Colonial Recognition on Trial: Keith Boucher and the Structural Violence of Indigenous Identity Adjudication in Canada

Abstract: This article critically examines the legal struggle of Keith Boucher, a Mi'kmaq non-status Indigenous man from New Brunswick, to expose the structural violence embedded within Canada's recognition regime under section 35 of the *Constitution Act*, 1982. Although Boucher ultimately achieved vindication before the New Brunswick Court of Appeal, his decade-long ordeal reveals the systemic barriers faced by non-status Indigenous Peoples: colonial evidentiary demands privileging written genealogies over lived Indigenous experience, epistemic violence that delegitimizes oral tradition and cultural memory, and adversarial legal processes that retraumatize claimants. The analysis highlights how courts perpetuate racialized logics of blood quantum and genealogical essentialism, impose impossible documentary standards, and dismiss the significance of Indigenous resilience and community affirmation. Beyond the courtroom, the article traces broader societal and academic campaigns that frame non-status Indigenous identities as fraudulent, entrenching public suspicion and exacerbating internal gatekeeping within Indigenous communities themselves. Through a critical doctrinal and structural analysis, the article argues that legal recognition functions not as a liberatory act but as a reenactment of colonial conquest, undermining Indigenous resurgence and self-determination. Boucher's case ultimately exemplifies the precariousness of Indigenous rights recognition in Canada and underscores the urgent need for profound structural transformation that honours Indigenous lived realities beyond colonial evidentiary regimes.

Keywords: Indigenous identity, section 35, structural violence, colonialism, epistemic violence, genealogical essentialism, Indigenous rights.

‘Judges are people of violence.’
Robert Cover[1]

Introduction

The recognition of Indigenous rights and identities within Canadian constitutional law remains a profoundly contested and structurally violent process.[2] Although section 35 of the *Constitution Act*, 1982 proclaims the affirmation of existing aboriginal and treaty rights, in practice, the pathway toward recognition demands that Indigenous individuals—particularly those without formal status—submit to invasive, adversarial, and colonial judicial processes.[3] As Gordon Christie indicates, Canadian courts translate Indigenous claims into narrowly defined cultural group rights, excluding robust forms of Indigenous political authority and self-determination, thus structurally constraining recognition processes.[4] Rather than serving as arenas of reconciliation, the courts often operate as instruments of Indigenous identity suppression, renewed forms of colonization, imposing evidentiary burdens and legal frameworks that marginalize the fluid, resilient, and evolving identities of Indigenous Peoples whose histories bear the enduring scars of dispossession and erasure.[5]

The legal odyssey of Keith Boucher, a self-identifying Mi’kmaq man from the Bathurst area of New Brunswick, Canada, offers a stark diagnostic of these systemic failures. Charged in

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[1] Robert M. Cover, ‘Foreword: Nomos and Narrative’ (1983) 97(4) *Harvard Law Review* 4.
[2] See Katherine Reinders, ‘A Rights-Based Approach to Indigenous Sovereignty, Self-Determination and Self-Government in Canada’ (2019) *SURG Journal* 11. https://doi.org/10.21083/surg.v11i0.4389; Roger Gibbins, 1984. ‘Canadian Indian Policy: The Constitutional Trap.’ (1984) 4 *Canadian Journal of Native Studies*.
[3] See Heather Dicks, (2023). ‘Beyond Binaries: Mixed-Blood Indigenous Inequalities’ (2023) 19(2) *AlterNative: an International Journal of Indigenous Peoples* 261-270. https://doi.org/10.1177/11771801231167654; Joseph E. Magnet, ‘Who Are the Aboriginal People of Canada?’ in Joseph Magnet and Dwight Dorey (eds), *Aboriginal Rights Litigation* (LexisNexis Canada 2003).
[4] Gordon Christie, ‘Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies’ (2021) 57(1) *Osgoode Hall Law Journal* 1-36.
[5] Ted Binnema, ‘Protecting Indian Lands by Defining Indian: 1850–1910’ (2014). 34(3-4) *Great Plains Quarterly* 203–222.

2015 with unlawful possession of a moose carcass under the provincial *Fish and Wildlife Act*, Boucher sought to defend himself by invoking an aboriginal right to hunt, protected under section 35. Over the course of three judicial decisions—before the Provincial Court in 2017, the Queen's Bench in 2018, and finally, the New Brunswick Court of Appeal in 2021—his case progressed from conviction to full vindication, culminating in the Supreme Court of Canada's refusal to grant leave to appeal. Yet, the legal outcome alone does not capture the true meaning of Boucher's struggle. His journey exposes the profound structural dangers faced by non-status Indigenous individuals seeking recognition—particularly those whose cultural continuity has been fractured by forced assimilation, displacement, and the socio-economic violence of colonialism.

Despite his ultimately achieving acquittal, Boucher's pathway was strewn with formidable systemic barriers: prosecutorial strategies that revived blood quantum logics and cultural essentialism; ineffective legal representation that failed to present crucial genealogical evidence; the weaponization of expert testimony to cast doubt on Indigenous continuity; and a broader public discourse that fueled shaming narratives about non-status Indigenous identities; that is, those who self-identify as 'Indian' but who are not eligible to be registered under the *Indian Act*. These were not aberrations but recurring features of Canada's legal treatment of Indigenous recognition claims.[6]

The Boucher case compels a deeper interrogation of the forces that shape the litigation of Indigenous identity in Canada today. It reveals how prosecutors, despite the formal rejection of racialized tests in *Powley*, continue to insinuate blood quantum arguments; how expert witnesses, aligned with Crown interests, deploy genealogical fragmentation to dismantle Indigenous

[6] Chris Andersen, *Métis: Race, Recognition, and the Struggle for Indigenous Peoplehood*. (UBC Press 2014).

resurgence; how public commentators amplify accusations of fraud and opportunism, discrediting Indigenous survival strategies; and how the adversarial model itself ensures that the very act of seeking recognition reproduces the colonial violence it purports to remedy.

The research questions guiding this article are, thus: What does Keith Boucher's legal struggle reveal about the structural violence, systemic risks, and epistemic harms faced by non-status Indigenous individuals when seeking formal recognition of Indigenous rights in Canada? Moreover, could legal recognition—far from serving as a liberatory act—function instead as a re-enactment of colonial conquest, subjecting Indigenous claimants to invasive evidentiary sieges and forensic skepticism that retraumatize, disqualify, and ultimately undermine Indigenous resurgence?[7]

To answer these questions, we adopt a critical doctrinal methodology that combines close analysis of the judicial decisions with a broader structural critique of the recognition process. Reflecting the work of van Gestel and Micklitz and others on recent initiatives to augment a purely doctrinal approach, we further draw upon critical legal studies, which acknowledges the social biases inherent in law, and on Indigenous legal scholarship, to foreground the voices of those affected.[8] To this latter point, Varuhas notes that, in the application of doctrinal methodology, there exists the question of which system of law should be considered canonical.[9] The analysis situates Boucher's case within the deeper political and epistemological structures that define and constrain Indigenous identity under Canadian law.

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[7] Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom*. (Broadview Press 2005); See Bonita Lawrence, 'Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview' (2004). 18(2) *Hypatia* 28.

[8] Refer to Rob van Gestel and Hans-Werner Micklitz. 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' European University Institute, Department of Law (2011); Urmi Roy. 'Doctrinal and Non-Doctrinal Methods of Research: A Comparative Analysis of Both within the Field of Legal Research.' 2(5) *Indian Journal of Law & Legal Research* (2023).

[9] Jason N. E. Varuhas. 'Mapping Doctrinal Methods.' In Paul Daly and Joe Tomlinson (eds) *Researching Public Law in Common Law Systems*, pp. 70-103. (Edward Elgar Publishing 2023).

We begin by reconstructing Boucher's factual and legal trajectory across the three key decisions, examining the evolution of judicial reasoning and the evidentiary barriers imposed. We then critically assess the doctrinal frameworks mobilized by the courts, including the Powley test—a set of criteria to determine Métis identity, arising from the seminal 2003 court challenge of a father and son who were ultimately acquitted of the charge of illegally hunting moose, near Sault Ste. Marie, Ontario—and the standards governing continuity and cultural practice.[10] From there, we offer a structural critique of the recognition process, addressing adversarial prosecution, public epistemic harms, lateral violence within Indigenous communities, and the complicity of academic and journalistic fields. The conclusion draws broader lessons from Boucher's journey, exposing the limits of Canada's recognition regime and the urgent need for profound structural transformation.

Section 1.1. The Provincial Court Decision: Procedural Violence, Evidentiary Rigidity, and the Struggle for Recognition

The prosecution of Keith Boucher for unlawful possession of a moose carcass marked the beginning of a grueling legal battle, exposing the depth of structural violence faced by non-status Indigenous individuals seeking recognition under Canadian law. In 2010, Boucher—then a longstanding resident of Bathurst, New Brunswick—contacted the Department of Natural Resources to voluntarily disclose that he had harvested a moose without a provincial permit.[11] From the outset, he did not dispute the facts. He asserted that his conduct was protected by an aboriginal right rooted in his Mi'kmaq identity, invoking section 35.[12] Although not recognized as a status Indian under the *Indian Act*, Boucher was a longstanding member of the New

[10] The original legal standard in Canada to determine aboriginal rights for First Nations people was the Van der Peet test, which was modified to determine Métis identity, in light of the Powley findings.
[11] *Boucher v. R.*, 2017 NBPC 6, para 6-7.
[12] Ibid, paras. 1-3.

Brunswick Aboriginal Peoples Council and had lived his life deeply entrenched within Mi'kmaq cultural traditions.[13]

Historically, the criteria employed by colonial authorities to legally assess and contain 'Indianness' ranged widely, from the mere presence of ancestral connections (to any degree), to the exhibition of a lifestyle associated with 'Indianness,' to calculations of blood quantum, and finally, to the imposition of a patrilineal descent model, whereby a person's Indigeneity became contingent upon that of their father.[14] This patrilineal framework resulted in systemic discrimination against Indigenous women who married non-Indigenous partners. Under colonial law, such women were deemed to have assimilated into the ethnic status of their husbands, effectively terminating, not only their own Indigenous identity, but also that of their descendants. As settler populations expanded, the descendants of mixed unions between Indigenous women and non-Indigenous men formed a significant, often diverse, Indigenous non-status diaspora—including Métis peoples and non-status Indians across Canada.[15]

From a non-status Indian, the testimony of Boucher reflected a profound attachment to Indigenous spirituality, hunting practices, and ceremonial observances such as sweat lodges, the

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[13] Ibid, para. 6. Note that the designation of *status Indian* under the law applies to those people who are considered 'Indian' per the definition of the *Indian Act*. The term *non-status Indian* refers to individuals who identify themselves as Indians but who are not entitled to registration on the Indian Register pursuant to the *Indian Act*. Métis people, descendants of intermarriage between First Nations people and Europeans, are one of the three Indigenous groups recognized in Canada—along with First Nations and Inuit (Indigenous Peoples inhabiting the North)—however, federal recognition of all people belonging to this group, the Métis, is inconsistent across the country.

[14] Danielle Naumann, 'Aboriginal Women in Canada: On the Choice to Renounce or Reclaim Aboriginal Identity' (2008) 28-2 *The Canadian Journal of Native Studies*; Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (UBC Press 2011).

[15] René Dussault and Georges Erasmus, 'Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back' (1996) Government of Canada; René Dussault and Georges Erasmus. 'Report of the Royal Commission on Aboriginal Peoples. Volume 4: Perspectives and Realities' (1996) Government of Canada.

Medicine Wheel, hunting prayers, and traditional protocols, when engaging with the land.[16] This was not an identity fabricated for legal convenience—it was the grounding reality of his life. Yet, the trial process systematically stripped this lived reality down to a cold technical battle over genealogical evidence. While the Crown conceded that Boucher would be entitled to section 35 protections if he could establish his Aboriginal status, the entire case hinged on his ability to meet the legal standards articulated in *R. v. Powley*.[17]

The Powley test required three main elements: self-identification, ancestral connection to a historic Aboriginal community, and present-day community acceptance.[18] Justice LeBlanc acknowledged the injustice of imposing exhaustive documentation requirements on Indigenous claimants.[19] Yet, paradoxically, the burden imposed on Boucher proved nearly impossible. As Naomi Metallic (2020) points out, the 'community-continuity requirement' imposed by courts, even to status people, demands impossible proof tied to fixed geographic communities and reserves, ignoring the migratory and fission-fusion social organization of the Mi'kmaq and other Indigenous peoples.[20] Moreover, as Gordon Christie highlights, Canadian courts' presumption is that only local, reserve-based communities can hold site-specific rights, disregarding larger Indigenous nations and polities that historically exercised authority over territories.[21]
Despite these epistemic recolonizing tendencies which we can associate with the *Powley* doctrine, Boucher's self-identification as Mi'kmaq was accepted without much hesitation in

[16] *Boucher v. R.*, 2017 NBPC 6, paras. 19-27. Refer to Andrew J. Siggner and Evelyn J. Peters. 'The Non-Status Indian Population Living Off-Reserve in Canada: A Demographic and Socio-Economic Profile.'3 *aboriginal policy studies* 3 (2014) for further discussion of non-status Indigenous peoples.
[17] *Boucher v. R.*, 2018 NBQB 264, paras. 2-4.
[18] Supra, paras. 13-14.
[19] Ibid. paras. 16-17, 70.
[20] Naiomi Metallic, 'Searching for "Superchief" and Other Fictional Indians: A Narrative and Case Comment on *R v Bernard*' (2020) 57 *Osgoode Hall LJ* 230.
[21] Gordon Christie, 'Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies' (2021) 57(1) *Osgoode Hall Law Journal* 1-36.

court, with the Justice stating, 'I accept that Mr. Boucher sincerely self-identifies as a person of Mi'kmaq ancestry and that he has done so not simply for the purposes of this litigation, but for many years.'[22] Similarly, the historic existence of a Mi'kmaq community in Bathurst-Nepisiguit was undisputed—a notable contrast with cases involving individuals identifying as Métis, who must additionally prove the existence of a distinct Métis historical community emerging after contact but prior to effective colonial control, and whose existence must be sufficiently visible in colonial records to demonstrate its location, cultural distinctiveness, continuity, and demographic density.

In Boucher's case, archaeological evidence confirmed continuous Mi'kmaq presence for over 3,000 years, while historical census records from 1815 and 1838 further supported the continuity of the Mi'kmaq community.[23] Oral testimonies from Mi'kmaq elders echoed this history, and Hereditary Mi'kmaq Chief on the Mi'kmaq Grand Council, Stephen Augustine, explicitly recognized Boucher's identity and belonging with the Mi'kmaq people. However, as Gordon Christie notes, even robust claims to Indigenous governance—such as rights to regulate hunting and land use—face near-insurmountable hurdles under the Van der Peet framework and related tests, which narrowly define aboriginal rights in cultural rather than political terms, excluding assertions of regulatory authority.[24] This doctrinal limitation also extends to the application of the Powley test in Boucher's case, despite his identification as a non-status Indian. As such, the critical third element of Powley—ancestral connection—proved fatal to Boucher's claim, despite strong community acceptance from influential Mi'kmaq leaders, and his consistent self-identification. In one devastating line, Justice LeBlanc ruled that 'There is in fact no

[22] *Boucher v. R.*, 2017 NBPC 6, para. 58.
[23] Ibid, paras. 49-50, 60, 63.
[24] Gordon Christie, 'Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies' (2021) 57(1) *Osgoode Hall Law Journal* 17-27.

evidence upon which the Court can rely to establish that Keith Boucher has an ancestral connection to the historic Aboriginal community in question.'[25]

Thus, despite a lifetime living Mi'kmaq traditions, the absence of court-acceptable genealogical proof nullified Boucher's claim, demonstrating once again the severe limitations of recognition frameworks rooted in settler evidentiary standards rather than Indigenous lived realities. At the heart of this failure lay a brutal contest between opposing experts. Donald Morrison, a genealogist retained by Boucher, traced 72 alleged lines of Aboriginal descent, anchoring them to Joseph Athanase Young.[26] Yet, Morrison's methodology—reliance on secondary sources and a disputed 1999 marriage certificate—was found fatally deficient.[27] In contrast, Stephen White, the Crown's expert, was accepted as more credible. His analysis found only ten verifiable Aboriginal ancestors, most tracing to Acadian lines, with Boucher's Aboriginal ancestry amounting to approximately 0.3%, nine generations removed.[28]

Though the Court disclaimed reliance on blood quantum, the emphasis on Boucher's remote Indigenous ancestry functionally reinstated racial thresholds: that is, 'no minimum blood quantum...but some proof that the claimant's ancestors belonged to the historic Métis community.'[29] Anthropologist Stephen Patterson, for the Crown, reinforced this outcome, concluding that Boucher's cultural practices were overwhelmingly Acadian, with insufficient Indigenous continuity to ground a section 35 right.[30] As we can observe, colonial policies and legal tests often impose genealogical essentialism and blood quantum logics that fracture Indigenous communities and erase the validity of culturally resilient, hybrid, and evolving

[25] *Boucher v. R.*, 2017 NBPC 6, para. 69.
[26] Ibid, paras. 36-44.
[27] Ibid, paras. 38, 44.
[28] Ibid, paras. 41, 46.
[29] *Boucher v. R.*, 2018 NBQB 264, para. 32.
[30] *Boucher v. R.*, 2018 NBQB 264, paras. 22-23.

identities.[31] These mechanisms serve as tools of assimilation and exclusion rather than genuine recognition.

In the case of Keith Boucher, the irony was stark: even as the court recognized the impossibility of demanding perfect documentary proof from colonized peoples, it proceeded to deny Boucher's claim precisely for failing to meet those impossible standards. Worse, serious deficiencies in Boucher's legal representation at trial went unaddressed until much later. His first lawyer failed to marshal key genealogical evidence; his second lawyer failed to raise ineffective assistance on appeal. Boucher's initial conviction thus crystallized a grim reality: the system demands that Indigenous individuals survive centuries of dispossession not merely spiritually, but genealogically—and in a form legible to settler courts.

For Keith Boucher and his family, the loss in provincial court must have been devasting.

Section 1.2. The Queen's Bench Appeal: Procedural Finality Versus Substantive Justice

Boucher's legal fight did not end with his conviction at Provincial Court, however. Determined to affirm his Mi'kmaq identity and rights, he appealed to the New Brunswick Court of Queen's Bench. Yet, this second stage of litigation unfolded, not as a substantive reconsideration of his lived Indigenous reality and identification, but mostly as a procedural entrenchment of the narrow evidentiary frame that had already crushed his claim.

The Queen's Bench reaffirmed that the governing standard was *Powley*, and its subsequent Powley test conditions—the initial purpose of which were meant to establish Métis identity—requiring proof of self-identification, ancestral connection, and community acceptance.[32] The Crown conceded an important point; had Boucher successfully demonstrated

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[31] Maximilian C. Forte, *Who is an Indian?: Race, Place, and the Politics of Indigeneity in the Americas* (University of Toronto Press 2013); Bonita Lawrence, 'Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview' (2003). 18.2 *Hypatia* 3-31.

[32] *Boucher v. R.*, 2018 NBQB 264, para. 26, 31-32.

an ancestral link through a line the Court knew existed but was not submitted before the Court to the historic Bathurst Mi'kmaq community, he would have been entitled to constitutional protection for his hunting activities.[33] But the focus narrowed to a devastatingly sterile question; whether the documentary record laid at trial supported the finding of an ancestral connection.

The appellate judge accepted the Provincial Court's findings on self-identification and community participation. Boucher's Mi'kmaq ceremonial practices, his affiliation with the New Brunswick Aboriginal Peoples Council (a non-status Indigenous organisation), his later election as Chief of the Mi'kmaq First Nation of Nepisiguit petitioning Ottawa for formal recognition—all remained acknowledged and undisputed.[34] Yet, when it came to ancestral connection, the Queen's Bench simply deferred to the trial record. Finding no 'palpable or overriding error,' the court concluded that 'There is no credible evidence before the Court that would allow it to interfere with the trial judge's finding'.[35]

Thus, the same evidentiary failures—rooted in distorted colonial archives, demographic erasure, and the structural impossibility of perfect genealogical continuity—were treated as final. The appellate court reinforced the discrediting of Boucher's genealogist, Donald Morrison, whose reliance on *one* disputed 1999 marriage certificate was again highlighted as a fatal flaw.[36] Stephen White's genealogy, illustrating Boucher's so-called minimal Indigenous ancestry *only* nine generations removed, was treated as definitive.[37]

The contradiction was glaring; while affirming that no blood quantum requirement should formally exist, the court relied on arguments that negatively portrayed the minimal

[33] Ibid, para. 4.
[34] Ibid, paras. 11, 55, 77.
[35] Ibid, para. 45.
[36] Ibid, paras. 15-18.
[37] Ibid, paras. 31-32.

percentage of Boucher's Indigenous ancestry to implicitly disqualify him, citing the need for 'no minimum blood quantum…but some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means'.[38] Thus, the court's rejection of racial tests was only rhetorical. In practice, it allowed fractional ancestry—and colonial documentation—to govern the threshold of recognition—a tendency we still observe in most court cases dealing with Métis and non-status defendants as a common tactic used by Crown prosecutors despite the directions offered by the Supreme Court of Canada in *Powley* against the use of blood quantum arguments.[39]

The courts have rhetorically rejected racial or blood quantum tests for Métis identity but have often relied heavily on genealogical evidence and fractional ancestry in practice, thereby allowing colonial documentation to influence recognition thresholds. In *Canada v. Vautour*, the court highlighted the limitations of grounding Métis status solely on genealogical descent, noting that Jackie Vautour had only six Aboriginal ancestors among over one thousand ancestors, concluding that 'from a genealogical point of view, one could conclude that his ancestry is overwhelmingly of Acadian descent and therein lies the flaw in attempting to ground a claim to Métis status with constitutionally protected rights on the basis of one's ancestry'.[40] Similarly, in *Corneau c. Québec*, the court criticized genealogical reductionism, finding the genealogist's work 'too vague and fragmentary' and insufficient to establish a historic Métis community, emphasizing that 'the genetic heritage of an individual, alone, is not determinative' and that cultural identity and community are paramount.[41] In *Procureur général du Québec c. Séguin,* the

[38] *Boucher v. R.*, 2018 NBQB 264, para. 32.
[39] *Corneau c. Québec* 2018 QCCA 1172; *Canada v. Vautour* 2010 NBPC 39; *Procureur général du Québec c. Séguin* 2023 QCCS 2108; *Parent c. R.* 2017 QCCS 6292.
[40] *Canada v. Vautour* 2010 NBPC 39, 17.
[41] *Corneau c. Québec* 2018 QCCA 1172, 12, 15, 16.

tribunal underscored the distinction between mixed ancestry and the existence of a Métis community, rejecting claims based solely on distant Aboriginal ancestors, some as far back as 12 generations, and emphasizing the necessity of demonstrating continuity of Métis customs and identity rather than mere bloodline.[42] Despite the Supreme Court's clear directions in *R. v. Powley* against blood quantum as a determinant, Crown prosecutors continue to rely on fractional ancestry as a tactic, a practice courts have struggled to consistently disavow.[43]

In the case of Boucher, anthropological evidence completed the structural foreclosure. Patterson's findings, asserting that Boucher's ancestry was solely culturally Acadian and lacked sufficient Indigenous continuity, were endorsed without critical engagement.[44] It is precisely through this logic that blood quantum ideology and fragmenting arguments are routinely resurrected in court by Crown-appointed experts. Their testimony often draws on commonsense prejudices, suggesting that the genealogical distance separating non-status defendants from their earliest Indigenous ancestors—compounded by successive unions with non-Indigenous partners—renders any claim to authentic cultural continuity tenuous, if not entirely implausible. They disregard the fundamental principle held as sacred among non-status Indians and Eastern Métis of mixed-ancestry that an Indigenous child carries the full weight of their ancestral connection, rendering both the Indigenous and European (or other origins) aspects of their heritage equally integral. Inspired by the wisdom of Métis leader Louis Riel who did recognize the existence of Métis peoples in the Eastern provinces of Canada, in the matter of a cumulative and relational conception of identity, it is understood that every descendant remains wholly

[42] *Procureur général du Québec c. Séguin* 2023 QCCS 2108, 2, 28, 66, 79.
[43] *R. v. Powley* 2003 SCC 43; *Canada v. Vautour* 2010 NBPC 39, 17-18; *Corneau c. Québec* 2018 QCCA 1172, 28.
[44] Ibid, paras. 22-23.

Indigenous and wholly of European heritage, irrespective of the legal status arbitrarily conferred—or denied—by the colonial state.[45]

In the case of Boucher, who identifies as non-status Indian of mixed ancestry, the lived presence of Mi'kmaq spirituality and traditions—embodied practices that shaped Boucher's life—were similarly rendered invisible under the cold gaze of settler historiography and skepticism. Oral testimony, community affirmation, the survival of traditions in non-traditional forms—were subordinated to a framework that privileged written colonial records over Indigenous modes of knowing and experience of culture and identity. Compounding the injustice, the Queen's Bench then paid no attention to the glaring deficiencies of Boucher's trial counsel. No inquiry was made into whether his defense had been fatally mishandled. No new evidence was admitted. The appellate process became a mere confirmation of procedural finality, rather than an effort toward substantive justice. Thus, the Queen's Bench decision entrenched a dangerous legal message: that Indigenous identity, if disrupted by colonialism and rendered imperfectly traceable, could simply be erased through evidentiary default.

The deeper violence was epistemic. The courts demanded not only the survival of Indigenous peoples through centuries of eradication but survival in a form that remained fully compatible with settler documentary expectations. In the wake of this decision, Boucher's Mi'kmaq identity—rich, embodied, and communally affirmed—was reduced to a technical absence. His existence fell through the cracks of a recognition regime built not to see him. It would take yet another appeal, and a confrontation with the failures of his own legal representation, for Boucher's struggle for justice to be revived.

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[45] Louis Riel affirmed that 'The Métis have as paternal ancestors, the former employees of the Hudson's Bay and Northwest Companies, and as maternal ancestors, Indian women belonging to various tribes,' and insisted that 'no matter how little we have of one or the other, do not both gratitude and filial love require us to make a point of saying, "We are Métis".' Louis Riel, *The Collected Writings of Louis Riel*, Vol. 3, 272.

Section 1.3: The Court of Appeal Decision: Vindication and the Limits of Recognition

After nearly a decade of struggle within a legal system that seemed engineered to exclude him, Boucher's journey culminated at the New Brunswick Court of Appeal. Yet, the stakes had shifted. This was no longer merely a question of whether he had proven his Aboriginal ancestry. It was now about whether the system itself could recognize the harm it had inflicted—and whether it could undo, even partially, the structural injustices that had distorted Boucher's path.

The core of Boucher's final appeal rested on an indictment of his previous legal counsel. He argued that both his trial and first appeal lawyers had failed him, first, by neglecting to present critical genealogical evidence at trial and second, by failing to raise ineffective assistance of counsel on appeal.[46] The Court of Appeal agreed.

Applying the well-established two-part test for ineffective assistance, the Court found that Boucher's lawyers had indeed performed incompetently, and that this performance had resulted in significant prejudice to his case.[47] What changed the landscape was the fresh genealogical evidence finally brought before the Court: baptismal records, affidavits, reconstructed family trees—all available at the time of the trial, yet never presented.[48] The Court found this evidence to be relevant, noting that 'The documents were credible and decisive in establishing Mr. Boucher's ancestral connection to the historic Aboriginal community.'[49]

The human cost of this failure cannot be overstated. For years, Boucher had lived under the weight of criminal conviction, painted, not as an Indigenous man exercising ancestral rights, but as an unlawful poacher and 'pretendian.' The system had not merely failed to protect his rights—it had criminalized and shamed his existence. Confronted with the power of the new

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[46] *Boucher v. R.,* 2021 NBCA 36, paras 1-4.
[47] Ibid, paras. 3-4, 14, 22.
[48] Ibid, para. 29.
[49] *Boucher v. R.*, 2021 NBCA 36, paras. 20-21.

evidence and the manifest injustice of the earlier proceedings, the Court of Appeal did not simply order a retrial. It went further. It entered an outright acquittal, with the Justice observing, 'I was of the view that the documents were decisive of the case...this was a case where an acquittal could be entered by the Court of Appeal.[50]

For Keith Boucher, this was vindication. His Mi'kmaq identity—long denied, scrutinized, and delegitimized—was finally recognized within the legal order. His constitutional rights were finally affirmed. His dignity was, at least formally, restored. From two court decisions prior condemning him to forced assimilation, fine, and prison, Keith Boucher was suddenly now a free and recognized Indigenous person, without Indian status yet with Constitutional rights–joining a very limited number of people, including his own cousin Gerald Lavigne, who endured the same humiliating ordeal only years before.

Yet, even in victory, the scars remained.

The appellate court's decision, while just, exposed profound truths that no judgment could erase. It confirmed that, for non-status Indigenous individuals, recognition remains conditional, dependent not on self-identification, cultural practices and community self-determination, but on the ability to navigate and satisfy colonial documentary standards. Boucher's acquittal depended on the random *availability* of surviving records translatable into the language of settler courts. Oral traditions, embodied practices, historical injustices—all were insufficient unless rendered into archival proofs that met colonial evidentiary thresholds. Thus, even as Boucher won, the systemic dangers his case revealed went largely unaddressed. The Court recognized his ancestral connection because fresh documents permitted it—but it left untouched the deeper structures that had demanded this form of proof in the first place.

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[50] Ibid, para. 28.

In this sense, Boucher's case is both a personal triumph and a collective warning. It shows that extraordinary perseverance can occasionally pry open the closed doors of legal recognition. But it also reveals the brutal cost: years of marginalization, procedural warfare, humiliation, and the painful exposure of intimate family histories to adversarial dissection. Moreover, it signals a deeper tragedy. The spirit of section 35—to protect Indigenous lifeways on their own terms—remains fundamentally compromised. Recognition is mediated through frameworks that Indigenous peoples neither created nor consented to. In practice, to be *recognized* is to be forced into the evidentiary molds of a colonial legal tradition. Boucher's journey is not merely a story of individual endurance. It is a case study in the structural cruelty of Canada's recognition regime. It reminds us that, for non-status Indigenous peoples, the courtroom remains a perilous space: one where the right to exist must still be fought for, document by document, line by line, against a system built to doubt them. For Boucher, the final judgment brought relief. But, for the broader struggle of Indigenous peoples navigating the wreckage of colonial recognition, it remains a bitter lesson: that legal vindication, when it comes at all, comes late, comes at a cost, and often leaves behind wounds no court can heal.

Section 3: Synthesis of Structural Risks: Recognition as Structural Violence

The case of Keith Boucher not only exposes the doctrinal flaws in Canada's legal recognition framework, but it also reveals a deeper structural cruelty that no appellate vindication can repair. At every stage, the law demanded that Boucher translate a resilient Indigenous existence into colonial documentary forms—a translation structured to deny him. Recognition, rather than functioning as a site of reconciliation, operates as a technology of recolonization. It imposes evidentiary regimes, epistemic standards, and procedural rituals designed to fracture, disqualify, and ultimately erase Indigenous survival strategies that do not conform to settler

expectations. And the reverse dynamic also emerges in other cases: ancestral connection and community acceptance may be acknowledged, yet recognition is withheld on the grounds that claimants allegedly fail to exhibit an 'authentic' Indigenous way of life—a standard often shaped by essentialist assumptions and colonial stereotypes that freeze Indigenous peoples in an imagined past. As John Borrows explains, by anchoring the recognition of Indigenous rights in a frozen historical framework, Canadian courts have 'reinforced a search for past examples of Aboriginal practices, rather than empowering present-day Indigenous claims,' thereby perpetuating colonial conceptions of Indigeneity and excluding contemporary expressions of Indigenous life from legal protection.[51]

The persistent question 'Who is an Indian?' remains a cultural and political battleground, where recognition admits Indigenous difference only to simultaneously contain and limit it, so that the act of dispossession remains ever present.[52] The following section synthesizes the systemic risks illuminated by Boucher's experience, showing how the recognition process, far from being neutral, is itself a site of structural violence. Four elements of harm emerge most sharply: epistemic violence, systemic disbelief, adversarial cruelty, and the amplification of lateral violence.

3.1 Epistemic Violence: Colonial Documentary Standards

At the heart of Boucher's ordeal lies a fundamental epistemic asymmetry. His existence as a Mi'kmaq non-status Indigenous person was attested, relational, and embodied—yet the courts demanded proof through colonial genealogical records, certificates, and parish archives that were never meant to affirm Indigenous presence.

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[51] John Borrows, Challenging Historical Frameworks: Aboriginal Rights, the Trickster, and Originalism. (2017). 98(1) *The Canadian Historical Review* 114–135.
[52] Maximillian C. Forte, M. C. *Who is an Indian? The Cultural Politics of a Bad Question* (University of Toronto Press 2011).

This is the first axis of structural violence: the primacy of colonial modes of proof over Indigenous ways of knowing.[53]

The courts insisted that Boucher reconstruct his ancestry through written sources that bore the scars of demographic erasure, forced assimilation, and administrative misclassification.[54] Oral histories, ceremonial practices, and community affirmation—central pillars of many Indigenous identity—were relegated to secondary, supplementary, and ultimately insufficient status. As Battiste and Henderson emphasize, 'Indigenous knowledge systems have been persistently undermined by colonial epistemologies that privilege written archives over oral traditions and lived experience, producing a form of "epistemic violence" that erases Indigenous presence in legal and social spheres.'[55]

The result is an insidious form of epistemic violence: Indigenous life must survive not only materially but archivally; not only in flesh and spirit, but in bureaucratic traces acceptable to settler courts. This demand operates as a hidden standard of racial and colonial legibility: to be recognized as Indigenous is not merely to be Indigenous, but to be able to translate oneself into colonial documentary form or expected cultural stereotypes to match proper Indigeneity.[56]

Thus, even when courts purport to reject 'blood quantum' logic, they instantiate a parallel logic: the documentary quantum—the minimum archival presence required to survive the test of recognition. In Boucher's case, despite decades of spiritual practice, community leadership, and

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[53] See Marie Battiste, 'Indigenous Knowledge and Pedagogy' in Marie Battiste and James Youngblood Henderson (eds) *First Nations Education: A Literature Review with Recommendations* (Indian and Northern Affairs Canada 2002).
[54] Refer to Dean Neu and Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Fernwood Publishing 2003).
[55] Marie Battiste and James Youngblood Henderson, *Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing Ltd. 2000).
[56] Make reference to Ward Churchill, (2010). *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*. (City Lights Publishers 2020) and Daniel N. Paul, *We Were Not The Savages: Collision Between European and Native American Civilizations* (3rd ed.) (Fernwood Publishing 2007).

cultural continuity, the absence of pristine colonial records was weaponized along two consecutive court decisions to cast doubt on his identity and culture. The lived Mi'kmaq experience was weighed against, and ultimately crushed by, settler expectations of evidence.

This violence is epistemic in the deepest sense: it attacks the very ways Indigenous peoples know themselves and each other. It refuses to accept that survival under conditions of colonial violence may leave fragmented, partial, non-archival traces—and that these traces are nonetheless valid, truthful, and sufficient. As Palmater suggests, 'Indigenous identity is so bound up in culture, language, territory, family, community, and history that the denial of any one of these factors can have traumatic effects on an individual's identity and sense of self.'[57] Thus, the first systemic risk faced by non-status Indigenous individuals seeking recognition is that they must litigate their identities within a hostile epistemological terrain, one still calibrated to disbelieve and erase them unless they can survive translation into colonial forms, with traumatizing exposure decoupled in the Canadian judicial environment.

This appears in a country where policies were historically and primarily driven by a desire to seize Indigenous lands and resources while simultaneously reducing governmental responsibilities toward Indigenous communities, with violent and restrictive systems codified in the *Indian Act*.[58] The *Indian Act* has long operated as a tool of assimilation, with policies such as the 'two-generation marrying-out rule' designed to extinguish Indigenous status and identity over time.[59] Recognition struggles like Boucher's reveal the ongoing legacy of these colonial policies.

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[57] Pamela Palmater, 'Genocide, Indian Policy, and Legislated Elimination of Indians in Canada' (2014). 3 *aboriginal policy studies.*

[58] Ibid; Dean Neu and Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Fernwood Publishing 2003). See also the excellent work of Binnema, T. (2014). Protecting Indian Lands by Defining Indian: 1850–1876. Journal of Canadian Studies, 48(2), 5–39.

[59] Bonita Lawrence, 'Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview' (2003). 18.2 *Hypatia* 3-31.

3.2 Systemic Disbelief: The Presumption Against Indigenous Continuity

Beyond the imposition of colonial evidentiary standards, Boucher's case reveals a second, equally corrosive axis of structural harm: systemic disbelief of Indigenous continuity outside the protection of colonial-state sanctioned status. At every procedural juncture, the burden placed on Boucher was not merely to demonstrate an Indigenous identity, but to overcome a judicial presumption that such continuity was improbable, suspect, or opportunistically manufactured. This presumption runs deeper than any formal test like that arising from *R. v. Powley* could express. It is not merely a question of whether certain evidentiary thresholds are met, it is an ontological skepticism embedded in the legal culture itself.[60]

Thus, while courts rhetorically acknowledge that colonial violence disrupted Indigenous genealogies, they nonetheless demand that non-status claimants reconstruct perfect chains of ancestral connection. Any lacuna—any break in the documentary record—is treated not as the predictable result of colonial erasure, but as evidence of inauthenticity. Despite the humiliating experience of two consecutive court decisions before vindication in Appeal Court, Boucher showed extreme courage and determination in these difficult circumstances.

Disturbingly, however, this is why Boucher's extensive ceremonial life, his embeddedness within Mi'kmaq community structures, and his decades-long affirmation of identity were treated as insufficient. They were viewed through a lens of suspicion, interpreted as artifacts of personal belief rather than manifestations of collective Indigenous continuity. The deeper violence here is that Indigenous cultural survival—adapted, evolved, lived in non-

[60] See, in particular, Bonita Lawrence, '*Real' Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (University of Nebraska Press 2004). Consult the following: *Sharon McIvor and Jacob Grismer v. Canada*, Communication No. R.6/24, UN Doc. A/36/40 (1981); *Indian Act*, R.S.C. 1985, c. I-5.

standard forms—is not recognized as survival at all unless it passes through the narrow gate of colonial, and often stereotypical, validation.

Thus, systemic disbelief operates not simply as a forensic posture but as a cultural posture: it treats Indigenous continuity as the exception, not the default. Moreover, it approaches non-status Indigenous claims as problems to be disproven, not as survivals to be honoured. It finally demands a form of cultural stasis and genealogical purity incompatible with the realities of colonial disruption and evolving modalities of Indigenous expressions, including hybridizations, especially for post-contact Métis cultures, often experienced via diasporic and now urban-based structures. In Boucher's case, even the undisputed Mi'kmaq presence in Bathurst, even his documented leadership roles, even his long-standing ceremonial practices—none of these shifted the gravitational pull of systemic skepticism. Thus, the second structural risk is clear: non-status Indigenous peoples, particularly those shaped by assimilation and displacement, must confront a legal system predisposed to doubt them, no matter how deeply rooted their lived Indigenous existence may be.

3.3 Adversarial Model and Procedural Cruelty: Recognition as Ordeal

The adversarial structure of Canada's section 35 litigation does not merely challenge Indigenous claimants procedurally, it subjects them to a calculated regime of structural humiliation and disqualification. As Boucher's journey reveals with devastating clarity, the recognition process operates less as a search for truth than as a systemic re-enactment of colonial conquest—executed through evidentiary siege and forensic skepticism.

From the outset, the adversarial model transforms the quest for recognition into an ordeal. Indigenous claimants are not invited to affirm who they are, they are compelled to defend their identities against the active, tactical denial of the Crown. This is not a neutral contest. It is an

asymmetrical war in which the full weight of state machinery is marshaled to fracture, doubt, and delegitimize Indigenous survival. Boucher's experience exposes the twofold violence of this model, first, through the invasive demand for documentary self-dissection. Boucher was required to excavate and display the most intimate dimensions of his ancestral history, exposing his family's private, painful genealogical fractures to the hostile scrutiny of a court operating within colonial evidentiary norms. Every absence, every inconsistency, every missing document was weaponized—not interpreted with compassion as the predictable scars of colonial erasure, but treated as evidence of personal or communal fraud.

Second, violence appears in the strategic deployment of hostile expertise. The Crown's genealogical expert, Stephen White, exemplified how expert testimony operates, not as neutral assistance to the court, but as an instrument of Indigenous discreditation. White's role was not merely to analyze; it was to minimize. His selective emphasis on remote Acadian ancestors, his insistence on a 0.3% Aboriginal ancestry figure, and his attacks on Boucher's genealogical sources functioned to cast Boucher's identity as diluted, derivative, and ultimately non-Indigenous. The court, operating within this adversarial structure, accepted this assault without serious critical interrogation. Although formally disclaiming any reliance on blood quantum standards, the court's reasoning—heavily influenced by White's framing—effectively reinstated biological and documentary purity tests as hidden preconditions for constitutional protection.

Thus, the violence of the recognition process is twofold: it is procedural, as Indigenous claimants must endure a brutal exposure of their histories and a systemic presumption of inauthenticity; it is strategic, as Crown expertise, masked as neutral forensic inquiry, systematically dismantles Indigenous claims from within, by eroding genealogical credibility and cultural legitimacy. For Boucher, recognition was not a legal right vindicated through principled

adjudication. It was a precarious, grueling conquest—won only after years of procedural trauma, invasive scrutiny, strategic discreditation, and belated appellate intervention. In this sense, section 35 litigation does not repair colonial harm. It re-performs it, re-inscribes it, and recasts Indigenous survival as something to be skeptically audited rather than honoured.

Recognition, far from being a liberatory act, becomes a site where colonial violence is re-enacted in forensic, procedural form—with devastating human cost.

3.5 Structural Disregard for Lived Indigenous Identity

Beneath the formal legal reasoning and ostensible objectivity of section 35 litigation lies a deeper, more insidious dynamic: the systemic disregard for the lived, evolving, and resilient identities of Indigenous peoples. As Borrows makes clear, the Supreme Court's repeated dismissal of oral tradition, even when provided by respected Indigenous leaders, reveals a systemic epistemic bias that privileges Western literate modes of proof over Indigenous knowledge systems.[61] Boucher's case epitomizes this structural blind spot, where Indigenous identity is evaluated, not through the prism of lived reality, but through colonial documentary templates frozen in time.

Throughout Boucher's legal journey, his deep engagement with Mi'kmaq spirituality, ceremony, and cultural practice was acknowledged, even respected at times, yet consistently subordinated to genealogical and archival evidence. His participation in sweat lodges, hunting prayers, and observance of traditional protocols—the very practices that sustained his Indigenous identity across generations of disruption—were rendered legally invisible unless anchored in colonial registries and documentary proofs.

[61] John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016).

The courts did not dispute that Boucher lived as a Mi'kmaq. They did not contest that his community recognized him, that he carried forth traditions integral to Mi'kmaq cultural survival. What they demanded was that this living identity be translated into static, colonial terms—birth records, genealogical charts, uninterrupted bloodlines—which Indigenous peoples neither created nor governed. In doing so, the courts effectively pathologized resilience, treating adaptations to colonial violence not as evidence of survival, but as signs of inauthenticity. Yet, Indigenous identity is not a fixed essence but a continuously negotiated and evolving process, shaped by history, place, and resilience in the face of colonial disruption.[62] Legal systems, however, often fail to accommodate this fluidity, demanding static, archival proofs of identity.

This structural disregard flows from an epistemological error deeply embedded in Canadian law: the presumption that authenticity is a function of archival purity, rather than cultural continuity, resilience or adaptivity. Under this framework, Indigenous identity must be demonstrable through colonial archives—baptismal certificates, land registries, parish records. Evolving cultural expressions, necessary adaptations, and hybrid survivals are treated with suspicion rather than reverence. Finally, oral histories, ceremonies, and contemporary forms of belonging are devalued unless they can be retroactively authenticated by colonial means. Thus, resilience itself—the ability of Indigenous peoples to survive, adapt, and continue cultural lifeways under conditions of catastrophic disruption—becomes a legal liability.

For non-status Indigenous individuals, like Keith Boucher, this creates a cruel paradox: survival disqualifies and adaptation discredits. Living identity is erased unless it conforms to a documentary narrative that colonialism systematically sought to destroy. The legal system's

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[62] Maximillian C. Forte, *Who is an Indian? The Cultural Politics of a Bad Question* (University of Toronto Press 2011); Bonita Lawrence, 'Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview' (2003). 18.2 *Hypatia* 3-31.

structural disregard for lived Indigenous identity does not merely disadvantage claimants procedurally. It reproduces colonial violence epistemically—by dictating the terms under which Indigenous existence can be seen, heard, and validated. This dynamic ensures that recognition remains a conditional, fragile, and often unreachable goal. It requires Indigenous peoples to exist as the law imagines them, rather than as they have lived and endured. It demands that Indigenous survival be authenticated through the very systems that historically sought their erasure.

Boucher's case is thus not simply about a flawed trial or a negligent lawyer. It is about the systemic foreclosure of Indigenous ways of being and belonging that cannot be transcribed into colonial evidentiary languages. In this way, the recognition process itself becomes a site of structural and epistemic violence—rendering the living Indigenous presence legally unintelligible, unless it can be re-scripted into archival forms that betray its very nature. Recognition, in short, demands not only proof of survival, but survival according to colonial expectations of what Indigenous continuity *should* look like.

4. Conclusion

The legal journey of Keith Boucher is a revealing case study of the structural violence and systemic fragility that characterize the recognition of non-status Indigenous peoples within Canada's legal, academic, and public spheres. Far from offering a predictable path to justice, Boucher's long battle underscores the randomness of legal victories and the profound risks they entail—risks that continue to imperil Indigenous survival and resurgence today.

Throughout his struggle, Boucher encountered the full weight of colonial evidentiary standards: courts that demanded documentary proof over lived experience, ancestral charts over spiritual continuities, and community validation over resilient self-identification. Experts like Stephen White, acting under the mantle of Crown authority, functioned not as neutral evaluators

but as agents of discreditation, wielding genealogical essentialism to undermine Indigenous claims and reproduce settler expectations of 'authenticity.'

At the same time, the courts themselves reproduced profound forms of judicial recolonization. Section 35, intended as a shield for Indigenous rights, instead became a sword wielded against claimants, forcing them into adversarial contests that retraumatized individuals and systematically erased non-archival forms of belonging. Recognition processes revealed themselves not as emancipatory, but as structurally violent ordeals demanding humiliation, intimacy, and impossible proofs.

Boucher's experience also exposed the toxic environment created by public campaigns against non-status Indigenous communities. Reports commissioned to root out so-called 'pretendians', amplified by academics and media actors, have poisoned public imagination. Entire communities—from the Southern Inuit to the Eastern Métis, the Métis Nation of Ontario's most eastern historical communities, as well as most non-status Indigenous organizations—have been increasingly framed as suspect, subjected to mediatic surveillance, shaming, and exclusion. Universities, pressured by these narratives, have launched reviews and purges among students and faculties, further entrenching a climate where suspicion, delegitimization, and genealogical policing became dominant tools of exclusion. Rather than embracing the diverse, resilient ways Indigenous cultures have survived colonial violence, these discourses pathologize adaptation itself—reducing Indigenous identity to blood percentages, uninterrupted records, and narrowly circumscribed histories. Recognition is thus not simply about rights affirmation; it is a contested site where Indigenous survival is measured against colonial expectations, making recognition a

precarious achievement that carries profound costs and opens new spaces for Indigenous sovereignty.[63]

Boucher's story must be read as a strong warning. Keith Boucher succeeded against the colonial *jurispathic* office—but barely, and at immense cost. His case demonstrates that the current recognition regime not only randomizes access to rights but weaponizes colonial frameworks from both above (through judicial structures) and laterally (through internalized Indigenous gatekeeping). Constitutional protection, even when achieved, is fragile, delayed, and impacted by processes designed to control and exclude.

And yet, Boucher's ultimate victory—however precarious—carries extraordinary implications. If non-status Indigenous peoples can secure section 35 protection, it signals nothing less than an historic breakthrough. They become living proof that ancestral memories, connections, and collective powers do not die with colonial disruption, nor can they be erased by fragmented genealogies or distance in time. They also escape the assimilative policies of the *Indian Act*—particularly its two-generation marrying-out rule designed to slowly extinguish status Indians—and resist control by *Indian Act*-imposed Band Councils. Their recognition introduces new anxieties within the state and some Indigenous organizations, as it challenges monopolies over Indigenous rights, resources, governance, and legitimacy. Non-status Indigenous peoples, by securing constitutional rights, become enduring constitutional actors—bearers of Indigenous survival and resurgence beyond the frameworks Canada sought to impose.

In this sense, Boucher's journey illuminates not only the cruelty of the present system but also the irrepressible vitality of Indigenous life beyond colonial permission. The case of Keith Boucher reminds us that Indigenous sovereignty, resilience, and memory are not artifacts to be

[63] John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016).

archived or policed. They are living inheritances, carried forward by those who refuse to disappear.[64]If Canada's legal and public institutions continue to weaponize recognition as a punitive test of archival purity, they risk not simply denying rights, but perpetuating a silent cultural genocide. The cost is nothing less than the erosion of Indigenous futurity itself.

First and foremost, it is non-status Indigenous peoples—the most fragile, the most exposed—who show us that, despite it all, survival, renewal, and resurgence remain possible. Their struggle demands not suspicion but solidarity, not gates, but pathways toward collective restoration and much-needed conversations.

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