

Jim Reynolds

# Aboriginal Peoples and the Law

**A Critical Introduction**



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## Preface

In his bitter, brilliant, and provocative polemic *The Unjust Society*, Harold Cardinal (then president of the Indian Association of Alberta) wrote: “Our people want, our people, the Indians, demand just settlement of all our treaty and aboriginal rights. To the Indian people, there can be no justice, no just society, until their rights are restored ... The question of Indian rights is the paramount question for all Indian people from the vantage point of the past, the present and the future.”<sup>1</sup> Cardinal was writing in 1969 in response to Prime Minister Pierre Trudeau’s proposal to terminate the special rights of Aboriginal peoples.

Almost fifty years later, Justin Trudeau followed in his father’s footsteps as prime minister but declared a very different approach to Aboriginal policy, stating that no relationship was more important to his government than that with Aboriginal people. Clearly, much has changed, at least on the surface.<sup>2</sup> But is there now justice for Aboriginal people? Do we have a just society? Are Aboriginal and treaty rights now restored? The answers are found in modern Aboriginal law developed since *The Unjust Society*.

Anyone who pays attention to current affairs in Canada will have seen almost daily reports relating to this area of law. Take, for example, the Supreme Court of Canada’s 2014 decision in favour of the Tsilhqot’in people, which found that they held Aboriginal title over almost 2,000 square kilometres; the final report of the Truth and Reconciliation Commission in 2015, which recommended greater knowledge of this area of the law; the Liberal government’s repeated statements confirming its desire to implement the UN Declaration on the Rights of Indigenous Peoples; the Supreme Court’s 2016 decision that Métis and non-status Aboriginal people are considered “Indians” for some purposes of the Constitution; and the Federal Court of Appeal’s decision that same year to overturn the federal government’s approval of the \$7-billion Northern Gateway pipeline project because of the government’s failure to adequately consult Aboriginal groups. You may have also noticed reports of the proposed treaty with the Chippewas of Ontario.<sup>3</sup> In February 2017, the prime minister announced a working group of

ministers to review all relevant federal laws, policies, and operational practices to ensure they met constitutional obligations and international commitments to Indigenous peoples. In July 2017, the minister of justice, Jody Wilson-Raybould, released principles to guide the review, based largely on statements from recent decisions of the Supreme Court of Canada.<sup>4</sup> In October 2017, there were press reports of boats being burned in Nova Scotia, actions arising out of a dispute over the right to fish under a treaty.<sup>5</sup> February 2018 saw second reading of a bill to implement the UN Declaration and an announcement by the prime minister of Recognition and Implementation of Rights legislation and policy.



This book is intended as an introduction to Aboriginal law for law students; students of Aboriginal studies, politics, and the social sciences; and general readers interested in this fascinating and important topic. A major consideration has been to maintain a length appropriate to this objective (and demanded by the publishers!), and this consideration, as well as the desire to focus on the most important features of the law and the policy issues involved – the forest and not the trees – means that I have not attempted to make this a comprehensive introduction. Of necessity, I have omitted much that others already acquainted with the topic may feel to be important. I hope that my modest effort will help you find a route through the legal thicket, and I encourage you to continue on the journey by reading some of the books and articles mentioned in the notes on particular topics, or by reading a more detailed text for a comprehensive account.

Although legal writers and judges may use long and technical words, or words from dead languages like *sui generis*, *plaintiff*, or *defendant*, law should not be a mystery.<sup>6</sup> I attempt to avoid technical detail as much as possible and explain it when I must use it, but on occasion you will have to be willing to slog on in order to get an understanding of the law. The important thing is to keep in mind the words of Professor Wedderburn in the preface to his classic work *The Worker and the Law*:

Technical law by itself is useless, at best an arid game played by keen minds in court rooms and academic ivory towers. To understand its significance we must look at its historical and social setting, we must question what are the value and policy judgements enshrined within the propositions of law, and we must ask what is done in other countries about the problems revealed.<sup>7</sup>

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Despite the introductory nature of this book, my aim is to follow this approach. Value and policy considerations are especially important to our task because this is an area of law developed largely by judges of the Supreme Court of Canada, unelected and unrepresentative, with limited input from Aboriginal people, the general public, or their elected representatives. It enshrines the social and political views of those judges and is unlikely to be challenged or changed given the nature of the judicial process (with no further appeals from their decisions) and the constitutional protection from being reversed by Parliament, since judges effectively have the last word on the Constitution.

This is also a critical introduction. It goes beyond a description of what the law is, based on what the judges say it is, and includes commentary on that law. As might be expected in an area of law dealing with such sensitive political, social, and economic issues as whether Aboriginal title prevails over private property rights and whether Aboriginal fishers should have priority over others, there has been a great deal of commentary and criticism. Sometimes that has been from dissenting judges. More often it has come from academics in disciplines such as law, political science, and anthropology. Their perspectives range from libertarian conservatives such as Tom Flanagan, who decries what he calls “the aboriginal orthodoxy” reflected, in part, in judicial decisions,<sup>8</sup> to the views of advocates of Aboriginal sovereignty, who are critical of decisions that have upheld Canadian sovereignty over Aboriginal peoples and lands. I attempt to summarize the diversity of views. I also include comments based on my own experiences as a lawyer, especially in the concluding chapter.

I hope this book will correct some misunderstandings about the current state of the law and provide some perspective for critical thinking and discussion about both the reform and the limits of the law. I have been deeply involved for almost forty years in representing Aboriginal peoples (especially the Musqueam people of Vancouver) as a lawyer. I agree with Felix Cohen, the great pioneer of US Aboriginal law, that “law is the battlefield on which all great social struggles take place.”<sup>9</sup> However, as a practising lawyer, I am also very aware of the limits of the law in dealing with the unfinished business of colonialism in Canada and bringing about genuine reconciliation between Aboriginal and non-Aboriginal Canadians.

I have been fortunate to have spent most of my professional career acting for the Musqueam, including many years working on reserves with community members. As I briefly summarize in Chapter 8, they have been at the forefront of developments in Aboriginal law since they went to court in

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what became the *Guerin* decision of the Supreme Court of Canada in 1984.<sup>10</sup> I had the honour to be part of the legal team in that case and in subsequent litigation, negotiations, and preparation of documents to record agreements with governments and businesses. This experience gave me a unique opportunity to participate in, and witness, what by any standards must be considered one of the most exciting aspects of Canadian law and politics in the last few decades. I have also come to learn something of the richness of Musqueam history, culture, and values. To all the Musqueam people, I express my best wishes and thanks, *hay chxw q̓a*.

The general scheme employed in this book is to consider some introductory issues in Chapters 1 and 2, giving background material to better understand the substantive legal issues covered in later chapters. Chapter 3 covers issues of Crown and Aboriginal sovereignties and the relationship between the governments and Aboriginal peoples. Aboriginal rights and title are the heart of Aboriginal law and are covered in Chapter 4. Treaties, which are the predominant legal means to terminate Aboriginal rights and title in exchange for treaty rights, are discussed in Chapter 5. The next chapter deals primarily with the topic of consultation in the context of claims of Aboriginal rights that have not been proven. In theory, such consultation is intended to protect unproven rights, pending negotiation of treaties or litigation to establish their validity. Chapter 7 looks at bodies of law that are not directly part of Canadian Aboriginal law but may influence and be adopted into it. The chapter is divided into sections on the Indigenous laws of Aboriginal groups in Canada and international law. Finally, Chapter 8 provides concluding comments, including my views on the limits of the law and the need for governments to show greater political will.

At the beginning of the book, I include a list of what I consider to be the leading cases in date order, using a short form for the name of each case. This list will help you understand the overall development of the law. At the end of the book, you'll find a list of all the cases mentioned, with complete names and citations.

A few points of clarification:

- I use “Aboriginal” rather than “Indigenous” because that is the term used in Canadian law and it is intended to be synonymous with “Indigenous,” except when the distinction is made in Chapter 7 between “Aboriginal law” (the law of the Canadian legal system applying to Aboriginal peoples) and “Indigenous laws” (the laws of an Indigenous group). This term is used for consistency and not to deny that

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“Indigenous” may be a better term or that some “Aboriginal” people identify only with their own tribe or nation.

- References to “governments” are to federal and provincial governments rather than Aboriginal governments. This is to avoid confusion and not in any way to deny the validity of Aboriginal governments, although it does reflect the general failure of Canadian law to recognize the powers of Aboriginal governments, as is discussed in Chapters 3 and 7.
- References to case names in the text are usually in a shortened form and are indicated by the use of italics. Full citations are given in the endnotes and in the list of cases cited at the end of the book.
- I have not included URLs for most references, but many of the materials cited can be found using a simple search. For all the Supreme Court of Canada cases, go to the website “Judgments of the Supreme Court of Canada by Lexum” (<https://scc-csc.lexum.com/scc-csc/en/nav.do>) and insert part of the case name. More recent decisions of other courts can be found at the Canadian Legal Information Institute website (<https://www.canlii.org/en/>). Many articles and some older books can also be found online.

I would like to acknowledge the assistance of the following people: my colleagues at Mandell Pinder LLP for their encouragement, and, in particular, Kris Statnyk and Aaron Wilson, who kindly provided me with materials on Indigenous laws; Don Purich, who reviewed a draft of this book and provided many helpful comments; Randy Schmidt, Lesley Erickson, Judith Earnshaw, Judy Dunlop, Nadine Pedersen, and Martyn Schmoll at UBC Press for their assistance during writing and production; Audrey McClellan for her careful copy-editing; and Haida artist Jim Hart, who allowed me to use a photo of part of his impressive Reconciliation Pole at the UBC Vancouver campus on the front cover.

## Leading Cases

- 1823 – *Johnson v. McIntosh*  
1831 – *Cherokee Nation*  
1832 – *Worcester v. Georgia*  
1888 – *St. Catherine’s Milling*  
1973 – *Calder*  
1984 – *Guerin*  
1985 – *Simon*  
1990 – *Sioui; Sparrow*  
1991 – *Bear Island*  
1995 – *Blueberry River*  
1996 – *Badger; Côté; Gladstone; N.T.C. Smokehouse;*  
*Pamajewon; Van der Peet*  
1997 – *Delgamuukw*  
1999 – *Marshall I; Sundown*  
2001 – *Mitchell*  
2002 – *Wewaykum*  
2003 – *Powley*  
2004 – *Haida; Taku*  
2005 – *Marshall/Bernard; Mikisew Cree*  
2006 – *Sappier*  
2009 – *Ermineskin*  
2010 – *Little Salmon; Rio Tinto*  
2011 – *Lax Kw’alaams*  
2013 – *Manitoba Métis Federation*  
2014 – *Grassy Narrows; Tsilhqot’in*  
2016 – *Daniels*

*Note:* A full list of cases cited in this book, including complete names and citations, can be found at the end of the book.



## What Is Aboriginal Law?

Aboriginal law deals with the legal situation of the Aboriginal peoples of Canada – in particular, their special rights, which may, of course, also have an impact on non-Aboriginal people. In order to understand substantive legal issues such as the content and limits of those rights and the basis for their recognition by the Canadian legal system, it is important to consider fundamental questions. For instance, why should Aboriginal peoples be treated differently from other groups? Who are the Aboriginal peoples of Canada? And what are the objectives and sources of Aboriginal law?

### The Special Rights of Aboriginal Peoples

An immediate question is why should Aboriginal people be treated differently from other minority groups, such as Ukrainians or Italians? Prominent Aboriginal rights lawyer Thomas Berger has asked that question and sought to answer it: “Native people did not immigrate to Canada as individuals or families who expected to be assimilated to Canada ... The Native peoples ... were already here: they have been forced to submit to the laws and institutions of the dominant White society. They have never relinquished their claim to be treated as distinct peoples in our midst.”<sup>1</sup> He has also suggested that Aboriginal peoples’ attempt to preserve, on their own

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Aboriginal law deals with the legal situation of the Aboriginal peoples of Canada under the laws of Canada; “Indigenous law” refers to the law of a particular Aboriginal group, developed within and applying to that group.

terms, a land-based culture and way of life distinguish them from other minorities. No other minority can assert a right to a land base and to distinct political institutions founded on Aboriginal sovereignty.<sup>2</sup> The remaining rights of Aboriginal peoples to their property and sovereignty are fundamental to the law. Patrick Macklem has suggested that four “complex social facts” account for the unique constitutional relationship that exists between Aboriginal peoples and the Canadian state:

- Aboriginal cultural difference
- Aboriginal prior occupancy
- Aboriginal prior sovereignty
- Aboriginal participation in a treaty process.<sup>3</sup>

Macklem argues that constitutional protection of “indigenous difference” promotes greater equality and a just distribution of constitutional power.

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“Native peoples ... have been forced to submit to the laws and institutions of the dominant White society. They have never relinquished their claim to be treated as distinct peoples in our midst.”

Thomas Berger, *A Long and Terrible Shadow*

A related question is whether special rights for Aboriginal peoples are objectionable as a form of racial discrimination. Since descent from the original population is a requirement (leaving aside exceptional cases based on marriage or adoption), ethnicity is an invariable factor. This can be regarded as a racial requirement; on occasion, courts have referred to “Indians” as a race.<sup>4</sup> And discrimination against them has been described as racial discrimination.<sup>5</sup> Some critics have complained that

Aboriginal rights are themselves a form of race-based discrimination and are “at variance with liberal democracy” since “Indians did not do anything to achieve their status except to be born, and no one else can do anything to join them in that status because no action can affect one’s ancestry.”<sup>6</sup> The Supreme Court of Canada (SCC or “the Court”) has struggled with this issue, noting in one case:

In the liberal enlightenment view ... rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal ... Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment ... they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal.<sup>7</sup>

The Court has resolved complaints from non-Aboriginal Canadians who claim they are being discriminated against – for example, when a licence to fish at a certain time and place is granted to an Aboriginal group but not to non-Aboriginal Canadians – by upholding special treatment for an Aboriginal group on the grounds that the Aboriginal group is disadvantaged and the favourable treatment can be justified as a form of affirmative action.<sup>8</sup>

Unless a law makes an exception, persons of Aboriginal descent are bound by the same obligations as other Canadian citizens. The SCC noted in one case: “Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all the responsibilities ... of other Canadian citizens.”<sup>9</sup> This means, among other things, that there is no general tax exemption for Aboriginal peoples. (The exemption in Section 87 of the *Indian Act* applies only to those people who are entitled to be registered as “Indians” under the act and only to property situated on a reserve. Modern treaties generally phase out this exemption.) In another case, the SCC noted that “Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance.”<sup>10</sup> The Court has also stated, “Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole.”<sup>11</sup>

Until relatively recently, “Indians” suffered from official discrimination. For example, they were denied the federal vote until 1960. Now, however, such discrimination would be illegal, and Aboriginal people are entitled to enjoy the same rights as non-Aboriginal people. For example, in 2016, the Canadian Human Rights Tribunal upheld a complaint that the federal government discriminated against First Nations children and families living on reserves and in the Yukon in the provision of child and family services.<sup>12</sup> The SCC has noted widespread prejudice against Aboriginal people, which has become greater because of land claims and fishing rights.<sup>13</sup> The question of discrimination within an Aboriginal group has been the issue in some litigation. The SCC overturned a provision that restricted voting in band council elections to those members resident on reserve.<sup>14</sup> In a recent case, the Court held that there was no evidence that a requirement for a minimum level of education to be elected chief or councillor was discriminatory.<sup>15</sup> Until 2008, the *Canadian Human Rights Act* did not apply to decisions made under the *Indian Act*, such as allocation of housing by band councils. The act was amended to remove the exemption, but the amendment states

that it is to be interpreted and applied in a manner that gives due regard to the First Nation's legal traditions and customary law, particularly when it comes to balancing individual rights and interests against collective rights and interests to the extent that the traditions and law are consistent with the principle of gender equality.<sup>16</sup>

## **The Dispossession of Aboriginal Peoples and Supposed Justifications**

An issue directly related to the special rights of Aboriginal peoples is their dispossession, since the limited extent of those rights today is the result of such dispossession. Generally speaking, current Aboriginal rights are rights dating from before the arrival of Europeans that have survived extinguishment, surrender, and infringement by government. It is vital to remember that they are rights that existed before European settlement and not rights conferred by non-Aboriginal governments. Likewise, most treaty rights are rights reserved by Aboriginal peoples when they agreed to surrender other Aboriginal rights. As noted by the Supreme Court of the United States, a treaty “was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.”<sup>17</sup> This fundamental point is often

### *Dispossession, Extinguishment, Surrender, and Infringement*

“Dispossession” is the loss of use by Aboriginal peoples of their traditional lands.

“Extinguishment” is the termination of an Aboriginal or treaty right by a colonial or the federal government. It has not been possible since 1982 because Section 35 of the *Constitution Act, 1982* protects those rights.

“Surrender” is the voluntary termination by an Aboriginal group of an Aboriginal or treaty right.

“Infringement” is a limitation by a government of an Aboriginal or treaty right, and it is valid only if it can be justified under the test developed by the Supreme Court of Canada.

ignored, and people speak of reserve land being “given” to the Aboriginal group, when it is actually land that, in the vast majority of cases, was retained from their traditional territory, with the balance being taken from them. The SCC has been guilty of this error.<sup>18</sup> Retention may be on a diminishing basis: some treaties, such as the numbered treaties in the Prairie provinces, have provisions permitting the government to “take up” land from time to time, a provision that limits the area within which Aboriginal rights have been retained.<sup>19</sup> Both the federal and provincial governments may infringe Aboriginal and treaty rights if this can be justified under a test devised by the SCC, although outright extinguishment has not been possible since the passage of Section 35 of the *Constitution Act, 1982*.

Aboriginal and treaty rights have only been fully recognized since 1982 under Section 35 of the *Constitution Act, 1982*.<sup>20</sup> It must be acknowledged that the role of law has been to support the colonization of Canada, including the dispossession of Aboriginal peoples, disruption of their culture and legal systems, and limitation of their power to govern. The Truth and Reconciliation Commission described Canadian law as “a tool for the dispossession and dismantling of Aboriginal societies.”<sup>21</sup> As stated by Justice Binnie in the *God’s Lake* case, “The history of Indian peoples in North America has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinctive elements of their cultures.”<sup>22</sup> Law played a prominent part in this colonial process and continues to support its legacy by legitimizing it. Although fundamental legal principles recognized Aboriginal rights until they were surrendered by treaty or extinguished by clear legislation, some laws directly prevented Aboriginal peoples from enforcing those rights. For example, an amendment to the *Indian Act*, passed by the federal government in 1927, made it an offence to raise funds to pursue claims of Aboriginal title.<sup>23</sup> Other laws attacked Aboriginal culture. A prime example is legislation that made it an offence to carry on certain customs and governance practices, such as the West Coast gift-giving feasts and assemblies (potlaches).<sup>24</sup>

More commonly, and especially in British Columbia, the legislatures and courts simply ignored the Aboriginal interest in land and resources. As the SCC acknowledged in *Sparrow*, “For many years, the rights of the Indians to their aboriginal lands – certainly as *legal* rights – were virtually ignored,” and “there can be no doubt that over the years the rights of the Indians were often honoured in the breach.”<sup>25</sup> Laws that ignored Aboriginal rights (as with land

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“[A treaty] was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.”

US Supreme Court, *U.S. v. Winans*

laws passed in British Columbia under the policy of denial of such rights) effectively defeated those rights by giving title to others. In practice, “Aboriginal rights existed at the margins, meaningful only in geographical spaces left vacant by Crown or third-party non-use.”<sup>26</sup> Even today, the law requires Aboriginal people to commence protracted and expensive litigation to prove their rights and have them recognized and enforced.<sup>27</sup> Special rights and recent developments in the law recognizing Aboriginal rights must be seen in this context.

A variety of justifications has been given for the dispossession of Aboriginal peoples: the religious excuses proffered by the Spanish that colonization would save souls; the racist views that Aboriginal peoples were “uncivilized” and inferior and should make way for a superior race; and the theory of “terra nullius” (the claim that the land was unoccupied or occupied by peoples without property rights), which was used in Australia. The view that the land was not being sufficiently used by Aboriginal peoples, who had no need for much of it, was the dominant theory in North America based on principles of “natural” or international law.<sup>28</sup> It remains alive today. Canadian author Conrad Black recently wrote:

There remains the issue of the moral and legal justification for the occupation of the Americas by the Europeans. It was a rich and underpopulated area and the occupants were, from the standpoint of the potential of the human species underutilizing it ... Indian society was not in itself worthy of integral conservation, nor was its dilution a suitable subject for great lamentations. To the extent the Americas were underdeveloped, the arrival of the Europeans was a positive thing.<sup>29</sup>

This view still influences the law through the test of justification, which permits infringement of Aboriginal and treaty rights to achieve objectives considered more beneficial to “the broader society.” The theory goes back to at least 1516, when Thomas More explained in *Utopia* that the Utopians were entitled by natural law to colonize another country if land in that country was not being sufficiently used, and to drive out the original inhabitants if they refused to follow Utopian laws: “For they count this the most just cause of war, when any people hold a piece of ground void and vacant to no good nor profitable use, keeping others from the use and possession of it.”<sup>30</sup> *The Law of Nations* by Vattel, first published in 1758, put it forward as a legal justification for the colonization of the Americas, saying that hunters had “no reason to complain if other nations, more industrious and too closely

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confined, come to take possession of a part of [their] lands,” and adding that Europeans “were lawfully entitled to take possession of it.”<sup>31</sup> However, he described the conquest of the agrarian empires of Peru and Mexico as “a notorious usurpation.”

The theory of the inferior claim of hunters and gatherers was widely used in Canada to justify the dispossession of Aboriginal peoples. This can be seen in a contemporary account from colonial British Columbia of a conversation between a settler and a chief, who said that he and his people did not want the white man, “who steals what we have.” The settler replied that “the high chief of King George men [the English], seeing that you do not work your land, orders that you shall sell it. It is of no use to you.” However, theory only went so far. Recognizing that “we had taken forcible possession of the district,” the settler stated that the practical answer to the question of “the right of any people to intrude upon another and to dispossess them of their country” is “given by the determination of intruders under any circumstances to keep what has been obtained; and this, without discussion, we, on the west coast of Vancouver Island, were all prepared to do.”<sup>32</sup> In the final analysis, the dispossession was explained and justified by “the loaded canon pointed towards the [Tseshaht] village.”

The Supreme Court of Canada has confirmed that Aboriginal peoples were never conquered.<sup>33</sup> However, duress and the threat of force if they failed to comply with the colonial authorities were always present. The historical treaties, which according to their English terms transferred much of the country to the Crown, were signed under conditions of great hardship that throw their validity into question.

These fundamental questions of fairness and justice should be kept in mind as we examine some of the legal rules.<sup>34</sup> In the final analysis, Aboriginal law and the special rights of Aboriginal peoples are about the continuing impacts of colonialism. In her recent book *Price Paid: The Fight for First Nations Survival*, Aboriginal author Bev Sellars quotes Chief Dan George: “We are a people with special rights ... We do not beg for these rights, nor do we thank you ... we do not thank you for them because we paid for them ... and God help us, the price we paid was exorbitant. We paid for them with our culture, our dignity and self-respect. We paid and paid and paid.” In her own words, “The trauma of colonialism is still with us today.”<sup>35</sup>

Related to the issue of justification for the historical dispossession of Aboriginal peoples is the question of the legal entitlement of the current

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The Supreme Court of Canada has confirmed [in *Haida*] that Aboriginal peoples were never conquered.

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occupants, who cannot claim Aboriginal title. Their entitlement is based on treaties (where they have been signed) and on the laws made under Crown sovereignty and upheld against Aboriginal title.

### **Who Are the Aboriginal Peoples of Canada?**

According to the 2016 Census, there were 1,673,785 Aboriginal people in Canada, accounting for 4.9 percent of the total population, comprising 977,230 First Nation (or “Indian”) people, 587,545 Métis, and 65,025 Inuit. This was an increase of 42.5 percent since 2006, due, in part, to more people identifying as Aboriginal.<sup>36</sup> Not all of these self-identifying Aboriginal people will be considered as “Aboriginal” under the current law, although some may be entitled to register as “Indians” (and so be included as “Aboriginal”) under recent changes to the *Indian Act* to remove vestiges of sexism.<sup>37</sup>

The legal terms used to refer to Aboriginal people in Canadian law are inconsistent and confusing. In 1969, Harold Cardinal called them “legal hocus-pocus.”<sup>38</sup> They certainly are a hodgepodge. As noted by Paul Chartrand, “In Canada, then, there are as many definitions of Aboriginal people as there are constitutional or legislative provisions that reflect particular purposes, and the relationship between the various terms has not been developed.”<sup>39</sup>

#### *Section 35 of the Constitution Act, 1982*

- 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.

He makes the important point that a distinction should be made between Aboriginal groups with collective Aboriginal rights and individuals of Aboriginal ancestry who share the same rights as other citizens, including the right to equal treatment, and who, where justified, may benefit from affirmative action to remedy discrimination based on their Aboriginal ancestry. As we'll see, Aboriginal law is concerned primarily with group and not individual rights.

Section 35 of the *Constitution Act, 1982* (which provides constitutional recognition for the “existing aboriginal and treaty rights of the aboriginal peoples of Canada”) defines the aboriginal people of Canada to include “the Indian, Inuit and Métis peoples of Canada.” Although offensive to some, “Indian” is the term used in legislation such as the *Indian Act* for those people who are entitled to be registered under that act and (especially if they live on a reserve) are subject to that act. “Inuit” refers to the Indigenous people living in northern Canada, especially Nunavut and northern Quebec. They may have Aboriginal title to their lands, although in many cases it will have been surrendered under one of the modern treaties. The term “Métis” has traditionally been associated with distinct historical communities formed as a result of marriages between European fur traders and “Indian” women, especially in western Canada, but it can also refer to anyone with some Indian or Inuit ancestry, however limited. The SCC has defined “Métis” for the purposes of Section 35 as follows:

- self-identification as Métis
- an ancestral connection to an historical Métis community
- acceptance by a modern Métis community.<sup>40</sup>

### *Section 91(24) of the Constitution Act, 1867*

91. ... it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ...

24. Indians, and Lands reserved for the Indians.

Section 91(24) of the *Constitution Act, 1867*, which gives the federal government jurisdiction over “Indians” (as well as “lands reserved for the Indians”), has been interpreted to include within its scope Inuit,<sup>41</sup> Métis people, and “non-status Indians.”<sup>42</sup> This last term refers to both Indians who lost status under the *Indian Act* and members of “mixed communities” who have never been recognized as Indians by the federal government and who identify with their Indian heritage rather than as Métis.<sup>43</sup> In the recent *Daniels* decision, the SCC declined to give a definition of Métis or “non-status Indians” for the purposes of Section 91(24), saying it was “a fact-driven question to be decided on a case-by-case basis in the future.”<sup>44</sup> Unlike the *Indian Act* registry for “Indians,” there is no government registry for Métis or Inuit.<sup>45</sup> As noted above, depending on the context, “Métis” can include all those who claim some “Indian” or Inuit ancestry or only those who are connected to a historical Métis community such as the Red River Colony in Manitoba. An individual may be both an “Indian” within the *Indian Act* and a “Métis,”<sup>46</sup> and an Aboriginal group may have both Inuit and Métis Aboriginal rights.<sup>47</sup> To add more confusion, the definition of “Indian” in the *Indian Act* excludes all Inuit<sup>48</sup> and some people who have ancestry in a First Nation but are not eligible to be registered as “Indians” (perhaps because an ancestor lost Indian status), and it includes some people without any First Nation ancestry (because of marriage before 1985 to an Indian man).

Certain other related terms appear frequently in this area of law. A “band” is defined in the *Indian Act* as “a body of Indians” for whose use and benefit in common lands have been set apart, for whose use and benefit in common moneys are held by the federal government, or who the federal government declares to be a band. In the last thirty or so years, the term “First Nation” has come into general use to replace “band” and has been used in recent legislation. Tom Flanagan maintains that this change was politically driven, given the implicit assumptions about sovereignty and nationhood in a phrase that includes the word “nation,” and has helped achieve political victories.<sup>49</sup> Since the reform of the Constitution in 1982 and the addition of Section 35 recognizing and affirming existing Aboriginal and treaty rights, the term “Aboriginal” has been generally used to refer to the “Indian,” Inuit, and Métis peoples. However, the term “Indigenous” has been used interchangeably with “Aboriginal” and is becoming more common. For example, the Department of Aboriginal and Northern Affairs Canada (formerly the Department of Indian Affairs) changed its name to Indigenous and Northern Affairs Canada in November 2015.<sup>50</sup> I use “Aboriginal law” to refer to the general law of Canada as it applies to the Aboriginal peoples of Canada and “Indigenous

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law” to refer to the law of a particular Aboriginal group developed within and applying to that group.

In practice, any attempt to distinguish between Aboriginal and non-Aboriginal individuals is complicated by the fact that many, if not most, Aboriginal people have some non-Aboriginal ancestry. This may be a difficult matter, as witnessed by the recent controversy over the entitlement of Joseph Boyden, a prominent writer on Aboriginal issues, to be considered Aboriginal.<sup>51</sup> Further, the cultural practices and day-to-day lives of Aboriginal peoples have been greatly influenced, and to some extent replaced, by those of the approximately 95 percent of Canadians who do not identify as Aboriginal in census responses. The SCC has observed that “Mixed identity is a recurrent theme in Canada’s ongoing exercise of achieving reconciliation between its Aboriginal peoples and the broader population ... Yet lines must be drawn” to distinguish different groups for some legal purposes.<sup>52</sup> The Royal Commission on Aboriginal Peoples considered this issue in its 1996 report, and the conclusion was that Aboriginal peoples are not racial groups; rather, they are organic political and cultural entities: “Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition.”<sup>53</sup> The commission was, therefore, of the view that for a group to qualify as Aboriginal, it did not have to be composed of individuals with a certain quantum of Aboriginal blood.

In contrast, “blood quantum,” or a specified degree of ancestry from an ancestral group, is a common requirement for membership in US tribes. Some call for a minimum of one-fourth degree of ancestry in the tribe, but others require as much as one-half.<sup>54</sup> Also, US law permits the right of entry into the United States of “American Indians born in Canada” if they “possess at least 50 per cent of blood of the American Indian race.”<sup>55</sup> Generally, Canadian law does not require a minimum “blood quantum,” although there have been exceptions. Early versions of the *Indian Act* referred to those “of Indian blood.” In one case, Justice Wilson of the SCC described a former provision of the *Indian Act* as being “designed to impose a restriction on the dilution of Indian blood by excluding from Indian status the offspring of two generations of mixed parentage.”<sup>56</sup> At times, the law has defined “Indians” as including those who “follow the Indian mode of life,” but this was dropped in the 1951 *Indian Act*.

For practical purposes, Aboriginal peoples may generally be regarded as groups descended from those groups living in what is now Canada at the

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time of the arrival of Europeans who have retained some of their own social, economic, cultural, or political institutions.<sup>57</sup> Whether a particular group qualifies will depend on the facts and may be contentious.

### **What Is the Crown?**

In Aboriginal law cases, there are numerous references to the Crown. Judges seem to assume that everyone knows what is meant by this term, implying that the meaning is clear. In fact, it is confusing and somewhat mystical. As one of the leading scholars on constitutional law wrote:

There is one term against which I wish to warn you, and that term is “the crown.” You will certainly read that the crown does this and the crown does that. As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers. No, the crown is a convenient cover for ignorance.<sup>58</sup>

For most people, references to the Crown are likely to conjure up images of the British monarch and perhaps her immediate family. Sometimes Aboriginal people in Canada personalize their relationship with “the Crown,” as if it were with the Queen and her family. During the negotiation of historical treaties, there were references to the “Great White Mother,” and since then there have been several unsuccessful attempts by Aboriginal groups to present their grievances to the monarch. In the 1980s, some Aboriginal groups went to London to lobby the monarch and British Parliament and to challenge the proposed patriation of the Constitution without adequate protection for Aboriginal and treaty rights. In 2013, Chief Theresa Spence unsuccessfully demanded that the Queen’s representative in Canada, the governor general, participate in negotiations to end her hunger strike. In 2016, Aboriginal leaders urged Prince William during his trip to British Columbia to intervene with the Canadian government to address their concerns.<sup>59</sup>

Two points need to be kept in mind:<sup>60</sup>

- “The Crown,” for our purposes, is not the monarch (whether of Britain or of Canada) but the relevant government of the day.
- The relevant government is not the British government but either the Canadian federal government or the government of the province.

As to the first point, it has been clear since *Calvin's Case* in 1608 that “the King hath two capacities in him: one a natural body ... the other is a politic body or capacity, so called because it is framed by the policy of man.”<sup>61</sup> It is the political body called “the Crown” that concerns us. A broad summary of constitutional developments over the last thousand years was given by the Supreme Court of the United Kingdom in its 2017 ruling on leaving the European Union. The Court noted that “the Crown’s administrative powers are now exercised by the executive, i.e., by ministers who are answerable to the U.K. Parliament.”<sup>62</sup>

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“The Crown,” for our purposes, is not the monarch ... but either the Canadian federal government or the government of the province.



*Calvin's Case* also made it clear that, in the political sense, there are different Crowns for different countries, including England, Scotland, and now, of course, Canada. Since Canada has a federal system, there are provincial Crowns as well as the central federal Crown. Depending on the context, references to “the Crown” in Canadian Aboriginal law can refer to the federal or provincial governments – specifically the federal or provincial cabinets, made up of representatives of elected politicians from the party that won the most seats in the most recent election, and all those who act under their authority, including the many employees of the federal and provincial governments. As a practical matter, “the Crown” meets daily across the country with representatives of Aboriginal groups, often with relative informality and without a tiara in sight.

As noted above, Section 91(24) of the *Constitution Act, 1867* listed “Indians, and Lands reserved for the Indians” as within federal rather than provincial jurisdiction. However, provincial governments are equally bound by the obligations of the Crown in their dealings with Aboriginal groups so far as Section 35 rights are concerned.<sup>63</sup> A 2014 decision of the SCC has changed the prior law and permits provincial governments to infringe those rights if such infringement can be justified under the *Sparrow* test.<sup>64</sup> Another 2014 decision permits the provinces to “take up” land under some treaties.<sup>65</sup> The law is changing and the role of provinces is becoming greater. There are situations where both federal and provincial governments together owe duties to Aboriginal peoples, such as treaty promises by the Crown.<sup>66</sup> In the case of the Trans Mountain pipeline expansion project, both governments consulted as “the joint Crown” following a court decision that invalidated an attempted delegation of powers by the Province of BC to the federal government.<sup>67</sup>

It is not always easy to determine if a body exercising government powers is “the Crown” that owes duties of the Crown to Aboriginal peoples. There are semi-government bodies running airports or transit systems and performing functions of government that would arguably make them “the Crown” for these purposes, although the semi-government bodies would dispute this. Lower courts have said that local governments, although created by provincial governments, are not part of the Crown. All depends on the particular legal status of the body in question.<sup>68</sup> The SCC has held that actions taken by the Crown through a body such as the National Energy Board are to be considered “Crown actions” subject to duties binding on the Crown.<sup>69</sup>

As we will see, the Crown (i.e., the federal or provincial government or both) is usually on the opposite side to an Aboriginal group, seeking to deny or limit Aboriginal and treaty rights.<sup>70</sup> This is despite an early ruling of the SCC that stated: “The relationship between the Government and aboriginals is trust-like, rather than adversarial.”<sup>71</sup> It is a David-and-Goliath struggle with the awesome power of the state against small Aboriginal communities.

## Collective versus Individual Rights

It is important to note that Aboriginal law deals mainly, and almost exclusively, with the legal situation of Aboriginal peoples as collectives rather than that of individuals of Aboriginal ancestry. Aboriginal societies are collectivist rather than individualistic,<sup>72</sup> and as the SCC has confirmed repeatedly, Aboriginal and treaty rights, including ownership of land, are held communally rather than by individuals.<sup>73</sup> Indeed, the Court has ruled that land held individually cannot be an Aboriginal interest.<sup>74</sup> The United Nations

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Aboriginal and treaty rights, including ownership of land, are held communally rather than by individuals.



Declaration on the Rights of Indigenous Peoples recognizes in its recitals that the collective rights of Indigenous peoples are “indispensable for their existence, well-being and integral development as peoples.”<sup>75</sup> We shall consider this issue in more detail. For now, it may be noted that, like the ethnic basis for Aboriginal rights, their collective nature is problematic for the prevailing liberal-democratic

ideology, with its emphasis on individualism rather than the common good that is the focus of social democracy.<sup>76</sup> From the perspective of Aboriginal peoples, it is said that liberalism, as reflected in the law, fails to respect their autonomy and cultural differences.<sup>77</sup>

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Despite this general rule that Aboriginal law deals with collective and not individual rights, individuals with Aboriginal ancestry directly benefit from legislation that has been passed relating to employment and sentencing.<sup>78</sup> Other benefits that apply to individual “Indians” residing on a reserve, as well as to bands, are found in Sections 87 and 89 of the *Indian Act*,<sup>79</sup> which deal with certain exemptions from taxation and seizure of property situated on a reserve. The act also has provisions that permit individuals to have a right of possession to reserve lands and that regulate the making of wills and what happens if no will has been made (“intestacy”). Other provisions give the minister of Indigenous affairs the power to deal with the property of “Indians” who lack capacity to manage their property and the property of the children of “Indians.” The *Family Homes on Reserve Act* deals with what happens to reserve lands on a breakdown of marriage.<sup>80</sup>

This book deals largely with SCC decisions and doesn’t attempt to cover lower court decisions, but a decision of the British Columbia Supreme Court is of interest in the context of a consideration of collective and individual rights. *Thomas v. Norris* involved the Coast Salish practice of initiating members in spirit dancing. The plaintiff claimed he was seized for dancing, confined in a Long House without food and with limited water, forced to bathe in a creek, and whipped with cedar branches.<sup>81</sup> The judge said he found it difficult to accept the argument that, in the contest between alleged collective cultural rights and the rights of the plaintiff, the plaintiff’s individual rights should give way to the communal rights. “He cannot be coerced or forced to participate ... by any group purporting to exercise their collective rights in doing so. His freedoms and rights are not ‘subject to the collective rights of the aboriginal nation to which he belongs.’”<sup>82</sup>

Section 25 of the *Constitution Act, 1982* states that nothing in the Charter of Rights and Freedoms (which protects individual rights) is to be construed as taking away from (“abrogate or derogate”) any Aboriginal, treaty, or other rights or freedoms of Aboriginal peoples. This provision is potentially very relevant to the topic of collective versus individual rights and favours the former. However, it has not yet been the subject of much clarification by the courts.<sup>83</sup>

## Development of Aboriginal Law

Aboriginal people have opposed colonization and defended their rights from the time of the assertion of British sovereignty. However, this opposition took place mostly in the political arena with petitions to government,

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meetings with representatives of the British monarch, and delegations to parliamentary committees. Their main allies were missionaries and anthropologists. The results were disappointing. Legal proceedings were few and far between and equally ineffective. One of the earliest legal cases, involving the Mohegan Indians of Connecticut, began in 1704 and ended in 1773 with a decision of the Privy Council in London. Scholars still debate the correct legal interpretation of these protracted and complex proceedings. Some more recent decisions of the nineteenth century were essentially disputes between the federal and provincial governments about which level of government would get title to Aboriginal lands once the Aboriginal interest in them ended. The Aboriginal group was not represented.

However, since the SCC's *Calder* decision in 1973, on the Nisga'a's claim of Aboriginal title, there has been an explosion in the development of Aboriginal law. In 1966, the Hawthorn Report referred to "the comparative paucity of cases" and the lack of interest of legal scholars in the topic.<sup>84</sup> A pioneering book, *Native Rights in Canada*, published in 1970, summarized the situation: "Indians have, generally speaking, not gone to court to test or enforce their rights. Unfortunately, this has meant that their legal rights and aboriginal claims are very poorly defined in our law. Being poorly defined they could easily be disregarded by the government."<sup>85</sup> The second edition of that book, published in 1972, stated that it was "within the prerogative of Government to reject aboriginal and treaty rights" and that "the legal authority dealing with aboriginal rights is not readily found in Canadian case law ... we have only limited precedents on the question of the content of an aboriginal claim and on the rules respecting extinguishment and compensation."<sup>86</sup> The SCC observed, "By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status."<sup>87</sup> Lawyers knew little or nothing about Aboriginal law. Aboriginal rights were not taught at law school.<sup>88</sup> *Calder* was a turning point.

In 1982, Section 35 of the *Constitution Act*, recognizing Aboriginal and treaty rights, was passed. Two years later, the Musqueam were successful in persuading the SCC that the federal government had a legal obligation to act in their best interests (a "fiduciary duty") and that it was not merely a political obligation unenforceable in the courts. The realization that they could seek legal remedies and were not dependent on the whim of politicians and government officials opened up new possibilities for Aboriginal people. Other key developments included a 1990 decision of the Court, also involving the Musqueam, which interpreted Section 35 for the first time.

These “breakthrough cases”<sup>89</sup> were followed by other cases that clarified the meaning of the section; the proof of Aboriginal rights, Aboriginal title, and treaty rights; the honour of the Crown principle; the duty to consult; and the legal situation of Métis people. The approximately one hundred decisions of the SCC which form the basis of this book have been supplemented by thousands of decisions of other courts.

This case law has been examined in and influenced by numerous articles and books on aspects of Aboriginal law. The SCC has relied to an unusual extent on the opinion of legal scholars, who have made significant contributions to the development of the law. In part, they looked back at other areas of the law – such as old English property law, imperial laws, and ancient cases – to point a way forward for Aboriginal rights and title.<sup>90</sup> Using this research, they developed innovative arguments to persuade courts to advance the law in directions they thought favourable. One commentator has observed, “The contemporary role of legal scholarship in ... seeking to put law at the service of Aboriginal aspirations can scarcely be exaggerated.”<sup>91</sup> In recent years, legal scholars with Aboriginal ancestry have been both prominent and provocative.

Thomas Berger has summed up the current situation: “Today, the law schools teach Aboriginal rights. There is a thriving Aboriginal rights bar – many of whose members belong to First Nations – and major law firms advertise the fact that they employ specialists in Aboriginal rights.”<sup>92</sup> It has been estimated that the number of Aboriginal lawyers grew from about six in 1973 to over a thousand in 2010.<sup>93</sup> In addition to specialist courses on Aboriginal rights, the subject is now increasingly recognized as a foundation course for all Canadian law students. One of the recommendations of the recent report of the Truth and Reconciliation Commission is that all law students and lawyers, as well as government officials and journalists, become familiar with this area of the law.

## **Objectives of Aboriginal Law**

Aboriginal law has four main objectives:

- justice for Aboriginal people
- providing a peaceful solution to historical grievances
- recognition of Indigenous laws
- reconciliation.

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Application of these objectives depends mainly on the views of the judges deciding cases, since this is largely a judge-made area of law.

*Justice for Aboriginal people.* A desire for justice is the motive of Aboriginal people and most lawyers acting for them. As noted by the SCC, “What is at stake is nothing less than justice for the Aboriginal group and its descendants.”<sup>94</sup> The Court has recognized that the history of colonial-

ism, displacement, and residential schools continues to translate into social problems that have been allowed to fester for too long.<sup>95</sup> As noted in another recent decision: “As the curtain opens wider and wider on the history of Canada’s relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought.”<sup>96</sup> Law is seen as one way to partially address the historical injustices suffered by Aboriginal peoples. In particular, their dispossession, and the

economic and social inequalities between Aboriginal and non-Aboriginal Canadians,<sup>97</sup> may be partially overcome by recognizing Aboriginal Canadians’ ownership of land and other assets, and by giving them a greater say in what happens within their traditional territories.

*Providing a peaceful solution to historical grievances.* Peaceful solutions to historical grievances contribute to a more peaceful society, which minimizes the violent confrontation that has been an occasional feature of recent history. In a revealing comment, Michael Ignatieff, the former leader of the Liberal Party of Canada, wrote, “Federal and provincial review panels may approve pipelines and mines, but companies know that lines can be cut and shaft-digging stopped if Aboriginal resistance is sufficiently determined. The companies have the watches but Aboriginal peoples have the time.”<sup>98</sup>

*Recognition of Indigenous laws.* Recognizing Indigenous laws is an example of the doctrine of continuity, a legal principle long applied by British imperial law and followed in Canada.<sup>99</sup> It means that the laws in effect in a new British colony are to be respected and continue to apply unless and until they were replaced by the imperial or colonial governments. Therefore, the Indigenous laws of the Aboriginal peoples of Canada should continue to be recognized by the Canadian law in the absence of contrary laws of the new governments.

*Reconciliation.* Reconciliation has been described by the SCC as “the fundamental objective,”<sup>100</sup> and “the grand purpose,”<sup>101</sup> of modern Aboriginal law. Chief Justice McLachlin listed it as one of five “constitutional moments”

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that have shaped what Canada is today.<sup>102</sup> The term has been used in three different, although related, senses. The first use was the reconciliation of the power of the federal government to limit Aboriginal rights with the duty to recognize them. In the view of the Court, “the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.”<sup>103</sup> A few years later, the Court adopted a different and somewhat inconsistent approach to reconciliation, which it now described as “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>104</sup> Unlike the first use of “reconciliation,” this use has been repeated many times subsequently. In effect, it upholds the paramount power of the Canadian state over any competing claim that an Aboriginal group may have to continued sovereignty. It might be seen as completing the process of legitimizing colonialism. Reconciliation in this sense has been rejected by many Aboriginal people.<sup>105</sup> John Borrows, a prominent Aboriginal law professor, describes reconciliation as “a flawed metaphor” that has problematically dominated the jurisprudence.<sup>106</sup> He warns that “any compromise with colonialism causes us to be compromised by colonialism.”

A third and now more common use of “reconciliation” balances Aboriginal and treaty rights with the interests of non-Aboriginal people. Different decisions have expressed the entities being reconciled in different ways:

- “aboriginal societies with the rest of Canadian society”<sup>107</sup>
- “aboriginal and European perspectives”<sup>108</sup>
- “Aboriginal interests and the interests of the broader community”<sup>109</sup>
- “aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions”<sup>110</sup>
- “aboriginal entitlements with the interests of all Canadians”<sup>111</sup>
- “Aboriginal and non-Aboriginal Canadians”<sup>112</sup>
- “Aboriginal and non-Aboriginal communities”<sup>113</sup>
- “Aboriginal peoples and the broader population”<sup>114</sup>
- “the [Aboriginal] group and the broader society”<sup>115</sup>
- “Aboriginal rights with the interests of all Canadians.”<sup>116</sup>

The flexible concept of reconciliation has often been used in court decisions, especially those permitting the infringement of established Aboriginal rights in the interests of the broader society. But should the courts be conducting the essentially political act of limiting Aboriginal rights for the perceived benefit of the broader society when Aboriginal peoples lack

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meaningful participation in that process? The SCC has stressed that reconciliation is an ongoing process,<sup>117</sup> which, for example, includes both treaty making and the implementation of treaties.<sup>118</sup> It noted in one case that “[r]econciliation in the Yukon, as elsewhere, is not an accomplished fact. It is a work in progress.”<sup>119</sup>

## Sources of Aboriginal Law

There are several sources of Aboriginal law:

- historical practice, both before and after contact
- Indigenous law
- the Canadian Constitution and statutes
- judicial law making
- imperial law
- international law
- law in other jurisdictions.

*Historical practice, both before and after contact.* To understand the current law, it is necessary to have some understanding of Aboriginal societies pre-contact as well as the post-contact historical background, which goes back as far as 1550 in Newfoundland and for centuries in all parts of Canada and will be explored further in the next chapter. As noted above, Aboriginal rights are essentially rights retained from pre-contact times. Proving Aboriginal rights requires proof of practices at the time of first contact (or at the time of effective control by the British in the case of Métis people), and proving Aboriginal title requires proof of exclusive occupation at the time of assertion of British sovereignty. Sometimes courts are called upon to interpret ancient treaties. The next chapter provides a very broad overview of the relevant history and especially developments that have influenced modern Canadian Aboriginal law. The basic issues of Aboriginal law have not changed greatly over the years. They remain the nature and extent of Aboriginal property rights and the question of who has jurisdiction to decide what may happen in traditional territories.

*Indigenous law.* The law of Aboriginal rights has been described as “intersocietal law” resulting from both the common law brought by the British settlers and the Indigenous laws of the Aboriginal peoples.<sup>120</sup> In my view, this greatly overstates the Canadian courts’ recognition of Indigenous law. However, it is correct to say that there has been some recognition

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and much work done, especially by Aboriginal legal scholars, to increase that recognition.

*The Canadian Constitution and statutes.* Section 35 of the Canadian *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights, plays a central role in modern Aboriginal law. This vague provision had a difficult birth, and it is unlikely that any of the politicians who were involved had any idea what they were approving. Section 35 forms part of the Constitution and “applies to both provinces and the federal government.”<sup>121</sup> Section 52 of the *Constitution Act, 1982* states that the Constitution “is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.” The words “any law” include federal and provincial statutes as well as judge-made law. The SCC stated in *Manitoba Métis*, “The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation.”<sup>122</sup> The same judgment also stressed the role of the courts in upholding the Constitution against inconsistent laws: “The courts are the guardians of the Constitution and ... cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less.”<sup>123</sup> The Constitution can be amended, so Section 35 could be repealed or modified. However, under Section 38, constitutional amendment requires the consent of the Senate, the House of Commons, and the legislative assemblies of at least two-thirds of the provinces that have at least 50 percent of the population of Canada as a whole, which sets the bar for amendment pretty high.

In addition to constitutionally protected Aboriginal and treaty rights, an Aboriginal group or individual may have rights under legislation, such as exemption from taxation or seizure of property situated on a reserve under Sections 87 to 90 of the *Indian Act*. The *Indian Act* and its predecessor legislation have been a major part of Aboriginal law for over 150 years. More recent legislation has been passed that applies only to First Nations that wish to adopt its provisions – for example, the *First Nations Land Management Act*,<sup>124</sup> which governs management of reserve lands, and the *First Nations Elections Act*.<sup>125</sup> These provisions do not qualify as constitutionally protected Aboriginal or treaty rights and may be withdrawn or modified by the federal government at will. They are examples of delegated powers.

Since “Indians, and Lands reserved for Indians” are matters of federal and not provincial jurisdiction under Section 91(24) of the *Constitution Act, 1867*, most specifically applicable legislation will be federal rather than

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provincial. However, this is a confusing and confused area of the law, and many provincial laws will validly apply to Aboriginal peoples.

*Judicial law making.* There is much debate about the proper role of the courts and whether judges should make law or simply apply it. There is little doubt that judges do make law and do not simply declare it as if it had always existed, waiting to be discovered.<sup>126</sup> This role has increased. In the words of Chief Justice McLachlin of the SCC, “Courts are playing a more important role in governance and playing it more openly than ever before,”<sup>127</sup> and “Judicial lawmaking ... is invading the domain of social policy once perceived as the exclusive right of Parliament and the legislatures.”<sup>128</sup> Judges are especially activist in the area of Aboriginal law. There has been almost no guidance from politicians on Section 35 to clarify the content of existing Aboriginal and treaty rights and how they are to be recognized and affirmed. Constitutional conferences intended to provide this guidance resulted in failure. By default, the SCC has given meaning to the section and developed related areas of the law, including Aboriginal title and the duty to consult

in the case of as-yet-unproven rights. It has done so without prior authority, plucking important concepts (e.g., the inherent limit to Aboriginal title) out of the air or from the opinion of legal scholars. It has also effectively rewritten the Constitution to place limits on Aboriginal and treaty rights.<sup>129</sup>

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Judicial law making requires political decisions to be made, which is cause for concern, especially given the lack of Aboriginal participation in that process.

One important aspect of judge-made law is that it is retroactive. The philosopher Jeremy Bentham said that it was like training your dog – you wait for him to do something you don’t approve of, and then you beat him for it.<sup>130</sup> Legislation is usually only applicable to future events. In contrast, judicial decisions are made today but deal with events that have occurred in the past – perhaps centuries ago in the case of Aboriginal law, such as entering into historical treaties. When judges make law, their decisions give rise to complaints that they are applying current values and new law to events that took place at a completely different time. A lively academic debate has been taking place on this issue.<sup>131</sup>

A brief word is in order about the SCC.<sup>132</sup> It has been the final court of appeal for Canada since appeals to the Privy Council in London were terminated in 1949. There are nine judges representing the different regions, appointed by the prime minister with little external input or review beyond

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(in some cases only) a token appearance before parliamentary committees without a vote. Most of the current judges were appointed by Conservative prime minister Stephen Harper and, given their relative youth and a mandatory retirement age of seventy-five, they will be in the majority for many years. A review in 2011 revealed broad legal education but limited social experience outside of law. There was nothing to indicate any experience with Aboriginal people or special expertise in Aboriginal law.<sup>133</sup> Justice Rowe, appointed in 2016, was the first candidate for nomination to the Court to complete and have published a detailed questionnaire, and this document indicated little experience in Aboriginal matters beyond sentencing Aboriginal offenders. However, although not Aboriginal, the second appointee of the Liberal government, Justice Martin, who was appointed in 2017, worked for the Assembly of First Nations on the residential schools settlement and became “immersed in learning and teaching about the Gladue principles in sentencing [of Aboriginal offenders], and ... read the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Committee Report.”<sup>134</sup> Reflecting on the origin of Canada’s legal system in the common law from England and the civil law from France, she noted, “[T]here is also a modern movement to go beyond a binary understanding of our nation’s history and to incorporate Indigenous perspectives, laws, practices and customs into Canadian jurisprudence.” There have been no SCC judges with Aboriginal ancestry despite many recommendations that such an appointment be made, especially given the role of the Court in developing Aboriginal law.

The general role of the Court was summarized by Justice Rowe in his questionnaire:

The Supreme Court is not, primarily, a court of correction. Rather, the role of the Court is to make definitive statements of the law which are then applied by trial judges and courts of appeal. Through the leave to appeal process, the Court chooses areas of the law in which it wishes to make a definitive statement. Thus, the Supreme Court judges ordinarily make law, rather than simply applying it. The Court deals more with constitutional, public law and criminal matters, as well as aboriginal and treaty rights and less with private law.<sup>135</sup>

Justice Rowe makes it clear that, in his view, the Court’s role is ordinarily to make law rather than simply apply it. This is refreshing honesty. Too often the Court gives the appearance that it merely applies existing law. As one critic has said, the Court sometimes writes as if the law “is what it is” without

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acknowledging that it has created it.<sup>136</sup> Appeals to the Court are not usually automatic; leave to appeal is required from the Court and is given in only about 10 percent of cases. In this way, the Court can decide what cases to hear and in what areas it wishes to make law.

Generally speaking, the Court will follow its earlier decisions (the doctrine of precedent or *stare decisis*) and will not lightly depart from them. But the Court has overruled some earlier judgments “based on compelling reasons” after conducting “a balancing exercise between the two important values of correctness and certainty.”<sup>137</sup> In 2014, the Court reversed a 2006 decision in Aboriginal law.<sup>138</sup> In the same case, the Court effectively reversed another decision, decided in 2005, without acknowledging that it was doing so.<sup>139</sup> Lower courts are bound by decisions of higher courts, although the SCC has recognized two exceptions: “(1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that ‘fundamentally shifts the parameters of the debate.’”<sup>140</sup> Although comments of the Court unnecessary to the actual decision (*obiter dicta*) are not strictly binding, it is a brave lawyer or lower court that does not treat them as authoritative.<sup>141</sup>

*Imperial law.* “Imperial law” refers to the law that previously applied to British colonies, including the doctrine of continuity mentioned above and the Royal Proclamation of 1763. Imperial law applied automatically to each colony when it was acquired, without regard to the prior law that may have applied, whether that was Indigenous law or the law of a prior colonial authority. Therefore, it applied to parts of Canada previously under French control, such as Quebec. This was made clear in the *Côté* case:

The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not a part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there.<sup>142</sup>

The Court rejected the contrary view as it “would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country.”<sup>143</sup> Today, this former imperial law is part of what is referred to as “federal common law.”<sup>144</sup>

*International law.* International law refers to the laws among nations and includes treaties with other nations, international conventions such as

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the International Covenant on Civil and Political Rights, and declarations such as the United Nations Declaration on the Rights of Indigenous Peoples. We shall consider relevant aspects of international law in Chapter 7. To date, international law has played only a marginal role in Aboriginal law, but this will change dramatically if the declaration is implemented in Canada as it is written.

*Law in other jurisdictions.* In early cases, the SCC relied somewhat on cases from the United States, especially the decisions of Justice Marshall of the United States Supreme Court of the 1820s and 1830s, which established the foundation of US Indian law. Cases from Australia and New Zealand are also relevant. Canadian Aboriginal law is now significantly different from that of those jurisdictions, and there are fewer references to their laws. English law is relevant in providing fundamental principles, such as trust principles, that have been adopted by Canadian courts.

## TO SUM UP

- The source of Aboriginal peoples' special status lies in the fact that they never immigrated to Canada or relinquished their claim to be treated as special distinct peoples.
- Special rights for Aboriginal peoples raise the question of race-based discrimination.
- Special rights are rights that pre-existed colonialism and are not rights conferred by non-Aboriginal governments.
- The role of the colonial and Canadian legal system has been to support the colonization of Canada, including the dispossession of Aboriginal peoples and the disruption of their governments and legal systems.
- The dominant justification for the dispossession was that Aboriginal peoples were not using the land sufficiently. This justification continues today in the ability of governments to infringe Aboriginal and treaty rights to benefit non-Aboriginal people.
- Aboriginal law and the special rights of Aboriginal peoples are about the continuing impacts of colonialism.
- The legal definitions of Aboriginal peoples are inconsistent and confusing but important since they determine which Aboriginal groups enjoy special rights.
- For practical purposes, Aboriginal peoples consist of those groups descended from groups living in what is now Canada at the time of the arrival of Europeans.
- Federal and provincial governments usually represent non-Aboriginal peoples in legal disputes with Aboriginal groups and are referred to as "the Crown."
- The federal government has the primary jurisdiction over "Indians, and Lands reserved for the Indians," but the power of the provinces is increasing greatly.

- Aboriginal law deals mainly with the legal situation of Aboriginal peoples as collectives and not that of individuals. Aboriginal and treaty rights are communal and not private rights.
- Aboriginal law has developed explosively over the last forty years or so.
- The objectives of Aboriginal law include a peaceful solution to historical grievances, the recognition of Indigenous laws developed by Aboriginal groups outside the Canadian legal system, and reconciliation.
- Reconciliation has been described by the Supreme Court of Canada as the fundamental objective of modern Aboriginal law. It is defined in different ways but mainly to balance Aboriginal and treaty rights with the interests of non-Aboriginal people.
- There are several sources of Aboriginal law, including the prior occupation of Canada by Aboriginal groups; the relationship between those groups and non-Aboriginal governments; the Canadian Constitution; and judge-made law.
- Aboriginal and treaty rights have received constitutional protection since 1982 under Section 35 of the *Constitution Act, 1982*.
- Judge-made law is the primary source of Aboriginal law.
- It's impossible to understand Aboriginal law without understanding the history of colonialism in Canada.