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As an enhancement to the materials we have created, where possible, external web links to those cases and legislation that were available on the CanLII website. Please note, however, that not all links are reliable. The incorrect links appear to be especially problematic for the statutes, especially if the complete citation for the statute is not present at that exact spot in the materials. If you use the web links, please always double-check to ensure that you are being directed to the correct place.

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# ABORIGINAL LAW

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April 2020

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## 1. INTRODUCTION

### GENERAL

#### ABORIGINAL PEOPLES OF CANADA

The [Constitution Act, 1982](#) defines the "aboriginal peoples of Canada" as including the "Indian, Inuit and Métis peoples of Canada" (*The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11*, s. 35(2)). There is no further definition provided for these three terms in the [Constitution Act, 1982](#). (There has been a recent move, including within the Canadian government policies and legislation, to use the term "Indigenous peoples" as an alternative to "Aboriginal peoples" reflecting to a preference to ground identification of these peoples and their rights beyond the Canadian constitution with reference to international law, namely the [United Nations Declaration on the Rights of Indigenous Peoples](#), GA Res 61/295, UNGAOR (2007), which supports a principle of Indigenous peoples identifying and defining themselves.)

Inuit peoples have been defined to include descendants of original inhabitants of Canada's north, sharing a distinct culture and language. Métis persons are those of mixed European and Indian or Inuit culture that developed their own distinct language and culture: *R. v. Powley*, [2003 SCC 43](#).

The term "Indian" in fact comprises over 50 distinct cultural-linguistic groups, such as the Mi'kmaq, Maliseet, Mohawk, Dene, Cree, Ojibway, etc. [Section 91\(24\)](#) of the [Constitution Act, 1867](#) assigns exclusive legislative jurisdiction over "Indians and Lands reserved for the Indians" to the federal government: *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s. 91(24). Pursuant to this power, Canada enacted the [Indian Act](#) in 1876, which has continued in force until the present day: the [Indian Act, RSC 1985, c. I-5](#). The [Indian Act](#) sets out certain laws that apply to Indians and reserve lands.

The [Indian Act](#) also defines who is an "Indian" pursuant to the Act (commonly called "status Indians") and establishes a registry to record qualified individuals. The [Indian Act](#) has a long history of removing and excluding "status" from individuals and has led to a category of people who self-identify as Indian but are not entitled to registration under the [Indian Act](#) (commonly called "non-status Indians"). Although it is not a legal term, it is common to use the term "First Nation" to refer to an Indian or "First Nations" to a band of Indians as a term of respect for the position of Indigenous Peoples as the original inhabitants of Canada.

Inuit and Métis do not fall under the jurisdiction of the *Indian Act*, however, court decisions have held that the Inuit, as well as Métis and non-status Indians, fall within the jurisdiction of the federal government pursuant to s. 91(24) of the [Constitution Act, 1867](#): *Re Eskimo*, [\[1939\] SCR 104](#) and *Daniels v. Canada*, [2016 SCC 12](#). Most Inuit peoples are now beneficiaries under modern treaty and land claims agreements that govern their unique interests.

## 2. APPLICABLE LAWS

The legal position of First Nations in Canada requires consideration of the complex interplay of federal and provincial law, as well as possible treaty and inherent rights-based jurisdiction.

The [Indian Act](#) focuses on a limited number of subject matters: Indian registration and Band membership; reserve lands; wills and estates of Indians; taxation and exemption from seizure of property on reserve; and election and bylaws of Band Councils. The [Indian Act](#) is silent on a number of areas including social services, health, education, housing, policing, etc., and therefore not a complete legal code when it comes to Indians on reserve. The *Indian Act* is not the only federal legislation passed pursuant to s. 91(24), however. Over the past 20 years, there have been over a dozen different statutes passed by Canada pursuant to this head of power in an attempt to supplement and address gaps in the *Indian Act*. Some examples include the [First Nations Land Management Act](#), SC 1999, c 24, [First Nations Goods and Services Tax Act](#), SC 2003, c 15, [Specific Claims Tribunal Act](#), SC 2008, c 22, [Family Homes on Reserves and Matrimonial Interests or Rights Act](#), SC 2013, c 20 and the [Indigenous Languages Act](#), SC 2019, c 23.

Provincial laws will also fill in some, but not all gaps created by the *Indian Act*. The *Indian Act* and the federal jurisdiction over Indians and reserve lands operate to displace the application of provincial laws that conflict or touch on a subject matter covered in the *Indian Act*. In general, this precludes some or all parts of provincial statutes on such subjects as wills and estates, land registries, division of family assets, land assessment, liens, residential tenancies, municipal zoning and construction, etc., from applying on reserve (see, for example, see *Attorney General of Canada et al. v. Canard*, [\[1976\] 1 SCR 170](#), *Derrickson v. Derrickson*, [\[1986\] 1 SCR 285](#)

Some provincial laws of general application apply of their own force and effect (such as provincial traffic laws) or through the operation of [section 88](#) of the *Indian Act* where such laws touch on the “core of Indianess,” which has been held to include laws that touch on “status and capacity of Indians” (*Dick v. The Queen*, [\[1985\] 2 SCR 309](#)), though it no longer includes Aboriginal and Treaty rights protected under s. 35(1) of the *Constitution Act, 1982* (see *Tsilhqot’in Nation v. British Columbia*, [2014 SCC 44](#) and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014 SCC 48](#)). In some cases, although there is no constitutional doctrine preventing application of provincial laws on reserve, the provinces choose not to enforce their laws on reserve, viewing the matters as a federal responsibility. This is often the case with regard to laws relating to essential services, such as laws dealing with social assistance, day care, policing, etc. Although the federal government has the jurisdiction pursuant to [s. 91\(24\)](#) to legislate in such areas, for decades, it choose instead to regulate these areas via policies and funding agreements. However, Canada has recently passed legislation recognized its responsibility to provide numerous essential services to Indigenous peoples: see section 6(2) of the [Department of Indigenous Services Act](#), SC 2019, c 29, s 336. Canada has also recently passed legislation respecting the delivery of child and family services to Indigenous peoples: see [An Act respecting First Nations, Inuit and Métis children, youth and families](#), SC 2019, c 24. In law introduces national minimum standards in relation to child and family services, as well as recognizing that inherent right of Indigenous peoples to pass laws and develop their own dispute resolution mechanisms in relation to child and family services.

Some First Nations are beneficiaries under treaties and land claims agreements that set out rights and responsibilities that may or may not operate independently of the *Indian Act*. Also, some First Nations have enacted their own laws, through inherent jurisdiction, self-government agreements, custom election, custom adoption and the bylaw-making authority under the *Indian Act* or pursuant to provisions under other federal statutes that recognize First Nations self-determination in certain areas. This includes in the areas of lands (see the *First Nations Land Management Act*, SC 1999, c 24), taxation (*First Nations Goods and Services Tax Act*, SC 2003, c 15 and *First Nations Fiscal Management Act*, SC 2005, c 9), matrimonial and family property (see *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20) and child and family services (see *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24). Such First Nations laws may displace provincial or federal legislation.

In addition, the courts are increasingly recognizing the existence of Indigenous laws and giving these broad interpretation, as well recognizing the need to respect and show deference to these laws when they are adjudicated within the Canadian courts. For example, in *Pastion v. Dene Tha' First Nation*, [2018 FC 648](#), the Federal Court states that at paras. 8-13:

Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. ...

Despite the occasional recognition of Indigenous law by Canadian courts, the overall tendency was, for a long period, one of denial and suppression...

There has recently been a renewed interest in Indigenous legal traditions. They are the object of academic research and teaching... . The Truth and Reconciliation Commission of Canada pointed out that the recognition of Indigenous peoples' power to make laws is central to reconciliation... . And the *United Nations' Declaration on the Rights of Indigenous Peoples* (UN GA Res 61/295, 61st Sess, Supp No 53 (2007)) echoes these aspirations...

... Indigenous peoples are fully entitled to use the written form to express their laws, and that does not make those laws any less Indigenous... .

... the manner in which various sources of law are blended is a matter for each First Nation to decide and this Court should respect that choice.

In providing legal advice to or regarding a particular First Nation, it will therefore be important to determine whether any such laws exist. Many First Nations communities have websites where information about community programs, services, policies and laws can be found. Alternatively, inquiries can be made by calling the offices of the First Nation government (Band Council).

### **3. HIGHLIGHTING DIFFERENCES IN THE LAW IN THE ABORIGINAL CONTEXT**

The following chapters of the Bar Review Materials contain sections setting out differences in the law in the Aboriginal context:

- Business organizations
- Commercial transactions
- Constitutional law
- Criminal law
- Family law
- Real estate
- Wills and probate

## 4. INTRODUCTION TO TRUTH AND RECONCILIATION COMMISSION REPORT AND CALLS TO ACTION

In 2015 the [Truth and Reconciliation Commission of Canada](#) (“TRC”) issued its *Final Report* and 94 [Calls to Action](#). The TRC was created out of the [Indian Residential Schools \(“IRS”\) Settlement Agreement](#) which resulted from litigation initiated by hundreds of survivors of the IRS experience, representing the largest class-action lawsuit in Canadian history. The preface of the *Final Report* summarized the history of IRS as follows:

Canada’s residential school system for Aboriginal children was an education system in name only for much of its existence. These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society, led by Canada’s first prime minister, Sir John A. Macdonald. The schools were in existence for well over 100 years, and many successive generations of children from the same communities and families endured the experience of them. ... Children were abused, physically and sexually, and they died in the schools in numbers that would not have been tolerated in any school system anywhere in the country, or in the world.

The Commission spent six years travelling to all parts of Canada with the mandate to reveal the complex truth about the history, and ongoing legacy, of residential schools. Ultimately, the Commission’s focus on truth determination was intended to lay the foundation for the challenge of reconciliation.

The TRC’s findings spoke of an urgent need for reconciliation running deep within Canadian society, noting the necessity for action on reconciliation going beyond residential schools and involving all aspects of the relationship between Aboriginal and non-Aboriginal peoples. The Commission defined reconciliation as an ongoing process of establishing and maintaining respectful relationships. It identified that a critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change.

Of particular significance, the TRC emphasized that establishing respectful relationships requires the revitalization of Indigenous law and legal traditions and the importance of all Canadians understanding how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.

The TRC’s Calls to Action included specific recommendations relevant to the legal profession and legal education. Given the lack of sensitivity, cultural competence and knowledge of the history of Aboriginal peoples exhibited by lawyers involved in the residential school class action litigation, the TRC called on both law schools and the legal profession to ensure a base level of competence of law students and lawyers:

27) We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of

residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

28) We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

These are the provisions that have received the most attention in discussions by law schools and legal regulators about responding to the TRC Report. There are, however, other calls to action relevant for those who are responsible for teaching future lawyers and regulating the legal profession. This is because the TRC calls for a significant paradigm shift in the Canadian legal system, transitioning from a system still steeped in colonial and racist doctrines, including, for example, *terra nullius* and the doctrine of discovery, to one that embraces treaty renewal and a Nation-to-Nation relationship.

In this regard, the TRC Report notes that, far from being ancient history with no relevance for reconciliation today, *terra nullius* and the doctrine of discovery underlie the legal basis upon which British Crown officials claimed sovereignty over Indigenous peoples and justified the extinguishment of their inherent rights to their territories, lands, and resources. The TRC points out that this framework continues to underpin our legal system, influencing the interpretation of treaties and Aboriginal rights and title under s. 35 of the *Constitution Act, 1982*. The TRC argues forcefully that these notions do not conform to international law or contribute to reconciliation, and calls on Canada to do the following:

45) We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

- i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the doctrine of discovery and *terra nullius*.
- ii. Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
- iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
- iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and

integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

Although this is a charge to the federal government, current and future lawyers and judges will be among the primary actors responsible for implementing this paradigm shift. Therefore, it is incumbent on legal educators and regulators ensure that both current and future lawyers (and judges) are adequately trained and prepared for these changes. Similarly, the TRC Report calls on law and policy makers to implement broad changes in criminal law, education, family and child welfare, as well as the corporate sector, all of which will implicate future lawyers. The TRC also calls for the creation of Indigenous law institutes, and law schools are an obvious location for such creation of such institutions:

50) In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

Finally, call to action 92 is relevant to the law schools, law society regulators, as well as legal workplaces. This provision calls upon corporations and non-governmental organizations, along with governments, to also adopt the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as a reconciliation framework and to apply its principles, norms, and standards to their policies and core operational activities involving Indigenous peoples, including ensuring that Aboriginal peoples have equitable access to jobs, training, and education opportunities within these organizations.

Beyond the Calls to Actions, the TRC also released 10 Principles of Reconciliation, several which are relevant to the law schools', law society regulators' and legal workplaces' relationship with Indigenous peoples and reconciliation:

- The *United Nations Declaration on the Rights of Indigenous Peoples* is the framework for reconciliation at all levels and across all sectors of Canadian society.
- First Nations, Inuit, and Métis peoples, as the original peoples of this country and as self-determining peoples, have Treaty, constitutional, and human rights that must be recognized and respected.
- Reconciliation is a process of healing of relationships that requires public truth sharing, apology, and commemoration that acknowledge and redress past harms.
- All Canadians, as Treaty peoples, share responsibility for establishing and maintaining mutually respectful relationships.
- The perspectives and understandings of Aboriginal Elders and Traditional Knowledge Keepers of the ethics, concepts, and practices of reconciliation are vital to long-term reconciliation.

- Supporting Aboriginal peoples' cultural revitalization and integrating Indigenous knowledge systems, oral histories, laws, protocols, and connections to the land into the reconciliation process are essential.
- Reconciliation requires political will, joint leadership, trust building, accountability, and transparency, as well as a substantial investment of resources.
- Reconciliation requires sustained public education and dialogue, including youth engagement, about the history and legacy of residential schools, Treaties, and Aboriginal rights, as well as the historical and contemporary contributions of Aboriginal peoples to Canadian society.

Finally, the [Report of National Inquiry into Missing and Murdered Indigenous Women and Girls](#) was released on June 4, 2019. Included in its 231 Calls to Justice are calls for mandatory competency training for members of the legal profession in Indigenous culture and histories.

After 2 years and four months of hearings, the National Inquiry into Missing and Murdered Indigenous Women and Girls released its Final Report. The Final Report provides conceptual and legal frameworks for understanding the history of violence between Canada and Indigenous peoples, particularly First Nations, Métis, Inuit women and girls, and Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual (2SLGBTQQIA) peoples. The Inquiry Report explains that its approach:

...includes understanding that Indigenous women, girls, and 2SLGBTQQIA people are holders of rights, as human beings and as Indigenous Peoples, in key areas that relate to their safety and to justice and that also link to Indigenous ways of knowing, understanding, and engaging in relationship. This framework has identified four root causes of violence, including intergenerational trauma; social and economic marginalization; a lack of institutional and political will; and the failure to recognize the expertise and capacity of Indigenous women themselves in creating self-determined solutions.

The National Inquiry also delves into issues about structural, systemic and symbolic violence, and concludes that the treatment of Indigenous peoples, based on the information gathered, constitutes genocide as defined under International law.