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FACULTY OF LAW

Aboriginal Law 101

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Aboriginal Issues in Canada

Objectives of this Presentation

1. Briefly describe the current situation of First Nations, Inuit and Métis Peoples.
2. Provide a brief historical overview of Canada's relations with First Nations, Inuit and Métis Peoples.
3. Familiarize you with the constitutional rights of First Nations, Inuit and Métis Peoples.

Land

1. 500 years ago 100 per cent of Canada was occupied by up to 2,000,000 First Peoples (First Nations and Inuit)
2. Today Reserves for First Nations total 3/10ths of one per cent of the total land area of Canada
3. Métis Settlements comprise 0.05 percent
4. Inuit never had a Reserve system

Population

1. By 1901 only 107,000 First Peoples and Métis survived.
2. In 2011 First Peoples and Métis number over 1.4 Million persons, they are the fastest growing population in Canada and 50% are under 25.
3. One half of First Nation live on 2700 Reserves and the remainder live in urban areas.
4. 60% of Reserve have populations under 500, 33% between 500-1,999, and 7% number 2,000+

Economy

1. First Nations members, on Reserves, get 50% funding for government services than other Canadians (including direct payments).
2. DIAND's budgets since 1996 have allowed annual inflation increases of 2% - First Peoples population has grown 45% since 1996.
3. Waste and corruption on Reserves is for practical purposes – a myth as 98% of Reserve funding is reaching the intended recipients e.g. compliance with government requirements (no outcome measures).

Social Outcomes

1. First Peoples trail in every socio-economic category: education, employment, health, housing and infrastructure.
2. First Peoples are 3 times more likely than a non-aboriginal person to be a victim of violence.
3. First Peoples are 4.3% of Canada's population and are over represented in Canada's criminal justice system accounting for 25% of provincial prisoners and 18% of federal prisoners.

History

Report of the Royal Commission on Aboriginal People (1996) described four stages in history that overlap and occur at different times in different regions.

1. Pre-contact – Different Worlds

2. Contact and Cooperation: Early Colonies (1500-1763)

3. Displacement to Assimilation (1764-1969)

4. Renewal (1969+)

Early Colonies

1. Mercantile colonies – trade with First Nations for the benefit of the mother country.

2. Major imperial powers such as France, Holland, Spain, Portugal and England were engaged in a contest to expand their colonies and influence in the Americas and early treaties of peace, alliance and trade with First Nations assisted in this expansion and contest.

3. These nation to nation treaties acknowledged the sovereignty of First Nations, as they did not concern themselves with matters internal to the First Nations.

French Indian Wars of 1754-1763

1. These colonial conflicts, an extension of a wider European war, culminated in a contest between France and Britain in North America where French and British colonies and troops together with their respective First Nation allies fought in what is commonly called the French Indian Wars of 1754-1763.

2. The Treaty of Paris, 1763 saw France surrender most of its colonies in North America to Britain. Britain's claim to its North American colonies against other European colonial powers was secured.

Royal Proclamation, 1763

The Royal Proclamation, 1763 administered the former French lands and addressed the concerns of First Nations over pressures on their territory from colonists.

1. It established four new colonial governments, and drew a boundary known as the "frontier" beyond which the Colonial Governors could not to grant land.

2. Lands beyond the frontier were reserved as "Hunting Grounds" for First Nations as was any unsurrendered lands within the colonies.

Royal Proclamation, 1763

3. The frontier along the borders of the new colonies and in existing colonies along the "Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West".

4. To stamp out private rampant land speculation, a constant source of disruption, the Royal Proclamation established a Crown monopoly on land purchases. First Nations who were inclined to dispose of their "Hunting Grounds" would only be purchased by the Crown after a public meeting of the "Indians" held for that purpose.

Royal Proclamation, 1763

5. This process was intended to finance the colonies as the Crown could prevail on the First Nations to obtain land which would be re-sold to colonists seeking land and thus finance the colony.

6. This "frontier policy" was a significant contributor in the American Revolution.

Displacement and Assimilation (1764+)

1. The claims of the British Crown were gradually changed to a concept of *territorial* sovereignty and is usually demarked by the end of the War of 1812 when First Nations lost any bargaining power they had in their military power.
2. This assertion of territorial sovereignty by Britain over a territory acted in disregard of First Nations' ownership of land and sovereignty in that territory.
3. The First Nations' understanding of relations with Britain had not changed but Britain's concept of relations with First Nations had changed.

Displacement by Treaty

4. Treaties continued to be made, implicitly acknowledging First Nation sovereignty, but were seen as mere surrenders of occupation by the First Nation with title and sovereignty ultimately resting in the British Crown.
5. First Nation "indian title" was held to be a:

   "personal and usufructuary right, dependent upon the good will of the Sovereign ... sufficient for the purpose of the case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium [complete ownership] whenever that title was surrendered or otherwise extinguished."

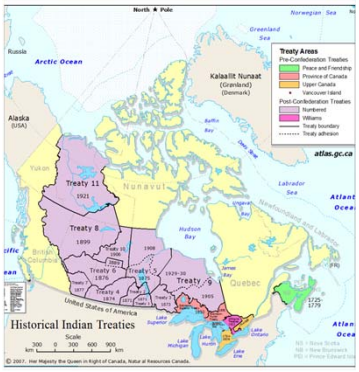
   St. Catherines Milling and Lumber Co. v The Queen (1888)

Displacement by Treaty

6. Under treaties First Nations were promised benefits such as education, medical care, supplies, cash and perpetual annuities.
7. They were promised they could continue their traditional ways of life on surrendered lands and that Reserves for their exclusive use would be set aside.
8. Government penury, neglect, corruption and First Nation political powerlessness left most of these treaty promises unfulfilled.

Displacement by Treaty

9. In all, some 500+ treaties were made between the Crown and First Nations and the bulk of Canada's territory was collected through treaty.
10. Some areas remained without treaties as Canada merely asserted its territorial sovereignty: the North and most of British Columbia, Quebec and Newfoundland & Labrador.



Historical Treaties 1725-1975

Note: Reserves within Treaty Areas are still being allocated and surveyed in 2013+

Displacement by Relocation

1. First Peoples have always been subject to relocation first by settlers, who took over the richest hunting and fishing grounds, and only occasionally by treaty.
2. First Peoples were also displaced by government directions for a number of reason, economic efficiency in providing educations in Residential Schools, supply distribution and Canadian sovereignty in the Far North displaced the Inuit.

Indian Act, 1876+

1. After Confederation in 1867 the federal government was allocated authority over "Indians, and Lands reserved for the Indians" in section 91(24) of *The Constitution Act, 1867* (formerly the *British North America Act*).
2. The *Indian Act* was consolidated in 1876 from pre-Confederation legislation and federal legislation and focussed on the protection and management of designated reserves to be held by the federal Crown in trust for First Nations.

Indian Act, 1876+

3. The Act mandated the registration of "Indians" into Indian Bands and distributed benefits and imposed disabilities on the basis of status as a Registered Indian.
4. It paternally imposed government trusteeship for "Band moneys" and resources derived from the reserve on the basis that "Indians" could not manage themselves.
5. It criminalized traditional aboriginal government and replaced it with Band Councils and elections.

Indian Act, 1876+

6. A system of all powerful "Indian Agents" managed the reserves and band moneys, their approval was required to live on or travel off the reserve, inherit any property or transact any business with "Indians."
7. Indians had no right to vote. The right to vote in federal elections came in 1960 and provincially in the 1960's.
8. The Act prohibited the hiring of lawyers to advance First Nation claims from 1927-1951 and the policy of non-disclosure by the government to the beneficiary First Nations continued until 1972.

Assimilation: Indian Residential Schools

1. There was an express government policy of assimilation:
   "to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department."
   (Deputy Superintendent Duncan Campbell Scott, 1920)
2. A key element was the Indian Residential Schools, which saw contracting for missionary teachers in boarding schools that First Peoples children were compelled to attend from 1883 to the 1980's in order to "civilize them." At its peak in 1927 the Residential schools held a third of all status Indians.

Assimilation: Indian Residential Schools

3. Children were separated from their families, housed in deplorable conditions and subject to abuse (including sexual abuse) where teachers "prohibited [them] from speaking their native languages, taught them to reject their cultures and traditions as inferior and to recoil from their ancient Aboriginal spirituality as devil worship."
4. Graduates were rejected by Canadian society and returned to their reserves as aliens unable to speak their own native languages or migrated to urban areas as a permanent underclass.

Failed Assimilation

5. Five generations of aboriginal children were trapped in the residential school system and the consequences to First People's social fabric and communities are incalculable and continuing.
6. Another assimilation effort was to encourage First Nation members and communities to relinquish their "Indian" status in return for money, the right to vote and in some cases land grants. It was an abject failure: "[b]etween 1867 and 1920, in all of Canada, a mere 250 Indian persons were enfranchised."

Renewal 1969+

1. In 1969 the Federal Government advanced a White Paper, proposing to remove special status from First Nations, repeal the *Indian Act* with the goal of fully integrating "Indians".
2. The negative reaction from First Nations and the interested public led to the withdrawal of the White Paper and a resurgence of First Nation advocacy.
3. In *Calder v Attorney-General of British Columbia* (1973), the Supreme Court's indicated its willingness to consider First Nation land rights.

Renewal 1969+

4. In *Calder* the Nishga First Nation sought a declaration that their aboriginal title has never been lawfully extinguished in British Columbia. The result was a split decision with the Court ruling on a legal technicality to dismiss the appeal.
5. The effect of the decision was galvanizing; the government position that aboriginal land rights were so vague as to defy court remedies was now questionable.
6. The government quickly moved to establish claims commissions to negotiate land claims settlements in areas without treaties.

Renewal 1969+

7. One of the earliest modern claims agreements was the 1976 James Bay Cree Agreement in Northern Quebec.
8. The advocacy of First Nation Groups and the interested public eventually led to the entrenchment of Aboriginal Rights in Canada's Constitution in 1982.
9. The process of renewal is ongoing. A small part of that renewal involves the legal system

Sources of Aboriginal Rights Doctrine

1. *common law aboriginal rights* : common practices in encounters with indigenous societies; for example *doctrine of continuity* that indigenous laws would continue in acquired territories until specifically replaced
2. *legislative enactments* : primarily the *Indian Act*
3. *indigenous laws themselves* : indigenous laws that have guided Canada's First Peoples since time immemorial are occasionally recognized in Canadian Courts
4. *constitutional law* : aboriginal rights have been constitutionally protected since 1982

Canada's Constitution

Canada's constitution is a blend of written instruments, unwritten conventions and vestigial Crown prerogatives.

It is a *federal constitution* that divides legislative authority between provinces and the federal government under the Constitution Act, 1867.

- Federal Government s 91 powers especially 91 (24) Indians, and Land reserved for the Indians
- Provincial Government s 92 powers such as 92 (13) Property and Civil Rights in the Province

Constitution Act, 1982

On April 17, 1982 Canada re-patriated its Constitution by including, among other things a Charter of Rights and Freedoms (Charter) in Part I of the Constitution Act, 1982.

Aboriginal Rights are set out in Part II of the Constitution in sections 35 and are protected from the application of the Charter in section 25.

Reference re Manitoba Language Rights (1985):

"The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitution Act, 1982 declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it.

Why Aboriginal Rights?

1. Common law tradition of aboriginal rights, exemplified by the *Royal Proclamation, 1763* and treaties.
2. Minority group rights have always existed in Canada e.g. Catholic schooling, Quebec's civil law system
3. Growing Canadian and international concern over treatment of indigenous peoples since WWII.
4. Parliamentary Hearings in 1980-81 saw a broad consensus that Canada's First Peoples, as the original occupants, merited special treatment.

Aboriginal Rights – Part II of the Constitution

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.

Protection from the Charter – Part I of the Constitution

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.

To date the Supreme Court has not ruled definitely on this provision.

Supremacy Clause

52. (1) The Constitution of Canada 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 or effect.

Canada does not have a specialized constitutional court, and the regular courts that interpret laws have by "a tradition of necessity" interpreted the *Constitution*. *per: Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, 9 DLR (4th) 161 (SCC) at para 11.

Supremacy Clause

Consistent with common law traditions, there are no remedies for a breach of constitutional rights (including aboriginal rights) aside from a declaration of invalidity of the offending portion of the relevant law.

The only remedial provision in the Constitution is the right under section 24 of the Charter to apply to a Court to "obtain such remedy as the court considers appropriate and just in the circumstances" for a breach of Charter Rights in Part I of the *Constitution Act, 1982*.

General Observations

1. The Court's role in Canadian society has changed since 1982, now they rule on the constitutionality of legislation.
2. Prior to 1982, Parliamentary sovereignty allowed legislatures, within their mandates, to void rights held by subjects.
3. The "notwithstanding clause" only applies to certain Charter Rights and requires renewal every 5 years and does not apply to the aboriginal rights in Part II of the Constitution.

General Observations

4. The Supreme Court of Canada has ruled infrequently on aboriginal rights (~8% of Constitutional cases) and done so mostly in general language that did not decide the actual results (*obiter dicta*).
5. The Supreme Court decisions have been fact specific decisions but have guided lower courts
6. Aboriginal rights doctrine is a developing area of law.

Scope of Constitutional Protection: *R v Sparrow* (1990)

1. The wording "existing aboriginal and treaty rights" in section 35(1) meant those common law aboriginal and treaty rights in existence on April 17, 1982 were protected and any extinguished rights were not revived.
2. Aboriginal right can only be extinguished when federal legislation exhibits a plain and clear intention to do so.
3. Aboriginal rights are not absolute and the words "recognized and affirmed" in section 35 (1) meant legislation affecting aboriginal rights would be valid if that legislation met a *justificatory* test.

The *Sparrow* Justificatory Test

First Part: Did the legislation infringe an aboriginal right?

a) Is the limitation unreasonable?

b) Does the regulation impose undue hardship?

c) Does the regulation deny to the holders of the right their preferred means of exercising that right?

If yes to *any question* an infringement of an aboriginal right exists. Proving this was responsibility of the affected First Nation. This is a low burden.

The *Sparrow* Justificatory Test

Second Part: To be a valid infringement of aboriginal rights the government must show that:

1. There is a *valid legislative objective for the legislation* as *a public interest* test was inadequate to override rights.

and

2. The legislation is consistent with the *honour of the Crown* and the *fiduciary relationship* between the Crown and aboriginal peoples.

Honour of the Crown in *Sparrow*

In Sparrow (1990), the *honour of the Crown* was variously described as:

a) ". . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians"; and
b) "...fairness to the Indians is a governing consideration" and "no appearance of `sharp dealing' should be sanctioned [by the courts]".

Manitoba Metis (2013), described this as "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."

Fiduciary Relationship in *Sparrow*

In Sparrow (1990), the *fiduciary relationship* was described as:

> The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Fiduciary Relationship: *Guerin v The Queen* (1984)

1. In *Guerin*, the Musqueam First Nation surrendered reserve lands in 1957 to the Crown for use as a golf club. The terms of the Crown lease were different than what the Musqueam approved and they sued in 1975.

2. The Supreme Court said, that First People's interest in land arose from their historical occupancy, and did "not depend on treaty, executive order or legislative enactment," as the British assertion of sovereignty left the First Nations claims to occupancy, possession and presumptive title unaffected within that territory.

Fiduciary Relationship: *Guerin v The Queen* (1984)

3. The Crown's monopoly on land acquisitions from First Peoples, was the source of the Crown's obligation as the *surrender requirement* was intended to "interpose the Crown between the Indians and [private parties] ... to prevent the Indians from being exploited."

4. This unilateral historical undertaking "conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie" and made the Crown liable as a fiduciary (e.g. trustee) for the beneficiary First Nation.

Definition of Aboriginal Rights

R v Van der Peet (1996)

1. To be an aboriginal right "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right," being practised in a current form that relates to the original practice prior to European contact.

2. The practice, custom or tradition is not something that is true of every human society or incidental or occasional to that society, but instead "the defining and central attributes of the aboriginal society in question."

Aboriginal Rights

1. First Nations *claim* their traditional practices (in the current form) and Courts will transform those claim into a "proprietary aboriginal right" that is specific to that First Nation and exercisable by their members.

2. *R v Sappier; R v Gray* (2006) clarified *Van der Peet* in saying the traditional practice "need not be distinct; it need only be distinctive" and "is really an inquiry into the pre-contact way of life" of a First Nation.

3. Métis Rights: *R v Powley* (2003) arose between the contact date and a *pre-control date* when Europeans achieved political and legal control in an area.

Site Specific Aboriginal Rights

R v Adams (1996)

1. Aboriginal rights are not dependent on establishing aboriginal title.

2. Land based practices that qualify as aboriginal rights under *Van Der Peet* can form site-specific aboriginal rights on surrendered Crown lands subject to the applicable treaty.

3. Legislation with an unstructured discretionary administrative regime that risks infringing aboriginal rights in a substantial number of cases will be invalid.

Aboriginal Title: Delgamuukw

Delgamuukw v British Columbia (1997)

1. Constitutional common law aboriginal title is a unique fusion of common law and aboriginal legal systems.

2. The unique character of aboriginal title involved several dimensions;
   (a) the lands were *inalienable* and could not be sold or surrendered to any person other than the Crown. Secondly,
   (b) the *source* of aboriginal title is the prior occupation by aboriginal peoples.

Aboriginal Title: Delgamuukw

(c) while occupation would at common law, be proof of possession giving rise to title, *aboriginal title* arose from the exclusive possession of First Peoples before the assertion of Canadian sovereignty.

3. Aboriginal title is held *communally* as a collective right of First Nation members. A First Nation would enjoy exclusive rights over and control of their aboriginal title provided that any use was not irreconcilable to that First Nation's attachment to the land.

Aboriginal Title: Delgamuukw

4. The *Sparrow* justificatory test applies to legislative restrictions on aboriginal title but the compelling legislative purposes were broadened to include general economic development subject to finding a justification in particular circumstances.

5. The results in *Delgamuukw* was to return the matter to trial. Since 1997 no court has found aboriginal title, but that does not mean that *Delgamuukw* was meaningless, it has spurred several land claim settlements and self government agreements.

Aboriginal Title: Unresolved Issues

1. *Roger Williams* (2013): Can nomadic First Nations, in their travels through a territory, establish a sufficient occupancy over that territory to have aboriginal title?

2. The *Oceans Act* (1996) was the first statute to claim ownership by Canada of the ocean and seabed but section 2.1 said that ownership may be qualified by aboriginal title – of which there are several First Nation assertions.

Treaty Rights

1. Treaty Rights are constitutionally protected First Nation Rights under section 35 (1) of the *Constitution*.

2. A *treaty* is a sacred agreement between Canada and First Nation(s) in perpetuity. They are unique agreements somewhere above personal contracts and below international treaties.

3. Treaty rights depend on the interpretation of the particular treaty and as special agreements they have special rules or *canons of construction*.

Treaty Interpretation: R v Marshall (1998)

- Treaties should be liberally construed and ambiguities resolved in favour of the aboriginal signatories.
- The goal of treaty interpretation is to choose from possible interpretations of common intention, the one that best reconciles the interests of both parties at the time the treaty was signed.
- The integrity and honour of the Crown is presumed.
- The court must be sensitive to the unique cultural and linguistic differences between the parties.

Treaty Interpretation: R v Marshall (1998)

- Words in the treaty are given the sense which they would naturally have held for the parties at the time.
- Technical or contractual interpretation is not allowed.
- While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
- Treaty rights are not frozen at the date of signature and must be updated by determining what modern practices are reasonably incidental to the core treaty right in its modern context.

Treaty Issues

1. Governments will generally look to the written text as a measure of certainty while many First Nations look at treaties as the basis for a relationship. First Nations have had mixed success in Court when arguing that the oral assurances, which did not make it into the written treaty, were part of the treaty.

2. Aboriginal harvesting rights (including treaty rights) for food or ceremonial purposes enjoy a priority over non-aboriginal harvesters and recreational fishing/hunting (*Simon*) in circumstances of conservation, as these low-scale harvests are self-limiting.

Treaty Issues

3. Commercial scale aboriginal harvesting rights require proof of aboriginal trade at the time of contact in the harvest items. The preferential treatment of those aboriginal commercial harvest is limited to the modern equivalent of subsistence: a moderate livelihood.

4. Unpaid benefits, treaty-land entitlement issues, reserve dealings, medical services, educational provisions etc. are constant Treaty issues.

5. Treaty rights are subject to federal legislative limits, if that legislation meets the *Sparrow* Justificatory test. Provincial legislation can be subject to treaties.

Aboriginal Sovereignty

1. First Peoples claim aboriginal sovereignty as an inherent aboriginal right. Canada's current policy (1995) only acknowledges an "inherent right to self-government" within the constitutional framework of Canada.

2. The Supreme Court has not ruled on this.

   R v Pamajewon (1997) - A claim was read down from aboriginal sovereignty to a right to an aboriginal right to engage in gambling.

   Mitchell v MNR (2001) – insufficient evidence to claim the right. In dissent Justice Binnie argued that Canadian sovereignty would be incompatible.

The Crown's Duty to Consult and Accommodate

Properly speaking, the Crown's duty to consult and accommodate aboriginal peoples when their interest are affected is a subset of the Crown's obligation to all of its subject that Crown actions are applied in a procedurally fair manner (natural justice) and with due recompense.

For example:
1. expropriation of land – proper purpose and a compensatory obligation
2. Charter Rights to a fair trial - Crown disclosure

Aboriginal rights are no different.

The Crown's Duty to Consult and Accommodate

1. First outlined in *Haida* (2004), and *Taku River* (2004), and expanded to treaty circumstances in *Mikisew* (2005), the duty to consult and accommodate is grounded in the *honour of the Crown* and can arise before claims of aboriginal rights or title are proven.

2. Once the Crown becomes aware of potential impacts to First Nation interests it is required to consult with that First Nation and negotiate in good faith in order to accommodate the concerns of the First Nation.

3. A good faith effort is required on both parties but there is no requirement to agree.

The Crown's Duty to Consult and Accommodate

4. The depth of negotiation required, depends upon a preliminary assessment of the First Nation claim, along a spectrum from a weak interest and minimal impacts to circumstances where the claim was strong and the impacts significant.

5. The Crown was solely responsible for the decision and if it failed to consult appropriately it would be responsible to the First Nation for a breach of the duty to consult.

6. The honour of the Crown infuses all aspects of treaties and may supplement both modern and historical treaties in requiring consultation.