

AN INTRODUCTION TO ABORIGINAL ISSUES

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This is a brief introduction to selected Aboriginal issues and concepts. Readers requiring additional information are directed to the texts outlined in the end-notes.¹

More than one million people in Canada are identified as being of Aboriginal origin or approximately 3.7 percent of the population of Canada. Of these, approximately 385,000 are registered Indians² under the federal **Indian Act**.³ The term "Aboriginal peoples" includes the Indian, Metis, and Inuit peoples of Canada as provided by section 35(2) of the **Constitution Act, 1982**.⁴ While this appears straightforward, Aboriginal peoples actually fall into numerous categories. These categories are, in many ways, arbitrary and do not reflect the cultural and social realities of how people define themselves.⁵

Being defined as "Aboriginal" automatically distinguishes one from other Canadians. Section 91(24) of the **Constitution Act, 1867** (which spells out which powers the federal and provincial governments possess) states that Indians (including the Inuit) and their lands are within the legislative jurisdiction of the federal government.⁶

The status of the Metis under section 91(24) remains undetermined. The **Indian Act** distinguishes who is, and who is not, an Indian for the purposes of the **Act**. For example, people may consider themselves to be Indian and yet, not fall within the definition of the **Indian Act**. Inuit are not governed by the **Indian Act**. There is also a distinction between treaty and non-treaty Indians. Treaty Indians are those Indians who can trace their ancestry to people who signed treaties in Canada, whereas non-treaty Indians have no such claim. To confuse matters even more, one can be a treaty Indian and yet not be registered under the **Indian Act**. This means that while these people may be entitled to rights under a treaty, they are not entitled to rights as Indians under the **Act**.

The definition of Metis generally recognizes two groups. First, the Metis are those people who were known as the Metis and whose origins can be traced back to the Red River (Manitoba) in the early 1800s. Second, the Metis are those people of mixed Indian and non-Indian ancestry who are not directly connected to the Metis of the Red River but, nevertheless, consider



themselves to be Metis. Those people who are of mixed Indian and non-Indian ancestry sometimes also refer to themselves as "Aboriginal" or "native."

Numerous pieces of federal legislation deal specifically with Aboriginal peoples. The most notable is the federal **Indian Act**. First enacted in the late 1800s and amended over the years, the modern **Indian Act** attempts to govern almost every aspect of Indian life and government on and off reserves. The **Act** contains various rights, privileges, and restrictions, and establishes a land regime known as the reserve system. Reserves can be created under the **Act** and are lands that are set aside for the use and benefit of Indians. Certain rights are attached to reserve land, including the tax exemption for property situated on reserve land. In addition, property owned by an Indian and situated on a reserve cannot be seized by a non-Indian. While this has the effect of protecting Indian property from seizure, it also has the effect of making the availability of loans to Indians difficult, because their properties, situated on reserves, including all reserve lands, have no or limited uses as collateral.

There is no national legislation governing the Inuit. Their primary means of government is the public government of the Northwest Territories (NWT). In 1999, the NWT will be split to create two new territories. The eastern territory will be Nunavut and will be managed essentially by Inuit public government. The only specific Metis legislation is found in Alberta where eight Metis settlements are governed by specific provincial legislation.⁷

Treaties are those agreements between Canada (or the colonial government in its place) and the respective Aboriginal peoples, and they deal with the maintenance of peace in an area and/or the cession of land and Aboriginal rights. The treaties of the 17th and 18th centuries in what is now eastern Canada were primarily concerned with the maintenance of friendship and peace. The treaties of the 19th and 20th centuries in western and northern Canada dealt with the cession of land and certain Aboriginal rights and title.

Outstanding claims are a continuing issue of importance to many Aboriginal peoples and can be categorized in three groups. Comprehensive land claims are based on the continuing use and occupation of traditional lands in areas where Aboriginal peoples still have an interest. Settled land claims include the 1975 **James Bay and Northern Quebec Agreement** in northern Quebec and the 1984 **Inuvialuit Final Agreement** for

the Inuvialuit of the Beaufort Sea area. Treaty entitlement claims are claims based on unfulfilled obligations to Indians arising from treaties. In many cases, the main issue is that not enough land for reserves was originally set aside. In 1992, a major treaty entitlement claim was signed with Saskatchewan Indian bands, which transferred more than \$400 million to the bands concerned to buy up to 1.67 million acres of land. Specific claims are claims which involve a breach of federal obligations to Indians under the **Indian Act**, administration of Indian moneys or Indian lands.

Perhaps the most publicized Aboriginal issue in recent years is been self-government. While there is no single accepted definition of self-government, it is generally seen as the structure through which Aboriginal peoples can gain increased control over their lives. Self-government can range from complete autonomy (like a province or a separate country) on the one hand, to increased control over programmes and services on the other. Most self-government proposals fall somewhere in between. The inherent right of self-government is argued by some to be an "existing right" within the meaning of section 35(1) of the **Constitution Act, 1982** which provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The issue of the inherent right is still outstanding and it will be some time before it is clarified.

The **Indian Act** contains provisions for the establishment of Indian band councils with municipal-type powers. In recent years, several pieces of self-government legislation have been enacted including the **Cree-Naskapi (of Quebec) Act**⁸ and the **Sechelt Indian Band Self-Government Act (of BC)**.⁹ The main purpose behind this self-government legislation is to give increased control to Indian peoples over their lives. It is no secret that many of the social, health, and economic problems experienced by Aboriginal peoples are the direct result of their inability to control their lives. Self-government is a mechanism by which they can address this issue.

The inherent right of Aboriginal self-government has dominated much of the recent discussion on this issue. The inherent right focuses on the argument that Aboriginal peoples possess a right to govern themselves based on the fact that they are the original peoples of the land now called Canada and that they never surrendered this right. Some argue that the right is a right within the meaning of section 35 of the **Constitution Act, 1982**



and is, therefore, already part of the Canadian Constitution. There are no clear answers to this complex issue. What is certain is that the inherent right will continue to dominate the discussion of self-government and Aboriginal issues in the near future.¹⁰

Finally, Aboriginal peoples possess certain hunting, fishing, trapping, and gathering rights, and other rights including health care and education, based on numerous instruments, including the **Royal Proclamation of 1763**, the treaties, the **Indian Act**, and section 35 of the **Constitution Act, 1982**. Health care, for example, has been argued to be a treaty right by applying a modern interpretation to the "medicine chest" clause which was promised in Treaty No.6.¹¹

A central reason for wanting to prove the existence of an Aboriginal right is that under section 35, existing Aboriginal rights (as of 1982, when it came into force) are constitutionalized and, therefore, can supersede federal, provincial, and territorial laws. At the same time, these rights are limited by the fact that government legislation can infringe on a right if it is justified. An example of justifying an Aboriginal right to hunt might be for reasons of conservation or wildlife protection.

In the area of health care, special attention has focused on the ability of Aboriginal peoples to gain increased control over the delivery and development of health care institutions by way of self-government. A fundamental point is that Aboriginal peoples are a richly diverse group and that while one approach may work for one community, there is no guarantee that it will work for another.¹²

The federal government has assumed jurisdiction over the health of Indians. Under the **Indian Act**, Indian band councils have the authority to enact health by-laws for Indians resident on reserve land and by-laws to help prevent the spreading of contagious or infectious diseases.¹³ The **Indian Act** also provides that the Governor in Council (Cabinet) may enact regulations to provide medical treatment and health services to Indians and to prevent the spread of infectious diseases among Indians.¹⁴

The health care challenges facing Aboriginal peoples in the future are linked, in many ways, to their self-government aspirations. Control over health care is a central issue to community well-being. The challenge for the health care profession will be to mesh clinical expertise with the needs of communities recognizing, at the same time, the legal and socio-political factors that make Aboriginal peoples a distinct group in Canada.*

* *The opinions expressed herein are those of the author and do not necessarily represent the views of the Government of the Northwest Territories.*

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REFERENCES

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2. Canada, Statistics Canada, 1991 Census of Canada; 1991 Aboriginal Peoples Survey.
3. Indian Act, Revised Statutes of Canada, 1985, c.I-5.
4. Constitution Act, 1982, Schedule B of the Canada Act 1982, (U.K.), 1982, c.11.
5. See generally, T. Isaac, "The Power of Constitutional Language: The Case Against Using 'Aboriginal Peoples' as a Referent for First Nations", 1993, 19:2 *Queen's Law Journal*. 415.
6. Constitution Act, 1867, Revised Statutes of Canada, 1985, App. II, No.5.
7. See for example: *Metis Settlements Land Protection Act*, Statutes of Alberta, 1990, c.M-14.8 and *Metis Settlements Act*, Statutes of Alberta 1990, c.M-14.3.
8. *Cree-Naskapi (of Quebec) Act*, Statutes of Canada, 1984, c.46.
9. *Sechelt Indian Band Self-Government Act*, Statutes of Canada 1986, c.93.
10. For a general discussion on the inherent right of self-government see: *Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, (Ottawa, Ont.: RCAP, 1993).
11. P. Barkwell, "The Medicine Chest Clause in Treaty No.6," [1981] 4 *Canadian Native Law Reporter* 1.
12. Lessard P. Aboriginal health care: how to understand and communicate better. J SOGC 1994;16:1571-9.
13. Indian Act, s.81 (1)(a).
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