

Aboriginal Law: *An Overview for Non-Lawyers*

Naiomi W. Metallic

BURCHELLS LLP



Definition of Aboriginal law

- The body of Canadian law that concerns a variety of issues related to Aboriginal peoples in Canada.
- In other words, situations where the Aboriginal status of an individual or group may impacts the legal outcome or the process leading to a legal outcome.



Definition of an Aboriginal person

- Defined in s. 35(2) of the *Constitution Act, 1982*, as including “Indian, Inuit and Métis peoples of Canada.”



Who's who

Inuit - descendants of original inhabitants of Canada's north, sharing a distinct culture and language

Métis - persons of mixed European and Indian or Inuit culture that developed their own distinct language and culture (*R. v. Powley*, 2003 SCC 43)

Indians - persons who are not Inuit or Métis; term covers over 50 distinct cultural-linguistic groups such as the Mi'gmaq, Maliseet, Mohawk, Cree, Dene, Algonquin, Blackfoot, Oneida, etc. (More common to hear "First Nations", although "Indian" is a legal term)



Statistics:

- **1,172,790 people** (or 3.8% of the Canadian population) identify as Aboriginal.
- **30%** identify as **Métis**
- **5 %** identify as **Inuit**
- **62%** identify as **Indian / First Nation**
 - **11%** as “**non-status**” Indians
 - **51%** as “**status**” Indians



Nova Scotia

- There are 24,175 people of Aboriginal identity in Nova Scotia.
- Aboriginal people make up 2.7% of the total population of Nova Scotia (the largest minority group in NS).
- There are 14,958 Status Indians registered to Nova Scotia bands.



Nova Scotia

- There are 13 First Nation communities in Nova Scotia – all Mi'kmaw.
- The largest reserves are Eskasoni and Indian Brook.
- There are 34 reserve locations across Nova Scotia.
- 9,773 Status Indians live on reserve in Nova Scotia.
- A growing portion of the Aboriginal population resides in Halifax (5,320)




*Nova Scotia
Mi'kmaq First Nations*



Foundational laws

1. Royal Proclamation 1763 – the Indian *magna carta*
2. Treaties – pre- and post- Confederation
3. Constitution Act, 1867 – s. 91(24)
4. Constitution Act, 1982 – ss. 25 and 35
5. UN Declaration on the Rights of Indigenous Peoples



Section 91(24) of the Constitution Act, 1867

- Provides legislative jurisdiction and authority to the Federal government over “Indians and lands reserved for Indians”
- Basis for the *Indian Act* (1876 to today) and other federal legislation



Indian Act – Past

- Dispossessed Aboriginal from traditional lands and relocated to reserves
- Replaced Aboriginal political systems with Chief and Council system
- Criminalized Aboriginal spiritual practices and ceremonies



Indian Act - Past

- Mandated Residential and Indian Day schools
- Prohibited lawyers from acting for Indians and Indian Bands
- Denied Aboriginal peoples' right to vote until 1960s



Indian Act - Past

- Controlled who can be an “Indian”:
 - Could give up ‘status’ if assessed by some “competent person” as to whether you had a “degree of civilization” and a “character for integrity, morality and sobriety” making you qualified to be *enfranchised*



Indian Act - Past

- Controlled who can be an “Indian”:
 - Would automatically lose ‘status’ if became:
 - Doctor
 - Lawyer
 - Had any type of University degree
 - Became a priest / nun
 - Traveled outside Canada for over 5 years without permission of Indian Affairs
 - Soldier in WWI or WWII
 - Left of Central Registry 1951



Indian Act - Past

- Controlled who can be an “Indian”:
 - Indian women who married non-Indian men lost ‘status’ and so did their children
 - Same rules did not apply to Indian men; their non-Indian wives and children became Indians
 - Rules in place until 1985



Challenges to Indian status rules

- *Lavelle* (1974) – Indian women challenging status rules under *Canadian Bill of Rights* and lose at Supreme Court of Canada
- In 1981, Sandra Lovelace and other native women bring their case to the UN Human Rights Committee and win.
- In 1982, Canada passes *Charter of Rights and Freedoms* – section 15 recognizes right to be free from discrimination .
- Based on these things, Canada decides to deal with discrimination in *Indian Act*.

Indian Act - Present

- Still controls who is an “Indian”:
 - 1985 Bill C-31 changed the rules:
 - No one could now lose or gain status through marriage
 - Gave status back who had lost it
 - Their children got status, but ‘lesser’ status
 - Introduced s. 6(1) “full” status and s. 6(2) “half” status

Parents' registration ↓	6(1) + 6(1)	6(1) + 6(2)	6(1) + non-Indian	6(2) + non-Indian
Child's registration	6(1)	6(1)	6(2)	Non-status Indian

Indian Act - Present

■ Residual discrimination

X's has Indian father (s. 6(1)(a)) and non-Indian mother (she becomes s. 6(1)(a))

X is s. 6(1)(a)

X has a child with a non-Indian

X's child is s. 6(2)

Y's has Indian mother (s. 6(1)(c)) + father non-Indian

Y is a s. 6(2)

Y has a child with a non-Indian

Y's child is a non-status Indian

X's father also could have had mixed Indian / non-Indian ancestry – this was permitted so long as it was along the male line.



Indian Act - Present

- *Mclvor case*: challenge to residual discrimination
 - Section 15 *Charter* equality rights challenge to Bill C-31
 - Partially successful (Court of Appeal found narrowing discrimination than Trial Judge)
 - Led to *Bill C-3 – Gender Equity in Indian Registration Act*

Indian Act - Present

■ Changes of *Bill C-3 – Gender Equity in Indian Registration Act*

X's has Indian father (s. 6(1)(a)) and non-Indian mother (she becomes s. 6(1)(a))

X is s. 6(1)(a)

X has a child with a non-Indian

X's child is s. 6(2)

Y's has Indian mother (s. 6(1)(c)) + father non-Indian

Y is a s. ~~6(2)~~ 6(1)(c.1)*

Y has a child with a non-Indian

Y's child is a ~~non-status Indian~~ s. 6(2)

*Y's child had to be born after Sept. 4, 1951

**Y had to have a child, otherwise won't be "bumped up" to 6(1)(c.1)



Indian Act - Present

- Rules will lead to legislative extinction
 - Many status Indians have children with non-status people (Aboriginal or non)
 - Rules only allow one generation of mixing
 - Within three generation (75 years) most new born children will not qualify for Indian status
 - Canada's *Citizenship Act* is not so strict – you are Canadian so long as you have one parent, you're Canadian (degree of mixing doesn't matter)



Indian Act - Present

- Split between Band members and status:
 - With Bill C-31, Canada provide no extra lands and money for Bands to deal with reinstated people
 - Instead, gave Bands ability to adopt membership codes
 - Can admit to membership people who are not status Indian
 - Can deny member to any registered Indian, except Indian women restored to status under s. 6(1)(c)
 - Approximately 90 Bands adopted membership that exclude s. 6(2) of Bill C-31 Indians.



Indian Act - Present

- Rules on reserve land:
 - Canada owns the land but the Band has a collective right of possession to, and to use and enjoyment of, reserve lands
 - Reserve lands can't be sold to third parties, except to the Crown, except with the consent of the Band
 - There are forms of private property on-reserve (band member sell to other band members, but no non-members)



Indian Act - present

- Indian wills and estates
- Band Council elections
- By-laws
- Exemption from taxation
 - Limited to living and working on reserve
 - Aboriginal people living off-reserve pay income tax
 - In most provinces, Aboriginal pay sales tax off-reserve, unless the store delivers to the reserve



Indian Act - present

- A number of ‘gaps’ in the *Indian Act*
- Sometimes provincial laws will fill the gap
- Sometimes provincial laws cannot apply because constitution won’t allow it
- Sometimes Canada doesn’t pass laws, but instead has policies (drinking water, health, welfare, education, etc.)
 - Inconsistent with rule that citizens should be governed by positive laws that allow Parliamentary / democratic oversight



Equality and human rights

- *Canadian Bill of Rights* 1960 – claims against Canada
- *Canadian Charter of Rights and Freedoms* 1982
- Provincial human rights acts
- *Canadian Human Rights Act*
 - Limits imposed by s. 67 restricted complaints against the *Indian Act* until 2008



Equality and human rights

■ Trends of cases:

- Individual discrimination
- Discrimination in the *Indian Act*
- Lack of equal treatment as between Aboriginal groups (laws that makes distinctions between on-reserve vs. off-reserve, status vs. non-status, First Nation vs. Metis, etc.)
- Inadequate provision of funding / services for Indians as compared to non-Indians
 - Child welfare case
 - Education



Criminal Law

- Section 718(e) of the Criminal Code sentencing principle to consider “all available sanctions other than imprisonment that are reasonable in the circumstances... with particular attention to the circumstances of Aboriginal offenders”
- *R. v. Gladue*, 1999 - aboriginal offender’s circumstances have to be considered in determining appropriate sentence
- *R. v. Ipeelee*, 2012 –the Gladue principles must be followed in every case involving an Aboriginal offender...
- Sentencing circles - *R. v Moses*, 1992



Criminal Law

- *Royal Commission Report on the Wrongful Conviction of Donald Marshall Jr. 1989*
- *Mi'kmaq Legal Support Network* and its Court worker program
- *R. v. Parks, 1993* - accused's right to challenge selection of jury member for cause based on racial bias
- Recent Ontario case acquitted Aboriginal offender because of lack of Aboriginal people on Ontario juries



Aboriginal and Treaty Rights

■ White Paper (1969)

- Proposed elimination of *Indian Act* and all that remained of special relationship between Aboriginal people and Canada
- Aboriginal reacted with strong resistance - they saw this form of imposed 'equality' as a coffin for their collective identities - the end of their existence as a distinct people
- National Aboriginal organizations created as a result and sought to claim collective rights



Aboriginal and Treaty rights

- *Calder v. British Columbia (Attorney General)* (1973) – Aboriginal title exist at common law
- Afterwards, Canada reverses long-standing position of not negotiating native claims
 - Specific claims – reserve land, trust funds, treaty entitlement
 - Comprehensive claims – claims to unceded Aboriginal lands (modern land claims)
 - Self-government agreements
- Section 35 of the *Constitution Act, 1982* recognizes and affirms Aboriginal and Treaty rights



Aboriginal and treaty rights

- 35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.



Aboriginal and treaty rights

- Came as a result intense political pressure by Aboriginal groups and court challenges
- It was intended that Aboriginal rights would be defined through further constitutional amendments...
- But that never materialized and interpreting section 35 has fallen to the courts.



Aboriginal and treaty rights

- The “promise of s. 35(1)” the Supreme Court of Canada has said is

To recognize the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and to reconcile that fact with the assertion of Crown sovereignty over Canadian territory. (*Van der Peet*, SCC)



Aboriginal and Treaty rights

- Recognition of hunting and fishing rights for food, social and ceremonial purposes
 - Practices that were ‘integral to the distinctive culture’ of the group pre-contact
 - Rights can be regulated, but must accommodate preferred means of exercising the right
 - Priority to right, after conservation



Aboriginal and Treaty rights

- Some hunting and fishing for limited commercial (e.g., *Marshall* 1999 – treaty right to fish for a moderate livelihood)
- Aboriginal Title – regular use and occupation
 - Challenges for migratory groups
- Has led to greater negotiations between Aboriginal people and governments



Aboriginal and Treaty rights

- Also lead to duty to consult and accommodate existing and credibly asserted Aboriginal and Treaty rights
 - Duty is on the government to consult and accommodate when it contemplates conduct that impacts rights
 - Affects business and resource developers
 - Has lead to negotiations and impact and benefit agreements



Aboriginal and Treaty rights

- Claims for self-government
 - Historical right? - prove jurisdiction was integral and distinctive pre-contact
 - 1995 federal policy recognizing self-government
 - Delegated vs. inherent jurisdiction
- Other rights?



Section 25 of the *Charter*

- 25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.



UN Declaration on the Rights of Indigenous Peoples

- Adopted by UN Human Rights Council on June 29, 2006 and subsequently supported by the General Assembly on September 2007.
- Four countries voted against: Canada, United States and New Zealand
- Canada finally ratifies on November 12, 2010



Canada ratifies UNDRIP (cont'd)

- UNDRIP contains 46 articles that comprehensively addresses Indigenous peoples rights and States obligations with respect to land, resources, self-government, economic and social rights, culture, language, consultation, non-discrimination, etc.
- Arguably its provisions go much further than Canada's domestic law under Section 35
 - Free, prior and informed consent regarding impact on



Canada ratifies UNDRIP (cont'd)

- Even though ratified, non-binding
- However, there is a presumption of compliance with international law.
- “It is accepted in Canadian law that, in understanding and developing the constitution and when determining its impact on legislation and government action, the Courts may refer to international law, especially human rights law.”
Dickson J. in *Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313

End

Wela'liog