other work, Winter (2011) provides a thorough analysis of the resilience of multiculturalism by analyzing the changing relationship between multiculturalism in Canada and Québécois nationalism with respect to the construction of national identity. Her thesis is that English-French conflict best explains the consolidation of multicultural national identity as the dominant discourse in the 1990s. Winter's argument is built on the theory of identity in social relations, and in particular, a Weberian approach. Max Weber was writing in the early twentieth century, when the division of humanity into biologically different "races" was accepted, and social inequalities were interpreted as the result of the gaps between individuals'

“natural disposition.” Weber deconstructed these doctrines (Winter 2011). According to Weber and as highlighted by Winter (2011), persons who are categorized as belonging to a specific “race,” ethnicity, or sex/gender may individually internalize stigma but still not share a collective identity.

Following the Weberian tradition, the Canadian sociologist Danielle Juteau theorizes that ethnic groups are constructed through internal and external power relations. As she argues, the two sides of the ethnic boundary are analytically distinct (Juteau 1996). Any external group boundary is constantly re-defined from within. According to Juteau, the internal dimensions of group boundaries consist of pre-existing histories, forged memories, economic situations, and other elements of culture. Group boundaries are the outcome of social relations, missions, and negotiated representations of the world. Weber locates the propagation of (ethnic) group formation within the context of conflict and unequal power relations. He (1978) observes that in the process of social closure the dominant group (majority) identifies others’ “differences,” not its own “commonalities” (Winter 2014: 198). As contemporary scholarship on ethnicity maintains, members of minority groups tend to internalize the essentialist view that the majority imputes to them, allowing for national groups to be perceived as static, homogeneous, and timeless entities. Extending the argument of Winter (2014), my research attempts to uncover any possibilities of how these essentialist views are extended by the courts.

3.1.2 “Marginalizing” Multiculturalism. Race. Immigration.

Various scholars critique multiculturalism for ghettoizing minorities and their aspirations. Multiculturalism is here believed to commodify culture by invoking cultural solutions to structural problems.

First, some scholars suggest that, by means of multiculturalism policy, ethnicity and race are reified to achieve inequality. For example, Rita Chin in *“The Crisis of Multiculturalism in Europe: A History”* (2017) reflects on the lack of European debates about plurality, evident in such policies as registration of the Italian Roma community, a policy where she questions the practices of racial profiling, detention, and deportation. Chin remarks that the attempts to depoliticize and keep debates about immigration out of public view by political parties up to the 80s “ultimately set the scenes for a major backlash ... [as] broader questions of “race” and national identity were about to explode across the continent” (Chin, 2017: 137). In Chin’s words, “these silences and disavowals have created a democratic deficit, a situation in which immigrants are effectively written out of the social body” (Chin, 2017: 305). If, as Chin states, robust democracies are to be built on the contributions of all members of society, there is a pressing need to see governments address racist policies and the increasingly significant and alarming consequences they are having for migrant and racialized populations. “[I]ndigenous and race-based mobilization has undoubtedly brought about significant changes. They may not always be the changes intended and they may not be particularly egalitarian” (Chin, 2017: 28). Olga Jubany (2019) further highlights the overall convincing and important argument put forward by Chin: taking a multiculturalist or an assimilationist stand is no more than an exercise of power in determining which conditions allow the “other” to relate with “us” while refusing to question the duality between “us” and the “other.” From an identity politics point of view, the recognition of indigenous rights is a recognition not only of the differentiated identity of a group but also of this

identity being verifiably different. So the question remains: who has the legitimacy to decide what makes a “true” indigenous community and/or to decide what does it take to belong to this or that “true” ethnic minority group?

Similarly, Eva Mackey considers whether multiculturalism and pluralism “draw on and reinforce racial exclusions and hierarchies of difference” in *The House of Difference: Cultural Politics and National Identity in Canada* (2002: 3). Specifically, she argues that multiculturalism implicitly constructs the idea of a core English-Canadian culture, and that other cultures become “multicultural” in relation to that unmarked, yet dominant, Anglo-Canadian core culture. Mackey suggests that the development of a pluralist national identity was a flexible strategy developed to manage diverse populations, and that it first emerged as a method of creating a common national culture and identity. In making this argument, Mackey contends that Indigenous peoples are situated as just another ethnic group that “affirms the importance of government intervention to assist Aboriginal people to develop “European-style” organisational structure” (Mackey, 2002: 60).

A similar perspective is offered by David Garneau, who argues that multiculturalism allows Indigenous peoples to be constructed as one minority group among many, rather than the “partners who make Canada possible” (Garneau, 2016: 31). Similarly, David B. MacDonald (2014) argues for recasting multiculturalism as a “binational relationship” between settler society and Indigenous peoples, stating that multiculturalism “insufficiently recognize[s] the *sui generis* or inherent rights of Aboriginal peoples which existed before colonization and continue still” (2014: 81). He offers the possibility of constructing narratives based on a new settler relationship with Indigenous peoples as a “majority-to-majority partnership,” rather than one based on

domination. This new relationship would be premised on sharing sovereignty, respect for diverse institutions, and the potential for creating new institutions devoted to the sharing of power and resources.

While the claims made by Eva Mackey (2002), Rita Chin (2017), and David Garneau (2016) resonate with my research, my research methodology is likely to bring about different results. My research will, however, strengthen the claim that any recognition of indigenous or other rights is a recognition not only of the differentiated identity of a group, but also forces us to interrogate who has the legitimacy to decide what makes a “true” ethnic or indigenous community.

Second, there is a large body of scholarship that studies questions of race and racial classification. In general, similar to some of the critiques of multiculturalism, this scholarship on race explains why people of colour (i.e. not of the white “race”) have historically had less access to resources, status, and power than “white” people. In Canada, racial ideology served as an excuse for the seizure of First Nations lands and as an explanation for the punitive treatment of Asian immigrants in the late nineteenth century, among other things. For example, in the same vein but focusing on a broader history of colonisation, Lawrence & Dua (2005) argue that anti-racist and anti-colonial academics and activists overlook the histories and political claims of Indigenous peoples in their analyzes. In doing so, however, these academics and activists fail to account for the foundational nature of colonization in discourses of race and racism. Their understanding of history functions to make people of colour erroneously independent from the ongoing colonization of Indigenous peoples. An ideology of race has also been used to discriminate against Canadian francophones, non-Protestant religious groups, and immigrants

from Eastern and Southern Europe. For example, Marlee Kline (1994) locates law as one of the discourses in which, through representations of “Indianness,” racism was constructed, reproduced, and reinforced in Canadian society. Canadian critical race theorists Sherene Razack (1998, 2002) and Sunara Thobani (2007) go even further and suggest that multicultural policies celebrate white tolerance of racialized others by erasing colonial white settlement, the historical displacement of First Nations communities, and the mistreatment of early immigrant groups. Sherene Razack (1998), referring to a more recent period, has further refined this understanding of law as a “racializing strategy.” She suggests that violence and drunkenness have come to be viewed as naturally occurring and inevitable features of spaces inhabited by indigenous⁴ people. Much the same could be said of other racialized communities in Canada: the persistence of the over-policing of communities of colour, including racial profiling and harassment (Armony et al, 2019) is clear. Similarly, sociologist Himani Bannerji examines the theoretical formulation of a “two-nation,” (English and French speaking Canadians) thesis and its implications for various cultural accommodations offered to “others” through the mechanism of “multiculturalism” (1996, 2000). Within this “two-nation” model, funding and essential services are provided to specific cultural communities to help them preserve their identities or even construct new identities, such as immigrant, visible minority, or new Canadian. According to Bannerji, how difference is construed and constructed by the state and how otherness in relation to Canada is projected and objectified fundamentally differ. Bannerji’s main critiques of multiculturalism is that speaking of culture without addressing power relations displaces and trivializes deep

⁴ Throughout this dissertation, I occasionally refer to indigenous people as aboriginal only to refer to the source text either in the data sample or literature review.

contradictions. It is a reductionism that hides the social relations of domination that continually create “difference” as inferior (Bannerji 1996).

While I fully acknowledge the problems of racialized communities in Canada, my research does not claim that difference is constructed by the state intentionally as a strategy. Instead, my research will highlight that racial stereotypes and attitudes have permeated major categories of Canadian law. Some scholars claim that, but these arguments are most apparent in studies of immigration law. In discussing immigration, Lisa Jakubowski (2011) reveals the racist nature of Canadian laws from the 1880s onward, arguing that it reached its apex at the time of arrival of three million immigrants between 1901 and 1920 (Palmer 1975). For example, the term “race” was used in Section 38 of the *Immigration Act* of 1910 as a prohibitive/restrictive legal category to exclude the “least desirable” candidates (Blacks, Jews, and Asians) for admission to Canada (Hawkins, 1989: 17). Without clearly dropping “race”, the *Immigration Act* was amended in 1919 to include “nationality” (Jakubowski, 2006: 100). In the 1950s, as stated by Backhouse, it became unfashionable to be characterized as racist (1999, 2001), but it was acceptable to hold racist views about natural inferiority of non-white people. While “race” semantically disappeared from the immigration official records of Canada, the 1952 *Immigration Act* maintained the explicitly restrictive clause 38 (Hawkins, 1989: 17), limiting the admission of people on the basis of ethnicity, nationality, geographic origin, peculiarity of custom, unsuitability of climate, or inability to become assimilated in order “not to disturb the existing character of the Canadian population” (Reimers & Troper, 1992: 25; Green, 1976: 21). Jakubowski (2014) argues that while in principle Canadian immigration law has shifted from being explicitly restrictive to non-discriminatory (that is, based on the points system enshrined in

the 1976 *Immigration Act*), in practice it reflects a more subtle and systemic form of discrimination.

On the subject of immigrants and social attitudes, scholars have commented on the criminalization of immigrants in Canada. Karim H. Karim (1993) notes that the term “immigrant” has become synonymous with illegal migrants, bogus refugee claims, and inadmissible others (also in Perry 2011). In the same vein, “gangs” and “gang warfare” have become code words for race and racialized groups (Jiwani 2006). Yasmin Jiwani (2002: 75) asserts that immigrants in Canada are perceived to be “a social threat in terms of their proclivity to crime,” yet this claim is not supported by race/immigrant-specific crime data because the latter is not collected by the criminal justice system.

Williams (1996) observes that within the criminal justice system, racialized people are often asked about their immigration status, and court transcripts often reference their foreign origins. One available data source, the 1999 General Social Survey, captures some 273,000 incidents of hate crime, the vast majority of which were believed to be associated with race/ethnicity (43%), religion (37%), or culture (18%) (Silver, Milhorean & Taylor-Butts 2004). The authors point out that most frequent victims were Jews (25%), Blacks (17%), Muslims (11%), and South Asians (10%). According to national public opinion data, 21% of Canadian citizens surveyed in 1995 either agreed or strongly agreed that immigrants increase crime; that number grew to 27% of those surveyed in 2003 (Simon & Sikich 2007: 960). Yet, the racialization of crimes is not simply confined to the realm of policing; it is also evident in the court systems. There is, as David Tanovich (2008) notes, a certain reluctance to factor in or identify “race” and “racism” as playing a role in criminal cases that are brought before the

courts. Similarly, my research will extend the argument that without addressing power relations, the social relations of domination will continue to persist.

3.2 Socio-legal Scholarship

While scholarship on equality and human rights is broad, the socio-legal scholarship that focuses on multiculturalism and ethnicity is not extensive. Below, I differentiate between two streams.

3.2.1 Race and Ethnicity

Constance Backhouse's book, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950*,¹⁵ represents one of the most significant contributions to the history of legal racism in Canada. At the outset, Backhouse declares that it is her goal to demonstrate "that the legal system has been profoundly implicated in Canada's racist history" (1999: 15). Backhouse selects six cases from various jurisdictions and levels of courts that bring questions of racial discrimination. She is concerned with the dynamics of race, society, and the law and, particularly, as they affect people. She adopts a case study methodology she considers especially well suited to explicating the complex interactions among race, society, and the law as reflected in legal records. Backhouse paints the portrait of the players in each of case studies with biographical attention paid even to seemingly minor actors. Among the best examples of her biographical contextualisation are Viola Desmond, the subject of the legal dispute in the book's seventh chapter; George Frederick Blair, city solicitor for Regina and advocate for Yee Clun; and Andrew Gordon Chisholm, counsel for the Six Nations of Grand River in the Sero case.

Throughout the book, Backhouse includes photographs, maps, posters, and quotations from key individuals. The rich details combined with thorough descriptions and analyzes of the communities and organisations that participated in each case make for a lively and textured book. Backhouse's introduction demonstrates a highly nuanced understanding of what constitutes "race." She characterises "race" as a shifting and malleable concept embracing skin colour, diet, dress, religion, and geographical location, among many other factors. All of her subsequent case studies focus on members of visible minorities. While eloquently written for a wide audience of readers—the book is easily accessible—the question about the development of legal institutions or following trends in legal reasoning is not quite answered. For the most part, each case study is considered as largely discrete from the others, and trends in legal reasoning are backgrounded to the consideration of patterns in racism and "race" definition. Although Backhouse includes many of these leads in the book's scholarly apparatus, this choice effectively sidelines any analysis of the development of judicial decision making.

Another, more recent study on race is worth mentioning here. Based on an empirical review of 113 relevant out of 826 reviewed cases decided between September 1997 and June 2020, Xavier (2021) argues that there is a demonstrable colour blindness within the jurisprudence on judicial impartiality. Sujith Xavier focuses on the colour blindness of the courts and judges as illustrated through two arguments. The first argument is that a large number of the cases surveyed illustrate that the presented evidence was deemed insufficient. The second argument focuses on judges who adopt an antiracist perspective. When judges have relied on social science evidence to engage in contextual and antiracist judging, they have been policed and their decisions overturned by supervisory and appellate courts. More precisely, as Xavier puts it: "the views of five male, white judges about predisposition to an outcome based on race

and Indigeneity remains the *modus operandi* for the lower courts since the Supreme Court decided this case in September 1997” (Xavier, 2021: 386). Two preliminary questions guided a robust survey conducted for post-*RDS* cases: has *RDS* created an opportunity for more antiracist and contextual judging? In short, the *RDS* case centred around a then 15-year-old Black Nova Scotian, Rodney Smalls, and his violent interaction with a Police Constable with the intention of preventing the arrest of Smalls’ cousin and resisting arrest. In determining Smalls’ guilt, Justice Sparks sought to acknowledge the racism prevalent in Nova Scotia. Has *RDS* mitigated racist predispositions of decision makers based on their conduct in the courtroom? As introduced by the author, this survey is an “exploration of Canadian settler case law from the ‘standpoint’ of a Tamil queer refugee settler” (Xavier, 2021: 354). Xavier’s research resonates with my research question. His work suggests that judges remain color-blind regardless of the implementation of multiculturalism as policy and law. Hence, as will be shown below, his research findings complement my own research even though the timeframes do not coincide. Leaving the discussion on judicial impartiality to the legal practitioners, I discuss the synergies between the findings of Xavier’s work (2021) and my own in the concluding chapters.

3.2.2 Equality and Charter

There is considerable literature about human rights principles with regards to the equality of treatment and non-discrimination. Racial and ethnic discrimination have been a problem with extreme consequences throughout history: the policy of apartheid in South Africa; the Nazi legislation of racial discrimination against Jews, Roma, and other ethnic non-Germans; and ethnic cleansing of former Yugoslavia are but a few prominent examples. The differential treatment applied to immigrant groups in certain areas can fall into an adjoining category, as in

many cases the discriminatory treatment is based on ethnic grounds (Dingu-Kyrklund & Kyrklund 2011: 198). The literature adopting a judicial-legal perspective on diversity explores one the most important principles in legal philosophy and judicial theory and practice: *equality before the law*. This principle is the foundational idea of all individuals' equal worth beyond inherent differences. Practically unchallenged as a principle in Western democratic states today, the actual application of this concept and its legal enforcement are much more difficult to achieve.

Primarily, there are legislative perspectives on analyzes of the Charter sections in reference to multiculturalism (Section 27) and ethnic groups (Section 15). When it comes to other group or identity grounds enumerated in Section 15(1), the research does not dwell much on multiculturalism and ethnicity/ethnic groups. Paul Eid (2001) proposes a jurisprudential and sociological analysis of Supreme Court interpretations between 1985 and 1993. He observes that the Supreme Court of Canada tends to limit Section 15(1) to identity groups. At the same time, claimants are inclined to make differentiations of these identity groups extremely precise to serve the specific and timely interests of the parties involved. Eid notes that the Charter permits a greater politicization of legal power and “translates the incapacity of the state to articulate a policy of recognition of differences in a unifying normative framework” (Eid, 2001: 226). Such a framework, he points out, would be oriented toward the consensual achievement of collective “horizons of meaning.” Despite its obvious significance, Section 15(1) in relation to ethnicity and ethnic groups remains a relatively neglected area of socio-legal research. My research methodology allows me to approach the question of ethnicity in relation to multiculturalism and Canadian judiciary from a broader perspective while deliberately putting ethnicity at the centre

of my research. Nonetheless, I expect to confirm the observations made by the authors discussed in this section.

As to Section 15 of the Charter, there is a scholarship intending to explain the constitutional rights under the Charter. Since Canada does not have a state religion and the Canadian polity is comprised of individuals holding a wide range of religious views, it means that in order to comply with the Charter's guarantee of religious freedom, law-makers must consider the impact of legislation on a wide range of religious beliefs and practices. In the edited book *15 - Walking the Tightrope: The Struggle of Canadian Courts to Define Freedom of Religion under the Canadian Charter of Rights and Freedoms*, Barbara Billingsley (2012) and collaborating authors discuss in greater detail how legislators take proper account of religious freedom. Since the Canadian constitution empowers the courts to nullify any law that unjustifiably infringes upon Charter rights, Canadian courts work as the arbiters of any conflict between positive law and religious freedom. In order to fulfil this role, the courts have been forced to conceptualize and articulate a meaningful definition of freedom of religion. In other words, for religious freedom, Canadian courts have set parameters on the constitutional protection of freedom of religion so as to accommodate other competing, but legitimate, social concerns. While there are no set parameters for ethnicity, my research will attempt to specify whether similar constitutional protection is even possible or could be extended based on the protection of freedom of religion.

There are also scholars who explore Canadian case law and situated religion as one of the pillars of multiculturalism. François Rocher's and Nikola Brassard-Dion's (2017) research deserves special attention in this regard. These authors used the Westlaw Next Canada database

to identify 165 judgments (from all jurisdictions) that were associated with multiculturalism rendered in Canada over a period from 1980 to 2015. The objective of their research was to obtain a sample of cases in order to compare the meanings given to multiculturalism by judges and in accordance with their context of enunciation. In their data collection, they used keyword searches of the following terms: (religion race ethni*); (multicultural* multiculturel* & accommodation* accommodement*). They then examined the judgments that met the following two criteria: (i) included accommodation litigation and/or discrimination linked to ethnocultural or religious pluralism; (ii) mentioned the term “multiculturalism.” Using these criteria, Rocher and Brassard-Dion reduced the selected cases to 68, which were then analyzed to identify four ways in which the term “multicultural” was used: (i) a description of the fact that society is composed of people and groups from different cultural backgrounds coexisting in the same national space (14 cases, 21%); (ii) a political ideology of the Canadian political project marked by the principles of openness, tolerance, and recognition of diversity (28 cases, 41%); (iii) a set of public policies arising from a legal obligation, found both in the Charter and in the *Canadian Multiculturalism Act*, with the objective of ensuring that institutions have the regulatory, administrative, and financial resources required to offer programs and services to ethnocultural minorities (6 cases, 9%); (iv) part of an axiological rationality, a representation of the good, the just (20 cases, 29%). This final category includes cases where a judge defined an ideal particularly in the context of “living together” in a perspective of social cohesion, with emphasis on the ideals of inclusion, integration, tolerance, participation, equity, and dialogue.

From this initial data, Rocher and Brassard-Dion (2017) decided to focus on religion and racial discrimination. In addition to the four categories/usages of the term multiculturalism, the authors also divided the 68 judgments into two categories: litigation on ethnocultural diversity

(based on race, nationality or ethnicity, colour) and religious diversity. Almost half of the cases (47%) focused on religious accommodation, while the other half of the judgments classified in the “ethno-cultural diversity” category were disputes related to racial discrimination.⁵ The authors conclude that the courts do not hesitate to consider religious diversity as a constituent element of multiculturalism and that the courts have tended to associate multiculturalism with religious diversity. The authors do not speculate on reasons for this, but their findings raise an important question: If courts readily treat religious diversity as a constituent element of multiculturalism, is there a difference between how the religious cases are argued and those cases that relate to ethnic and racial discrimination? Using a different methodology, I will attempt to answer this question by reviewing the cases related to ethnicity and then comparing my results with those by Rocher and Brassard-Dion (2017).

Importantly, many scholars agree that Section 27 has very limited legal significance: it confers no positive and absolute rights, meaning there is no right to exist in a multicultural state (Christopher 2002, also supported by Rocher & Brassard-Dion 2016). In the same vein, they argue that the quantity of case law that applies Section 27 is not yet sufficient to draw conclusions about how the section gets applied. They further claim that an understanding of identity needs to be incorporated into legal practice (Bakht 2009). My research intends to corroborate the conclusions of previous studies that focus on particular sections of the Charter.

⁵ While the authors mention discrimination based on race, it is unclear how they arrived at such a conclusion. Moreover, a simplified differentiation between race and religion is problematic conceptually: there are groups that do not quite fit the “ethnic” versus “national” distinction. Religious signifiers only add more complexity. For example, some religious groups share neither territory nor language.

3.4 Law and Social Change, Legality, and Culturally Reflexive Legal Reasoning

The liberal view of the law and legal processes is that they are part of and are fundamental to protecting both the individual and civil society (Cotterrell 1984). According to this view, the law is objective and fair. It deals with facts and it should not reflect the interests, motivations, ideas and values of specific parties in that society and is viewed as an instrument of social change. There are also critical views of the law: economic interests are viewed as factors influencing the creation of laws. For example, a Marxist stance is that the law simply protects the powerful, their interests, and the capitalist system of exploitation, and indeed much good evidence can be presented to make such a case. It is not only that within the criminal justice system racialized people are often asked about their immigration status, and court transcripts often reference their foreign origins (Williams 1996), but prison inmates are also from marginalized ethnic groups as demonstrated in Section 3.1.2. Yet, there is a much subtler view that rejects both the view that laws exist solely as a system of rational rules, external to society, and the view that it is simply a top-down instrument of the powerful. From this perspective, the law is not only seen as part of how an economic order maintains its sense of consensus and legitimacy, but also in part providing elements of rights and protection (Hunt 1993). This subtler view, bridging the two opposing perspectives—law as a system of a rational rules and law as a top-down instrument, is influenced by the ideas of Antonio Gramsci, is that the law is infused into the micro-processes of society, policed and moralized through the professionals of major institutions, in schools, medicine, and news media. The subtler view is an expanded thesis on how the law constructs the social world that, in turn, creates the law (Hunt 1993).

In the similar vein, Patricia Ewick and Susan Silbey (1998) have developed a holistic thesis of how the law constructs the social world that, in turn, creates the law.

Drawing on case studies, Ewick and Silbey (1998) analyze the individual experiences of dealing with law and map a theory of legality. Their study of law and narrative, *The Common Place of Law*, depicts the institution as it is lived based on 430 residents of New Jersey interviewed between 1990 and 1993. As the respondents define, think about, and use the law, three ways of participating in the construction of legality (predominant types of legal consciousness) are identified: (1) “Before the law” legality in Ewick’s and Silbey’s (1998) study is imagined and treated as an objective realm of disinterested action, removed and distant from the personal lives of ordinary people. Here, law is majestic, operating by known and fixed rules in carefully delimited spheres. The law exists in times and places that put it outside of, rather than inside, the midst of everyday life. (2) “With the law” legality is depicted as a game, a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals. In this game, people see themselves and others bound by a set of rules that they may also try to change. Rather than existing outside of daily life, this second story describes legality as operating simultaneously with commonplace events and activities. (3) “Against the law” sees the law as a product of power. Rather than being objective, legality is understood to be arbitrary and capricious; unwilling to stand before the law, and unable to play with law, people act against the law. For them, legality is a feature of social relations rather than an external apparatus acting upon social life and the law embodies the diversity of the situations out of which it emerges and that it helps structure:

Legality is not sustained solely by the formal law of the Constitution, legislative statutes, court decisions, or explicit demonstrations of state power such as executions. Rather, legality is enduring because it relies on and invokes commonplace schemas of everyday life (Ewick & Silbey, 1998: 17).

Put another way, Ewick and Silbey (1998) claim that legality is a structural component of society that is constituted through everyday actions and practices. That is, legality consists of cultural schemas and resources that operate to define and pattern social life. That is, legality consists of cultural schemas and resources that operate to define and pattern social life. Ewick and Silbey's study of law and narrative depicts the institution as it is lived based on 430 residents of New Jersey interviewed during the years 1990–1993. While the respondents define, think about, and use law, three ways of participating in the construction of legality (predominant types of legal consciousness) were identified. Unfortunately, Ewick and Silbey (1998) do not provide the details on their methodology. More importantly, in the absence of possibility to interview the respondents, legality as a concept cannot be applied in my theoretical framework. The authors came up with this concept in their interviews and it would not be plausible for the design of this research.

A few other efforts, in a different vein, were made to define the law and social change through the concept of norms. Closer to the law perspective, there is a strand of literature dedicated to exploring the judicialization of culture examining the merits of the cross-cultural jurisprudence models. David Howes (2005), in the introduction to a special issue on cross-cultural jurisprudence of *The Canadian Journal of Law and Society*, described *culturally-reflexive legal reasoning* in the following way:

Culturally reflexive legal reasoning is increasingly necessary to the meaningful adjudication of disputes in today's increasingly multicultural society. It involves recognizing the interdependence of culture and law (i.e., law is not above culture but part of it). It is our cultural differences from each other that actually make us human (Howes, 2005: 10).

A solution that at least recognizes the concerns and realities of historically disadvantaged groups and diverse sociocultural communities was suggested by Jean-Francois Gaudreault-DesBiens and Diane Labrèche (2009), who advocate a social context approach to law. In Quebec and Canada, the courts' consideration of the social context is driven by Section 15 of the Charter. One of the central concepts they developed—the “social context of law” —includes the following themes: myriad social facts and practices; implicit and explicit ideological presuppositions; “extra-legal” norms, opinions, attitudes, beliefs; and factors such as race, religion, physical and intellectual capacities, sexual orientation, and socio-economic status. For example, expert evidence may be relied on to a certain extent with respect to contextual realities of vulnerable groups in society. According to Gaudreault-DesBiens and Labrèche (2009), judges are constrained in what they can do when lawyers⁶ fail to provide robust individualized and social context evidence in general (not specific to any cases). According to the authors, the aim of the “social context” concept is to draw the attention of legal experts to certain elements of

⁶ Not only judges who formulate the case law, but also lawyers (who sometimes do not adduce sufficient evidence), and self-represented litigants (often from marginalized and poor communities represented by legal aid lawyers with limited resources). People in general make sense of their experiences by relying on legal categories and concepts even when they are not familiar with the details of law (Ewick & Silbey, 1998). However, most often it is precisely those people who need good evidence of the impact of social context on their situation who are less likely to be sufficiently represented.

context in particular—the assumptions, conventions, attitudes, perceptions, and beliefs specific to different non-dominant identity groups (women, homosexuals, immigrants, the disabled, the poor, etc.). For example, the offence of obstructing police officers may not have the same degree of seriousness for the majority as for a person who has just arrived from a country where the police abuse their power. The authors suggest that cultural evidence is the essential mechanism for linking individual circumstances to group-based phenomena—a proof that connects the lives of individual litigants to the broader realities facing the group(s) to which they belong. The approach to culturally-reflexive legal reasoning is in essence a prescription for legal experts to consider cultural evidence. How one takes cognizance of their personal beliefs and biases seems to be a puzzle even without considering the positions of power. In other words, there is no easy way to implement and enforce “culturally reflexive legal reasoning” coined by Gaudreault-DesBiens and Labrèche (2009).

To conclude, the academic discussion on social change and law in a more pragmatic sense refers to cultural “tool kits” from scientific and professional perspective and in Chapter 5, I continue the discussion focusing on language is the fundamental component of any such tool kit.

3.5 Conclusion of Chapter 3

To summarize, from the literature review it is obvious that existing scholarship that integrates perspectives from law, multiculturalism, and racial/ethnic inequality is not extensive and tends to be segmented. It does not, therefore, clearly articulate the relationship between multiculturalism and ethnicity in Canadian courts.

As scholarship on ethnicity maintains, members of minority groups tend to internalize the essentialist view that the majority imputes to them, allowing for national groups to be perceived as static and timeless, while multicultural discourses are rooted in an almost essentialized understanding of immigrant ethnicity as primordial and immutable. Thus, there is a challenge: a national multiculturalism—focused on citizenization of newcomers, a commitment to migrant settlement and integration, and the goal of minority accommodation—no longer resonates with the realities and demands (Fleras 2019). Whether or not it is working, or if it has made any difference to the Canada-building project, for 50 years of Canada’s official history, multiculturalism remains a fairly popular and politically inspired pillar in the governance of diversity. In legal scholarship, proponents of multiculturalism tend to accept multiculturalism as a given while struggling with its application. If Canada offers anything more complex than a static mosaic of what seems like as trapped ethnicities, would any interpretation of multiculturalism be able to consider peoples’ lived realities? Or, how else one would ensure that multiculturalism remains relevant to meet the particularities and realities of the current world? The challenge formulated by Fleras (2019) becomes even more important when viewed from the perspective of Canadian courts.

First, while the literature on ethnicity and multiculturalism in Canada highlights the power imbalance between the national majority and minority representations, research on the court system is scarce. Especially, the position of power of the deciding majority in the courtroom is seldom considered. My research makes a modest attempt to help filling this gap. Extending arguments made by MacDonald (2010), Winter (2015) and Fleras (2019), my research attempts to unveil whether the courts’ conceptualisation of rights based on the preservation or protection of an ethnocultural identity assumes that personal identity has essential characteristics.

My research raises the following question: Can ethnicity in the courts be acknowledged without being reified or essentialized?

Second, the scholarship on race relations explains why people of colour (i.e. not of the white “race”) have historically had less access to resources, status, and power than “white” people. However, the scope of my research does not lend itself to extend the arguments made by Canadian critical race theorists like Razack (1998, 2002) and Thobani (2007). To examine whether multicultural policies celebrate white tolerance of racialized others by erasing colonial white settlement and bring the understanding of law as a “racializing strategy” would require a different approach. My work does not assume that difference is constructed intentionally by the state or the judge for that matter. Instead of assuming a “racializing strategy,” my research explores if racial stereotypes and attitudes have permeated the understanding of ethnicity in judgments. Very few scholars have adopted a similar approach, such as Jakubowski (2014), although her work is in relation to examining immigration law which is outside my research scope. Similar to Tanovich (2008), I suspect that there may be a bias due to a reluctance to identify “race” and “racism”.

4. THEORETICAL FRAMEWORK: Ethnicity as Common

Knowledge

Through this section, I demonstrate how the sociology of law and the sociology of ethnicity inform my theoretical framework and analysis.

Section 4.1 provides an overview of the history of the sociology of ethnicity and outlines the main sociological approaches to ethnicity, reviewing different elements of ethnicity that contribute to explaining how ethnicity has been interpreted in Canadian courts over the decades. It shows the advances of conceptualizing ethnicity in academic research some of which can be expected into media and discourses that are consumed by an educated public and can therefore also be expected to inform the understanding of ethnicity in court judgments.

Section 4.2 builds further on the concept of common sense and seeks to explain how major theories in the sociology of law contribute to understanding the processes associated with the articulation of ethnicity as captured in judgments. It expands my theoretical framework and allows me to formulate the research question on the variations in the articulation and mobilization of ethnicity in Canadian federal courts from 1950 to 2009.

4.1 Sociological Approaches to Ethnicity

The idea of a certain “purity of blood”—not fully the biological concept of race but rather the first use of blood heritage as a category of religious-political membership (Bernasconi & Lott, 2000: vii; Hannaford, 1996: 122–126; Frederickson, 2002: 31–35, cited in James 2011)—dates to ancient times. Following the Moorish conquest in the eighth century A.D., the Iberian

Peninsula became the site of the greatest intermingling between Jewish, Christian, and Muslim peoples. The Catholic monarchs sought to establish a Christian state by expelling the Jews in 1492 and then the Muslims in 1502. To avoid expulsion, many from these groups converted to Catholicism and to further ensure that only faithful Catholics remained, the Grand Torquemada Inquisition started to inquire not just into individuals' religious faith and practices but into their lineage. In European tradition, ethnicity relates to nationhood by descent or territory. In Anglo-American tradition, ethnicity is conceptualized as related to minority groups within a larger society of the nation-state (James 2011). Despite the different meanings of ethnicity in the European and Anglo-American scholarly traditions, both of these traditions aim to replace a concept of race based on blood heritage.

The first classical theorist to distinguish ethnic groups from biological races was Max Weber (Winter 2000, 2004; Banton 2007; Rex [1980] 2010). According to Weber, when members of different ethnic groups interact and compete with one another under unequal power relations, the term “ethnic” is sometimes used by the dominant's group to justify the subordinate group's marginalization (Winter, 2011). For Weber, an ethnic group is created through social and political action, often functioning as a type of status and providing group members with a “sense of dignity.” Weber insists that group concepts must be used only as a shorthand capable of being explicated in terms of more fundamental units (social agents) where taking account of one another's actions serves to constitute the group's structure—but not reduced to the motivations of individuals. Rex's explanation of Weber's recognition of the primacy of agency over structure is helpful: “structures are seen as arising from the continuity in time of interlocking patterns of interaction and, though these may be changed by intervention at strategic points, it would be utopian in the extreme to suggest that these structures were always and everywhere open to

change by redefinition” (Rex [1980] 2010: 439). Weber’s recognition of the primacy of agency over structure allows him to conceptualize ethnicity in a way that avoids the pitfalls of a substantialist approach. In this sense, a definition of a substantialist approach (Martienello 1995) refers to definitions where any ethnic group is treated as “container” for a particular culture and is similar to “race.”

4.1.1 Ethnicity as “Race”, Phenotype, Region, Cultural Practice, and Language

There is a consensus that any expression of difference could reinforce racism (Stolke 1995). However, there are also conflicting views. While most scholars continue to argue for the categorical distinctiveness of race and for studying race and racism on their own as phenomena with their own structures and dynamics, sharply distinct from those of ethnicity, Brubaker (2009: 25) argues that race, ethnicity, and nationalism are often treated as belonging to a single integrated domain. Other scholars also distinguish between race and ethnicity (Jenkins, 1997: 23-24/ 74-75/80-82; Cornell & Hartmann, 1998: 15-34): race is involuntary, ethnicity voluntary; race is a matter of external categorization, ethnicity of internal self-identification; race is based on differences of phenotype or nature, ethnicity on differences of culture; race is rigid, ethnicity flexible; race involves super- and subordinate groups, ethnicity involves coordinate groups; race arises from processes of exclusion, ethnicity from processes of inclusion; race has grown out of the European colonial encounter with the non-European world, ethnicity out of the history of nation-state formation (the list is summarised by Brubaker 2009: 26).

Even if analytically the separation of race and ethnicity would make sense, such separation is still problematic. Safran demonstrates the historical persistence of race as an identity marker seen through the choice of ethnonym, as in the case of Jews and other white ethnic minorities, a hyphenated label suggested an antecedent culture (Safran, 2008: 438). The “hyphenation” provided a degree of identitarian autonomy for this group. The term ‘people of color,’ widely used by advocates of multiracialism, conflates race and ethnicity and often also confuses policies of racial identity promotion with cultural pluralism, making it clear that race has historically been the most important identity marker.

References to race most often invoke some visual form of embodiment and therefore race is often argued (Alcoff 2006; Thomson 2008) as a signifier of a complex set of power relations. Individuals rarely have any choice over their racial identity, due to the immediate visual impact of the physical traits associated with race. Individuals are thought to exercise more choice over ethnic identification, since the physical differences between ethnic groups are typically less striking, allowing individuals to choose whether or not to express the cultural practices associated with ethnicity (Waters 1990). Such agency is typically lacking in racial identities, which are externally imposed through informal perceptions and formal laws and policies. In her later work, Waters documents how phenotypically black West Indian immigrants exercise agency in asserting their ethnic identity in order to differentiate themselves from native-born African Americans, although discrimination and violence aimed at all Blacks, regardless of ethnicity, strongly constrains such agency (Waters 2009). Alcoff identifies the desire of communities of color in the US to conserve their racial and ethnic identities, and the just-as-strong desire of many feminists to maintain their feminist identities.

Guillaumin (1995) notes that in pre-revolutionary France, the term race had a legal sense, and it referred to people with common lineage. For Guillaumin, race and ethnicity denote the same—both are constructed, though ethnicity is detached from racial politics and includes specific markers such as language, history, religion. According to Guillaumin, in France changes in the class structure after the Revolution gave rise to changes in the meaning of the term race and the social content of *race* was altered from its legal sense to describe people with common lineage (a self-identification label for aristocracy) to definitions of a range of “others” (an externally imposed categorization that also included class content and referred to the manual working class and peasantry).

Using a broad understanding of ethnicity, Wimmer treats race as a subtype of ethnicity, (as is nationhood), explaining that “if phenotypical features are used as indicators of group membership, we speak of ethnosomatic groups; if members of an ethnic community have developed nationalist aspirations and demand (or control) a state of their own, we describe such categories and groups as nations” (Wimmer, 2008: 974). Wimmer articulates important analytical reasons in his argument to subsume race under ethnicity. One of the reasons is treating race as fundamentally different from ethnicity does not resolve the issue that the same group of individuals might be treated as a race at one and as another type of ethnic category at another point in history. Another reason is that phenotypical differences are often evoked as markers of ethnic distinction. And, more importantly, distinguishing between races as fixed, imposed, and exclusionary, on the one hand, and ethnicity as fluid, self-ascribed, and voluntary, on the other hand, would not do justice to constellations (such as among Serbs in Kosovo, Albanians in Serbia) where ethnic groups experience degrees of forced segregation, exclusion, and domination usually associated with race (Wimmer, 2008: 974).

Brubaker (2015), among others, identifies that there was a shift from typological to populationist understandings of differences in biology that have been justly criticized for obscuring the continuities in biological understandings of human difference. Typological understandings of race in biology, like common-sense understandings, were essentialist. Racial differences were understood as differences between types, not as differences between individuals. Differences between types were real and fundamental; differences between individuals were accidental and theoretically uninteresting. Typological understandings of difference could thus underwrite essentialist and hierarchical social thinking on race.⁷ Nevertheless, it is important to remember that race and ethnicity are constituted by practices of social classification and categorization and by practices of attributing meaning to social categories and organizing social life in accordance with them.

Last but not least, a bio-sociological approach to ethnicity argues that ethnicity is a form of extended kinship, and ethnic groups are defined by common descent. Pierre van den Berghe (1981, 1995), for example, explains that genes, not physical appearance, are the overriding determinants of group competition. While most scholars today agree that race and ethnicity are

⁷ There was no underlying type; population-level characteristics existed only as statistical abstractions and could not underwrite essentialist social understandings of race in the same way as typological characteristics. Biologists did not simply abandon objectivist understandings of race. Though, they did not contradict the assertion that race has no biological foundation for two reasons. First, race could not serve as a stable principle of taxonomy. Races identified based on one genetic variant or set of variants (the genes governing skin colour, for example) would differ, sometimes radically, from races identified on the basis of another set (the genes controlling, say, blood type). Patterns of genetic variation would thus pick out “races” that did not correspond to folk understandings of race. The second reason, according to Brubaker (2015), for biologists’ complying with social scientists involved political and moral sensibilities, is expressed in the “Statement on Race” drafted by UNESCO in 1950, which declared *inter alia* that for all practical social purposes, “race” is not so much a biological phenomenon as a social myth (Brubaker, 2015: 49–51).

not “containers” for culture, what is judicial decision making in relation to ethnicity requires a separate investigation.

4.1.2 Ethnicity through Social Interaction

The theory of symbolic interactionism aims to demonstrate the importance of social interaction; it asserts that people act toward things based on the meanings those things have for them, and that these meanings are derived and modified through social interaction and interpretation. For interactionists, individual and collective agents are symbolic. An ethnic identity is therefore a segment of an individual’s general social identity, an object of change and interpretation (Malesevic, 2004: 76). Both symbolic ethnicity and ethnic options (described below) embrace the poststructuralist acknowledgment that agency plays a critical role in the creation of ethnic identity.

According to Herbert J. Gans (2009), symbolic ethnicity involves the temporary and periodic expression of feelings about or toward the ethnic group or culture through material and non-material symbols (Gans, 2009: 123; for a critique, see Anagnostou 2009). Such an approach to ethnicity is understood as a nostalgic allegiance to the culture of the immigrant generation. While symbolic ethnicity is passive, ethnic options on the other hand allow for a choice between active and passive ethnicity. In other words, the theory of “ethnic options” (Waters 1990) means that a person could decide for themselves what ethnicity to self-identify with. The theory of “ethnic options” introduces a notion of some choice in the ethnicity for the descendants of immigrants. These individuals can choose to self-identify as either the descendants of immigrants and their former “home country” or as members of the nation state in which they

currently reside. People who are able to “choose” an ethnic identity are free to involve themselves actively or passively in their chosen ethnic group and culture as well as in “mainstream society” associations.

Another perspective that conceptualizes ethnicity as “situational” or “contextual” (Nagel 1994; Okamura 1981) draws on Frederik Barth’s work ([1969] 2010). In this approach, emphasis is placed on social situations for the analysis of ethnicity and ethnic relations. The approach recognizes the unstable and changing nature of ethnic identity, taking different forms depending on which culturally shared items are self-defined by individuals. Once these characteristics are activated, they become symbolic material available to members of the group for purposes of identity construction. Locating oneself in relation to a community is a complex process that happens on different levels: inner self-definitions or feelings of closeness (cognitively opaque) as well as objective expression of inner states in external “performance” patterns (Goffman 1990) that come to be shared by others. External aspects of identity refer to observable markers, both cultural and social, such as speaking a language; practicing ethnic traditions; and participating in ethnic institutional organizations, such as churches, schools, enterprises, and media. These external aspects are not always predicted. An individual may speak the language but not attend any ethnic organizations and vice versa, although the role of language seems to be more stable among the other external aspects of ethnicity.

Margaret Somers (1994), attempting to formulate a relational and network approach to identity, explains why identity is not sufficient and in fact problematic in social analysis. Somers claims there is no reason to assume a priori that people with similar attributes will share common experiences of social life, or become mobilized, unless they share similar narrative identities and

relational settings. Jonathan Okamura (1981) distinguishes cognitive and structural aspects of situational ethnicity, as it is the actor's ascriptions of ethnic identity that provide meaning to social relationships within given social situations. The cognitive dimension of situational ethnicity refers to the actor's perceptions and understandings of cultural symbols and signs and the relevance he attributes to these elements is a factor on the behavioural options in the situation in which the actor finds himself. The structural dimension has reference to the role constraints enjoined upon actors within social situations as a consequence of the overall structure of ethnic group relations.

This conceptualization of ethnicity is framed as dynamic and constructed, open ended and complex, performative and contextual, rather than categorical. This understanding of ethnicity is also close to Brubaker's approach, which he defines as cognitive perspective, and is characterized by the ways through which people recognize and experience objects, places, persons, actions, or situations as ethnically marked or meaningful. As expected, I found the descriptors of ethnicity described by Brubaker (2004) to be useful in analyzing my empirical data: ethnicity to identify self and others, to construe situations, to explain behaviour, to impute interests, to frame complaints, or/and to tell stories.

To conclude on the sociology of ethnicity, the theoretical framework of this dissertation is built to explore variations of ethnicity described in this section. It integrates both understandings of ethnicity: ethnicity as "race" described in 4.2.1. and ethnicity as social interaction. This open-ended variation of ethnicity seems similar to Fleras' definition of post-ethnicity (2019), as outlined above in Chapter 3. These different understandings of ethnicity will be used to examine the articulation of meaning of in the Canadian court system, and to assess

whether the dominant meaning of ethnicity in the courts has changed since multiculturalism became an official policy and law.

The next section seeks to explain how major theories in the sociology of law contribute to understanding the processes associated with the articulation of ethnicity as captured in judgments.

4.2 The Sociology of Law

Critical Legal Studies, a tradition in legal scholarship rather than in social science literature, explore judicial decision-making processes. According to this perspective, legal reasoning and decision-making are not neutral applications of principles, but rather are affected by dozens of biases on the part of legal professionals that depend on the personal ethical-political values they hold and the socio-structural context in which they were formed (Deflem, 2008: 192). I draw upon the work of these Critical Legal Studies scholars in my attempt to understand how judges make their decisions and what factors are important.

One subgroup of this scholarship is feminist jurisprudence. Authors from this tradition demystify the supremacy of the legal method. Carol Smart (1989), for example lifts the idea of equality out of its narrow definition by challenging the idea that there are only institutional means to achieve women being equal to men. Like Smart, Mary Jane Mossman (1987) also challenges the view that the law is neutral and identifies three principles of legal method: the characterization of the issue, the choice of precedent, and the process of statutory interpretations. These principles illuminate how courts work in various cases (Johnson 2002; Beaman 2008). In

other words, law adopts the language of neutrality and objectivity, giving it the illusion of being “truthful” and unbiased, in contrast to other ways of understanding things that rely on theory (like social sciences).

Within the feminist legal tradition particularly relevant to this study, there are a number of feminist scholars of multiculturalism. For many of them, any analysis of the ontology of race, ethnicity, or gender will be incomplete without considering the embodied experience of beings marked by those categories (Alcoff 2006; Shachar 2001; Young 1997). Phillips (2007) and Phillips and Sachar (2008), for example, use studies around “cultural defenses” in criminal law (see also Renteln 2004, 2005)—cases involving veiling, forced marriages, and sex trafficking—to demonstrate the ways in which gender equality arguments are being protected by a “blanket ban,” which in effect negates gender equality altogether and restricts the autonomy and agency of women. In Canada, examples of religious diversity and its intersection with multiculturalism (and not necessarily from a feminist perspective only) include issues related to Muslim marriages, crimes of honour, and when women can and cannot wear a religious veil (Fournier 2012, 2013, 2014; Bakht 2005; Beaman 2011, 2012). Overall, the preponderance of evidence suggests that, as argued here, a “cultural defence” may negate gender equality, though not in all situations. It remains important to complement these findings with a better understanding of what ethnicity (and not only religion) means for the courts, and how the judges make the decisions when indeed multiculturalism is implied in the case considered.

4.2.2 How Law “Wins”

[The law] makes no bones about the fact that legal decisions—even decisions as weighty as imprisoning, deporting, or executing someone—have to be taken without full knowledge.

– Mariana Valverde (2003: 4)

The article “Common Sense as a Cultural System” (1975) by Clifford Geertz seeks to understand in greater detail the very idea of common sense—what for most people is a simple thought process that determines how individuals react to any given situation. For Geertz, however, common sense is an area worthy of deep study. Geertz uses many examples to demonstrate the relevance of common sense and explores common sense as a relatively organized body of considered thought. Religion rests its case on revelation, science relies on method, and ideology rests on moral passion. Geertz eloquently presupposes that common sense rests on the assertion that it is not a case at all, just life in a nutshell with the world as its authority. He further suggests that this analytical dissolution of the unspoken premise from which common sense draws its authority is not intended to undermine that authority, but to relocate it:

If common sense is as much an interpretation of the immediacies of experience, a gloss on them, as are myth, painting, epistemology, or whatever, then it is, like them, historically constructed and, like them, subjected to historically defined standards of judgment. It can be questioned, disputed, affirmed, developed, formalized, contemplated, even taught, and it can vary dramatically from one people to the next. It is, in short, a cultural system, though not usually a very

tightly integrated one, and it rests on the same basis that any other such system rests: the conviction by those whose possession it is of its value and validity (Geertz, 1973: 7).

Similarly, in his seminal work on representations, Stuart Hall (1990, 1997) draws attention to the role of the common stock of knowledge that includes historical as well as contemporary forms of cognition and consciousness. These different forms of knowledge constitute a “common sense.” Derived from Antonio Gramsci’s work, Hall’s common-sense knowledge is a source of conflicting information. Its “naturalness” makes it difficult to examine or even question this kind of knowledge, leaving it unchangeable. The “spontaneous” quality of much common-sense knowledge makes common sense ideological and, at the same time, unconscious (Hall, 1979: 325–326).

Geertz (1973) illustrates the “naturalness” of common sense with an example from the *American Anthropologist* article on intersexuality by Robert Edgerton. In the cited article, Edgerton states that while it is recognized that some people may not behave in terms of the role expectations ascribed to them on the basis of their biological sex, gender in human beings is not a purely dichotomous variable. But intersexuality is more than an empirical surprise; it is a cultural challenge. For common sense, as Geertz argues, it is a cultural challenge for the network of practical and moral concepts woven about those supposedly most rooted of root realities: maleness and femaleness. Following the article analysis, Geertz concludes that what divides the American attitude from the Navaho and Pokot is not that people with bisexual organs seem that much more peculiar to us, but that the peculiarity seems unnatural, a contradiction in the settled terms of existence. Navaho and Pokot take, in their different ways, the view that intersexuals are

a product of the normal course of things (botched pots, gifted prodigies). For Americans, femaleness and maleness exhaust the natural categories in which persons can conceivably come; what falls between is a darkness, an offense against reason. This naturalness is the first characteristic of common sense.

Among various characteristics of common sense, Geertz lists “practicalness,” as he puts it, to tell someone to wise up: to be prudent, level headed, keep his eye on the ball. Common sense attributes to reality, through “simpleness,” that which represents a person as being precisely what they seem to be, neither more nor less. As for “immethodicalness,” another quality that is ad hoc, it comes in epigrams, proverbs, jokes, anecdotes, and not in formal doctrines, theories, or dogmas. The final quasi quality, “accessibleness,” follows as a logical consequence once the others are acknowledged. Accessibleness is the assumption that any person with faculties reasonably intact can grasp common-sense conclusions, and indeed, once they are stated unequivocally enough, will not only grasp but embrace them.

The tone of common sense, according to Geertz (1975) is anti-expert, if not anti-intellectual: we reject, and so, as far as I can see, do others. There is no knowledge, no special technique or peculiar giftedness, and little or no specialized training—only what is rather redundantly called experience. Common sense represents the world as a familiar world, one everyone can, and should, recognize. Hence, common sense is a cultural system; one cannot empirically uncover or conceptually formulate it by cataloguing its content. It is wildly heterogeneous, not only across societies but within them. One cannot sketch out some logical structure or sum up the substantive conclusions it always draws, for there are none of those. One has to proceed instead by the detour of evoking its generally recognized tone and temper,

through constructing metaphorical predicates to remind people of what they already know. Thus, the concept of “common sense” introduced by Clifford Geertz (1975) seeks to understand the thought process that determines how individuals react to any given situation.

The sociology of law attempts to make theoretical sense of and explain the relationship between law and society. In particular, the sociology of law studies the social organization of the legal system, and the social interactions of all who encounter it and its representatives—including judges (Trevino, 2007: 1). This field of scholarship argues that the sociological (systematic and empirical) scrutinizing of legal ideas is necessary because law is a social phenomenon (Cotterrell 1996, 1998). As part of a societal system, the legal system is a self-organizing and self-determining one, “producing its own operations, its own structures, and its own boundaries by its operations; not by accepting any external determination” (Luhmann 1992: 1425). Informed by postmodernism and deconstructionism,⁸ the sociology of law theorizes a social differentiation of expertise with its own distinct language and circularity of communication (Bourdieu 1987; Luhmann 1992).

Crucially, in Pierre Bourdieu’s view (1987), legal field professionals are continuously in a struggle with those outside the field to gain and maintain acceptance for their views of the law’s relation to the social whole and of the law’s internal organization. In the disciplinary

⁸ In the sociology of law, the ideas from postmodernism and deconstruction have been adopted to approach law as a text or narrative—for example, an application of Jacques Derrida’s approach to the sociology of law is his work on the mystical foundations of authority of law. In this tradition, Carty and Mair (1990) argue that the text of law is to be read as being self-referential, that is, it has no outside referent (other than other legal text). Because the structure of the text of law has changed, postmodern law is fragmented into multiple power sources to form a horizontal collage of multiple regulatory types. The once authoritative singular voice of law has thus given way to a diversity of multiple laws. The terror of the legal text is that there can be no escape to context but that, imprisoned in language, reference is inescapably made to universals (of rights, of justice), which are appealed to as if they are objective.

history of intellectual (the academy) and institutional (the state) interaction between law and social science, the “law wins” (Tomlins, 2000: 911). The law “winning” can be partially explained by the mere existence of the legal method which is taught in law schools. Much of this competition is linguistic, symbolic, and hermeneutic—it is the struggle for authorized or legitimized interpretations of the texts of the legal corpus and legal practice. In other words, the law adopts the language of neutrality and objectivity, giving it the illusion of being “truthful” and unbiased, in contrast to other ways of understanding things that rely on theory (like sociology).

The “law wins” when those who professionally engage with law set the law above other knowledge and claim to establish the truth of events. This “truth effect” is generated by the format of neutrality or when realist epistemology is put on a pedestal (Valverde 2003: 7). Through analogy and reflective equilibrium modes of operation, legal reasoning draws on existing principles and precedents to produce a decision in a pragmatic resolution-oriented manner (Lopez & Lunau 2012). At the same time, legal reasoning and decision-making is anything but a neutral application of principles. Instead, it is affected by dozens of biases on the part of legal professionals with their personal ethical-political values, formed in unique socio-structural contexts. (Deflem, 2008: 192).

As mentioned above, feminist jurisprudence (Smart 1989, Mossman 1987) has managed to challenge the supremacy of the legal method (principles taught at law schools). Pursuing the quest for feminist jurisprudence, Carol Smart attempts to lift the idea of equality from its narrow definition by challenging the idea that women should be equal to men and that there are

institutional means to achieve this⁹ (Smart, 1989: 85). Smart does this by drawing attention to the problems of using rights as part of a feminist strategy to jurisprudence.¹⁰ More importantly for the purpose of this research, Smart (1989) advances Michel Foucault's analysis of power¹¹ by considering the ways in which law exercises a form of power parallel to the development of scientific knowledge. In other words, by accepting that law, like science, makes a claim to truth, law becomes indivisible from the exercise of power and disqualifies other knowledge and experiences. To become "legal," these other experiences must be translated into another form before they can be processed through the legal system (Smart, 1989: 13–14).

Bourdieu (1987) claims that law purports to accumulate knowledge in a practical manner aiming at generating a decision. This makes legal arenas excellent sites for the exploration of knowledge. His essay *The Force of Law: Towards a Sociology of the Juridical Field* considers the "world of the law" from several related points of view. The world of law includes the conceptions that professionals working within the legal world have of their own activity. It contains the mechanisms by which their conceptions of the law, and those of others within their

⁹ Smart raises the concern that exercising the law may produce effects that make conditions worse, and that in worsening conditions we make the mistake of assuming that we need to apply more doses of legislation. It is commonplace that the legal "cure" of child sexual abuse is frequently as bad as the original abuse: the very legal process itself creates its own harms (Smart, 189: 162).

¹⁰ For example: (1) rights oversimplify complex power relations (that women have the right to apply to the courts for injunctions to remove a man who is violent from the family home has not stopped the problem of domestic violence); (2) rights are often formulated to deal with a social wrong, yet they are focused on the individual who must prove that her rights have been violated; (3) rights that are formulated to protect the individual against the state, or the weak against the strong, may be appropriated by the more powerful (Smart, 1989: 144–145).

¹¹ For a detailed Foucauldian analysis of the juridical model for encoding power and the "legal complex" (legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms, and forms of judgment), see Rose and Valverde (1998), and Hunt (1993). Hunt, in particular, critiques Foucault's work for the displaced concern with "totalizing structures"—like capitalism—with an under-theorized new disciplinary society in which capitalism, quietly, disappears.

society, are formed, sustained, and propagated. The world of law considers the objective social effects (both within the legal field and outside of it) of the professional work of lawyers, judges, and other legal professionals. Bourdieu's central claim is that the juridical field, like any social field, is organized around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining values—his version of a *legal culture*. Indeed, legal culture, in its most general sense, is a way of describing relatively stable patterns of legally oriented social behaviour and attitudes. According to Nelken (2004), the identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour, ideas, values, aspirations and mentalities: “Like culture itself, legal culture is about who we are not just what we do” (Nelken 2004: 1). Legal cultures are described as being provisional consequences of interactions and occur pursuant to a challenge and response paradigm. Traditionally in legal studies, any analyses of legal cultures are examined by a field of scholarship, which is situated at the line bordering comparative law and historical jurisprudence. A widely accepted definition of legal culture is the one by Friedman (1969: 30): “the network of values and attitudes relating to law, which determines when and why and where people turn to law or government, or turn away.” While Friedman's definition of legal culture is situated at a more macro level, Bourdieu (1987) offers a pattern at a more micro level. As I am not pursuing a comparative study of national or sub-national levels, the appropriate unit of legal culture may be at the court, even though differences between places in the same society may often be considerable.

The key to understanding legal culture is to accept that this internal organization, while it is surely not indifferent to the larger social functions of the law, has its own incomplete but established autonomy. The social practices of the law are, according to Bourdieu, the product of

the functioning of a “field” whose logic is determined by two factors: the specific internal power relations between legal personnel and the internal logic of juridical functioning. The first factor—structural—orders the competitive struggles (the conflicts over competence) that occur within it. The second constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions (Bourdieu, 1987: 816).

Following the arguments of the sociology of law scholarship identified above, the articulation of ethnicity in judgments is likely to be influenced by legal culture. In the sociology of law, attention is devoted to the special linguistic and social power of the law.

4.2.3 Ethnicity “Trapped” in Legal Culture?

This dissertation aims to determine whether there was any change in ethnicity’s articulation and meaning in the Canadian court system since multiculturalism became an official policy and law. Inspired by the scholarship in the sociology of law theorizing the relationship between law and society, brings me to question my earlier assumption. Although more open-ended definitions of ethnicity (relying on self-identification, symbolic interactions, and individual choice) have become commonplace in academic scholarship, I hypothesize that the articulation of the ethnicity in judgments may not necessarily reflect this progress as it may possibly be “trapped” in legal culture. What this means will be explained next.

The power of law to formalize and codify is within the limits of the correspondence with pre-existing power structures. Bourdieu’s “juridical field” (1987) is the site of a competition for the monopoly of the right to determine the law. Within this field there occurs a confrontation among agents possessing a technical competence, which is inevitably social and which consists

essentially of the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world. The field is organized around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining values that create an incomplete but quite settled autonomy. The practical content of the law—the judgment—is the product of a symbolic struggle between professionals possessing different degrees of technical skill and influenced by a diversity of social factors. Pierre Bourdieu’s concept of “miscognition” (1987) outlines the process by which power relations come to be perceived not for what they objectively are, but in a form that renders them legitimate in the eyes of those subject to the power. Law exercises a form of power, which is parallel to the development of power associated with scientific knowledge. In other words, by accepting that law, like science, makes a claim to truth, and that this truth claim is indivisible from the exercise of power, one disqualifies other knowledge and experiences (Smart 1989). The properly symbolic effect of Bourdieu’s “miscognition” results from the illusion of the law’s absolute autonomy in relation to external pressures. Legal professionals are constantly engaged in a struggle with those outside the field to gain and sustain acceptance for their conception of the law’s relation to the social whole and of the law’s internal organization.

If law exercises a form of power similar to the development of scientific knowledge, then how does the law apply and shape the concept of ethnicity? Could we assume that legal professionals legitimize ethnicity by incorporating scientific knowledge from sociology and related disciplines? Or, do they give preference to the knowledge of their own profession? In the latter case, their understanding of ethnicity is likely to remain largely unchanged from more recent scholarly advances in the social sciences. The external influences—e.g., from multiculturalism in its ideological and/or factual sense and/or scholarship in the social sciences

—may be blocked by the law’s autonomy would not have influenced the meaning of ethnicity in the judgments. In other words, this could mean that the articulation of ethnicity in judgments might remain limited to the realm of legal culture in broader sense, as defined in the previous subsection, or rather, in accordance with Bourdieu (1987) juridical field.

The law’s claim to enact justice depends crucially on the concept of “common knowledge”—defined by legal sociologists as a body of awareness that extends beyond the small facts known to individual witnesses, and even beyond the general facts known to experts. When judges “use” common knowledge to decide a legal case, this becomes part of the judge’s mental equipment—what Bourdieu calls professional capital (Bourdieu 1987b). This means that in adjudicating cases where ethnicity is implied, the judges’ understanding of ethnicity is often dependent on a “common knowledge” of ethnicity, which could potentially be associated with factors such as skin colour, ancestry, and regional location. Indeed, common knowledge empowers certain subjects; the epistemological space of common knowledge is not a static sphere, hence practical meaning will depend on how it is used, by whom, and in what context. Legal culture and common knowledge are dimensions of power that work in tandem. In her book, Valverde (2003) highlights two dimensions or aspects of the power/knowledge nexus in this regard: epistemological authority and the formatting of knowledge. In a trial, the confrontation is resolved by the judgment of an “authority” whose power is socially granted. The power of such an authority is to impose a universally recognized principle of knowledge of the social world (a principle of legitimized distribution) and empower specific knowers. Thus, the sociology of law theories offers a lens through which the study of (external) influences upon the understanding of ethnicity and its semantics can be studied. The sociology of the law may also reveal the ways in which the common-sense understanding of ethnicity impacts society and its

understanding of ethnicity in general. Read through the lens of the sociology of law, the recourse to common knowledge may suggest that there has been little progress in the understanding of ethnicity due to the nuances of legal culture, in particular, juridical field, and the law's autonomy in relation to external pressures. In fact, various viewpoints and ideologies feed a rhetoric that is full of paradoxes and a multiplicity of meanings—the rhetoric common to legal texts (Bourdieu 1987; Valverde 2003).

As a consequence of these considerations, my research question can now be reformulated as follows: what are the variations in the articulation and mobilization of ethnicity in Canadian federal courts and tribunals during 1950-2009? Furthermore, I now approach my empirical research with two contradictory working hypotheses in mind: First, as mentioned above, provided that a) biological definitions of ethnicity became repudiated after World War II, b) the policy of multiculturalism (in Canada since 1971) presupposes (self-identified) cultural definitions of ethnicity, and c) state-of-the art definitions of ethnicity in academic scholarship tend to highlight boundary-making and symbolic interactionism, I expect judgments in Canadian courts to reflect these changes (Hypothesis 1). Second, and in stark contrast, given that a) juridical culture keeps the law “autonomous”, i.e., free from outside influences, and b) legal professionals may rely on “common sense” knowledge to inform judgments (but this “common sense” knowledge may not have kept up with the advances on ethnicity in social sciences research), I also expect judgments to mobilize somewhat old-fashioned static definitions of ethnicity rooted in biology, blood or some immutable culture (Hypothesis 2).

In the following chapter, I will describe the methodology that is used to provide an answer to this research question.

5. METHODOLOGY

5.1 The Judiciary and the Federal Court of Canada

Prior to explaining the design of this study, understanding the role of ethnicity in judgments first requires a general understanding of how powers are divided among different courts, and in particular the role of the Federal Court in ensuring legal decisions and processes adhere to the law. It is worthwhile bearing in mind that courts in Canada divide responsibilities and jurisdiction in the following way:

- Provincial/Territorial courts handle most cases in the legal justice system;
- Provincial/Territorial Superior Courts deal with more serious crimes, and hear appeals against lower court judgments:
- The Federal Court of Canada (FCC) operates at the same level as the superior courts, but has jurisdiction over different issues, such as immigration matters, intellectual property, and disputes involving the federal government;
- Provincial/Territorial Courts of Appeal and the Federal Court of Appeal (FCA) hear appeals from their respective superior courts; and
- The Supreme Court of Canada (SCC) is the final court of appeal and has jurisdiction over disputes in all areas of the law, including constitutional, administrative, criminal, and civil.

For the purpose of this research, the research scope has been limited to court decisions at the Federal Court for the following reasons. The Federal Court hears cases in which ethnicity matters, such as issues of immigration and asylum, official languages, and the application of the *Canadian Charter of Human Rights*, as well as matters related to passports, public works, public service employment, and First Nations.

Geographically, the Federal Court holds court and renders decisions in disputes in major cities across the country. Orders of the Court are binding in every province and territory, but unlike the provincial and territorial superior courts, the Federal Court has no inherent general jurisdiction. In order for the Federal Court to hear a case on a given subject, Parliament must have the authority to rule on that subject under the Constitution Act of 1867, there must be an existing and applicable federal law, and Parliament must have given the Federal Court the right to administer that law. The Federal Court therefore has exclusive jurisdiction to review the actions of most federal offices, boards, commissions, and tribunals, including the Canadian Human Rights Tribunal (CHRT). This means that most federal government decisions may be challenged in the Court. In cases of a challenge, the Federal Court cannot “overturn” or “reverse” decisions made by tribunals. Rather, it can perform a “judicial review” in which the Court decides whether the decision rendered by the lower tribunal (e.g. the decision of a Visa Officer) was reached correctly. If the Court finds that the decision maker made a mistake in reaching his/her decision, then the case must be heard again by a different decision maker. The Court is not so much interested in whether the decision was correct, but rather that it was reached correctly—i.e. that proper procedures were followed. The Court has stated on many occasions that two decision makers can make different decisions on a particular case and both could have reached their decision properly.

Among the tribunal decisions that the Federal Court is empowered to challenge are those made by the Immigration and Refugee Board (IRB). The IRB is Canada’s largest independent administrative tribunal, responsible for assessing the thousands of refugee claimants who come to Canada every year. The Board has four divisions: Immigration, Immigration Appeals, Refugee Protection, and Refugee Appeals. The Refugee Protection Division (RPD) determines whether

claims for protection will be accepted or rejected under the provisions and regulations of the *Immigration and Refugee Protection Act* passed in 2001, which replaced the *Immigration Act, 1976* as the primary federal legislation regulating immigration to Canada.

Organisation-wise, the Court consists of a first-level trial court, known as the Federal Court of Canada—Trial Division, and an appellate Court, known as the Federal Court of Canada— and Appeal Division (more commonly referred to as the Federal Court of Appeal). The Trial Division has jurisdiction to hear judicial review of decisions of federal boards and tribunals. The Appeal Division has jurisdiction to hear appeals of decisions of the Trial Division, as well as to determine applications for judicial review of decisions made by specific boards and tribunals. Decisions of the Appeal Division can be appealed to the Supreme Court of Canada.

5.2 Selection of Cases and Text Segments

The Canadian Legal Information Institute (CanLII) database was used to investigate variations in the notion of ethnicity in federal judgments. CanLII is a research tool funded by provincial and territorial law societies that provides access to the decisions of various courts and tribunals across Canada. Its objective is to meet the needs of the public and the legal community.

The CanLII.org website provides open access to court judgments from all Canadian courts, including the Supreme Court of Canada, federal courts, and the courts in all Canadian provinces and territories. Judgments provide the court's explanation; a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. CanLII started by publishing current cases, which courts and tribunals sent as they were written, starting

in the early 2000s. For most Canadian courts, the collection spans more than 18 years of these “organically acquired” cases. CanLII was founded by the lawyers and notaries who are members of Canada’s provincial and territorial law societies through the Federation of Law Societies of Canada. CanLII’s technology and editorial services provider since its founding is Lexum. Lexum started publishing law online in 1993 as a legal informatics lab at Université de Montréal, starting with the Supreme Court of Canada decisions.

An examination of the data revealed that references to ethnicity and culture could either be explicit, or implicit, in which the concepts may be only obliquely referred to but never mentioned directly. When performing the database search in September 2016, several different keywords were tried. For example, the keyword “multiculturalism” yielded 7 judgments/cases for the period of 1980–1989 (with the first result in 1981); 50 cases for the 1990–2000 period; and 147 cases for 2000–2010. But combined searches for the terms “ethnic” and “multiculturalism” did not yield any meaningful results. Over time, it became obvious that the more effective search term was ethnicity (ETHNIC*), so only that one keyword was focused upon. Between 1950 and 2009, a total of 2,358 federal-court and tribunal judgments/cases contained the keyword “ethnicity,” according to the CanLII database. The results showed that the concept of ethnicity is invoked in a wide variety of cases, ranging from Refugee Board tribunals to criminal and family cases.

After uncovering that references to ethnicity were indeed frequent and varied in Canadian legal cases, select timeframes were chosen in order to begin exploring the potential influence of multiculturalism policy on the articulation of ethnicity in court judgments. This period ranged from the first usage of ethnicity in case law in 1955 until 2009, the year this research was first

envisioned and designed. While this period does not take us fully up to the present day, it covers the declaration of the official policy of multiculturalism in 1971, the passing of the *Canadian Multiculturalism Act* of 1988, as well as multiculturalism policy’s numerous iterations under Liberal and Conservative governments. Decades were used to examine the incidences in the searches, I then narrowed down the results by filtering the cases by year. Table 1, below, demonstrates the general rise in the number of cases referencing ethnicity in the various time periods: there were 3 cases in the 1950s; no cases in the 1960s; 9 cases during the 1970s; 100 cases in the 1980s; 369 cases in the 1990s; and 1,877 cases in the first decade of the 21st century.

Table 1: Cases Found, Reviewed, and Analyzed in Timeframes

Timeframe	Number of Cases		
	Database Search	Abstracts Reviewed	Detailed Analysis
1950-01-01 to 1959-12-31	3	3	1
1960-01-01 to 1969-12-31	0	0	0
1970-01-01 to 1979-12-31	9	9	2
1980-01-01 to 1989-12-31	100	100	11
1990-01-01 to 1999-12-31	369	103	12
2000-01-01 to 2009-12-31	1,877	100	10
Total	2,358	315	36

To manage the large number of search results for the two last time periods—that is, from 1990 to 2000, and from 2000 to 2009—I narrowed down the results by filtering the first 100 cases by relevance. The advance database option “by relevance” showed the results where the keyword was used most often. Apart from the fact that relevant cases occurred most often in

higher court levels, the research found no predictability or consistency in the search results. In general, some years generated more cases from higher-level courts such as the Supreme Court of Canada (SCC), while other years generated more cases from judicial reviews from tribunals such as the Canadian Human Rights Tribunal (CHRT). Nonetheless, the sample provided a great variety of results in terms of levels and types of courts.

At the end of the data collection process, including the filtering by relevance for the period from 1990 to 2009, the cases were reduced from a total of 2,358 that appeared in the search to 315 abstracts. To better examine these cases, a table of each one was prepared—see the following example. Each table indicated the year of the case, the court or tribunal in which it was heard, the full case name, the number of times the case was cited, a list of CanLII “catalogue keywords” as defined inconsistently by various law clerks, and the number of times the case referred to the “ETHNIC*” keyword.

Figure 1: Example of an Abstract Reviewed

Year	Court	Name of Case	Times Cited in other cases	Sample of CanLII “Catalogue Keywords” defined by law clerks	Times Keywords Mentioned
1955	SCC	<i>Narine-Singh v. Attorney General of Canada</i> (SCR 395, CanLII 8)	2	race, geographical area of origin, regulation, ethnic group, nationality	10

Since neither the case-search abstract nor the “catalogue keywords” provided enough consistency to select and categorize the 315 cases based on judgment relationship to ethnicity, all 315 full judgments had to be downloaded, printed, and reviewed. Since the focus of my study is

on ethnicity throughout the judicial system, there was no particular preference for which types of cases were found (criminal, administrative, etc.).

After the initial review, each of the 315 cases were again studied, eliminating those that merely cited the law; these were mostly references to document titles and legislation texts. The remainder were further examined to select only those that discussed ethnicity meaningfully, not those just referring to the existing legislation (such as enumerated grounds of the Charter's Section 15(1)). For example, *Forget v. Attorney General of Quebec* (1988 SCC) concerned an Anglophone nursing assistant in Québec who required a permit from the provincial nursing union—which, under Section 35 of the 1977 *Charter of the French Language*, the organization was not allowed to issue. Although that case did reference language in general, there was no explicit mention of the keyword “ethnic” and hence, the case was discarded as no meaning of ethnicity could have been studied in the claim.

Similarly, *Bhinder v. Canadian National Railway* (1985 SCC) concerned a Sikh employee, Mr. Karnail Singh Bhinder, who refused to comply with the company's regulations concerning hard hats at work, since his religion did not allow him to wear any headgear other than the turban. The company refused to make an exception to the rule, so Mr. Bhinder was fired. Although this case contains three mentions of “ethnic,” these all merely enumerated the prohibited grounds for discrimination. Accordingly, this case was not useful for this research. Although it is understood that the case revolves around religion (and ethnoreligious dimensions), it was not clearly defined by ethnicity.

At the end of this multi-step process of elimination, all cases that did not provide any interpretation of ethnicity beyond referencing the existing legislation were removed. As a result,

only 36 cases, from six decades, were selected for more detailed analysis (see Column 3 of Table 1). In these 36 cases, there were 46 text segments with references to ethnicity.

5.3 Methods of Analysis: Meaningful Patterns of Ethnicity

First, I determine whether the 46 segments of the 36 examined cases empirically match the different concepts of ethnicity suggested by the sociology of ethnicity scholarship. The goal here is to explore the variety of ways in which ethnicity has been used in Canadian courts since the 1950s by applying existing theories from the sociology of ethnicity. I construct the “meanings of ethnicity” in a way that is both deductive (clues taken from theoretical framework) and inductive (clues taken from engagement with the research data over the last half-century in Canadian federal courts). Typically, according to Hsieh and Shannon (2005), all such approaches require standard steps, such as: formulating the research questions, selecting the sample to be analyzed, defining the categories to be applied, outlining the coding process, implementing the coding process, determining the trustworthiness of the process, and analyzing the results of the coding process (Kaid & Wadsworth 1989).

Following the conventional, directed, and summative approaches to qualitative content analysis described by Hsieh and Shannon (2005), I began my content analysis by identifying and quantifying certain words in the text, with the purpose of understanding their contextual use (as in a summative approach). This quantification explored usage rather than inferring meaning. The coding process consisted of organizing text into content categories: patterns or themes either directly expressed in the text or deduced via analysis. Relationships among the categories were

then identified and coded using a set of systematic and logical rules. During the process, as needed, I developed additional codes, and revised and refined the initial scheme. Specifically, the first step in my analysis was to tag all 46 meaningful (highlighted) passages of the 36 cases with the appropriate descriptors of ethnicity (for greater details, please refer to Appendix A and for the passages/segments to Appendix B).

The first codes were temporary ones; but after I had thoroughly familiarized myself with the cases, I studied the “leftover” text to see whether it represented a new category or subcategory that needed a new code. In other words, I looked at each instance where ethnicity is referenced in a case, and determined the criteria being used to reference ethnicity.

Ethnicity as “Race”, Phenotype, Region, Cultural Practice, and Language:

- **Phenotype.** This concept appears in passages where ethnicity in judgments was characterized as ascribed at birth and derived from kinship and blood as in sociobiology. Preliminary codes: biological factors, kinship, genes, skin, and blood.
- **Region.** This concept appears in passages where ethnicity in judgments was characterized as territorial belonging for ethnic communities. Preliminary codes: territorial factors including citizenship.
- **Language/Tradition.** This concept of ethnicity is based on a shared system of common values such as language spoken and traditions practised. Preliminary codes: language and traditions.

Open-ended Ethnicity:

- In a way, this variation of ethnicity is a “placeholder” for the conceptualization of ethnicity that is neither reified nor essentialized. This understanding of ethnicity is close to Brubaker’s approach, which he defined as cognitive perspective, and is characterized by the ways through which people recognize and experience objects, places, persons, actions, or situations as ethnically marked or meaningful. The conceptualization of ethnicity by the appreciation of the fact of multiplicity; the conceptualization which is framed as dynamic and constructed, open ended and complex, performative and contextual rather than categorical, similar to Fleras (2019) definition of post-ethnicity. This open-ended variation of ethnicity seems theoretically plausible based on my literature review outlined above. The goal here was to empirically situate a concept of ethnicity that was fluid, optional, and situation- and context-driven.

Only those passages that contained a specific and meaningful reference to any of the categories of the preliminary classification were flagged as a heuristic means of analysis rather than a final classification. If passages referred to different categories, I tabled the case into those different categories. The 46 segments that belong to several categories were marked by a formula (X of N+1) if coded more than once, where X is the number of a particular segment and N+1 the total number of segments in the case (example: 1 of 3, 2 of 3, 3 of 3, etc.). Next, I revised the data and compared the time blocks (Hsieh & Shannon 2005; Maxwell 2005) to examine the changes over time (Abbott 2001). This step was designed to find the major ethnicity interpretations, and to isolate any meaningful patterns. Table 1, below, summarizes the preliminary categories and codes through which I analyzed uses of the term “ethnic” or “ethnicity” in court cases. The codes derived deductively and inductively were confirmed empirically by category:

Ethnicity as “Race”, Phenotype, Region, Cultural Practice, and Language (deductive):

Phenotype codes were grouped into three major themes:

- **visible differences:**

- a. race, racial background, racial origin
- b. Caucasian, non-Caucasian
- c. Asian, Oriental
- d. visible minority, visibility
- e. physical evidence, physical features
- f. appearance, colour
- g. dark skin, skin tone
- h. whites, non-whites

- **kinship:**

- i. last name
- j. descendants from original stock background of mother and father
- k. ancestral connection

- **fixed characteristics:**

- l. immutable, singular

Region:

- m. geographical area/part
- n. residence
- o. territory

Tradition

- p. social organization

- q. system of clans and crests
- r. shared customs, beliefs traditions, and characteristics

Language

- s. language
- t. linguistic affiliation

Open-ended Ethnicity (inductive)

- u. emphasis on human rights, humanity
- v. vulnerable
- w. disadvantageous
- x. changing (nature)
- y. historical context
- z. value of the past
- aa. totality, context
- bb. promotion of cross-cultural training (highlighting multicultural values)

Finally, following the preliminary and more in-depth first round of analysis, I encountered a limitation. In the category of ethnicity as region of the 46 segments of the 36 cases, only a few fell under this heading. Of interest is that all of them are related to Indigenous groups, but since the number was small, I eliminated the discussion of these segments from findings and discussion chapters. However, to maintain integrity of the data sample, I provide a brief description of these segments in Appendix C.

5.4 Juridical Language and Epistemological Authority

There are two major streams of scholarship that inform the methodology of this research: the sociology of ethnicity (explained in greater details in Section 5.3) and the sociology of law informing the methods as to how I approached judicial decision making. Judicial decision making is akin to roles and normative expectations that embody an instrumental repertoire of skills necessary for proper enactment of judicial role. There is also an important and rich body of literature on legal processes emerging from the dynamics of language use rather than on understanding law and its use in the context of wider discourses in societies. Language is the fundamental component of this repertoire for, without it, no other skills can be enacted. The law, like any form of language, carries ideas and values. The language of the law classifies the world and represents identities and human agency. The law shapes, legitimizes, and naturalizes social practices. This language formalizes and naturalizes discourses disseminated by other institutions in society (Cheng & Machin 2023). Following Bourdieu's (1987) theoretical framework described in Chapter 4, there is a multiplicity of discursive effects in juridical language. As a methodology for this research, I am using a qualitative "discourse analysis" technique, with its emphasis on linguistic and symbolic strategies.

In this research, I examine whether—and how—variations in the articulation of ethnicity in federal court cases have been related to juridical language. Where appropriate, I built on the sociology of law to focus on the epistemological format and organization surrounding the concept of ethnicity. Given the variety of different contexts in the 36 cases examined, I contemplated classifying them according to the type of legal producing they arose in: criminal cases, human rights tribunals, refugee panels. However, it quickly became apparent that a better

approach would be to examine whether the juridical understanding of ethnicity is due to the specifics of its language, and its epistemological authority. To analyze the legal language, I took a closer look at how the judgments in these cases articulated the idea of ethnicity.

The effects in legal texts, according to Bourdieu (1987), are designed to mark the impersonality of normative utterances and to establish the speaker as universal subject, at once impartial and objective. I focused on cases where I was able to see the effects of neutralization and universalization, as well as the effects of legal terminology (legalisms). To remind the reader, the neutralization effect is created through a set of syntactic traits, such as the predominance of passive and impersonal sentence constructions, designed to establish the speaker as universal subject, at once impartial and objective. The universalization effect aims to produce an effect of fairness and is usually achieved using five types of discursive effects (Bourdieu, 1987: 820):

- (1) Using the indicative mood—that is, a sentence structure used to make factual statements, or to express opinions as if they were facts—to express norms.
- (2) Using constative verbs—that is, conveying a message that can be compared to reality, and found to be true or false—to express facts. For example: a person “accepts / admits / commits himself.”
- (3) Using indefinite tenses that reflect a timeless “juridical future,” designed to express the omnitemporality of the rule of law.
- (4) Using subjective values that presuppose the existence of an ethical consensus (for example: “acting as a responsible parent”).
- (5) Using fixed formulas and locutions, with no individual variation.

I determined that the most salient differences between the judgments related to epistemological authority. Like Valverde's approach, described in Chapter 4, I focused not only on how meanings are constructed, revised, and challenged, in an analysis of juridical language; I also highlighted the aspect of power/knowledge (as described earlier in Chapter 4). In other words, my goal was to explore the conceptualizations of ethnicity—including how these are used, by whom (judges and other parties), and in what contexts.

According to Valverde (2003), authority has the power to impose a universally recognized principle of knowledge in the social world, and that principle has a built-in tendency to empower only certain knowers. To examine how epistemological authority affects the judgments rendered in my cases, I posed the following four questions:

- (6) How is epistemological authority distributed when the concept of ethnicity is invoked?
- (7) Who is authorized to interpret acts, representations, and situations for legal purposes?
- (8) Why are expert witnesses considered appropriate in cases that do not involve technical matters, but inappropriate in very similar cases?
- (9) What is the status of testimony that lies somewhere between "fact" and "expert opinion?"

In attempting to answer those questions, I paraphrased Bourdieu's 1987 concept of how power relationships come to be perceived in a form that renders them legitimate to those subject to them. According to him, the law's "power of form" is its capacity to reproduce and continue its legitimacy in the eyes of those under its jurisdiction. Bourdieu connects this tendency with

Max Weber’s “formal rationality,” arguing that this formalization is a crucial element in the law’s ability to obtain and sustain general social consent; it is taken as a sign of the law’s impartiality. Still, regardless of whether the law is defined solely by legislation, or also by other normative orders, it must be accepted by its community. To be socially valid—that is, *legitimate*—the law must also be administered in a specific *legal* manner.

5.4.1 Segment vs. Case as a Unit of Analysis

In this subsection of my methodology, I explain why the decision was made to study the segments as opposed to the cases in its entirety. For a number of reasons, researchers may feel overly cautious about engaging with the law. For one thing, the stylistic features of law are off-putting. Some explain such language as being necessary for precision and for technical purposes, but to others such language must be viewed more critically as part of a creation of a mystification of law (Cotterrell 1996, 1998).

My methodology consisted of reviewing the cases in its entirety but the detailed analysis focused on the segments that constituted a corpus of data by a) selecting cases by means of a word search and b) limiting the text to be analyzed to a certain length (segment). When developing my research strategy, I found that all possible data selection methods came with certain limitations. My research methodology needed to be rigorous (fairly “objective” data selection criteria) and “repeatable” (if one follows the same methodology – arriving at the same or similar results).

Importantly, I have tried to establish a comparable measure in the cases selected by keyword. Since my data did not differentiate between the courts or tribunals, I had to limit the analysis of the case and only focus on deliberations dedicated to ethnicity per se. Otherwise, it would have been difficult to compare for two reasons. First, it would have been difficult to compare a multitude of entire cases because of the workload. The methodology of segments, by contrast, offered a possibility of reviewing multiple segments versus a few cases. Second, a SCC case cannot be compared to a tribunal judgment, neither by length, nor depth/complexity, nor by mere fact the SCC judgment format differs (dissenting views including). Analyzing segments of approximately the same length establishes a fair amount of comparability across these very heterogeneous cases.

Despite my lack of legal training, it is important to note that similar methodology has been used recently by legal scholars. For example, Xavier (2021) reviewed 829 cases from September 1997 to June 2020 of all of the provinces and territories, except Quebec in order to examine cases that resulted from the following keyword search terms in Westlaw (similar to the CanLII database but with a paid access only). Similar to my methodology, Xavier used keywords: “reasonable apprehension of bias race” and “reasonable apprehension of bias aboriginal” and of the 829 cases, identified 86 cases where the decision maker’s conduct gave rise to a predisposition to an outcome based on race. In Xavier’s research, the 86 cases were categorized based on the following distinctions: rejection of claims due to insufficient evidence to pierce judicial impartiality (56 cases); rejected recusal motions and or arguments because it was not raised at first instance (3 cases); decision did not deal with the reasonable apprehension of bias arguments raised by the applicants (2 cases); judicial backlash against antiracism (3 cases); frivolous and vexatious claims (7 cases); sent back to the original decision makers for

redetermination (4 cases); and successful predisposition to an outcome based on race and Indigeneity (11 cases) (Xavier, 2021: 372). In this manner, Xavier used paradigmatic cases to illustrate the colour blind approach taken by judges and adjudicators in deciding on race and Indigeneity.

Another feature of law that can be off-putting for a researcher beginning to work in the area is its self-referential nature, the legal discourse is known for its “autonomy”. This relates to how each part can reference, and be legitimized by other parts, suggesting a unified, consistent, and logical whole (Goodrich 1990). In each instance, the meaning of a particular law can seem evasive and immediately spread out to the case law that has built up through its use in the courts. This particular concern seems to be appropriately addressed by introducing methodology of studying segments with the objective of this particular dissertation. The internal and integral logic of a case decision, in which all parts matter, may be the case for a study with a stronger legal emphasis or for a case of a lower court decisions (whereas the judgments of SCC reflect the dissenting views and as such are less “integral”). Given the nature of language in case law, the text cannot be assumed to be some kind of rational code somehow existing “above” or external to the society where it is applied. Hence, for the purposed of my research, breaking the case law into meaningful segments offers a possibility of looking at the discourse without being pressured to preserve the internal logic of a case law argument.

Table 1: Preliminary Research Categories and Codes for Ethnicity and Located via Empirical Research

	Ethnicity as “Race”, Blood, Region, Cultural Practice and Language (deductive)			Open-ended Ethnicity (inductive)
Category	Blood	Region	Language/Tradition	
Preliminary (theoretical)	kinship, biological factors, genes, skin, and phenotype	territorial factors, citizenship	Language, tradition, shared value statements society	
Located (empirical)	<p>visible differences: race, racial background, racial origin Caucasian, non-Caucasian Asian, Oriental visible minority, visibility physical evidence, physical features appearance, colour dark skin, skin tone whites, non-whites</p> <p>kinship: last name descendants from original stock background of mother and father ancestral connection</p> <p>fixed characteristics: immutable, singular</p>	geographical area/part residence territory	social organization system of clans and crests shared customs, beliefs traditions, and characteristics language linguistic affiliation	Emphasis on human rights, humanity vulnerable disadvantageous changing (nature) historical context value of the past totality, context promotion of cross-cultural training (highlighting multicultural values)

6. ANALYSIS AND FINDINGS

6.1 The Make-up of Ethnicity as Blood Category: Your Name, Your Skin Colour, the Way You Look?

This chapter shares my findings from the 36 cases analyzed, focusing on 22 segments in cases in which the concept of ethnicity is blood-based. In subsequent chapters, I look at the other categories of ethnicity outlined in the research methodology. My objective here is to assess the content of the selected cases in order to uncover both the semantics of juridical language and how the legal language around ethnicity conveys epistemological authority. Because the cases that fall into the category of blood-based ethnicity often involve refugees (at large, cases to determine refugee status or assess the rights due to refugees and/or refugee claimants), this chapter focuses on that group.

In Section 4.1, I analyzed the various categories of ethnicity based on the existing schools of sociological thought. Based on the criteria for each category, I identified 22 segments of cases that came before the Canadian courts in which ethnicity was referred to or treated as a blood-based category (see Table 5). In this category, the preliminary codes included kinship, biological factors, genes, skin, and phenotype. Ethnicity in these judgments may be characterized as ascribed at birth and derived from kinship and blood, as in sociobiology.

To start, I introduce first the segment that provides greater clarity as to how the analysis was conducted and then, introduce the cases in chronological order. In 2002, a

young Hungarian man, Istvan Vodics, applied for refugee status in Canada, claiming that his Roma ethnicity had made him the victim of discrimination and persecution in his country of citizenship.¹² As part of the Canadian government's assessment of his application, the federal Convention Refugee Determination Division (CRDD) panel was called upon to decide whether the 24-year-old applicant would likely suffer from further persecution if he was returned to Hungary. At the hearing, based on what panel members believed Vodics' ethnicity to be, the panel disbelieved his evidence. Specifically, the panel concluded that Mr. Vodics was not ethnically Roma, believing that his fair skin, brown hair, and brown eyes were not uniquely Roma characteristics.

While the panel was ready to consider his claim that his mother was a visible Roma minority, since Vodics claimed she had dark hair and dark skin, Mr. Vodics did not provide the panel with a photograph of his mother, as requested, to prove this. The panel therefore drew "a negative inference from the absence of [that] photograph," which it "would have been reasonable for [him] to produce" (*Vodics v. Canada*, 2005 FC). In explaining its decision to deny Mr. Vodics refugee status, the panel emphasised physical appearance, ethnicity, and the relationship between the two. It stated that members were:

aware of the documentary evidence that there are some Roma who are fair-skinned, and there are some Roma who also have broken the barriers of

¹² The various terms used to refer to these groups of people include Roma, Romany, Manouches, Ashkali, Sinti, Gypsies, and Travellers, among other titles. In this work, the use of the term Roma is in no way intended to downplay the great diversity within the many different Romany groups and related communities, nor is it intended to promote over-generalizing.

discrimination. However, the panel believes that the preponderance of evidence in your claim, does not on a balance of probabilities establish that you are Roma. In fact, in the panel's opinion, the evidence points to the probability that you are in fact Hungarian (*Vodics v. Canada* 2005 FC).

In their decision, the panel also questioned the origins of the applicant mother's name, which was Pohancsenyi. They additionally noted that Mr. Vodics did not speak the traditional Romany language, nor practise many of the traditions of someone of that descent, without referring to any customs specifically as an example. (The applicant countered that this was not surprising, since he had been raised in an institution from the age of four.) Further, the panel pointed out that Mr. Vodics had a higher level of education than most Roma in Hungary, the majority of whom have only an elementary education. Other considerations included the small size of Mr. Vodics' family compared to other Roma families; his employment at McDonald's (in the context of high unemployment rates among Roma); his lack of knowledge of Roma public figures; and the area of Budapest where he lived. For these reasons, the CRDD panel concluded that Mr. Vodics could not be subject to ethnically-based discrimination in Hungary because, in their view, he lacked the physical characteristics (i.e. skin and hair colour) and social circumstances (i.e. education level, language, employment record) most associated with Roma.

Three years later, in 2005, Mr. Vodics appealed this decision to the Federal Court. In his ruling, the judge strongly rebuked both the CRDD's verdict and the criteria used to reach it. Significantly, the judge emphasized: "To disbelieve someone about his or her

ethnicity, which is a critical feature of his or her humanity, is a most serious matter requiring extreme caution and careful deliberation” (*Vodics v. Canada*, 2005 FC). In the judge’s view, the CRDD did not consider the value of the past as evidence in determining the prospective need for refugee protection. Instead, the panel focused its entire decision on what it believed was the applicant’s ethnicity, determined primarily on the basis of his physical features, presumed ancestry, and regional location. Like the Federal Court, I am perplexed by the CRDD’s reasoning in the case of Mr. Vodics. To me, it suggests a purely blood-based (or biologically-based) understanding of ethnicity. Clearly, to the panel, the brown eyes and fair skin of the applicant were more significant than the allegedly dark eyes and skin of his mother in determining his ethnicity. Yet what the CRDD understood as “ethnicity” in this case is essentially what the official records of Canadian history have commonly understood as “race” (Backhouse 2001). Overall, Segment 18 codes for ethnicity included codes for visible differences: *[dark skin]*, *[hair]*, and *[visible minority]*. The segment also included ethnicity codes for kinship: *[name]*.

A clear phenotypical nature of ethnicity was observed in Segment 1 where ethnicity was coded as *[Asian]* and *[race]* with a clear understanding that ethnicity is maintained via kinship *[descendants from the original stock]*. These codes appear in the first Canadian case to refer explicitly to ethnicity: *Narine-Singh v. Attorney General of Canada* (1955 SCC). In that case, the issue was that the appellants were “**Asians**” and, as such, excluded from Canada by Section 61(g) of the 1952 *Immigration Act*. The Act stated that the Governor in Council may make the regulations prohibiting or limiting of admissions of persons by reason of nationality, citizenship, ethnic group, occupation,

class, or geographical area of origin as well as peculiar customs, habits, modes of life, or methods of holding property. Both appellants were born in Trinidad, and in reply to the question “Of what **race** are you?” they answered (according to the judgment) “East Indian.”¹³ The judgment further states that the argument on behalf of the appellants was based on the wording of the previous 1910 Immigration Act (Kelly & Trebilcock 1998), which prohibited the landing in Canada of immigrants belonging to “any nationality or race.” In contrast, the newer the 1952 Immigration Act (which at that time had only been in effect for three years) authorized the making of regulations respecting (g) the prohibiting or limiting of admission of persons, by reason of (i) nationality, citizenship, ethnic group, occupation, class, or geographical area of origin. The use of the word **Asian** in the regulation was justified only by the words “geographical area of origin” (since it is “geographical,” the case appears in both categories). Since both appellants were from Trinidad (where their parents and grandparents were also born), their case did not fall within the statute.

As a result, the appellants submitted that the words “ethnic group” could not be interpreted as being equivalent to “race,” but rather should have a much narrower meaning. However, the judge—referring to the Oxford English Dictionary—held that the meaning of the word “ethnic” was “pertaining to **race**; peculiar to a race or nation; ethnological,” and that one of the meanings of “race” is “a group of persons connected by

¹³ It is unclear from the judgment itself why the appellants said they were East Indians, since Trinidad, in fact, is in the West Indies. Historically, millions of East Indians migrated to the West Indies to work in agriculture in the later 19th and early 20th century, and many thought of themselves as East Indians, even generations later.

common descent or origin. In the widest sense, the term includes all **descendants from the original stock**, but may also be limited to a single line of descent” (*Narine-Singh v. Attorney General of Canada* [1955 SCC]).

A few years prior to the 2005 Vodics case, a similar case took place in 1999. In it, the applicants, Josef Mitac and his wife and sons, claimed refugee status in Canada on the grounds of their **race**—stating that, as members of the Roma minority, they faced persecution in their home country, the Czech Republic. A clear connotation of ethnicity in reference to visible minority was observed in Segment 12 where ethnicity was coded as [*dark skin*], [*racial traits*] and [*physical features*]. In a judicial review of the tribunal case *Mitac v. Canada, Minister of Citizenship and Immigration* (1999 FC), the tribunal found that the applicants were not, in fact, Roma. It relied on three factors to support this conclusion:

- (10) the family did not have the usual **ethnic** or **racial traits** typical of European Roma; rather, they resembled persons from Pakistan or Turkey
- (11) the family could not prove that they spoke the Romany language, or were familiar with Romany culture
- (12) the parents could not identify the sub-group of Roma with which they were affiliated.

Although Mr. Mitac said that others would identify him as a Roma as a result of his **physical features** and **dark skin**, the panel responded that he—and especially his sons—did not appear to have typically Roma **features**; rather, the physical appearance of the claimants appeared to be more Near Eastern or Asian. I include this case in this

section because of the tribunal members' reliance on their own observations of the applicants' **physical features**.

A similar illustration of Roma ethnicity in the Czech Republic was found in Segment 14 in relation to the case of *Pluhar v. Canada, Minister of Citizenship and Immigration* (1999 FC). The claimants, Mr. Lubomir Pluhar, who was not Romany, feared persecution in his home country, the Czech Republic, because of his marriage to a woman who was perceived to be Roma. At the applicants' hearing, the Refugee Division focused on whether Mr. Pluhar's wife, Eva Pluharova, would be perceived as Roma. The panel made note of her **physical appearance: dark skin**, black hair and black eyeliner, heavy makeup, a fringed vest, and large, gold, hooped earrings. The panel concluded that she appeared to be accentuating the physiological traits and clothing traditions that the panel might associate with a female Roma person. The appearance of Ms. Pluharova was, in the view of the panel, unnatural: her skin tone had obviously been altered by heavy makeup and a dark suntan (either from hours of exposure to the sun, or hours spent in a tanning bed). In other words, the panel found Ms. Pluharova to be too stereotypical to be believable. Examining photographs of Ms. Pluharova, the panel concluded that her natural skin tone was much lighter than it appeared to be at the hearing and that, as a light-skinned person, she would not be perceived as Roma, and hence would not be discriminated against. As a result of this finding, the panel rejected the couple's refugee claim. Overall, segment 14 codes for ethnicity included codes for visible differences: *[dark skin]*, *[hair]*, and *[visible minority]*.

In Segment 13 of another judicial review involving the Immigration and Refugee

Board involved the case of *Lutete v. Canada, Minister of Citizenship and Immigration* (1999 FC). In this case, the applicant, Mgenbi Lutete, a citizen of the Democratic Republic of the Congo, attempted (along with her child) to claim refugee status. As the daughter of a Zairian mother of Rwandan Hutu origin, she feared persecution by the Congo government of President Joseph Kabila. Ms. Lutete claimed that the ethnic origin of her **mother** – kinship [*ancestral connection*], and her own **physical appearance** (similar to ethnic Hutus) put her at risk in her home country, where the officials are predominantly Tutsi.

As quoted in the review judgment, Ms. Lutete argued that the documentary evidence submitted to the Board established that the Hutus, and the majority of Congolese, are members of the Bantu group, and that their **physical appearance** is quite similar to one another. This led the Board to determine that the claimant (who lived in Kinshasa, the capital city of the Congo) would not, in fact, likely be persecuted by reason of her ethnicity. It appeared that neither Hutu nor Tutsi Rwandans, nor people with their physical characteristics, were targeted for persecution under the Kabila regime. For that reason, the Federal Court determined that the applicant and her child could not claim the status of Convention refugees.¹⁴

¹⁴ The meaning of Convention Refugee in Canada is defined under Section 96 of the *Immigration and Refugee Protection Act*: see <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef.aspx>. The page was last updated December 31, 2010; accessed March 13, 2018.

Similarly to Vodics case where a surname was questioned, in the Segment 4 of *LeDeuff v. Canada, Employment and Immigration Commission* (1986 CHRT), Mr. Jacques LeDeuff filed a complaint with the Canadian Human Rights Commission, alleging that the Commission had harassed him on the basis of his perceived ethnic origin. Because his **last name** sounded foreign (that is, French rather than “Canadian”), he was questioned about his immigration status. The case addressed the issue of whether the Canada Employment and Immigration Commission acted on a prohibited ground of discrimination, based on national or ethnic origin. The immigration officer, Mr R  al H  bert, explained his method for identifying illegal immigrants and landed immigrants who have committed crimes in Canada in detail. To do this, Canada Employment and Immigration Commission has developed a procedure, which it applies in all regions of Canada. Officers of the Canada Employment and Immigration Commission visited the registries of criminal courts and prepare a list of names which appear to be foreign or non-Canadian. R  al H  bert admitted that he did not follow any guidelines or apply any objective standards, and that he simply relied on his own judgment in trying to determine which of the persons on the roll might be in Canada illegally or be landed immigrants in conflict with the law. The judgment stated: “What could be more logical than to go to the registry of criminal courts, examine the names of those accused and verify the status of the persons whose names were selected?” (*LeDeuff v. Canada, Employment and Immigration Commission* 1986 CHRT). Since it did not appear that the procedure was directed against individuals of a particular race or national or ethnic origin, the panel members concluded that there was no discrimination aimed at differentiating adversely in relation to an individual or a group of individuals by applying the criterion of national or

ethnic origin. Further, the judgment stated that “If the evidence had shown that Réal Hébert systematically looked for names of a particular origin, race or ethnic group, it might be possible to claim that the investigation procedure was directed against a specific origin, race, or ethnic group” (*LeDeuff v. Canada, Employment and Immigration Commission* 1986 CHRT). Similar to the Vodics case, the Segment 36 of the judgment in LeDeuff case is categorised in “multicultural ethnicity” in Chapter 11.

In the same way as in the Vodics case, where physical appearance was questioned, in the Segment 5 of *Hum v. Royal Canadian Mounted Police* (1986 CHRT), a complaint was brought by Mr. Gordon Hum, a Chinese-Canadian citizen who was born in Halifax, Nova Scotia. The complaint centred on the fact that the RCMP had asked Mr. Hum to verify his identity during a random traffic stop, based on the fact that he was a visible minority. At that time, in 1986, the RCMP would question persons of “foreign ethnic background” by checking the documentation of visible minorities to see if they had the legal right to be in Canada (as part of an effort to prevent people from entering or remaining in the country illegally). The RCMP would conduct random stops and check individuals by means of **physical evidence** such as their dress, speech, customs, and **appearance**, in order to determine their status under the *Immigration Act*. As noted in the judgment for the case, the Act required RCMP officers “to identify all aliens, whether they are **Caucasian** and have a good command of the English language, or whether they are **non-Caucasian**” (*Hum v. Royal Canadian Mounted Police* (1986 CHRT).)

This chapter focused on the blood-based and geographical categories of ethnicity. In total, of the 36 cases I examined, 22 segments appear in this category, confirming the

terminological closeness of race and ethnicity.

While 5 of the 22 segments (roughly 23%) in this group dealt with refugee issues, my study suggests that definitions of ethnicity that are based on blood indicate a broader trend to associate such conception of ethnicity with refugee claims. The broader trend is based on the proportionality of the cases reviewed. Just as with the initial review of 315 cases, 56 dealt with refugee issues (while that figure was only 18%, that percentage was the highest). Similarly, the 23% (5 cases) is the highest percentage in this categorization. In judgments in these five cases, the individuals' characteristics were considered to be ascribed at birth and to derive from kinship. In *Vodics v. Canada* (2005 FC), the CRDD panel decided almost arbitrarily what the applicant's "true" ethnicity was, as distinct from what he claimed it was. In the 1999 *Mitac v. Canada* case, the tribunal again decided that the family did not have the usual ethnic or racial traits of European Roma. In addition, in 1999, a judicial review of *Lutete v. Canada* determined that the Congolese applicant and her child did not qualify as Convention refugees, because the Hutu claimants would not likely be persecuted by Rwandan Tutsis for their ethnic group.

Several non-refugee cases in the blood-based category of ethnicity involve cases of random traffic stops of visible minorities or foreign-sounding last name verifications by police or immigrations services.

Ethnicity in the 36 legal judgments I examined may be characterized as being ascribed at birth and derived from kinship and blood. For that reason, in the following section I emphasize the terms that follow this view of ethnicity, putting in bold the codes

that indicate a blood-based perspective. To summarize, the new codes from the sample above included references and factors such as:

- **Visible differences:** race/racial background/racial origin, Caucasian/non-Caucasian/Asian/Oriental, visible minority, visibility, physical evidence, physical features, appearance, dark skin, skin tone or colour, etc.
- **Kinship:** last name, descendants from original stock, background of the mother and father, ancestral connection
- **Fixed characteristics:** immutable, singular

The latter category appears relatively late in my survey period, around 2000–2010. Some terms that I expected to find in my data sample, but did not, include phenotype, biology, and genes.

My first finding is that there are many similarities between how ethnicity has been viewed in the cases examined here (stemming from 1950 to 2009) and how race has been adjudicated prior to adoption of multiculturalism policies, for the period 1900–1950 (Backhouse 1999a). Within the limits of my sample, I discover that ethnicity kept being referred to as background/racial origin, visible, physical evidence, kinship, geographical area/part, residence, territory, beliefs, and traditions. I discuss this finding in greater detail in Chapter 7.

6.2 Framing of a Legal Discourse— “Common Knowledge” of Ethnicity

The previous section of Chapter 6 presented my analysis of text segments where ethnicity is equated with biological “blood-based” characteristics. This analysis was framed by the sociology of ethnicity. In this section, I analyze cases and text segments that reveal the legal discourse in judgments that refer to ethnicity. I examine the strategies used by judges informed by the sociology of law. Specifically, the following subsections explore the legal language surrounding ethnicity by examining it through the lenses of neutralization and universalization (as described in Section 5.5). It also explores framing of legal discourse by means of examining legal language and its specific terms.

6.2.1 Ethnicity as “a Natural and Unalterable Fact”? Immutability.

The legal world’s interpretation of ethnicity in the blood-based cases I reviewed comes about via a multiplicity of discursive effects in juridical language, as I described in the methodology in Chapter 5. To remind the reader, legal texts are designed to render normative utterances impersonal, and to establish the speaker as impartial and objective, as explained by Bourdieu (1987). That neutralization effect is created through a set of syntactic traits, such as passive and impersonal constructions. The universalization effect, which aims to impart an aspect of fairness, is achieved through the use of types of discursive effects such as systematic recourse to the indicative mood for the expression of norms; the use of constative verbs in the present and past third person singular; the use of

indefinites and of the intemporal present “juridical future” designed to express the generality or omnitemporality of the rule of law; reference to trans-subjective values presupposing the existence of an ethical consensus—for example, “acting as a responsible parent”; and/or recourse to fixed formulas and locutions, which gives little room for individual variation between actual experiences (Bourdieu 1987: 820).

An example of the universalization effect of ethnicity can be found in the Segment 6—a quotation from Professor Dale Gibson, a Professor of Law, in his testimony during the discrimination case of *Headley v. Public Service Commission Appeal Board* (1987 FCA). The applicant, Denise Headley, had applied for a position with the Department of Manpower and Immigration, only to be told that she lacked the necessary language qualification to be considered for the post. However, that qualification was only put in place in several months earlier and was still not required of incumbents in similar positions. The case itself addressed the issue of whether it was a Charter violation for the Department to require such a qualification. When the Public Service Commission Appeal Board heard the case, it rejected Ms. Headley’s argument under Section 15 of the Charter. However, the Federal Court of Appeal indicated in its judgment that the earlier decision erred in law. Professor Gibson opined that the creators of the Charter attributed certain characteristics to ethnic origin:

In particular, the fact that the drafters spelled out as grounds the principal **natural and unalterable facts** about human beings—race, national or ethnic origin, colour, religion (admittedly, not wholly a natural and unalterable fact), and sex—can only mean, I believe, that **non-trivial**

pejorative distinctions based on such categories are intended to be justified by governments under Section 1, rather than to be proved as infringements by complainants under Section 15 (*Headley v. Public Service Commission Appeal Board* [1987 FCA], my emphasis).

Professor Gibson’s statement largely refers to the distinction between Sections 2 and 15(1) of the Charter: while Section 2 of the Charter guarantees that all Canadians are free to follow the religion of their choice, Section 15(1) makes it clear that every individual in Canada—regardless of race, religion, national or ethnic origin, colour, sex, age, or physical or mental disability—is to be treated with the same respect, dignity, and consideration. Yet he still seems to take for granted that aspects of ethnic origin can be described as natural and unalterable, as well as non-trivial and pejorative.

The Segment 19 of another case *Granovsky v. Canada, Minister of Employment and Immigration* (2000 SCC) features immutable characteristics of ethnicity. I found that this case treated ethnic origin as immutable in comparison to disability:

Disabilities are certainly not “**immutable**” in the secondary sense of “[n]ot varying in different cases” (New Shorter Oxford English Dictionary (1993), vol. 1, p. 1317). **Unlike gender or ethnic origin, which generally stamp each member of the class with a singular characteristic,** disabilities vary in type, intensity, and duration across the full range of personal physical or mental characteristics (my emphasis; *Granovsky v. Canada, Minister of Employment and Immigration* (2000 SCC).)

Later on in 2007, immutability is referred to in the Segment 20 of the case of *Baier v. Alberta* (2007 SCC). This case discussed how to identify analogous grounds like the ones enumerated in Section 15(1) of the Charter: race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. In this case, the judgment stated that what the enumerated grounds had in common was the fact that:

they often serve as the basis for stereotypical decisions made not on the basis of merit, but on the basis of a personal characteristic that is **immutable** or changeable only at unacceptable cost to personal identity [...]. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making (*Baier v. Alberta* (2007 SCC).)

Though *Baier v. Alberta* (2007 SCC) does acknowledge the stereotypical nature of the enumerated grounds and decisions made on the basis of a personal characteristic that is immutable or changeable, there is no further discussion about ethnicity or race. *Baier v. Alberta* (2007 SCC) considers how to identify analogous grounds like those

enumerated in s. 15: race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

6.2.2 An Ordinary Person: “Standard Behaviour Peculiar to the Race”

The concept of an “ordinary person” is another legalism that appears in the case segments pertaining to ethnicity. The literature review in Chapter 3 described the concept of “the reasonable person,” a central figure in the law, as inherently male, privileged, and non-ethnic (Moran 1999). The reasonable person is a legal concept from common law representing an objective standard against which any individual’s conduct can be measured. In essence, the standard holds that each person behaves as a reasonable person would under the same or similar circumstances.

The Segment 3 directly invoked the “ordinary person” standard in case *R. v. Hill* (1986 SCC), which raised the issue of whether the term “ordinary person” meant a person of the same age and sex as the accused. If an altercation occurred in which one man, of a particular colour or ethnic origin, said things to another man that were grossly insulting, should the jury consider whether the words would have similarly provoked a man of a different ethnic origin? The judgment in that case cited *R. v. Parnerkar* (1971), in which the Saskatchewan Court of Appeal held that the cultural and religious background of the accused was not relevant. The accused, born in India, argued that he was provoked to murder when the woman he wanted to marry told him: “I am not going to marry you because you are a black man.”

The Court's ruling, similar to the referenced *Bedder v. Director of Public Prosecutions* (1954), narrowed the concept of the ordinary person, and prohibited consideration of the ethnicity of the accused. Although the derogatory use of the word "black" might have been particularly galling to the accused, an Indian man, the court ruled that the expression was not one that would deprive an "ordinary person" (a concept similar to that of a reasonable person) of the power of self-control. The judgment further stipulates that:

It would certainly undermine the principle of equality if the jury in *Parnerkar* were instructed to evaluate the accused in accordance with a standard of behaviour peculiar to his **race**. Whereas it is permissible to take into account factors such as the **ethnic identity, language** or physical infirmity of an accused for the purpose of giving the insult context, it would violate the principle of equality to assert that the reaction of a person of a certain **ethnic or linguistic group** to an insulting remark must be measured against a different standard from that applicable to others. Likewise, it would undermine the principle of individual responsibility if the jury in *Bedder* were instructed to fashion a special standard of behaviour against which to measure the actions of a person with his particular physical disability. (*R. v. Hill* (1986 SCC))

That judgment argues that the objective standard applies to a person's mental state, rather than to attributes that simply place the insult in its cultural context. It could be said, however, that the legal "ordinary person" standard deprives the defendant of an

appropriate cultural context, thereby putting defendants from minority cultures at a disadvantage. As Mayo Moran points out, this fact plays an important role in discussions of the objective standard: “The qualities of common-sense reasoning come most to the fore in articulating the importance of assumptions about what is normal” (Moran 1999: 164).

The rhetoric surrounding the objective standard confirms the systematic entanglement between the normal, the reasonable, and the ordinary—assumptions which are, in fact, very difficult to define or justify. Such troubling reliance on those assumptions calls into question the notion of equal protection for Canadian citizens, and, as Moran suggested, the objective standard operates very differently for different groups of litigants.

Building on the sociology of law, in this section, I explored the framing of legal discourse and the strategies used by judges in the cases with respect to ethnicity understood in terms of blood and region. In particular, I examined the legal language surrounding ethnicity through the lenses of neutralization and universalization and its specific terms. My second finding is that there are post-Charter cases that treat ethnicity and ethnic origin as “immutable.” Over the six decades covered by this study, I found that references to visual or blood-based identifiers of ethnicity were replaced by more generalized references to ethnicity as immutable—possibly due to universalization effect such as a recourse to fixed formulas. The universalization effect created by using words of Latin etymology is argued to be designed to establish the speaker’s universality and impartiality. Similar to legalisms, which are homonymic collisions (or

misunderstandings) that might result from the confrontation of two signifiers within the same space between the users of learned codes (legal actors) and laypeople (Bourdieu 1987). For example, the above mentioned citation of the judgment in the case of *Baier v. Alberta* (2007 SCC) considers how to identify analogous grounds like those enumerated in s. 15: race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. These “often serve as the basis for stereotypical decisions made not on the basis of merit, but on the basis of a personal characteristic that is immutable, or changeable only at unacceptable cost to personal identity” (*Baier v. Alberta* 2007 SCC). The immutability of a marker is central to American antidiscrimination law. It is the most common approximation to physical characteristics, according to Christian Joppke (2017: 3334), even if incomplete: height, for instance, is immutable, but mostly not included, whereas religion, which is mutable, is included.

Equally important is the use of the concept of an “ordinary person” as another legalism that appears in the case segments pertaining to ethnicity. By using the concept of the ordinary person, and prohibited consideration of the ethnicity of the accused in essence in the sample, the court accepts that each person behaves as a reasonable person would under the same or similar circumstances. The legal language, such as *ordinary person* or *immutability*, tends to disadvantage individuals from minority cultures.

The analyses of ethnicity that is based on tradition are consistent with the observations of other scholars, such as Mariana Valverde (2003). Namely, they illustrate how the law shapes the world it claims to adjudicate. This is similar to the patterns of social life, in Valverde’s view; people or groups apprehend the world in accordance with

their existing cultural codes, thus making it more comprehensible and meaningful for them. Valverde reached this conclusion by focusing on the acts or identities that emerged as “lifestyle” and “community.”

6.3 Epistemological Authority

In this section of my analysis, I continue my examination of epistemological authority. I start by describing the category of ethnicity as language and tradition. I also continue with the analysis related to the cases where ethnicity is categorized as blood or region. As described earlier, following Valverde (2003), the law’s claim to enact justice depends crucially on the concept of “common knowledge”—which goes beyond the small facts known to individual witnesses, and even beyond the general facts known to experts. Legal culture and common knowledge are dimensions of power that work together. In a trial, the confrontation between two parties is resolved by the official pronouncement of the judge, whose “authority” is granted by society through the state. In order to examine that authority, I pose two questions: how do courts, tribunals, and panels address the concept of ethnicity? And, what kind of knowledge is required to make a decision?

These questions address the fraught relationship between epistemological bodies of knowledge, and the all-too-human bodies that actually appear in courts—a relationship often neglected by scholars who engage in discourse analysis or textual deconstruction.

The academic study of this relationship is in contrast to the rule of evidence, which makes it very clear that knowledge is always site-specific (Valverde 2003: 22). The close relationship thus established between a person, a witness, and a body of knowledge is what distinguishes the law from other arenas of adjudication. In a scientific peer review, for instance, the personal character of the person presenting the facts is precisely the information that is excluded. The power of such an authority is to impose a universally recognized principle of knowledge of the social world and empower specific knowers.

6.3.1 Ethnicity as Language or Traditions

In selecting the cases where judgment refers to ethnicity—introduced below—I looked above all for cases in which ethnicity, when referred to, emphasized the language and/or traditions. The linguistic affiliations referenced here include French- and English-speaking Canadians; other descriptors of ethnicity are defined in terms of social organization, shared customs, beliefs, traditions and characteristics, and systems of clans and crests.

I first described the case of *Hum v. Royal Canadian Mounted Police* (1986 CHRT) in Section 7.1, since references to ethnicity in that case contain elements of the blood-based category. In this case, a complaint was brought against the RCMP by Mr. Gordon Hum, a Chinese-Canadian citizen who was born in Halifax, Nova Scotia. The officers stopped Mr. Hum, who was a visible minority, to verify his identity—as was the policy at that time for persons of “foreign ethnic background.” In addition to visible

appearance, the Segment 28 refers to another code used to identify aliens: the fact that they might have difficulty with the English language. In this sense, in stopping Mr. Hum the RCMP officers made both racial and linguistic conclusions.

The Segment 29 of *Headley v. Public Service Commission Appeal Board* (1987 FCA) reviewed an earlier decision of the Department of Manpower and Immigration. In this case, Ms. Denise Headley's application to for the position of "CR-4, Reception Information Clerk" for the Toronto West Canada Immigration Centre was screened out because of linguistic proficiency. She did not have proficiency in the use of one of the six languages (Vietnamese, Chinese, Polish, Portuguese, Italian, Spanish) the employer had specified as a basic requirement in the statement of qualifications for the position. Headley appealed the department's decision, arguing that the Department's new language requirement violated Section 15 of the Charter, and imposed on her a qualification that had not existed in the past. The case focused on discrimination based on language requirements, and the judgment explored the violation of Charter rights.

A somewhat similar case is *Devine v. Attorney General of Quebec* (1988 SCC), which again involves the Segment 27 on language rights—specifically, the rights of ethnic groups in Quebec to publicly post signs and fliers announcing cultural activities in both the French language and the language of their linguistic group. And, in the 1989 case of *Mossop v. Secretary of State*, detailed in Chapter 7, the issue of language was introduced by an expert witness in Segment 30.

In the Segment 31 of the case of *Kabashi v. Canada, Minister of Citizenship and Immigration* (1998 FC), in which the applicant, Mr. Sokol Kabashi, claimed to be an ethnic Albanian from the (former) Yugoslavian province of Kosovo. To test Mr. Kabashi's Serbo-Croatian language skills, the CRDD administered "a very basic [language] test," and found his knowledge of his supposed mother-tongue to be "spotty." He was reasonably fluent when demonstrating what he knew but did not do well when asked to translate words chosen by the panel. In its judgment, the CRDD concluded that the claimant, "knowing that language testing is frequently used to help determine whether someone is really from Kosovo, has learned some of the language for purposes of this hearing" (*Kabashi v. Canada, Minister of Citizenship and Immigration* (1998 FC).)

Similarly, in the Segment 31 of Mitac case of 1999, in which the applicants claimed to be Roma, the tribunal found that, aside from being apparently unfamiliar with the Romany culture, the family also could not speak the Romany [language]. Their refugee claims were therefore denied.

The Segment 35 belongs to *R. v. Spence* (2005 SCC) case, in which an African-Canadian man was charged with robbing an East Indian. The accused challenged the prosecution's selection of jurors, arguing that East Indians would likely feel a natural sympathy for a victim of the same race. Further, the accused argued that such race-based sympathy would compound any potential racial prejudice against a Black man charged with a crime. The trial judge permitted the defence to challenge potential jurors for cause, but refused to extend the challenge to race since he regarded the "interracial" element of the case as irrelevant. After the accused was convicted, he again argued on appeal that he

was deprived of his right to an impartial jury. The Court of Appeal set aside the conviction, holding that an accused in an interracial crime is entitled to challenge the jury; the Supreme Court reversed that decision and upheld the conviction, deeming that the Court of Appeal had exceeded its proper limits.

At issue in the Spence case was the concept of judicial notice, which is best described as a “fast-forward” tool that allows a court to accept, without evidence, a variety of facts which are held to be common knowledge—things that “everybody knows.” The existence of racism is one such fact, as is the likelihood that anti-black sentiment is aggravated when a victim is white. However, there is no similar consensus that a juror of a particular ethnicity is likely to favour a complainant (or a witness) of the same race, especially if the judge has instructed them to the contrary. In the Spence case, ethnicity was mentioned only in the context of the Court’s attempt to draw the “fairness” line (Segment 35). The Johnson article cited above also referred to findings that shows that a defence lawyer’s race can impact whether their client is found innocent or guilty, finding a consistent bias. In 1985 Johnson in the article “Black Innocence and the White Jury” sets forth a large body of social science research that reveals the tendency among whites to convict black defendants in instances in which white defendants would be acquitted. While the article seems highly appropriate for the issues of this case, the judgment does not cite this study further. Instead, the next lines of the judgment cite the study by R. M. Bagby and N. A. Rector, “Prejudicial Attitudes in a Simulated Legal Context” (1991), 11 *Health L. Can.* 94, referred to by Doherty J.A. in *Parks*. Notably,

the judgment in *R. v. Spence* contained an analogy between English-speaking and French-speaking Canadians:

English-speaking Canadians were provided with a modified court transcript of a rape trial [in which] the ethnicity of the defendant and the victim were varied. The study found that [the subjects] viewed **French-speaking** Canadians more positively than either English or native Canadians. The victim was viewed more positively when she was French, and the accused was seen as more guilty when the victim was French (*R. v. Spence* (2005 SCC).)

Michael Bagby and Neil Rector's research explores the theoretical parameters of social identity theory and utilizes artificially created ingroups and outgroups. Their study aimed to examine the propositions of social identity theory between naturally existing groups (French and English Canadians) where the dependent measure was more consequential than typical ratings within this experimental paradigm. Subjects read a transcript of a rape trial which varied the ethnicity of the defendant and victim and were asked to rate the victim and defendant on 18 adjectives and then determine the defendant's guilt on a 7-point scale. While the results are not entirely consistent with the predictions emanating from social identity theory, the study found that French Canadian subjects rated the outgroup (English) defendant guiltier when the victim was from the ingroup (French) than when she was from the outgroup (English), as was anticipated.

Justice Binnie in the *Spence* case further posed a question: "Can such complications of race and ethnicity be followed up as a matter of fairness without

embracing the American model which, to date, Canadian courts have declined to do?” (*R. v. Spence* 2005 SCC). While this case acknowledges that the racial prejudice against visible minorities is indisputable that its existence is to be admitted without any need of evidence, equating matters of race with language based on the study English- and French-speaking Canadians seems to heighten the issues related to language to the same level as the issues of race.

6.3.2 “Facts” by Refugee Board Panels

The most frequent situations where I encountered the concept of blood-based ethnicity were in the cases involving a dispute over refugee status. Here, epistemological authority was embodied by the Immigration and Refugee Board, particularly its Refugee Protection Division, whose panel members were mandated to interpret the representations made by refugees for legal purposes. This could include defining physical appearance such as skin colour—as, for example, in the Segment 12 of the *Mitac v. Canada* case of 1999. Although Mr. Mitac claimed that others would identify him as Roma because of his dark skin, the panel decided that his physical features suggested that he was of Pakistani or Turkish ethnicity. It did not seem to occur to them that the claimant’s features were, in fact, those one might customarily attribute to persons claiming to be Roma.

The panel’s ability to correctly distinguish the physical attributes of the claimants was also questionable in the Segment 14 of the 1999 Pluhar case. That judgment by the Immigration and Refugee Board contained a disclaimer that the panel did not “pretend to be expert in the physiological characteristics of Roma.” Yet despite acknowledging its

limitations, the panel nonetheless claimed that it used “common sense in assessing the physical appearance of the female claimant” (*Pluhar v. Canada, Minister of Citizenship and Immigration* (1999 FC).) Although it was Ms. Pluharova herself who based her claim that she was Roma on her physical appearance, asking the panel to make its determination primarily on the basis of her skin tone, the panel could (and should) have paid more attention to the rest of the applicants’ testimony, in turn evoking more complex definition of ethnicity. In this case, however, it did not appear to the panel that the claimant had the features one might customarily attribute to persons claiming to be Roma.

Very similar in this regard is the Segment 18 of *Vodics v. Canada* (2005) case. As described in the Introduction, the panel disbelieved the applicant’s evidence of his ethnicity based on the claim that his mother, who had dark hair and dark skin, was Roma. The panel members pointed out that the applicant’s very fair skin, brown hair, and brown eyes were not uniquely Roma characteristics.

The judgments of the Immigration and Refugee Board in the Mitac, Vodics and Pluhar cases are at odds with contemporary scholarship on identity. In those three cases, Roma identity was understood in terms of common properties and characteristics. Schools of thought in this tradition depict Roma’s ethnic group identity as a historical diaspora: a once-bonded but now fractured community, with common historic roots and common patterns of migration; issues of lifestyle and behaviour, including common cultural practices: religion, habits, rules, cleanliness (or lack thereof), musical traditions, dress, animals, etc; interpretations of the world (sometimes referred to as gypsiness). For

example, Peter Vermeersch (2007) points out that a radical version of the lifestyle perspective argues that the Roma are related to one another exclusively in terms of their behaviour; he concludes that for this reason, they should not be seen as an ethnic group. Their emphasis is not on their common origin, but rather on its effects on the matter of their lifestyle and habits. Unfortunately, some of the literature from that perspective tends to preserve the negative stereotypical thinking about the Roma as inherently nomadic and marginal, as represented in popular culture by the figure of the gypsy. Nevertheless, most studies do accept the existence of a Roma ethnicity, and even agree with the thesis of a common origin in India. Comparing this academic debate to the judgments rendered by the refugee board, it not only appears doubtful whether the panel had any specific process for establishing a claimant's ethnicity based on his/her physical features, but the mere fact of suggesting that he/she looked like a person of a different ethnicity reveals that the panel approached the idea of "ethnicity" from a narrow perspective, focusing only on physical features. While scholars recognize shared physical features as part of ethnicity, they do not focus just on physical characteristics and also draw attention to broader context (habits, ways of knowing).

Most importantly, my analysis of the judgments shows many similarities between how ethnicity has been viewed since 1950, and how race has been adjudicated since 1900. Constance Backhouse's 1999 study of racial identity in Canadian law concludes that, although she does not use that specific term, epistemological hybridity was the norm. She points out that egal decisions had been based on an amazing array of factors:

language, customs, and habits, mode of life, manner of dress, diet, demeanor, occupation, wealth, voting history, religion, blood, skin colour, head shape, hair texture, thickness of lips, beard characteristics, facial features, teeth size, eye shape and colour, nasal aperture, cranial capacity, stature, intermarriage, adoption, legitimacy at birth, place of residence, reputation, and the racial designation of one's companions, to offer just a few examples (Backhouse 1999a: 54–55).

While Backhouse's study covers the period from 1900 to 1950, my study suggests that based on the sample of my study, there seems to have been little progress since that time. In the legal cases I analyzed, ethnicity definitions closely parallel hers, as I described earlier:

- **Visible differences:** race/racial background/racial origin, Caucasian/non-Caucasian/Asian/Oriental, visible minority, visibility, physical evidence, physical features, appearance, colour, dark skin, skin tone
- **Kinship:** last name, descendants from original stock, background of the mother and father, ancestral connection
- **Fixed characteristics:** immutable, singular

Even more puzzling than the decisions of and criteria used by judges and refugee boards panel members are the questions of how and why they are considered qualified to make decisions in some cases.

6.3.3 Expert Witnesses

The function of an “authority” is to impose a universally recognized principle of knowledge of the social world through a format whose built-in tendency is to empower specific knowers (Valverde 2003). Here I pose a similar question to that posed about panel members and judges: why are expert witnesses considered appropriate in some cases but inappropriate in others, and what is the status of their testimony? In only 3 cases of the 36 selected for in-depth analysis were expert witnesses asked to testify on issues related to ethnicity. These experts are the focus of this section, particularly with their role in reference to the region-based concept of ethnicity. The experts in these cases were from various disciplines, including archeology and family policy.

One of the cases in which an expert witness was called in to provide testimony on ethnicity provides a striking contrast to the others: the sexual discrimination case of *Mossop v. Department of Secretary of State* (1989 CHRT). Specifically, the Segment 30 in the Mossop case brings forward the contextual nature of ethnicity. The case itself had very little to do with ethnicity per se. The complainant, Mr. Brian Mossop, attended the funeral of the father of his partner, and applied to his employer for bereavement leave; the request was denied, since the relationship was not a family one. At the hearing, Dr. Maya Eichler, an expert in the field of sociology and family policy, discussed other *family-like* relationships. From a family policy perspective, Dr. Eichler emphasized the importance of looking at “**relationships as they are**” in determining the ethnic origin of

a child. She gave the example of a child whose natural parents or step-parents may be of different ethnic origins and may speak different languages from their children. Dr. Eichler noted that Statistics Canada had adopted a definition for **ethnic origin** that considered a number of factors, including the background of the mother and father, the language spoken at home, and the child's actual identification.

While the expert witness in sociology looked at the importance of current relations and experiences affecting actual people, the expert witnesses in archeology and ethnology focussed on different sets of issues, removing ethnicity from the context of everyday life. The expert witnesses provided two different conceptions of ethnicity: one in which it was rooted in human relations and lived experiences, and the other in which it was predetermined by factors beyond a person's control. It should also be noted that the judicial review of the *Mossop* case (not part of this dissertation) remains one of the few decisions of the Supreme Court of Canada where comments on multiple grounds of discrimination were noted as intersecting. In the Supreme Court decision, the social context and life experiences of persons who suffer multiple forms of discrimination were discussed. Writing for the minority in the *Mossop* case, Madam Justice L'Heureux-Dubé remarked that: "it is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap or some other combination" (*Mossop v. Department of Secretary of State* (1989 CHRT)). She further commented that categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.

My third finding concerns aspects of ethnicity as language and tradition.

Language appeared as a marker for ethnicity in mostly in cases pertaining to issues of bilingualism, but also issues related to discrimination, refugee, and Indigenous Peoples cases; in these cases, language concerned claims for equal representation and economic resources. As these cases and the use of function of language in them illustrate, language in legal proceedings tends to embody social and cultural identification—one that can be taken for granted and used in different ways to identify the sameness (or difference) of oneself and others. These social or cultural identifications vary depending on the case matter. In contrast to the cases of bilingualism cited above, in a few refugee cases, the claimant was denied the status of refugee on the basis of a language *not* spoken—such as in the Vodics, Mitac, and Kabashi cases. The first two of these cases hinged on the applicants’ inability to speak the Roma language, the third on the applicants’ inability to translate English words into Serbo-Croatian. In the Rivers case, it was a feature of expert testimony that the Squamish and Gitksan languages were mutually unintelligible. And in the Hum case, the RCMP’s “harassment” of the complainant seemed to be based solely on his “difficulty” with the English language. Unfortunately, the sample did not contain enough examples to develop a theme of ethnicity being defined in large part based on shared societal values and cultural affinities.

At large, my goal in this section was to examine the cases for examples of common knowledge as it relates to ethnicity. As I explained in Chapter 4, Bourdieu created a theoretical framework for analyzing common knowledge by theorizing that judges’ use of common knowledge becomes part of their professional capital (Bourdieu

1987b). This common knowledge is supposedly a body of awareness that extends beyond the small facts known to individual witnesses, and even beyond the general facts known to experts (as pointed out by Mariana Valverde in her 1978 book *Law's Dream of a Common Knowledge*). Since the epistemological space of common knowledge is not a static sphere, its practical meaning depends on how it is used, by whom, and in what context. As I mentioned earlier, the close relationship between a person, a witness, and a body of knowledge constitutes legal authority. But this authority does not work in the same way for all agents and therefore it cannot be investigated with any one approach, nor even a combination of methods. Different situations call for different sources and types of investigation. However, through my analysis, certain similarities between how ethnicity was viewed since 1950 and how race was adjudicated since 1900 (Backhouse 1999) in Canadian law can be observed. It seems plausible to suggest that epistemological hybridity remains the norm and legal decisions continue to be based on an astounding array of factors. In addition to the factors such as language, customs, and habits, mode of life, manner of dress, diet, demeanor, occupation, wealth, voting history, religion, blood, skin colour, head shape, hair texture, thickness of lips, beard characteristics, facial features, teeth size, eye shape and colour, nasal aperture, cranial capacity, stature, intermarriage, adoption, legitimacy at birth, place of residence, reputation, and the racial designation of one's companions, observed by Backhouse in her study that covers the period from 1900 to 1950, my study adds the following traits to the list helping to determine ethnicity: race/racial background/racial origin, Caucasian/non-Caucasian/Asian/Oriental, visible minority, visibility, physical evidence, physical features, appearance, colour, dark skin, skin tone, last name, descendants from original

stock, background of the mother and father, and ancestral connection.

As described in Section 6.1, the most frequent situations where I encountered the concept of blood-based ethnicity were those involving disputes over refugee status. In such cases, the epistemological authority was distributed among the panel members, regardless of the claims of the applicants. As I mentioned earlier in the context of the Mitac case and others, it was they who were authorized to interpret representations of claimants in order to define physical characteristics such as skin colour.

6.4 Building Towards an Open-Ended Ethnicity

The objective of this section is to explore whether the court judgments and text segments included in my sample contain versions of what I have termed “open-ended ethnicity” earlier in this dissertation. Informed by academic knowledge in sociology, I searched for this fluid open-ended ethnicity in my data sample by associating it with the following criteria: human rights, humanity, vulnerability, disadvantageousness, changing natures, historical context, value of the past, totality, context, cross-cultural training, and the highlighting of multicultural values. While there is no clear-cut deductively derived definition of open-ended ethnicity, its contours emerged inductively in 11 segments of the judgments included in my sample.

This section is subdivided into four sections. In Section 6.4.1, I describe the range of cases where the definition of ethnicity is based on the context rather than on the

“natural” facts. Section 6.4.2 describes the cases where ethnicity is defined as acknowledging history, human rights and/or is based on vulnerability. Section 6.4.3 discusses the discursive effects of universalization and neutralization.

6.4.1 The Contextual and Changing Nature of Ethnicity

Is it possible to think about ethnicity differently than in blood- or region-based concepts explained above? Is it possible to think about ethnicity as not being treated as a natural fact? In *LeDeuff v. Canada, Employment and Immigration Commission* (1987 CHRT), Mr. Jacques LeDeuff was asked to verify his immigration status because his name sounded “foreign”. He filed a complaint that he was differentiated and harassed on the basis of perception of his national or ethnic origin (i.e. he was perceived as being other than Canadian). According to the officer in the case, this was standard practice of the respondent (the Canada Employment and Immigration Commission). Since the Commission derived its authority from an act of Parliament of Canada, it was carrying out its official duty as an agent of the Crown and thus was providing a service to the public. Accordingly, the tribunal judged that the Commission was obliged to refrain from acting on a prohibited ground of discrimination. This understanding of ethnicity is different from what was observed in the category of ethnicity as blood. Specifically, the Segment 36 reveals that a person’s name is not a natural fact, nor is the perception that the name was not “Canadian.”

In the Segment 41 of *X (Re)* (1999 CA IRB), a prospective refugee claimed that she was persecuted in Ethiopia based on her Eritrean background through her mother's family. The refugee board panel, however, had many concerns regarding this claimant's ethnicity. Despite the lack of documentation and misgivings by the claimant herself, the panel placed emphasis on the other contextual factors, such as claimant's gender and her young age. The panel also considered testimony from the claimant's brother and a letter from the Eritrean Canadian Community Centre of Metropolitan Toronto. In the end, the panel accepted that the claimant was of Eritrean ethnicity primarily on the strength of the letter from the Eritrean Community Centre. In this case, ethnicity was determined by a person's place in a country's social organization, and through reference to how other members of the ethnic group to which the person claimed to belong saw her. It is less self-ascribed by individual but still self-ascribed as a group. This, in turn, highlights the pluralist character of the democratic society and equal respect that may justify differential treatment (the recognition of special minority rights).

Although it is not always clear how one is supposed to define ethnicity, the judicial review of the tribunal case *Mitac v. Canada, Minister of Citizenship and Immigration* (1999 FC), and in Particular Segment 39, notes that basing ethnicity definition on appearances and physical characteristics is not sensitive. In this case, a group of applicants claimed refugee status on the grounds of their race and membership of the Roma minority in the Czech Republic. Importantly, the review noted that it was inherently dangerous for Board members to base a finding on "whether people in another country would regard a claimant as of particular ethnicity solely on the basis of the

members' observation of the person concerned." The decision cites the Pluharova case in which "common sense" is questioned:

[...] since Ms. Pluharova had black hair and a "sun tanned" appearance, the panel's "**common sense**" was an **insufficiently reliable basis** for the panel's assessment of such a sensitive matter.... Racists may be able to identify a person as a member of a minority group by physical characteristics that would not necessarily be apparent to people in other countries (*Mitac v. Canada* (1999 FC); my emphasis.)

While I discussed the actual case earlier in Chapter 7, this citation indicates that a "common sense" understanding of ethnicity is not good enough; if the CRDD doubted the claimants' credibility, there were more rigorous ways to establish that based on law, scientific knowledge, or probing the complainant's experiences.

The Segment 40 of the case of *Dogra v. Canada, Minister of Citizenship and Immigration* (1999 FC) concerned Ms. Vandana Dogra, a citizen of India living in New York and who applied for permanent residence in Canada. Ms. Dogra worked as a school and guidance counselor in India. She was interviewed at the Canadian Consulate in New York City by a visa officer who suggested that, with education cutbacks and the laying-off of teachers in Canada at the time, Ms. Dogra might find it difficult to find employment in her profession. In the letter of decision, Ms. Dogra was advised that her application had been rejected because she did not satisfy the regulatory requirements for

admission to Canada as a permanent resident. Further, the officer explained that he could award Ms. Dogra no points for experience because when asked questions about Canadian customs and culture, she was unable to answer them.

The *Dogra v. Canada, Minister of Citizenship and Immigration* (1999 FC) judgment mentioned that it was not normally appropriate for visa officers to engage in the exercise of assessing the “Canadian relevance” of applicants’ education, training, and experience when they are consistent with the terms of the statutory criteria. This task, the judge concluded, should be left to national accreditation committees and provincial licensing authorities. Immigration policy is placing increasing emphasis on applicants’ adaptability and flexibility. Characteristics that are particularly important in the contemporary labour market and applicants’ active labour market participation are likely to be of more importance in predicting successful establishment in Canada than the possession of a store of specific knowledge. Further, the judgment stated that “one of contemporary Canada’s defining characteristics is its **multicultural** nature” (my emphasis). It further describes the multicultural phenomenon in the following terms:

Our major cities, in particular, have a vibrant ethnic diversity and richness, and relative harmoniousness that are the envy of many. For a visa officer to reject an application for permanent residence as a school guidance counsellor because students in Canada “for the most part, come from an entirely different background than yourself” seems to me to be quite at odds with the realities of today’s Canada [...]. (*Dogra v. Canada, Minister of Citizenship and Immigration* (1999 FC).)

Under the screening regulations then in place, it was understood that the assessment given under the point system was to determine the likelihood of the applicant being able to establish themselves successfully in Canada. This is what the Visa Officer was trying to do. The judgment links together the multicultural nature of Canada and the chances of the applicant to build a successful life in Canada.

One of the significant cases in Canadian constitutional law, *Van de Perre v. Edwards* (2001 SCC) recognizes the importance of race and ethnicity. The case involved a single female Caucasian Canadian citizen and a married male African-American professional basketball player. Theodore “Blue” Edwards earned millions as a professional basketball star in the United States, while Kimberly Van de Perre was a hotel receptionist. Their relationship lasted approximately 18 months, and a son was born to the couple. Van de Perre then commenced proceedings against Edwards for child support and sole custody, which later became a request for joint custody. A trial judge initially awarded Van de Perre sole custody, but the British Columbia Court of Appeal reversed that decision. Despite Elijah’s mixed racial heritage, the Court of Appeal deems Elijah to be Black, arguing further on that it would be in child’s interests to live with a parent or family who can nurture his identity as a person of colour. The Court of Appeal highlights that in child’s interest, it is important that the parent appreciates and understands the day-to-day realities that Black people face in North American society—including discrimination and racism in various forms. The judgment acknowledges the social reality that Elijah will, most likely, be perceived as Black. The Supreme Court overturned

this decision, maintaining that race can be an important factor for consideration, depending largely on the facts of a given case.

The Supreme Court considered that it was unacceptable that the counsel failed to raise evidence on a factor that he or she believed might impact on the best interests of the child and for any court to decide based on the importance of race. The Segment 44 wording of the decision further indicates that the decision of the Court of Appeal was unfortunate:

If it is correct that Elijah will be seen by the world at large as “being black,” it would obviously be in his interests to live with a parent or family who can nurture his identity.... it seems to me likely that being raised in an Afro-American family in a part of the world where the black population is proportionately greater than it is here, would to some extent be less difficult than it would be in Canada. Elijah would in this event have a greater chance of achieving a sense of cultural belonging and identity and would in his father have a strong role model who has succeeded in the world of professional sports (*Van de Perre v. Edwards* (2001).)

In assigning Elijah a black racial identity, and assuming that only a black parent can address the needs of a black and white biracial child, the Court of Appeal can be viewed as freezing ethnicity/race in time and space. Is it necessary to be raised by a black parent for a black or biracial child to develop a positive racial identity? Even if a judge makes conscious efforts to carefully consider race, by virtue of his or her social position

s/he may not know how to consider race. Consequently, case law on the issue tends to gravitate between the polarities of over-observing or under-considering race. The Supreme Court judgment explicitly stated that there was no evidence of the racial awareness of the applicants or of their attitudes concerning the needs of the child with regard to racial and cultural identity. The “issues of race and ethnicity were not argued at trial, nor were written submissions provided in the appeal” (In fact, Edwards’ counsel observed that “neither of the parties wanted to touch it, because it’s so politically incorrect to say that race has any bearing.”).

In the Segment 45 of *R. v. Powley* (2003 SCC), the Supreme Court looked into three broad factors as indicia of Métis identity, since then referred to as *Powley* test, for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance. In terms of community acceptance, the court wrote that:

the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a **contextual** understanding of the membership requirements of the organization and its role in the Métis community. (*R. v. Powley* (2003 SCC).)

The judgment goes beyond common understanding of community acceptance; the core of community acceptance is past and ongoing participation in a shared culture, in the

customs and traditions that constitute a Métis community's identity and distinguish it from other groups. The judgment lists other indices of community acceptance that might include evidence of participation in community activities, including the possibility of testimony from other community members about the claimant's connection to the community and its culture. It states that: "the range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community" (*R. v. Powley* (2003 SCC)). In *Powley*, the Supreme Court of Canada stated the term Métis in s. 35 does not encompass all individuals with mixed Indian and European heritage. Rather it refers to a distinctive people who, in addition to their mixed ancestry, developed their own customs and recognizable group identity separate from their Indian or Inuit and European forbearers. The Métis communities claiming rights of Indigenous Peoples in Canada must have emerged in an area prior to the Crown effecting control over a non-colonized region. Although the *Powley* test can be problematic, like any sort of identity criteria, it has expanded popular thought about Métis from being limited to Red River Métis to understanding that Métis communities exist elsewhere—the *Powleys* being from Sault Ste Marie, Ontario.

6.4.2 Acknowledging the Vulnerable and Disadvantaged

In *Andrews v. Law Society of British Columbia* (1989 SCC), Mr. Mark Andrews, a British citizen and lawyer who was a permanent resident in Canada, wished to be admitted to the British Columbia bar. He met all the requirements for admission except that of Canadian citizenship, so the Law Society of British Columbia did not admit him. He argued that that requirement violated Section 15(1) of the *Canadian Charter of Rights and Freedoms*. The two constitutional questions before the Supreme Court in this case were: (1) did the Canadian citizenship requirement infringe on, or deny, the equality rights guaranteed by the Charter? and (2), if so, was that infringement justified by Section 1? In the Segment 38, the Supreme Court agreed with the Court of Appeal that citizenship did not necessarily ensure familiarity with Canadian institutions and customs.

In enumerating the specific grounds in s. 15, the framers of the Charter embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the **disadvantaged on the grounds of ethnic origin**, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the “unremitting protection” of equality rights in the years to come. (*Andrews v. Law Society of British Columbia* (1989 SCC).)

Further, the judgment in the Segment 38 also equated the ethnic origin of the vulnerable and disadvantaged position of non-citizens with that of minority groups, thereby making individuals who do not have citizenship an analogous category to those specifically enumerated in Section 15:

Relative to citizens, non-citizens are a group lacking in political power and as such **vulnerable** to having their interests overlooked and their rights to equal concern and respect violated.... Their vulnerability to becoming a **disadvantaged** group in our society is captured by John Stuart Mill's observation in Book III of *Considerations on Representative Government* that in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked.... While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others (*Andrews v. Law Society of British Columbia* (1989 SCC).)

Throughout the case, there were other references to “a group of persons who are **relatively powerless politically**, and whose interests are likely to be compromised by legislative decisions” (*Andrews v. Law Society of British Columbia* (1989 SCC), my bolding).

The *Andrews* case also made an important observation about the changing and contextual (social and political) nature of Section 15 categories. Namely, the judgment noted that “...the range of discrete and insular minorities has **changed and will continue**

to change with changing political and social circumstances. [...] It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of Section 15 that it be interpreted with sufficient flexibility to ensure the ‘unremitting protection’ of equality rights in the years to come” (*Andrews v. Law Society of British Columbia* (1989 SCC), my bolding). Furthermore, it raises an important point by contextualizing non-citizens within an historical context of discrimination:

History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons entering into certain employment. Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15 (*Andrews v. Law Society of British Columbia*, 1989 SCC).

It should be also noted that the ruling in the *Andrews v. Law Society of British Columbia* (1989 SCC) case rejected the claim put forward by the Law Society that citizens, by virtue of their citizenship, are familiar with a nation’s customs, institutions, and values: “Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our

society.” Similar logic is applied in this case with respect to ensuring commitment to Canadian society:

The second reason for the distinction that citizenship implies a commitment to Canadian society fares little better upon close examination. Only those citizens who are not natural-born Canadians can be said to have made a conscious choice to establish themselves here permanently and to opt for full participation in the Canadian social process, including the right to vote and run for public office. (*Andrews v. Law Society of British Columbia*, 1989 SCC).

Although the decision was not about ethnicity per se, it referred to ethnicity 6 times (the majority of references are about non-citizenship) and tended to view ethnicity from the position of vulnerable and disadvantaged persons with references to (and importance placed on) changing nature, history and context, and the idea that the requirement of commitment to country is not just justified based on citizenship. Non-citizens may be deeply committed to Canada. Moreover, the requirement of commitment to the country is arguably satisfied by the oath of allegiance which lawyers are required to take.

The case of *Syndicat Northcrest v. Amselem* (2004 SCC) is a landmark decision in constitutional law, freedom of religion, and analysis of the Charter. The appellants, all Orthodox Jews, owned units in luxury apartment buildings in Montréal. The appellants set up “succahs,” small temporary huts on their balconies, to fulfill the biblical obligation of dwelling in such spaces during the annual nine-day Jewish religious festival of Succot.

Under the terms of the by-laws in the declaration of co-ownership, the balconies of individual units, although constituting common portions of the immovable, are nonetheless reserved for the exclusive use of the co-owners of the units to which they are attached. The respondent requested the removal of the succahs claiming that they violated the by-laws. None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units. The respondent proposed to allow the appellants to set up a communal succah in the gardens. The appellants expressed their dissatisfaction with the proposed accommodation, explaining that a communal succah would impede their religious observance and violate their religious beliefs. The respondent refused their request and filed an application for a permanent injunction prohibiting the appellants from setting up succahs and, if necessary, permitting their demolition. The Segment 46 mentions the keyword “ethnic” just once, but the case is one of the few that refers explicitly to multiculturalism:

In a **multiethnic** and **multicultural** country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants’ religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. (*Syndicat Northcrest v. Amselem*, 2004, at para 87).

The case itself is notable as in the majority decision the Supreme Court of Canada adopts a highly individualistic and subjective definition of religion in Canadian law.

Namely, the majority held:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. [...]. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith. (*Syndicat Northcrest v. Amselem* 2004 SCC at para. 39).

Though this definition deliberately speaks in broad strokes, it is notable for its individualistic treatment of religion. It relies on the concepts of “freely” held convictions (implying an individual choice), individual self-definition, and individual connections to the divine or spiritual realms.

Another implication of individual choice is that a notion of community is absent from the *Amselm* definition of religion. This was a point of division for the Court. In a dissenting judgment, Justice Bastarache held that “a religion is a system of beliefs and practices based on certain religious precepts” (*Syndicat Northcrest v. Amsalem*, 2004, at para. 135). Justice Bastarache's approach would have required claimants to prove the objective existence of a religious precept in order to benefit from the protection of

religious freedom. Justice Iacobucci's definition renders religion entirely subjective, with the sincerity of an individual's belief becoming the touchstone for analysis.

The court attributes to multiculturalism involve tolerance and human rights: "Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others" (*Syndicat Northcrest v. Amselem* 2004 at para 87). As in the quote above, in *Amselem*, the court not only acknowledges multiculturalism, but the Supreme Court of Canada attempts to acknowledge multiculturalism as foundational.

In *R. v. Krymowski* (2005 SCC), the offence of the accused was the willful promotion of hatred against an identifiable group, in this case "Roma." As the trial judge maintained during the trial, it was not necessary for the Crown to prove that the terms "gypsies" and "Roma" were interchangeable. During the appeal, the Supreme Court found that the trial judge had erred in law by focusing entirely on one statement in the information. The Supreme Court further indicated that it was incumbent upon the trial judge to look at the *totality* of the evidence and the reference to "gypsies" was but one item to consider. The decision highlighted the ethnic flavour to the demonstration and the fact that the Roma people had been *historically* persecuted by the Nazis while a Nazi theme was apparent at the demonstration, were all factors to take into account: (1) some of the participants of the demonstration were seen giving the "Sieg Heil" Nazi salute; (2) Nazi and American Confederate flags were used in the demonstration; and (3) the chant "White Power" was heard during the demonstration. As well, the Supreme Court concluded that the trial judge should have taken judicial notice of dictionary definitions

showing that “gypsy” can refer to “Roma,” and he should have considered that fact together with the rest of the evidence in the Segment 43:

A court may accept without the requirement of proof facts that are either “(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.” The Crown presented the trial judge with five dictionaries demonstrating a relationship between “Roma” and “gypsy” (*R. v. Krymowski*).

Another case that illustrates the importance of totality of evidence and historical perspective is *B. H. v. Alberta (Director of Child Welfare)* (2002). In this case, and in contrast to *R. v. Krymowski* (2005 SCC), a trial judge considered a reference to the religious persecution by Nazi as excessive. In this case, the mother of Bethany Hughes (referred to as AH), a Jehovah’s Witness, attempted to bring the seriousness of the violation of religious freedom to the attention of the court by comparing her daughter’s case to those endured by Jehovah’s Witnesses under Nazi rule in Germany. Her daughter was denied her right to refuse a medical treatment on the basis of her religious conviction. In an affidavit, the mother compared the atrocities thousands of innocent persons endured during Nazi rule, many of whom were mistreated because they would not violate their conscience, to her daughter’s situation. In her book *Defining Harm: Religious Freedom and the Limits of the Law*, Lori Beaman (2008) cites the statement made by Justice Kent. Describing the affidavit as “one of the most intemperate statements

I have seen in evidence,” Justice Kent concluded that “First, I had thought that we as a society had come to understand that what occurred under Nazi rule was a singular event because it was so horrible. It is not something that should be used lightly as a comparator. Second, if AH truly believes what she says, then it is a very strong indication that she has no perspective on her child’s current medical situation. She cannot make decisions for her or advise her” (Beaman 2008: 81). By indicating that AH was unable to meet a minimum standard of parental care, Justice Kent vitiated her agency. As further argued by Beaman, it is the judge’s unawareness of the historical events and the persecution of Jehovah’s Witnesses under the Nazi regime depicted by other scholars that further highlights the importance of historic knowledge in evidence. More specifically, the professional “truth” of the judge, including her ignorance of history, eschews any possibility of dignified diversity.

Another observation is that some judgments allude to an acknowledgement of multicultural reality through recommendations on training. For example, the Segment 37 of *Hum v. Royal Canadian Mounted Police* judgment contains the following paragraph:

The evidence of officers suggest that the RCMP has made considerable strides in sensitizing the members of the Force to the realities of the multi-racial and cultural society that Canada now is. The Force is to be commended for the cross-cultural programs which it has devised, and the instruction it gives in these matters.... the perceived imperatives of enforcement and the rights of Canadian citizens in which the impulse is to

give greater weight to the former over the latter. (*Hum v. Royal Canadian Mounted Police* (1986 CHRT).)

The Segment 37 specifies several important elements about this kind of training. Through this judgment, the judge linked sensitivity and racial-bias training with the advancement of human rights:

The only satisfactory way of working change in police attitudes in these matters in the long term is through education and the challenging of officers to think through carefully the undesirable implications, both to society and to the individual, of infringing the rights of a citizen from a visible minority on grounds of race, colour or ethnic origin. (*Hum v. Royal Canadian Mounted Police*, 1986 CHRT).

Provided that the training itself is based on the contextual understanding of ethnicity and does not treat culture or ethnicity as a static category, the educational and training programs on the importance of the right of citizens could be important elements towards articulation of open-ended ethnicity.

6.4.3 “Must Not Be Based on Race” or “Cannot Be Light or Dark”

I will now review the cases through the lens of the sociology of law to further explore open-ended ethnicity. This inductively located category can be summarized as being achieved through references to vulnerability, disadvantageousness, the past

(historical context, value of the past), changing nature, totality (as opposed to singularity), context, and also with an emphasis on human rights and humanity. In this section, I will analyze the cases to see whether any discursive effects of juridical language can be found. Again, the neutralization effect is designed to establish the speaker as a universal subject, impartial and objective. The universalization effect aims to produce an effect of fairness designed to express the generality of the rule of law and other means (Bourdieu 1987).

The effect of neutralization created through the use of impersonal constructions, the expression of norms, and constative verbs in the present and past third person singular is evident in the *Syndicat Northcrest v. Amselem*, 2004 Supreme Court case, the Segment 46 of the researched material:

In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants’ religious freedom is unacceptable. (*Syndicat Northcrest v. Amselem*, 2004 SCC).

This sentence alone is packed with the effects of universalization. They are achieved through the use of the indicative mood—that is: “In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and

ethnic minorities...” (*Syndicat Northcrest v. Amselem*, 2004 SCC). In this way, a sentence structure is used to make factual statements, or to express opinions as if they were facts—to express norms. The first part of the sentence accentuated by “such as ours” also exploits a subjective value that presupposes the existence of an ethical consensus. The sentence also uses constative verbs—that is, conveying a message that can be compared to reality, and found to be true or false—to express facts: the country “which accentuates and advertises its modern record of respecting cultural diversity and human rights.” While the neutralization effect is created to establish the speaker as universal subject, at once impartial and objective, the universalization effect aims to produce an effect of fairness.

The effect of neutralization created through the use of the imperative and through negation is evident in the Segment 37 of *Hum v. Royal Canadian Mounted Police* (1986 CHRT). The judgment in this case contained a paragraph with a recommendation on specific training. The judgment is expressed in the imperative form: “The only satisfactory way of working change in police attitudes in these matters in the long term is through education and the challenging of officers to think through carefully the undesirable implications both to society and to the individual of infringing the rights of a citizen from a visible minority on grounds of race, colour or ethnic origin.” In other words, the judgment provides instruction to RCMP members on the importance of not sacrificing the right of citizens of visible minorities to equal treatment when investigating infringements of the *Immigration Act*. Further instructional tone comes in the form of replaced negation—in other words, “what not to do.” The recommendation emphasizes

that the inquiries “under the Act as to a person’s legal status must not be based only on race, colour or ethnic origin.” (*Hum v. Royal Canadian Mounted Police*, 1986). The neutralization effect here is created through a set of syntactic traits, such as the predominance of impersonal constructions, designed to establish the speaker as universal subject, at once impartial and objective. The effect of universalization is created with the use of the indefinite form of verbs and with the intemporal present “juridical future,” designed to express the generality or omnitemporality of the rule of law.

Another example of imperative negation can be seen in the Segment 39 of the 1999 *Mitac* case. There, the judicial review noted that it was inherently dangerous for Board members to base a finding on “whether people in another country would regard a claimant as of particular ethnicity solely on the basis of the members’ observation of the person concerned.” The decision specified that: “Skin tone cannot be categorized simply as either ‘light’ or ‘dark’: there is a broad spectrum between these polarities” (*Mitac v. Canada, Minister of Citizenship and Immigration* (1999 FC)). Again, the neutralization effect is created through a set of syntactic traits of impersonal constructions designed to establish the speaker as universal subject. As in the case of *Hum v. Royal Canadian Mounted Police* (1986 CHRT), the effect of universalization created with the use of indefinites is designed to express the generality of the rule of law. The instructional tone takes the form of replaced negation—in other words, “what not to do and what cannot be done.” The effect of negation used in the research sample of case law reviewed in the category of open-ended ethnicity inevitably highlights its normative prescriptive nature.

7. DISCUSSION OF RESULTS

To recall, the objective of my dissertation is to examine how ethnicity is defined in the legal realm against the backdrop of Canadian multiculturalism. In other words, my research examines if there was a change in the articulation and meaning of ethnicity in Canadian courts over time (between 1950 and 2009) and specifically if it was possible to identify an impact of multiculturalism as a government initiative upon the way that ethnicity is understood in judgments issued in the courts and tribunals of Canada with the specific emphasis on the Federal Court of Canada and respective appellate courts including the Supreme Court of Canada. In order to achieve this objective, I studied all meanings of ethnicity that appeared in the written judgments, demonstrating variations of how ethnicity has been interpreted in the above-mentioned courts and tribunals. Considering the particularity of the legal context, I also attempted to analyze the discourse and understand any linguistic patterns associated with the meaning of ethnicity captured in judgments. This Chapter discusses the results of my analysis and especially the four findings outlined in Chapter 6 by relating them to existing research identified in the literature review and the theory chapter.

While quantitative analysis was not the main methodology of this research, the following trends were observed in the initial review of 315 cases. During the 1980s, 39 out of 100 cases dealt with different kinds of discrimination—gender, maternity, race, age, etc.—in a variety of federal court and tribunal cases. Of those 39, most cases (26) referred to unemployment, qualifications, training requirements, and retirement. In the

1990s, based on the same criteria, the number of discrimination cases dropped; of the 100 reviewed, only 17 referred to various kinds of discrimination. During this period, however, there was an increase in the number of refugee cases (51) involving the Ministry of Citizenship and Immigration and referring to applicants' fears of persecution. Roughly, the increase in refugee cases coincides with the increase in refugee applications at ports of entry and inland. Indeed, there was a growth of refugee claims in the early 1990s with the collapse of the Soviet Union and Somalia. In the next decade (2000–2010), I observed no specific patterns in terms of issues in the cases.

Since the first appearance of the term ethnicity in Canadian case law in 1955, the judgments in increasing numbers of cases between 1955 and 1971 continued to invoke “blood-based ethnicity”—that is, alleged biological or phenotypical connotations, which have so frequently governed much of Canada’s legal past (as exemplified by *Vodics v. Canada*, as late as 2005). My expectations were confirmed: 22 out of 46 segments in the 36 federal courts cases did in fact equate ethnicity with blood. In the adjudicating of cases involving ethnicity, one of the observed tendencies is for judges to fall back on their “common knowledge” of ethnicity, equating it with skin colour, ancestry, and other blood-based categories. This common knowledge is supposedly a body of awareness that extends beyond the small facts known to individual witnesses, and even beyond the general facts known to experts (as pointed out by Mariana Valverde in her 1978 book *Law’s Dream of a Common Knowledge*).

Second, the observed recourse to accepted wisdom suggests that old-fashioned static (“blood-based”) understandings of ethnicity still dominate the public realm,

including the judiciary, at least until the end of 2009 (when my research ends). Multiculturalism, while a dominant and widely accepted theme in Canadian public discourse, has thus not done much to change this. To support this finding, another important observation from the research sample is that there are post-Charter cases that treat ethnicity and ethnic origin as “immutable.” I found that references to visual or blood-based identifiers of ethnicity were replaced by more generalized references to ethnicity as immutable—possibly due to the universalization effect as a recourse to fixed formulas.

As such, my first and second findings point in the same direction, namely that when adjudicating cases where ethnicity is implied and when the understanding of ethnicity is based on “common knowledge”, ethnicity is often equated it with skin colour, ancestry, and regional location. Within the limits of my data sample, legal professionals often disregarded the scientific knowledge and experience of experts in other areas like sociology, and articulated ethnicity in a way whereby a particular conceptualization is rendered as legitimate. The text analysis in this research demonstrated that there are many similarities of how ethnicity was articulated in judgments sampled for this dissertation (1950-2009) and how race was adjudicated during the period 1900–1950 (Backhouse 1999a). Even from 1950 to 2009, ethnicity kept being referred to as background/racial origin, visible, physical evidence, kinship, geographical area/part, residence, territory, beliefs, and traditions. As such, my research confirms the close association between race and ethnicity outside the realm of academic research. While not in itself new – although still remarkable in a “multicultural” context at the beginning of the 21st century– this

finding aligns with existing research, where the close association and terminological proximity of the concepts of ethnicity and race is discussed extensively (e.g. Brubaker 2015). In fact, scholars have suggested that introduction of ethnicity served as more politically correct term to replace a discredited race term dating from the beginning of the 20th century (Backhouse 2001).

Third, within the limits of my study, definitions of ethnicity that are based on blood were often found in cases that deal with refugees: 5 of the 22 cases (roughly 23%) in this group dealt with refugee issues. Same as with the initial review of 315 cases, 56 dealt with refugee issues (while that figure was only 18%, that percentage was the highest). Similarly, 23% (5 cases) is the highest percentage in this categorization. The fact that the number of cases that deal with ethnicity related to refugee status may represent a broader trend pending a confirmation for any subsequent research. In the judgments in these five cases, the individuals' characteristics were considered as ascribed at birth, and to derive from kinship. In *Vodics v. Canada* (2005 FC), the CRDD panel decided almost arbitrarily what the applicant's "true" ethnicity was, as distinct from what he claimed it was. In the 1999 *Mitac v. Canada* case, the tribunal again decided that the family did not have the usual ethnic or racial traits of European Roma. In addition, in 1999, a judicial review of *Lutete v. Canada* determined that the Congolese applicant and her child did not qualify as Convention refugees, because the Hutu claimants would not likely be persecuted by Rwandan Tutsis for their ethnic group.

In addition, my findings vis-à-vis aspects of ethnicity such as language and tradition suggest that language appeared also as a marker for ethnicity in refugee cases

(as well as cases involving matters of Indigenous Peoples). In a few refugee cases, the claimant was denied the status of refugee on the basis of a language *not* spoken—such as in the *Vodics*, *Mitac*, and *Kabashi* cases. The first two of these cases hinged on the applicants' inability to speak the Roma language, the third on the applicants' inability to translate English words into Serbo-Croatian. In the *Rivers* case, it was a feature of expert testimony that the Squamish and Gitksan languages were mutually unintelligible. And in the *Hum* case, the RCMP's "harassment" of the complainant seemed to be based solely on his "difficulty" with the English language. Overall, this finding also aligns with sociological theories that find static definitions of ethnicity being particularly often imposed in instances of large power inequalities and upon subordinate groups (Weber, 1978).

My fourth finding partly contradicts findings 1 and 2 but adds an optimistic note to my research. It suggests that versions of an open-ended understanding of ethnicity exist in the court judgments analyzed for the purpose of this dissertation. The interpretation of ethnicity in these cases is highly nuanced and contextual. It is important to note that while my full analysis is from 1955-2009, the cases that evoke some kind of open-ended ethnicity are from 1988-2005. This finding suggests that the understanding of ethnicity in Canada's legal system is indeed evolving, and that we may find more instances of fluid, relational open-ended interpretations of ethnicity in the future.

Furthermore, the court cases that provide the context to understandings of ethnicity as open-ended reveal the normative prescriptive nature of the case law under consideration. As described in the previous chapter, the decision in the judicial review of

the tribunal case *Mitac v. Canada, Minister of Citizenship and Immigration* (1999 FC), for example, indicates that a “common sense” understanding of ethnicity is not good enough. The decision further prescribes that if the CRDD doubted the claimants’ credibility, there were more rigorous ways to establish that based on law, scientific knowledge, or probing the complainant’s experiences. Ethnicity remains created with use of juridical language: the indefinite form of the verbs and the intemporal present “juridical future” are designed to express the generality or omnitemporality of the rule of law. In other words, there is less of the actual descriptions of a fact or a state of affairs that ethnicity is defined with in any association with multiculturalism. Rather, it is the juridical language and its effects of neutralization and universalization that create an association between ethnicity and multiculturalism.

7.1 Common Knowledge of Ethnicity

References to blood or visual markers appear as legitimized with the effects created through legalisms. The sample contained both neutralization (predominance of passive, impersonal constructions) and universalization effects (by using words with Latin etymology), designed to establish the speaker’s universality and impartiality. The sample also contained judgment segments in which ethnicity is described as “natural” and “unalterable,” as in the testimony during the discrimination case of *Headley v. Public Service Commission Appeal Board* (1987 FCA). The sample suggests that the references to blood or visual markers appear as legitimized with the effects created through

legalisms. One of the legalisms, the “ordinary person” standard invoked in *R. v. Hill* (1986 SCC), raised the issue of what the term “ordinary person” meant. The objective standard in the judgment applied to a person’s mental state, rather than to attributes that simply place the insult in its cultural context, further meaning that the legal “ordinary person” standard deprived the defendant of an appropriate cultural context, by extension putting defendants from minority cultures at a disadvantage. The results of my research align with Moran’s (1999) observation that the objective standard operates very differently for different groups of litigants. These problems likely illustrate a much more general difficulty in ensuring that all members of a society are equally protected by the rule of law—a problematic situation for litigants, even with constitutional and other guarantees of equality.

Universalization effects are noticeable in several cases where ethnicity is interpreted as blood- or region-based, as well as a few cases that refer to ethnic origin as immutable. This is possibly due to the fact that judgments tend to be written using fixed formulas, which give little room for variation. Why is it surprising to see parts of the immutability doctrine in Canadian case law? The doctrine originates in the race paradigm and is strongly associated with antidiscrimination in the US. The case that established the “immutability” doctrine in American antidiscrimination law was *Rogers v. American Airlines*, decided by a federal court in 1981. The case concerned a black female employee of the airline, who was fired for wearing her hair in the “cornrow” style. To her, that personal style was “part of the cultural and historical essence of black American women,” but the court did not accept her claim that she was discriminated against on the basis of

her race and/or sex. Instead, it argued that the airline’s grooming policy was the same for both women and men, and that it did not regulate on the basis of any immutable characteristic of the employees. It should be noted that the doctrine of immutability in US law has often been criticized (Hellman 2008).¹⁵ The persistence of immutability as the standard of antidiscrimination is anachronistic, considering that “race” is primarily a social and not a biological fact.

As demonstrated by Ewick and Silbey (1998), court judgments not only embody the diversity of social situations, but also reinforce the structure of society. When judges use alleged “common knowledge” to decide a case, this common knowledge becomes part of the judge’s storehouse (Bourdieu 1987). In other words, when legal professionals articulate ethnicity in this way and not in any other, then this particular conceptualization is validated and provided with judicial legitimacy – a rise in status that comes with the elevated position of judges and “the law” in society. It would therefore be troubling if professionals in the legal field legitimized “blood-based” interpretation of ethnicity that have long been discarded as inaccurate and anachronistic by experts in the social sciences. It is in this sense that identifying traces of a more dynamic, contextual and

¹⁵ For example, for Deborah Hellman (2008) criticizing immutability demonstrates that many familiar ideas about when discrimination is wrong—when it is motivated by prejudice, grounded in stereotypes, or simply departs from merit-based decision-making—fail to adequately explain our shared intuition of wrongness, which Hellman argues comes from distinguishing between people on the basis of traits. She coins the term “wrongful discrimination” when it demeans the people affected—and the situations that so demean or stigmatize may vary considerably according to place or period in history. To wrongfully discriminate is to deny equal moral worth to a person from a position of power.

relational interpretation of “open-ended” ethnicity in some of the more recent cases in my sample is an uplifting finding.

Furthermore, there are significant variations in the articulation and mobilization of ethnicity (both the concept and related semantics) in Canadian federal courts:

Disregarding or random selection of knowledge. The studies undertaken by Valverde (2003) show that legal epistemological authority is constituted through several uncoordinated processes which, to make matters more complicated, do not work the same way for all categories of actors. Not only is scientific knowledge selected randomly and sometimes disregarded; the segments where judgments referred to the existing body of knowledge go beyond the classical precedent and are extremely varied when it comes to ethnicity. For example, in *Narine-Singh v. Attorney General of Canada* (1955 SCC), it was held that in accordance with the Oxford Dictionary, the meaning of the word “ethnic” was “pertaining to race; peculiar to a race or nation; ethnological.” In contrast, the trial judge in *R. v. Krymowski* (2005 SCC) chose not to take judicial notice of dictionary definitions showing that “gypsy” can refer to “Roma,” despite the fact that the Crown presented the trial judge with five dictionaries demonstrating a relationship between “Roma” and “gypsy.” A judge can quote, or not quote, a dictionary entry or cite a law professor.

7.2 Excluding Dimensions of Blood-based Ethnicity in Refugee Cases

The discussion of the next findings pertains less to multiculturalism and more to immigration laws. As was demonstrated in the literature review, for example, the Immigration Act (1952) maintained the explicitly restrictive Section 38, limiting the admission of people based on ethnicity, nationality, geographic origin, peculiarity of custom, unsuitability of climate, or inability to become assimilated in the existing character of the Canadian population (Reimers & Troper 1992; Green 1976). Jakubowski (2011) reveals the racist nature of Canadian laws from the 1880s onward was semantically anchored on “race” until 1952. “Universality” and “non-discrimination” became policy in 1966 and became law a decade later in the 1976 Act. It can also be noted that the provisions of Section 38 were not unique to Canada. The US had similar restrictions in its “quota system” for immigration that came to an end only in the mid 1960’s. Australia had a “white Australia policy” until the late 1960s.

Defining physical appearance such as skin colour for legal purposes. It is understood that the CRDD is charged with rendering decisions on claims by applicants for Convention Refugee status. If the CRDD makes decisions on “race”, etc. it is because the claimants have made their case on those grounds—e.g. if Vodics had not claimed to be a Roma, the issue of skin colour would not have come up. The panel’s ability to distinguish physical attributes of the claimants is questionable and yet, in the sample of the research, it is the panel that makes the decisions based on their understanding of ethnicity and physical attributes. In the case of *Pluhar v. Canada, Minister of Citizenship*

and Immigration (1999 FC), Mr. Pluhar feared persecution because of his marriage to a Roma woman. The Refugee Division panel observed the female claimant's physical appearance (dark skin, black hair, makeup, and clothes) and concluded that the claimant appeared to have been attempting to demonstrate physiological traits and clothing traditions that she believed the panel might associate with a female Roma person. In the sample, it is the Immigration and Refugee Board of Canada, in particular the Refugee Protection Division, whose panel members are authorized to interpret the representations and situations for the legal purposes of defining physical appearance such as skin colour.

External categorization works to exclude. My empirical study of case law discourses allows me to identify some factors that have contributed to the excluding dynamics of the concept of ethnicity. In the cases reviewed in this research, it does not matter how people identify their ethnicity; external categorization tends to work as means to exclude. These exclusions are most often based on an interpretation of ethnicity that is associated with phenotypical characteristics. An important observation on race and ethnicity in this perspective is made by Weber (1978: 392). He notes that “the racial qualities [are] effective only as limiting factors; they are not positively group forming.” Skin color, for example, becomes only meaningful within the relation of domination and exclusion. The individuals upon whom the mark is imposed have few things in common other than sharing the experience of racism and subordination. In other words, skin color as a marker does not have a sense of its own outside the relationship of unequal power relations. Without a context of racial oppression, it does not inspire individuals to form a community. In this sense, it is different from shared language, religion or similar eating

habits which make people want to gather with each other. The fact that within my research sample the concept of the ethnicity interpreted as blood-relationship is frequently used in cases that determine refugee status aligns with literature on race and ethnic relations. It allows me to suggest that when ethnicity is interpreted as “immutable” and/or as rooted in biology or blood, it likely points to the presence of an excluding dynamic even in Canadian case law.

7.3 Any Impact of Multiculturalism?

One of the main objectives of this dissertation was to examine how ethnicity is defined in the legal realm against the backdrop of multiculturalism and to understand, to the extent it is possible to do so, the relationship between the understanding of ethnicity and multiculturalism and how it has evolved over time. I was able to detect an understanding of ethnicity in the judgments that would be characterized by the ways that people experience objects, places, persons, actions, or situations that are analogue to multiculturalism characteristics. In total, out of 46 text segments in 36 cases, I considered 11 text segments to belong to the category of open-ended ethnicity. As mentioned before, coding for this category included references to ethnicity interpreted or associated with vulnerability, disadvantageous, the past (historical context, value of the past), changing nature, totality (as opposed to singularity), and context as well as an emphasis on human rights, humanity, promotion of cross-cultural training, and the highlighting of multicultural values. It is important to note that while my full analysis is from 1955-2009,

the cases in this category are from 1988-2005. This comparatively short period might suggest that the understandings of ethnicity in Canada's legal system is still evolving.

One of the examples of open-ended ethnicity that highlights the historic context was the *Andrews* case. In fact, it is one of the very few Canadian cases to equate the ethnic origins of the vulnerable and the disadvantaged position of non-citizens with that of minority groups. The *Andrews* case also stresses the importance the disadvantaged position of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions (*Andrews v. Law Society of British Columbia* (1989 SCC). The case also made an important observation about the changing and contextual nature of Section 15 categories of the Charter.

In *Powley*, the Supreme Court of Canada accepted a more complex approach to the recognition of the past and acknowledged Métis who, in addition to their mixed ancestry, developed their own customs and recognizable group identity separate from their Indian or Inuit and European forbearers (*R. v. Powley* (2003 SCC). The ethnicity was nuanced as referring to the vulnerable and disadvantageous past (historical context, value of the past). Similarly, in *Vodics*, the judicial review found that ethnicity is a critical feature of humanity requiring extreme caution and careful deliberation. In *Vodics*, a consideration of the value of the past as evidence was deemed necessary in determining the prospective need for refugee protection (*Vodics v. Canada* (2005 FC).

Second, there is a limited nature of open-ended ethnicity observed in the research sample. As mentioned in the findings, the case law reviewed in the category of open-

ended ethnicity was at large characterized as of normative, prescriptive nature. The prescriptive nature is noticeable in the judicial review of the tribunal case *Mitac v. Canada, Minister of Citizenship and Immigration* (1999 FC). The judgment noted that it was inherently dangerous for Board members to base a finding on “whether people in another country would regard a claimant as of particular ethnicity solely on the basis of the members’ observation of the person concerned.” The decision indicates that a “common sense” understanding of ethnicity is not good enough; if the CRDD doubted the claimants’ credibility, there were more rigorous ways to establish that based on law, scientific knowledge, or probing the complainant’s experiences. The prescriptive nature is also evident from the promotion of cross-cultural training and the highlighting of multicultural values (*Hum v. Royal Canadian Mounted Police*, 1986 CHRT).

Although I was able to locate the open-ended ethnicity, its impact seems to be of limited nature. These are the effects of juridical language such as neutralization and universalization. Due to these effects, the usage of ethnicity “falls back” into the pitfalls of juridical language. Ethnicity in the judgments is created using the impersonal constructions (the effect of neutralization) and the expression of norms; imperative through negation, constative verbs in the present and past third person singular. The sample also contained ethnicity created with the use of indefinites and of the intemporal present “juridical future,” are designed to express the generality or omnitemporality of the rule of law (the effect of universalization). The articulation of open-ended ethnicity in the judgments discussed appears to be largely “universal, symbolic, and abstract,” fitting into generalities of the rule of law and expressions of norms.

Religious accommodations. The empirical data of my research suggests that even if the meaning of ethnicity in judgments may have been influenced by the ideology of multiculturalism, the influence is limited to specific cases. To go back to the original thesis of Bourdieu that if the law creates the social world, it is so only if we remember that it is this world which first creates the law:

In reality, the schemas of perception and judgment which are at the origin of our construction of the social world are produced by a collective historical labour, yet are based on the structures of this world themselves. These are structured structures, historically constituted. (Bourdieu 1987: 839)

So, if our thought categories contribute to the production of the world, but only within the limits of their correspondence with pre-existing structures, what are those pre-existing structures?

Chronologically, the accommodation of religious beliefs in Canada has a longer history than multiculturalism—more than 60 years, going back to the Treaty of Paris of 1763 in which the Crown promised to respect the Roman Catholic Church in the territories newly acquired from France. Justice McLaughlin (2012) writes: “The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. For over half a century this tradition has served us well” (N.S 54). For example, employers have been required to adapt workplace practices to

accommodate employees' religious beliefs.¹⁶ This implies that the courts developed a different set of strategies accommodating religious diversity long before multiculturalism policies and law were put in place.

Although there is a tendency to interpret religious accommodation in the same vein as multiculturalism, putting ethnicity at the centre of my research allows me to see a different perspective. The results of my research demonstrate that out of 36 cases, only 1 case referred explicitly to religion. Proportion wise, this outcome was quite different from the findings of Rocher and Brassard-Dion (2017): 47% of their selected cases (selected with a focus on multiculturalism) referred to religion. It should be noted, however, that my research did not aim to cover religious aspects of ethnicity in greater detail. After the initial review, each of the 315 cases were again studied, eliminating those that merely cited the law; these were mostly references to document titles and legislation texts.¹⁷ The remainder were further examined to select only those that discussed ethnicity

¹⁶ Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, at p. 555; Commission scolaire régionale de Chambly v. Bergevin, [1994] 2 S.C.R. 525, at pp. 551-52; Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970, at p. 982. Schools, cities, legislatures and other institutions have followed the same path: Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at pp. 327-29; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 336-37; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 782; Amselem, at para. 103; Multani, at para. 2.

¹⁷ For example, as explained already in Chapter 5, *Bhinder v. Canadian National Railway* (1985 SCC) concerned a Sikh employee, Mr. Karnail Singh Bhinder, who refused to comply with the company's regulations concerning hard hats at work, since his religion did not allow him to wear any headgear other than the turban. The company refused to make an exception to the rule, so Mr. Bhinder was fired. Although this case contains three mentions of "ethnic," these all merely enumerated the prohibited grounds for discrimination. I was not able to locate any reference to ethnicity or ethnic groups. Although it is understood that the case revolves around religion (and ethnoreligious dimensions), it was not clear that it was defined by ethnicity. Accordingly, this case was not used for this research.

meaningfully and not just referring to the existing legislation (such as enumerated grounds of the Charter's Section 15(1)).

Thus, the one case in the sample of my research relating to religious accommodation was also the same one considered by Rocher and Brassard-Dion (2017). In this case, *Syndicat Northcrest v. Amselem* (2004 SCC) the appellants, all Orthodox Jews, were co-owners of units in luxury condominium buildings in Montreal. In accordance with Jewish religious law and custom, they had set up "succahs" on their balconies. Although the case mentioned the keyword "ethnic" just once, it is categorized here as this was one of the few cases connecting ethnicity to multiculturalism. Rocher and Brassard-Dion (2017) observed that when it comes to protecting freedom of conscience, religion, the principle of neutrality or separation of Church and State, the courts invariably use the Charter as it related to fundamental freedoms (s. 2) and equality rights (s. 15). The authors conclude that the courts rarely refer to Section 27 as the effective interpretation principle but invoke multiculturalism on a regular basis to recall the values of tolerance and respect for diversity. When using this term, the courts adhere to its axiological rationality or present it as a characteristic, often qualified as fundamental, of Canadian society. According to Rocher and Brassard-Dion (2017), these two repertoires (axiological and ideological) overlap and reinforce each other when the courts invoke multiculturalism in their judgments. The authors suggest that the repertoires are more or less the same in disputes involving issues related to ethnocultural and religious diversity and hypothesize that the only difference is that the latter category receives more attention from the media. While it is hard to dispute that the religious disputes get more attention

from the media, the authors seem to underline that multiculturalism is often interpreted on the basis of pre-existing trends inherited in religious diversity disputes.

In *Syndicat Northcrest v. Amselem*, the Supreme Court of Canada adopted a highly individualistic and subjective definition of religion in Canadian law. The definition relies on the concepts of “freely” held convictions (implying an individual choice), individual self-definition, and individual connections to the divine or spiritual realms. The case puts an emphasis on human rights and humanity that “invariably requires openness to and recognition of the rights of others” (*Syndicat Northcrest v. Amselem* 2004 at para 87). By extension, this definition of religion could imply a very similar definition of ethnicity—ethnicity as an individual choice.

Multicultural Mirage? It is not surprising that my empirical research suggests that when ethnicity is interpreted as “open-ended” it tends to be normatively prescriptive. Its impact is of a limited nature as it does not dwell on any particular situation in question. Due to the effects of juridical language, such as neutralization and universalization, multiculturalism based on such articulation of open-ended ethnicity in the judgments appears to be “universal, symbolic, and abstract.” In other words, multiculturalism in judgments appears to be “given” and does not indicate what it means to apply multiculturalism in the situation given by the matters of the case. Remaining symbolic and abstract, multiculturalism means is that even after 50 years of service to Canada and Canadians, it remains problematic in that it requires constant theorization (Mishra 2005). It is not only that applied solutions for multiculturalism in courts and tribunals are lacking, it is also because if multiculturalism is stated as a norm from the

position of power, it lacks nuancing, context and risks of remaining static. Critically however, while recognizing that Canadian multiculturalism changes and evolves, the goal is not simply to protect and promote cultural difference for the sake of it but, to quote a phrase from Justice McIntyre's 1989 Andrews Supreme Court of Canada ruling, to reinforce in Canadians the idea that "the accommodation of differences . . . is the true essence of equality" (Tabachnick 2017: 113). Similarly, Fleras' (2019) argument on postmulticulturalism is also about the integration of migrants and accommodation of minorities through the removal of discriminatory barriers and prejudicial attitudes.

7.4 Limitations of the Research Methodology

The dissertation's objective was to study the use of ethnicity in the Canadian courts from 1950 to 2009 to understand how ethnicity is defined in court cases and the extent to which the understanding of ethnicity has evolved. As set in Hypothesis 1, provided that a) biological definitions of ethnicity became repudiated after World War II, b) the policy of multiculturalism (in Canada since 1971) presupposes (self-identified) cultural definitions of ethnicity, and c) state-of-the art definitions of ethnicity in academic scholarship tend to highlight boundary-making and symbolic interactionism, I expected judgments in Canadian courts to reflect these changes. Whereas conditions (a) and (c) are relatively general, the context of Canada, set in the condition (b) is important not only because of the introduction of the Multiculturalism Act of 1988 and the Canadian Charter's recognition of its role in preserving Canada's multicultural heritage, but also

because multiculturalism or the ethos of multiculturalism is closely associated with the self-understanding of many Canadians. Although it may have been reasonable to expect that multiculturalism would have had an impact on the legal understanding of ethnicity, given the nature and size of the research sample, the research findings tell us more about the ways in which ethnicity has been interpreted than about the impact of multiculturalism policy. In other words, there is a research limitation as to the approach and any attribution of variations in the interpretation of ethnicity to the impacts associated with multiculturalism should not be regarded in purely causative manner. The case law in my sample shows very few traces of multiculturalism's definition based on ethnicity. In fact, the sample did not contain any clear references to multiculturalism in definitions of ethnicity, and the absence of any reference to multiculturalism as a value or policy in the segments where ethnicity is reviewed is a finding on its own that should be studied (more) in future research. A different kind of methodology in a follow-up study could be used to study the role of multiculturalism in the formulation of ethnicity to see whether the findings would differ from the approach taken in this dissertation. Leaving aside recommendations on how to transcend this limitation for another research proposal, it is still important to note that any future analysis must be placed in the correct historical context recognising the role of multiculturalism. Importantly therefore, despite this limitation, it must be acknowledged that the Canadian legal system is one that has multiculturalism built into its legal framework.

The second limitation of my research methodology is about methodological and analytical consequences of clipping a segment, or segments, out of a judicial decision and

establishing the segment as a unit of analysis for the meaning of the term ethnicity. The reasoning as to why this methodology was chosen is described in greater details in subsection 5.4.1. However, it would be remiss of me not to mention that this choice of methodology entails its own limitations. In particular, legal discourse creates its “autonomy” by its self-referential nature, such as, that legal texts always refer to author legal texts, authorities, or legally authorized texts makes it. The limitation of reviewing the segments is at large due to the fact that the position of the term in the decision, and the decision’s position with respect to previous decisions is how meaning is established in legal reasoning and consequently in judicial decision-making. Empirically, there are important variations among discourses and their contexts. Thus, it is possible that in some cases the meaning of the term by thematically coding it at a particular segment was cut short of other connotations. Considering how the law as a self-referential discourse produces meaning, it is also possible that if read broadly, beyond the segment (and even the case, for example, a judicial review), ethnicity could be conceptualized more broadly. However, it should be noted that a thorough review of segments (and not cases) allowed the research in this dissertation to focus not only on commonsensical broad definitions of ethnicity, but also on other attempts by decision-makers to go beyond these definitions.

Thirdly, legal culture is not necessarily uniform (organisationally and meaningfully) across different branches of the law as pointed out in Subsection 4.4.2. The research points out to some tension in how administrative tribunals, and particularly those associated with refugees, as well as lower courts juxtapose to how SCC treats ethnicity. In other words, some of the specificity and context of each area may have been lost due

to my broad review of cases, and specific nuances from the respective fields may have been overlooked. Of the 36 cases that I focused on, some cases are drawn from immigration and refugee law, other cases focused on criminal law, administrative law issues, and others. In this sense, the diversity of the cases studied here can also be viewed as a limitation.

A similar limitation arose during the analysis. It became clear that the high number of refugee cases in the sample was not anticipated in the design stage. However, the result may not be of surprise and points out to yet another gap in scholarship: multiculturalism is predominantly discussed outside the issues of refugees. Refugee movements are a sub-set of global mass migration from south to north and east to west, and have a real and well-rounded fear of persecution. It is worth noting that the definition of ethnicity for citizenship and citizenship-like immigration statuses was generally found to have excluding effects. This aligns with Brubaker's observation that "citizenship and citizenship-like immigration statuses are extreme: how people identify themselves is irrelevant." The dominance of external categorization is characteristic of all forms of exclusion that work through legal categories (Brubaker 2015: 26).

What becomes important is that the discussion of the meaning of ethnicity in refugee cases evokes questions of citizenship and the limitation of the modern state system. Outside of academic discussions, this production of inequality remains legally, politically, and morally fairly unchallenged. Those excluded from the territory have neither the legal standing nor the political and organizational resources to challenge their exclusion (though there is at least legal recourse in Canada). Citizenship-based territorial

closure serves to perpetuate between-country inequalities by locking (most) people into the countries to which they were assigned at birth. Citizenship is not just a privilege (or for those with a “bad” citizenship, a disability); it is an inherited privilege (or disability), and one that is transmitted, in turn, to one’s descendants. In his book *Grounds for Difference*, Brubaker (2015) argues that rather than assuming for the sake of theory-building that the major categories of difference are implicated in the production and reproduction of inequality in fundamentally similar ways, citizenship, gender, and ethnicity contribute to regimes of durable inequality in different ways. On a global scale, “the visible exclusion of tens of millions of undocumented residents from a range of benefits within the territories of prosperous and peaceful states is dwarfed by the invisible exclusion of billions of noncitizens from the territories of such states” (Brubaker 2015: 19). The distinction between citizens and foreigners is built into the basic structure of the modern state system, which functions by assigning every person at birth to one and only one territorial state (though increasingly recognizing dual citizenship). A different kind of methodology in a follow-up study could be used to study possible intersections of ethnicity with questions of citizenship and refugee status.

In addition, and similarly to the above-mentioned limitation (from the legal perspective), treating all cases equally is not ideal as it removes procedural differences. In other words, the nature of each administrative regime is important as there are specific practices based on the type of delegated authority, the nature of the decision and the expertise of the decision maker. However, the potential differences between the type of cases/domain of law and how ethnicity is being treated offers an opportunity to pursue

this type of research in future. For a fuller analysis, the level of adjudication and perhaps the type of law needs to be taken into consideration. This fuller discussion and analysis should not be limited to the judicial and legal processes, it should include the discussions about definitions development and training resources. Ideally, and extending the argument of legal culture heterogeneity beyond legal system, it also should be noted that, the data reveals some tension in what elements of definitions of ethnicity appellants of applicants offer to make their claims. A broader discussion, relying on interviews, could inform as to how different understandings of ethnicity being made now only by judges, but also by those before the courts.

A broader discussion and proper comparative research are also necessary to study the questions of religious freedom vs. ethnicity within the Constitutional provisions for multiculturalism. The questions deserve more attention as it was not feasible to answer in greater detail whether religion cases are argued differently. The focus of this research is on ethnicity. It could be that religion is also largely ignored by those who focus on multiculturalism (Bramadat & Dawson 2014), though through this research it appears as if there was a greater legal attention to religion vs. ethnicity in relation to multiculturalism.

Last but not least, there are certain discourse analysis limitations. First, social scientists are aware of contextual realities when engaging with databases like CanLII. For example, the sample is limited to the keyword of ethnicity and does not include potential groups of geographic names that may have been used to replace ethnicity in the segments. Another limitation related to my choice of methodology is that the research was based on

rather broad search terms of “ethnicity” instead of specific ethnic markers analogous to racial markers such as “black” and “South Asian,” or specific national identifiers. Using these search terms may have excluded cases. However, the research confirmed that these terms are closely related to the definition of ethnicity by the courts. Secondly, the research was oriented to locate “progress” without providing a precise conceptualisation what the progress would look like. While the research for this question remained purely inductive, it is still possible that the courts and tribunals started to mobilize multiculturalism in their articulation of ethnicity as an ideal and heritage rather than as a right or basis of discrimination, and hence, symbolic characteristic of open-ended ethnicity may need to be reviewed with a different lens and methodology (interviews with decision-makers).

8. CONCLUSIONS

8.1 Contributions of the Dissertation

This dissertation's main contribution is that it provides a better understanding how decision-makers like judges and tribunal members understand ethnicity. Empirical studies that focus on the factors that may affect judicial decision making are rare (Xavier 2021). Canadian laws and the legal system proclaim commitments to equality before the law, and yet, judicial interpretation could undermine the equality that is provided in the legal texts. Therefore, this dissertation's empirical review was important as it allowed us to get, at the very least, a peak as to how the idea of ethnicity is defined and dealt with in judicial decisions. Especially, the position of power of the deciding majority in the courtroom is seldom considered in existing scholarship. My dissertation, first and foremost, offers such an empirical review.

The contribution of this dissertation as an empirical review of case law offers the how ethnicity is defined in court judgments. Since the law masks the condition of value-bias by positing neutrality and justifying legal outcomes in terms of a formal application of statutes and precedents, identifying the meaning of ethnicity is not an easy task. Drawing upon the critical strand of socio-legal scholarship, this empirical study helps to understand how judges make their decisions and what factors are important in defining or conceptualizing ethnicity. Importantly, the research reveals the decision-making process associated with adjudicating the cases where ethnicity is mentioned. It also continues to examine how social science evidence are brought in the case law.

My findings can be summarized as follows: the case law tends to over observe and under consider ethnicity. In particular, there is an observed tendency for courts and tribunals to fall back on a “common knowledge” of ethnicity, equating it with skin colour, ancestry, and other blood-based categories. Within the limits of my study, definitions of ethnicity that are based on blood were often found in cases that deal with refugees. These old-fashioned static understandings of ethnicity were still dominant at least until the end of 2009, where my study ended. Furthermore, my research revealed that references to visual or blood-based identifiers of ethnicity were sometimes replaced by more generalized references to ethnicity as immutable. I attributed this to the universalization effect as a recourse to fixed formulas. Also my research shows that ethnicity is often articulated in a way where a particular conceptualization is rendered as legitimate. On a hopeful note, in my research, some versions of an open-ended understanding of ethnicity were identified in court judgments where the interpretation of ethnicity is highly nuanced and contextual. This finding suggests that the understanding of ethnicity in Canada’s legal system may possibly be evolving, and that we may find more instances of fluid, relational open-ended interpretations of ethnicity in the future. (Even though such use of ethnicity also reveals the normative prescriptive nature of the case law and remains created with use of juridical language.) These findings are especially important in the absence of a legal case that explicitly refers to both ethnicity/ethnic groups AND multiculturalism, i.e., a case that could potentially clarify the role and understanding of ethnicity in a multicultural society.

As mentioned above, the relationship between multiculturalism and ethnicity in Canadian courts is understudied. The literature review made it explicit that existing scholarship integrated from the perspectives of law, multiculturalism, and racial/ethnic inequality tends to be segmented and does not clearly articulate the relationship between multiculturalism and ethnicity in Canadian courts. The theoretical framework of this dissertation offers a carefully assembled synthesis of disparate areas of research brought together to conduct my empirical research in a complex and nuanced way.

The dissertation also makes a modest contribution to the theoretical discussion in socio-legal studies. My research findings empirically confirm and extend the conclusions of the previous theoretical socio-legal studies that focus on the Canadian Charter of Rights and Freedoms. When it comes to other groups or identity grounds enumerated in Section 15(1), the existing scholarship does not dwell much on multiculturalism and ethnicity/ethnic groups. By using a different methodology, and by putting ethnicity at the centre of my research – and thus broadening the discussion beyond Section 15(1) of the Charter –, my research helps us understand whether there is a difference between the way the religious cases and those cases that relate to ethnic and racial discrimination are argued. In this sense, my research findings speak to previous socio-legal studies that focus on the limited significance of the Section 27 of the Charter (Christopher 2002; Rocher & Brassard-Dion 2016; Bakht 2009). While it is hard to dispute that multiculturalism is often interpreted on the basis of pre-existing trends inherited in religious diversity disputes, religious and ethnocultural diversity is not treated the same way. My research, however, did not confirm the statement that courts treat similarly

ethnic and religious diversity as a constituent element of multiculturalism (Rocher & Brassard-Dion 2016).

In terms of contribution to the theoretical discussion in socio-legal studies, my research aligns with the argument of MacDonald (2010), Winter (2015), and Fleras (2019) that “ethnic others” are constructed as being socially, culturally, or morally deviant from the dominant norm. As observed in the sample, judges sometimes use their “common knowledge” of ethnicity, equating it with skin colour, ancestry, and other blood-based categories, often extending beyond the small facts known to individual witnesses and even beyond the general facts known to experts. Such “common knowledge” seems to affect the most vulnerable groups. Thus, my research confirms the findings of Mackey (2002), Garneau (2016), and Chin (2017) who claim that any recognition of ethnic rights is a recognition not only of the differentiated identity of a group, but also of questions who has the legitimacy to decide what makes a “true” ethnic community.

From legal scholarship theoretical standpoint, my research suggests that prescribing culturally-reflexive legal reasoning to legal experts for them to consider cultural evidence would neither provide legal experts with an “over-counter” methodology of how to consider cultural evidence nor the additional time to reflect and meaningfully consider cultural evidence in the context of the cases in question. The research findings confirm the notion that the law masks the condition of value-bias by postulating neutrality and disregarding or random selection of scientific knowledge. References to blood or visual markers are legitimized with the effects created through

legalisms. This research identified post-Charter cases that treat ethnicity and ethnic origin as “immutable” due to the universalization effect. My research sample confirms Moran’s (1999) observation that the objective standard operates very differently for different groups of litigants. My research finding also aligns with Xavier’s (2021) argument that the law masks the condition of value-bias by positing neutrality and justifying legal outcomes in terms of a formal application of statutes and precedents. The research findings further advance the argument that we must overlay the experience of the various ethnic communities of color for the legal system to stop functioning as a means to exclude.

Finally, and most importantly, the comparatively short period of 17 years that is covered in the research sample suggests that the open-ended understanding of ethnicity in Canada’s legal system (while my full analysis is from 1955-2009, the cases in this category are from 1988-2005) is of a rather normative, prescriptive nature. As noted by Fleras 2019, multicultural discourses are rooted in an almost essentialized understanding of immigrant ethnicity as primordial and immutable. It is clear that even proponents of multiculturalism tend to accept multiculturalism as a given. Based on the articulation of open-ended ethnicity located in the judgments in this research, multiculturalism also appears to be largely symbolic and abstract. This finding confirms rather prognostic statements that multiculturalism should not be framed as a corpus of immutable beliefs as much as a flow of mutable practices and evolving ideals whose very nature is to change and be changed (Appiah 2018). Apart from a very few instances in the empirical evidence of the research sample suggesting some level negotiations within the courtroom, I was

not able to either confirm or deny Day's (2000) argument of the importance of multicultural "negotiation" of diverse identities. Otherwise, it would become apparent that multiculturalism policy is indeed rather about management, discipline, and uniformity. Even, if there is some emerging evidence (11 segments) to suggest that "ethnic" identities in the courtroom are framed as dynamic and constructed, open ended and complex, performative and contextual. Rather, in my research they appear categorical, rigid in terms of identity and belonging, and very little voluntaristic in commitment. They are thus unsuitable to what Fleras (2019) suggests to be an "interpretive lens" of articulating ethnicity and reframing multiculturalism. A social-justice infused commitment to multiculturalism should be about making Canada more inclusive rather than making it more multicultural. Sadly, the cases reviewed in this dissertation tended to (re)produce a vertical, exclusive, and essentializing multiculturalism.

8.2 Practical Recommendations

When it comes to practical advice, the research findings highlight the importance of expert decision-making. They suggest possible insights into the work of both expert witnesses and judicial decision-makers (panel members and judges). What is the knowledge or the area of expertise required to make the kinds of decisions that pertain to ethnicity? Much of the literature on expert decision-making emphasizes the point that expertise is "domain-specific," such as appears in the cases described in this research. For

example, Cunliffe (2014), in assessing a person's expertise, suggests a focus on the particular skill being exercised, the task being completed, and the individual's previous opportunity to acquire that skill in the same or an analogous environment, and not on the person's prior experience across the field as a whole. Courts should be particularly wary of experts who testify to a perfect record of accuracy or who assert the capacity to reach conclusions other experts cannot reach.

Members of the Refugee Protection Division reach a decision on each case by listening to the facts and analyzing them, and matching up the individual circumstances with the relevant Canadian and international law. They must also listen to often-complex legal arguments, sometimes by self-represented claimants. Interestingly, for such an important job, the requirements are primarily a combination of administrative education and experience. The job description outlines that members of the Immigration and Refugee Board must have a secondary school education and previous experience in different kinds of tribunals. Very little attention is given to a panel member's particular academic background, highlighting how the federal government does not believe that specific academic knowledge or approaches are required in either the social sciences or in legal training.

For judges, legal experience is a must, since the decision-making process remains a complex one. In this regard, Cunliffe (2014) describes the legal process for determining facts. By the time judges are appointed to the bench, they have considerable training and experience in legal analysis. From a basic introduction to legal reasoning in first-year law school, through more advanced classes and bar-entrance examinations, to the formal and

informal training of practice, years of experience give judges many opportunities to improve their skills at legal analysis (Cunliffe 2014). But when it comes to factual reasoning, Cunliffe opines, law students and lawyers receive far less training. Courses in process evidence may not be compulsory, and they usually focus only on legal rules of admissibility.

Appendix A: Summary of Cases/Segments by Ethnicity

Codes

Time	# of Cases (36)	# of Segments (46)	Blood (22)	Region (4)	Values (9)	Open-ended (11)
1950-	1	2	(1) Segment 1 - 1 of 2 Narine-Singh v. Attorney General of Canada, 1955 SCC	(1) Segment 23 - 2 of 2 Narine-Singh v. Attorney General of Canada, 1955 SCC		
1960-	0	0				
1970-	2	2	(1) Segment 2 - Arthurs v. R., 1972 SCC	(1) Segment 24 - Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development), 1979 FC		
1980-	13	15	(8) Segment 3 - R. v. Hill, 1986 SCC Segment 4 - 1 of 2 LeDeuff v. Canada (Employment and Immigration Commission), 1986 CHRT Segment 5 - 1 of 3 Hum v. Royal Canadian Mounted Police, 1986 CHRT Segment 6 - 1 of 2 Headley v. Public Service Commission Appeal Board, 1987 FCA Segment 7 - Basi v. Canadian National Railway, 1988 CHRT Segment 8 - Kibale v. Transport Canada, 1987 CHRT Segment 9 - Dhami v. Canada (Employment and Immigration Commission), 1989 FCT Segment 10 - 1 of 2 Mossop v. Secretary of State, 1989 CHRT		(4) Segment 27 - Devine v. Attorney General of Quebec, 1988 SCC Segment 28 - 2 of 3 Hum v. Royal Canadian Mounted Police, 1986 CHRT Segment 29 - 2 of 2 Headley v. Public Service Commission Appeal Board, 1987 FCA Segment 30 - 2 of 2 Mossop v. Secretary of State, 1989 CHRT	(3) Segment 36 - 1 of 2 LeDeuff v. Canada (Employment and Immigration Commission), 1987 CHRT Segment 37 - 3 of 3 Hum v. Royal Canadian Mounted Police, 1986 CHRT Segment 38 - 1 of 1 Andrews v. Law Society of British Columbia, 1989 SCC
1990-	12	15	(7) Segment 11 - Bader v. Canada (Department of National Health & Welfare), 1996 CHRT Segment 12 - 1 of 3 Mitac v. Canada (Minister of Citizenship and Immigration), 1999 FC Segment 13 - Lutete v. Canada (Minister of Citizenship and Immigration), 1999 FC	(2) Segment 25 - Peterson v. Canada (Minister of State, Grains and Oilseeds), 1995 FCA Segment 26 - 1 of 2 Rivers v. Squamish Indian Band Council, 1994 CHRT	(3) Segment 31 - 2 of 3 Mitac v. Canada (Minister of Citizenship and Immigration), 1999 FC Segment 32 - 2 of 2 Rivers v. Squamish Indian Band Council, 1994 CHRT Segment 33 - Kabashi v. Canada (Minister of	(3) Segment 39 - 3 of 3 Mitac v. Canada (Minister of Citizenship and Immigration), 1999 FC Segment 40 - Dogra v. Canada (Minister of Citizenship and Immigration), 1999 FC Segment 41 - X (Re), 1999 CA IRB

Time	# of Cases (36)	# of Segments (46)	Blood (22)	Region (4)	Values (9)	Open-ended (11)
			Segment 14 - Pluhar v. Canada (Minister of Citizenship and Immigration), 1999 FC Segment 15 - Benoit v. Canada Post Corp., 1992 CHRT Segment 16 - B'Nai Brith v. Manitoba Knights of the Ku Klux Klan, 1992 CHRT Segment 17 - Chander v. Canada (Department of National Health & Welfare), 1995 CHRT		Citizenship and Immigration), 1998 FC	
2000-	10	12	(5) Segment 18 - 1 of 3 Vodics v. Canada, 2005 FC Segment 19 - Granovsky v. Canada (Minister of Employment and Immigration), 2000 SCC Segment 20 - Baier v. Alberta, 2007 SCC Segment 21 - 1 of 2 R. v. Powley, 2003 SCC Segment 22 - R. v. Grant, 2009 SCC		(2) Segment 34 - 2 of 3 Vodics v. Canada, 2005 FC Segment 35 - R. v. Spence, 2005 SCC	(5) Segment 42 - 3 of 3 Vodics v. Canada, 2005 FC Segment 43 - R. v. Krymowski, 2005 SCC Segment 44 - Van de Perre v. Edwards, 2001 SCC Segment 45 - 2 of 2 R. v. Powley, 2003 SCC Segment 46 - Syndicat Northcrest v. Amselem, 2004 SCC

Legend:

- (13) SCC: Supreme Court of Canada
- (14) FC: Federal Court
- (15) FCA: Federal Court of Appeal
- (16) CHRT: Canadian Human Rights Tribunal
- (17) CA IRB: Canada Immigration and Refugee Board.

Appendix B: Textual Analysis - Segments

Blood-based Category by Segment and Corresponding Case

1. In *Narine-Singh v. Attorney General (Canada)*, 1955 SCC, the question was that the appellants were “Asians” and, as such, excluded by the terms of s. 61(g) of the Immigration Act, 1952. Both appellants were born in Trinidad, from where they had come to Canada, and that in reply to the question “of what race are you?” the answer in each case was “East Indian.” The use of the word “Asian” in the regulation is justified only by the words “geographical area of origin” in the statute and having been born in Trinidad (and that their parents and grandparents were also born there), was not within the statute. It was hence submitted that the words “ethnic group” cannot be interpreted as in any sense equivalent to “race” but are to be given a much narrower meaning. It was held, however, that in accordance with the Oxford Dictionary, the meaning of the word “ethnic” was “pertaining to race; peculiar to a race or nation; ethnological.” Further, one of the meanings given to the word “race” is: “a group of persons connected by common descent or origin. In the widest sense the term includes all descendants from the original stock but may also be limited to a single line of descent or to the group as it exists at a particular period” (*Narine-Singh v. Attorney General (Canada)*, 1955 SCC).
2. In *Arthurs v. R.*, 1974 SCC, the appellant (a man of colour) was convicted, after a trial before a judge and jury, on a charge of causing bodily harm to L. by criminal

negligence in the operation of an automobile. The case judgment simply enumerates ethnic origin together with color and race: “there was no record or otherwise, of the race, colour, creed or ethnic origin of counsel engaged in the trial, or of the members of the jury” (*Arthurs v. R.*, 1974 SCC).

1980-1990

3. In *R. v. Hill*, 1986, SCC segment on whether or not “ordinary person” means ordinary person of same age and sex as accused also raised “ethnic” origin: “If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of a different colour or ethnic origin--or to consider how such a man would have acted or reacted” (*R. v. Hill*, 1986, SCC).
4. In *LeDeuff v. Canada* (Employment and Immigration Commission), 1986, CHRT, Mr. Jacques LeDeuff filed a complaint with the Canadian Human Rights Commission, alleging that the respondent differentiated adversely in his regard and “harassed me on the basis of its perception of my national or ethnic origin” (perceived as being other than Canadian). Because his last name sounded foreign, he was contacted by the respondent and was questioned about his immigration status in Canada.
5. In *Hum v. Royal Canadian Mounted Police*, 1986 CHRT, a complaint was brought by Mr. Gordon Hum, a Canadian citizen of Chinese Canadian

background who was born in Halifax, Nova Scotia. RCMP stopped Mr. Hum on the basis that he was a visible minority to verify his identity. Persons of ‘foreign ethnic background’ were identified by the use of appropriate questions and by means of physical evidence such as dress, speech, customs, and appearance. The purpose was to determine the person’s status in Canada in order to enforce the Immigration Act: “under the Immigration Act, RCMP officers are required to identify all aliens whether they are Caucasian and have a good command of the English language or they are non- Caucasian. Americans are the number one offenders of the Immigration Act” (*Hum v. Royal Canadian Mounted Police*, 1986 CHRT).

6. A quote from Professor Gibson in *Headley and Public Service Commission* 1987 FCA discrimination case. Professor Gibson is of the opinion that the drafters of the Charter attributed to the ethnic origin natural and unalterable characteristics: “In particular, the fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings — race, national or ethnic origin, colour, religion (admittedly, not wholly a natural and unalterable fact), and sex — can only mean, I believe, that non-trivial pejorative distinctions based on such categories are intended to be justified by governments under s. 1 rather than to be proved as infringements by complainants under s. 15” (*Headley and Public Service Commission*).
7. *Basi v. Canadian National Railway*, 1988 CHRT mentions colour in reference to ethnicity.

8. In *Kibale v. Transport Canada*, 1987 CHRT, the appellant, who is black, responded to a notice of competition for the position of Economist, Strategic Analysis, with Transport Canada. The appellant was interviewed and claimed that he was asked a number of questions about the ethnic and racial origin of his wife.
9. *Dhami v. Canada (Employment and Immigration Commission)*, 1989 FCT The question of the case was whether these two incidents were the result of discriminatory conduct or practices by the Respondent and its' agents or servants based on race, colour and national or ethnic origin.
10. In sexual discrimination case *Mossop v. Secretary of State* 1989 CHRT, evidence of an expert witness in the area of sociology and family policy was requested at the hearing. From a family policy perspective, Dr. Eichler emphasized the importance of looking at "relationships as they are" in determining the ethnic origin of a child whose natural parents or step-parents may be of different ethnic origins and speak different languages even than their children. Dr. Eichler noted that Statistics Canada has adopted a definition for ethnic origin that considers a number of factors, including: background of the mother and father, language spoken at home, and the actual identification of the child.

1990-2000

11. In *Bader v. Canada (Department of National Health & Welfare)*, 1996 CHRT, the Complainant alleged that the Department of National Health and Welfare had discriminated against him in the provision of services on the basis of his national

or ethnic origin and race in violation of section 5 of the Canadian Human Rights Act. He testified that Canada's policies and actions with respect to the enforcement of the Food and Drug Act and the regulations made in relation to the import and sale of health foods differentiated between the business carried by merchants who are Caucasian, compared to by merchants whose race is Oriental or whose ethnicity is Chinese.

12. In judicial review of the tribunal case *Mitac v. Canada (Minister of Citizenship and Immigration)*, 1999 FC, the applicants claimed refugee status on the grounds of their race and membership in the Romany minority. The tribunal relied on three findings to support its conclusion that the applicants were not Roma: (a) the family did not have the usual ethnic or racial traits of European Roma but resembled persons from Pakistan or Turkey; (b) the family could not prove that they spoke the Romani language and were not well-versed in the Romani culture; and (c) the parents could not identify the sub-group of Roma with which they were affiliated. The claimant said that others would identify him as a Roma as a result of his dark skin. In response, the panel remarked to the principal claimant that his physical features suggest he may perhaps be someone of Pakistani or Turkish ethnicity, because he, and especially his sons, do not appear to the panel as bearing the features one might customarily attribute to persons claiming to be Roma. The claimants' physical appearance is more Near Eastern or Asian than the usual traits normally observed by this and other panels of European Romas from the Czech Republic. Although this case is coded here because of the tribunal

reliance on their own observations concerning an applicant's physical features, the case is also coded in two other categories and discussed below: shared values (language) and cognition.

13. In judicial review of the Immigration and Refugee Board case *Lutete v. Canada (Minister of Citizenship and Immigration)*, 1999 FC, the Board determined that the applicant and her child are not Convention refugees. The claimant feared persecution by Kabila's officials, who are predominantly Rwandan Tutsis, by reason of the ethnic origin of her mother and her physical appearance, which is similar to that of ethnic Hutus. In the review, she submits that the documentary evidence submitted to the Board established that the Hutus and the majority of Zairians are members of the Bantu group and their physical appearance is quite similar, which led the Board to determine that the claimants would not be persecuted by reason of their membership in an ethnic group. With respect to the fear of persecution by reason of her maternal ethnic origins, the panel is of the view that there is no reasonable chance that she would be persecuted. The documentary evidence does not indicate that people with Hutu physical characteristics, or Rwandan Hutus who live in Kinshasa are persecuted by reason of their ethnic group or Hutu characteristics. The panel is of the view that it is unlikely the Kabila regime persecutes people with Hutu characteristics.

14. In *Pluhar v. Canada (Minister of Citizenship and Immigration)*, 1999 FC, Mr. Pluhar, who is not Rom, fears persecution because of his marriage to a woman who is perceived to be a Roma. At the hearing of the applicants' claims, the

Refugee Division focused on whether Ms. Pluharova would be perceived as Roma in the Czech Republic. The panel observed the female claimant's physical appearance: darkened skin, black hair and black eyeliner, heavy makeup, and a fringed vest with large, gold, hooped earrings. According to the panel, the claimant appeared to have been attempting to demonstrate physiological traits and clothing traditions which she believed the panel might associate with a female Roma person.

15. In *Benoit v. Canada Post Corp., 1992 CHRT* a complainant with the Canadian Human Rights Commission against the Canada Post Corporation claims to have been discriminated against because of her race, colour (black) and ethnic origin (Haitian), in contravention of subsection 7(a) of the Canadian Human Rights Act. She further claims that the respondent adopted a policy or practice that deprives or tends to deprive an individual or class of individuals of an employment opportunity, based on race, colour (black), and ethnic origin (Haitian), in violation of section 10 of the Canadian Human Rights Act.

16. *B'Nai Brith v. Manitoba Knights of the Ku Klux Klan, 1992 CHRT* dwells on the issues of hatred and deals with evidence including Quotation (3) while still targeting non-whites, expands the grounds upon which people are targeted by dealing with immigration and, in particular, third world immigration, thus raising the inference of national and ethnic origin. The clear message here is that there is too much third world immigration ("a massive flood") which is given unfair priority over whites who can better contribute to this nation. Quotation (4) uses

language which blatantly attacks these immigrants as "underqualified undesirables" who are given priority because of their colour.

17. *Chander v. Canada (Department of National Health & Welfare)*, 1995 CHRT case of discrimination. Each complainant was qualified for the job but neither were hired. The respondent continued to seek applicants with the qualifications presented by the complainants. The complainants were subjected to differential treatment in their work concerning the fluconazole submission. The decision not to hire the complainants was made prior to the job interviews, the job interviews were subjective and perfunctory, and the respondent's representatives later lied about the conduct of the interviews to the union. The job interviews were not real and the respondent showed bias toward the complainants after the job interviews. No reasonable explanation was provided by the respondent. The explanations which were provided are inconsistent with the evidence. The complainants have made out a prima facie case which has not been rebutted by the respondent. We are satisfied that the reasons for the conduct of the respondent toward each complainant included discrimination on the grounds of the complainants' race, colour, and national or ethnic origin.

2000-2010

18. The panel was ready to consider the applicant's claim that his mother is a visible Roma minority because she has dark hair and dark skin. However, since the

applicant did not provide the panel with a photograph of his mother, the panel “dr[e]w a negative inference from the absence of [his] mother's photograph, which the panel believe[d] would have been reasonable for [him] to produce at the hearing” (Vodics v Canada 2005).

19. *Granovsky v. Canada* (Minister of Employment and Immigration), 2000 SCC case content is largely irrelevant in terms of content except the case treats ethnic origin as immutable in comparison to disability: “Disabilities are certainly not ‘immutable’ in the secondary sense of “[n]ot varying in different cases” (New Shorter Oxford English Dictionary (1993), vol. 1, p. 1317). “Unlike gender or ethnic origin, which generally stamp each member of the class with a singular characteristic, disabilities vary in type, intensity and duration across the full range of personal physical or mental characteristics...” (Granovsky v. Canada (Minister of Employment and Immigration), 2000 SCC).
20. The content of *Baier v. Alberta*, 2007 SCC case is irrelevant except it refers to another case *Corbiere v. Canada* (Minister of Indian and Northern Affairs), 1999 SCC, for the discussion on how to identify analogous grounds like the ones enumerated in s. 15 race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability: “[what the enumerated grounds] have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. [...] Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority

or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making” (*Baier v. Alberta* 2007)

21. In *R. v. Powley*, 2003 SCC, the respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence. The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the Constitution Act, 1982, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals. The SCC looked into three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance. For the ancestral connection, the SCC wrote that a “claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practises ground the right being claimed. We would not require a minimum “blood quantum”, but we would require some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative” (*R. v. Powley*, 2003 SCC).

22. The *R. v. Grant*, 2009 SCC case content is irrelevant except ethnicity is suggested to be visible in the following paragraph: “In determining whether [Mr. Grant] (or a reasonable person in his position) would feel free to choose to walk away from three policemen, contrary to their wishes in the circumstances here, his ethnicity raises a significant issue. As the above-mentioned studies show, trial judges differ in the weight they are willing to accord to ethnicity in such “low visibility” encounters, despite the over-representation of Aboriginals and other visible minorities in encounters with police patrols” (*R. v. Grant*, 2009 SCC).

(Territorial Factors, Nationality, and Citizenship by Segment and Corresponding Case)

The preliminary codes were region based (territorial factors, nationality, and citizenship).

23. In the *Narine-Singh v. Attorney General (Canada)*, 1955 SCC case detailed earlier the question was whether the appellants were “Asians” and, as such, excluded by the terms of s. 61(g) of the Immigration Act, 1952. The use of the word “Asian” in the regulation is justified only by the words “geographical area of origin” in the statute and having been born in Trinidad (and that their parents and grandparents were also born there), was not within the statute.

24. In *Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development)*, 1979 FC, the plaintiffs asserted an existing aboriginal title over an undefined portion of the Northwest Territories of Canada, including approximately 78,000 square kilometers around the community of Baker Lake. The boundaries of the Baker Lake Area coincided with the boundaries of the lands withdrawn from disposal under the Territorial Lands Act of 1970. The government defendants asked that the action be dismissed with costs. The defendant mining companies asked that the action be dismissed and some, by counterclaim, for declarations that the lands within the Baker Lake Area are “territorial” and “public” lands and that the Inuit resident there do not have “rights previously acquired” and are not “holders of surface rights.” In reviewing the evidence, the judge intended to describe the geography of the Baker Lake Area and its environs and then its occupation by humans from pre-historic times to the present and dealt with mining effects on the caribou and the Inuit's hunting of them. (*Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development)*, 1979 FC).

25. In *Peterson v. Canada (Minister of State, Grains and Oilseeds)*, 1995 FCA, the appellants were citizens of the United States. For three years, they farmed in Saskatchewan and held a permit book for the sale of grain. One of the appellants was a landed immigrant, and Employment and Immigration Canada authorized the other two to work in Canada for specified periods of time each year. Together, the appellants marketed their grain through the Canadian Wheat Board and paid

Canadian income tax on their Canadian income. The decision was largely based on similarity to citizenship (discussed in the Andrews case later in ethnicity as cognition), however, the judgment states that there was less of a discrimination factor as there was no evidence of a "discrete and insular minority" who have suffered historically from stereotyping or otherwise in Canadian society. In contrast to citizenship, residence is hardly viewed as analogous to the prohibited criteria specified in s. 15(1) since the appellants probably could have secured (and one did secure) landed immigrant status and thereby qualify for the subsidy program.

26. One of the segments in *Rivers v. Squamish Indian Band Council*, 1994 CHRT (described in details further) in which Dr. Robinson gives evidence as to fundamental distinguishing features between aboriginal groups on the Northwest Coast and, in particular, fundamental differences in the ethnic identity between the Gitksan and the Squamish people states that the Squamish nation (described as geographically part of Central Coast Salish) and the Gitksan nation are located very far apart geographically.

In sum, the codes related to territorial codes: geographical area/part of origin, residence, territory. As predicted in the proposal stage of this research, a Weberian perspective on nationality, in which one could trace common political experience formed and crystallized the ethnic group sentiments in the formation of nationality was absent in the sample.

Language Category by Segment and Corresponding Case

In this category, I considered the cases wherein ethnicity was referenced to shared values (value statements with the emphasis on society and not agency), such as religion (the “shared values” perspective is present in recent discussions in Canada’s courts about the niqab). For example, I looked for cases in which ethnicity has an emphasis on the norms and values of social systems and little discussion about individual and group dynamics.

27. The *Devine v. Quebec* (Attorney General), 1988 SCC case is about the signs and posters in Quebec respecting cultural activities of a particular ethnic group that may be in both French and the language of that ethnic group.

28. In *Hum v. Royal Canadian Mounted Police*, 1986 CHRT, a complaint was brought by Mr. Gordon Hum, a Canadian citizen of Chinese Canadian background who was born in Halifax, Nova Scotia. RCMP stopped Mr. Hum on the basis that he was a visible minority to verify his identity. Persons of ‘foreign ethnic background’ were identified by the use of questions and criteria used in identifying persons who have difficulty with the English language.

29. The *Headley and Public Service Commission* appeal board, 1987 FCA reviewed the decision of rejecting the applicant's argument that s. 15 of the Canadian Charter of Rights and Freedoms had been violated by the decision of the

Department of Manpower and Immigration to require, as a basic qualification for the position by the applicant, a new qualification that had not been required in the past. This case is about discrimination based on language requirements and as such the judgment explores the violation of rights and freedom through the guarantees in the Charter.

30. In sexual discrimination case (detailed above) *Mossop v. Secretary of State* 1989 CHRT, evidence of an expert witness in the area of sociology and family policy was requested at the hearing. Dr. Eichler emphasized that the ethnic origin of a child whose natural parents or step-parents may be of different ethnic origins and speak different languages even than their children. Dr. Eichler noted that Statistics Canada has adopted a definition for ethnic origin that considers a number of factors, including: background of the mother and father, language spoken at home, and the actual identification of the child.

1990-2000

31. In judicial review of the tribunal case *Mitac v. Canada* (Minister of Citizenship and Immigration), 1999 FC (detailed above), the applicants claimed refugee status on the grounds of their race and membership in the Romany minority. The tribunal relied on three findings to support its conclusion that the applicants were not Roma: the family could not prove that they spoke the Romani language and were not well-versed in the Romani culture among other factors.

32. In *Rivers v. Squamish Indian Band Council*, 1994 CHRT the Complainant Leonie Rivers stated that she had grounds for believing that the Squamish Indian Band Council of North Vancouver, B.C. engaged in discriminatory practices on the grounds of family status and national or ethnic origin (Gitksan). The case dwelled on the terminology of ethnic groups. Dr. Robinson gave evidence as to fundamental distinguishing features between aboriginal groups on the Northwest Coast and, in particular, fundamental differences in the ethnic identity, linguistic affiliation, and other cultural features between the Gitksan and the Squamish people: [(a) The Squamish nation (described as geographically part of Central Coast Salish) and the Gitksan nation are located very far apart geographically]; (b) The Squamish language (part of the Coast Salish language group) and the Gitksan language (part of the Tsimshian language grouping) are totally unrelated and mutually unintelligible; (c) The Squamish have historically had a bilateral kind of social organization, in contrast to the Gitksan who are organized matrilineally; (d) A particular system of clans and crests is part of the Gitksan ethnic identity (as according to Leonie Rivers is the use of button blankets in Gitksan ceremonies which contrast with other costumes for ceremonies in the Squamish culture); (e) Historically and prehistorically, the Squamish and the Gitksan would have seen themselves as absolutely ethnically distinct, and it is very unlikely that there would have been amicable relations of any kind between the two nations or indeed any contact at all.

For meaning of the term “ethnic origins”, the case referred to the New Zealand Court of Appeal by *King-Ansell v. Police*, (1979): “Those same shared historical bonds to which he referred are sufficient to constitute national origin. In the same way a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological term is common racial stock. They have a distinct social identity based on simply on group cohesion and solidarity but also on their belief as to their historical antecedents” (*Rivers v. Squamish Indian Band Council*, 1994 CHRT).

33. The *Kabashi v. Canada* (Minister of Citizenship and Immigration), 1998 FC case is an application for judicial review of a decision of the CRDD for the applicant's claim to be an ethnic Albanian, having been born and lived in Yugoslavian in the Province of Kosovo. Although this case refers to ethnic Albanian, it tests the claimants' citizenship by verifying his Serbo-Croatian language skills “...by administering a very basic language test developed in conjunction with [the applicant's] counsel.” The CRDD found the applicant's knowledge of that language to be “spotty.” In its reasons, it explained this to mean that he did better when he was able to demonstrate to the CRDD what he knew, but not so well

when he was invited to translate words chosen by the panel. The CRDD concluded: “We think that the claimant, knowing that language testing is frequently used to help determine whether someone is really from Kosovo, has learned some of the language for purposes of this hearing.”

2000-2010

34. Although I did not notice originally at the time when I developed the preliminary typology, the Vodics case is to be added in the category of ethnicity as shared values. To remind the reader: the CRDD panel in Vodics noted that the applicant did not speak the language or practice the traditions¹⁸ traditionally ascribed to someone of Romany descent.

35. In *R. v. Spence*, 2005 SCC, a black accused was charged with robbing an East Indian man. The accused sought to challenge potential jurors for cause, arguing that jurors who are East Indian may feel a natural sympathy for a victim of the same race and that race based sympathy for the victim aggravates or compounds the potential racial prejudice against a black accused. The trial judge permitted the defence to challenge potential jurors for cause on the basis of potential bias against a black accused but exercising his discretion, refused to extend the challenge to include the race of the complainant, as he regarded the “interracial” element on the facts of this case to be irrelevant. At trial, the accused was

¹⁸ Although the applicant stated that this is not surprising because he was taken into an institution at the age of four, the panel concluded by all the other characteristics that one would assess whether someone is a Roma, he appears to be the exception.

convicted. On appeal, he argued that he was deprived of his right to an impartial jury and therefore to a fair trial. The majority of the Court of Appeal set aside the conviction, holding that if an accused is entitled to challenge the jury for cause and wishes to include the interracial nature of the crime in the question for potential jurors, he is entitled to have the question posed in that way. The SCC decided that the majority of the Court of Appeal pushed judicial notice beyond its proper limits. While courts have properly taken notice of the widespread existence of racism, and the likelihood that antiblack racism is aggravated when the alleged victim is white, there is no similar consensus that “everybody knows” a juror of a particular race is likely to favour a complainant or witness of the same race, despite the trial safeguards and the trial judge’s instruction to the contrary. Although this case largely relates to race, the ethnicity is only discussed in an attempt to identify where the Court draws the “fairness” line. “In the Johnson article, cited above and referred to both in Williams and Parks, reference is made to a study investigating the effect of the defence lawyer’s race on the determination of his client’s guilt. The study found a consistent anti-black defence lawyer bias. Does “fairness” require that the race of counsel be included in the Parks question? [...] a study in which English speaking Canadians were provided with a modified court transcript of a rape trial whereby the ethnicity of the defendant and the victim were varied. The study found that English speaking Canadians viewed French speaking Canadians more positively than either English or native Canadians. The victim was viewed more positively when she was French, and the accused was seen as more guilty when the victim was French.

In total the 9 cases mentioned here are about language and other linguistic affiliations: French/English, French/English speaking Canadians, language, and linguistic affiliation. The ethnic group is defined as social organization, system of clans and crests, and shared customs, beliefs, traditions, and characteristics.

Open-ended Ethnicity by Segment and Corresponding Case

In my draft of the typology of ethnicity in Canadian federal court judgments, I was most interested to observe and empirically ground the conceptualization of ethnicity that is characterized by the appreciation of the fact of multiplicity. As mentioned already, there were no defined codes for the category of ethnicity as cognition. Very loosely, in this category of ethnicity, I expected that ethnicity would rather “engage” than suppress the ethnic differences. To remind the reader, this understanding of ethnicity is close to Brubaker’s approach and is characterized by the ways through which people recognize and experience objects, places, persons, actions, or situations as ethnically marked or meaningful.

The cases are described below in chronological order.

1980-1990

36. In *LeDeuff v. Canada* (Employment and Immigration Commission), 1987 CHRT, detailed above in the first category, Mr. Jacques LeDeuff filed a complaint that

the respondent differentiated and harassed on the basis of perception of his national or ethnic origin (perceived as being other than Canadian). Because his name sounded foreign, he was contacted by the respondent and asked what his immigration status was in Canada. According to the officer, this is standard practice of the respondent – the Canada Employment and Immigration Commission. The tribunal concluded that the Canada Employment and Immigration Commission derived its authority from an act passed by the Parliament of Canada. The Canada Employment and Immigration Commission was carrying out an official duty as an agent of the Crown and thus was providing a service to the public. Similarly to the Hum case, the tribunal judged that the Canada Employment and Immigration Commission was providing a service to the public and consequently was obliged to refrain from acting on a prohibited ground of discrimination.

37. In *Hum v. Royal Canadian Mounted Police*, 1986 CHRT, the complaint was brought by Mr. Gordon Hum, a Canadian citizen of Chinese Canadian background who was born in Halifax, Nova Scotia. RCMP stopped Mr. Hum on the basis that he was a visible minority to verify his identity. While this case was categorized in two previous categories, the judgment also contains a paragraph that alludes to ethnicity as cognition through recommendation on training: “The evidence of officers suggest that the RCMP has made considerable strides in sensitizing the members of the Force to the realities of the multi- racial and cultural society which Canada now is. The Force is to be commended for the

cross-cultural programs which it has devised and the instruction it gives in these matters.” The recommendation further specifies that: “the perceived imperatives of enforcement and the rights of Canadian citizens, in which the impulse is to give greater weight to the former over the latter. The only satisfactory way of working change in police attitudes in these matters in the long term is through education and the challenging of officers to think through carefully the undesirable implications both to society and to the individual of infringing the rights of a citizen from a visible minority on grounds of race, colour or ethnic origin.”

Although it is not a straightforward categorization and the definition of ethnicity, as such, remains ambiguous, I consider the fact that the educational and training programs are promoted to provide instruction to RCMP members on the importance of not sacrificing the right of citizens from visible minorities to equal treatment when investigating infringements of the Immigration Act.

38. In *Andrews v. Law Society of British Columbia*, 1989 SCC, the respondent Andrews, a British citizen permanently resident in Canada, met all the requirements for admission to the British Columbia bar—except that of Canadian citizenship. His action for a declaration that that requirement violated s. 15(1) of the Canadian Charter of Rights and Freedoms was dismissed at trial but allowed on appeal. The constitutional questions before the SCC: (1) whether the Canadian citizenship requirement for admission to the British Columbia bar infringed or denied the equality rights guaranteed by s. 15(1) of the Charter; (2) if so, whether that infringement was justified by s. 1. The SCC judgment agrees

with the Court of Appeal in viewing that citizenship does not ensure familiarity with Canadian institutions and customs. First, the case denounces that citizens are the only ones who are familiar with customs, institutions, and values: “Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society.” The similar logic is applied in this case with respect to ensuring commitment to Canadian society: “The second reason for the distinction—that citizenship implies a commitment to Canadian society—fares little better upon close examination. Only those citizens who are not natural-born Canadians can be said to have made a conscious choice to establish themselves here permanently and to opt for full participation in the Canadian social process, including the right to vote and run for public office. While no doubt most citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that that is the case. Conversely, non-citizens may be deeply committed [sic] to our country. Moreover, the requirement of commitment to our country is arguably satisfied by the oath of allegiance which lawyers are required to take. An alien may swear that oath. In any event an alien may owe allegiance to the Crown if he is resident within this country, even if he does not take the oath of allegiance” (*Andrews v. Law Society of British Columbia*, 1989 SCC). The case refers to ethnicity as a keyword 6 times. While the decision is not about ethnicity per se, it is one of the very few cases that expresses minority group dynamics from the

vulnerable and disadvantaged position of the non-citizens (making them an analogous category to those specifically enumerated in s. 15). For example: “Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. [...] Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of Considerations on Representative Government that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked. [...] While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.” Secondly, the Andrews case makes an important observation about the changing nature of s.15 categories: “...the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. [...] It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come.” Thirdly, non-citizens are described in the light of historical context of discrimination: “a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions. History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons

entering into certain employment. Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15.”

1990-2000

39. In judicial review of the tribunal case *Mitac v. Canada* (Minister of Citizenship and Immigration), 1999 FC,—detailed above—the applicants claimed refugee status on the grounds of their race and membership in the Romany minority. Importantly, the review noted that it is inherently dangerous for Board members to base a finding on “whether people in another country would regard a claimant as of particular ethnicity solely on the basis of the members’ observation of the person concerned.” The decision cites the Pluharova case in which “common sense” is questioned: “since Ms. Pluharova had black hair and a “sun tanned” appearance, the panel’s “common sense” was an insufficiently reliable basis for the panel’s assessment of such a sensitive matter [...] Racists may be able to identify a person as a member of a minority group by physical characteristics that would not necessarily be apparent to people in other countries” (*Mitac v. Canada*, 1999 FC).
40. *Dogra v. Canada* (Minister of Citizenship and Immigration), 1999 FC is about a citizen of India who lived in New York and applied for permanent residence in Canada as an independent applicant in the skilled worker category: school and guidance counselor. Ms. Dogra was interviewed at the Canadian Consulate in

New York City by a visa officer who raised with the applicant the relevance to Canada of her experience as a guidance counsellor in India, and suggested that, with education cutbacks and the laying-off of teachers, Ms. Dogra might find it difficult to find employment in Canada in her intended occupation. In a letter of decision, Ms. Dogra was advised that her application had been rejected because she did not satisfy the statutory requirements for admission to Canada as a permanent resident. The officer explained that he could award Ms. Dogra no units for experience because when asked questions about Canadian customs and culture, she was unable to answer them. The judgment further on mentions that it is not normally appropriate for visa officers to engage in the exercise of assessing the "Canadian relevance" of applicants' education, training, and experience when they are consistent with the terms of the statutory criteria. This task should be left to national accreditation committees and provincial licensing authorities.

Immigration policy is placing increasing emphasis on applicants' adaptability and flexibility, characteristics that are particularly important in the contemporary labour market and applicants' active labour market participation are likely to be of more importance in predicting successful establishment in Canada than the possession of a store of specific knowledge. Further, the judgment mentions that: "one of contemporary Canada's defining characteristics is its multicultural nature. Our major cities, in particular, have a vibrant ethnic diversity and richness, and relative harmoniousness that are the envy of many. For a visa officer to reject an application for permanent residence as a school guidance counsellor because students in Canada "for the most part, come from an entirely different background

than yourself” seems to me to be quite at odds with the realities of today’s Canada. [...] As counsel for the applicant pointed out, the visa officer seemed quite impervious to the possibility that many boards of education might well regard Ms. Dogra’s national origin and her experience in Indian schools as valuable assets in assisting children, particularly of South Asian background, to flourish in a setting where tensions between the values and expectations of parents and their ethnic community on the one hand, and the norms prevalent at school and in North American society at large on the other, may be felt particularly keenly. Indeed, this was precisely the kind of assistance that Ms. Dogra was providing to the two Singh children whom she was tutoring in New York.”

41. In *X (Re)*, 1999 CA IRB a claim (discussed earlier) was made to a well-founded fear of persecution against both Ethiopia and Eritrea, based on claimant’s nationality through her mother’s family. The panel had many concerns regarding this particular claimant’s ethnicity. Despite the lack of documents, and misgivings by the claimant herself, the panel placed emphasis on other contextual factors, such as claimant’s gender and her young age. The panel also considered the testimony of the claimant’s brother and a letter from the Eritrean Canadian Community Centre of Metropolitan Toronto. Moreover, the panel accepted that the claimant is of Eritrean ethnicity mostly on the strength of the letter from the Eritrean Community Centre.

2000-2010

42. The first case that was categorized here was the Vodics judicial review by FCA in 2005. The judge found the CRDD's decision unreasonable and stated: "to disbelieve someone about his or her ethnicity, which is a critical feature of his or her humanity, is a most serious matter requiring extreme caution and careful deliberation" (*Vodics v Canada* 2005). The CRDD did not consider the value of the past as evidence in determining the prospective need for refugee protection. Instead, the panel chose to focus its entire decision on what they felt was the applicant's ethnicity and rejected the applicant's evidence of his ethnicity as Romany, mostly on the basis of findings concerning the applicant's skin colour, physical factors, ancestry, and regional location.

43. In *R. v. Krymowski*, 2005 SCC, the gist of the offence was the willful promotion of hatred against any identifiable group. In this case, the Crown particularized the group as "Roma." It was not necessary for the Crown to prove that the terms "gypsies" and "Roma" were interchangeable, as decided by the trial judge. The trial judge misdirected himself and erred in law by focusing entirely on one statement in the information. The Supreme Court indicated that it was incumbent upon the trial judge to look at the totality of the evidence and the reference to "gypsies" was but one item to consider. The decision highlights "the ethnic flavour to the demonstration" and the fact that the Roma people had been historically persecuted by the Nazis while a Nazi theme was apparent at the demonstration, were all factors to take into account. some of the participants were seen giving the "Sieg Heil" Nazi salute; (3) Nazi and American Confederate flags

were used in the demonstration; and (4) the chant “White Power” was heard during the demonstration. As well, the trial judge should have taken judicial notice of dictionary definitions showing that “gypsy” can refer to “Roma,” and he should have considered that fact together with the rest of the evidence. “A court may accept without the requirement of proof facts that are either “(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.” The Crown presented the trial judge with five dictionaries demonstrating a relationship between “Roma” and “gypsy.”

44. The *Van de Perre v. Edwards*, 2001 SCC case is about a single Caucasian Canadian citizen and an African American professional basketball player (married and with twin daughters). Their relationship lasted approximately 18 months and the son was born. Proceedings commenced against the basketball player for custody and child support which later turned into a joint request for custody. The case is coded here for the sole matter that although largely ethnicity in this case was used interchangeably with race, both were missed at a trial level: “there was no evidence of the racial awareness of the applicants or of their attitudes concerning the needs of the child with regard to racial and cultural identity. The issues of race and ethnicity were not argued at trial, nor were written submissions provided in the appeal.” In fact, in this Court, counsel for the respondents stated that “neither of the parties wanted to touch it, because it’s so politically incorrect to say that race has any bearing.” The Supreme Court considered this reason to be

unacceptable for counsel to fail to raise evidence on a factor that he or she believes may impact the best interests of the child and for any court to make a decision based on the importance of race. The decision further states that it was unfortunately what the Court of Appeal did: “If it is correct that Elijah will be seen by the world at large as ‘being black’, it would obviously be in his interests to live with a parent or family who can nurture his identity [...] it seems to me likely that being raised in an Afro-American family in a part of the world where the black population is proportionately greater than it is here, would to some extent be less difficult than it would be in Canada. Elijah would in this event have a greater chance of achieving a sense of cultural belonging and identity and would in his father have a strong role model who has succeeded in the world of professional sports.”

45. In *R. v. Powley*, 2003 SCC, the respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence. The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the Constitution Act, 1982, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals. The SCC looked into three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance. For the community acceptance, the court wrote that: “the claimant must demonstrate that

he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.”

46. The famous *Syndicat Northcrest v. Amselem*, 2004 SCC case is a landmark decision in constitutional law, freedom of religion, and analysis of the Canadian Charter of Rights and Freedoms. The appellants, all Orthodox Jews, were divided co-owners of units in luxury buildings in Montréal. The appellants set up “succahs” on their balconies for the purposes of fulfilling the biblically mandated obligation of dwelling in such small enclosed temporary huts during the annual

nine-day Jewish religious festival of Succot. Under the terms of the by-laws in the declaration of co-ownership, the balconies of individual units, although constituting common portions of the immovable, are nonetheless reserved for the exclusive use of the co-owners of the units to which they are attached. The respondent requested the removal of the succahs claiming that they violated the by-laws. None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units. The respondent proposed to allow the appellants to set up a communal succah in the gardens. The appellants expressed their dissatisfaction with the proposed accommodation, explaining that a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs, which, they claimed, called for the setting up of their own succahs on their own balconies. The respondent refused their request and filed an application for a permanent injunction prohibiting the appellants from setting up succahs and, if necessary, permitting their demolition. The case mentions the keyword “ethnic” just once and is categorized here as this case is one of the few that connects ethnicity to multiculturalism: “In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities—and is in many ways an example thereof for other societies—the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants’ religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all

democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others.”

Appendix C: Description of Text Segments Pertaining to Indigenous Groups (Eliminated From Analysis)

As mentioned in the Methodology Chapter, all cases where ethnicity was interpreted as belonging to a particular region related to Indigenous groups. However, since number of cases was small, I eliminated the discussion of these segments the analysis. Below, I provide a brief description of these segments.

Segment 24 is that of *Hamlet of Baker Lake v. Canada, Indian Affairs and Northern Development* (1979 FC). The plaintiffs, an Inuit band, had tried to assert an existing title over a large area of land (roughly 78,000 square kilometers) around the community of Baker Lake in the Northwest Territories. Within those boundaries, several mining companies were carrying out activities, which the plaintiffs asserted were an unlawful invasion of their rights. In particular, they claimed that their right to hunt caribou had been significantly impeded by the mines. At issue was whether the plaintiffs—whose predecessors had occupied the same territory for generations—were in fact “subject to the aboriginal right and title of the Inuit residing in or near that area to hunt or fish thereon” (*Hamlet of Baker Lake v. Canada, Indian Affairs and Northern Development* 1979 FC). They sought an order restraining the defendant mining companies from denying them future permits for further activities or leases for mining activities. The boundaries coincided with lands withdrawn from government disposal under the *Territorial Lands Act* of 1970. The government defendants asked that the action be dismissed, and that the lands in question be declared [*territorial*] as “public” lands. In their view, the Inuit residents did not have any “rights previously acquired,” and were not

“holders of surface rights” (*Hamlet of Baker Lake v. Canada, Indian Affairs and Northern Development* 1979 FC). The evidence under review was intended to describe the [geograph]y of the Baker Lake Area and its environment as well as the effects of mining on the caribou and the Inuit’s hunting of them (*Hamlet of Baker Lake v. Canada, Indian Affairs and Northern Development* [1979 FC]). The Court sought the evidence of two archeologists familiar with the area, questioning them about the extent of Inuit occupation from prehistoric times to the present. Ethnicity comes up in the testimony of one of the witnesses, Professor Elmer Harp, an anthropologist from Dartmouth College. On the basis of geographical location and archeological findings, he concluded that the indigenous band of Baker Lake were descendants of the Thule Inuit, of the ethnicity historically known as Caribou Eskimos.

The Segment 25 is even less relevant to multiculturalism. *Peterson v. Canada, Minister of State, Grains and Oilseeds* (1995 FCA) involves three appellants who were citizens of the United States. One was a landed immigrant (or Permanent Resident) and the other two had authorization to work in Canada for specified periods each year from Employment and Immigration Canada. They had farmed in Saskatchewan for three years and held a permit to sell grain, which they marketed through the Canadian Wheat Board. They paid tax on their Canadian income. However, the Board determined that they did not qualify for the subsidy given to other grain farmers. The judgment stated that there was less of a discrimination factor as there was no evidence of the appellants being a “discrete and insular minority” who suffered historically from stereotyping or otherwise in Canadian society. In contrast to citizenship, [residence] was hardly viewed as

analogous to the criteria specified in Section 15(1) since two of the appellants probably could have secured (and one did secure) landed immigrant status and thereby qualified for the subsidy program.

In the Segment 26 of *Rivers v. Squamish Indian Band Council* (1994 CHRT) case, one of the factors involved was the fundamental differences in ethnic identity between the Gitksan and the Squamish peoples of Canada's Northwest Coast. In that case, an expert witness gave evidence as to fundamental distinguishing features between indigenous groups on the Northwest Coast.

Although I describe these segments, I did not include them in my analysis. In the same vein as Backhouse (1999), I consider that issues of Indigenous Peoples are often deliberated apart from those involving other visible minorities in writings on race, at the same time recognizing that a fuller analysis is important in the history of Canada and Canadian law. In future research, these segments and additional data should be examined in more detail and with a different research design. This may reveal an important nexus of ethnicity as region and interpretations of indigeneity.

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