ABORIGINAL IDENTITY AND THE *CHARTER* OF *RIGHTS AND FREEDOMS*

ABSTRACT

The author examines the *Charter* and the Aboriginal rights clauses in the Constitution Act 1982, and considers their influence on Aboriginal identity. Following some comments on the substantive meaning and significance of these provisions, the author suggests some of their implications, not only for group and personal identity and rights, but also for the making of Aboriginal policy and the politics of Aboriginal representation.

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The *Charter*, which constitutes Part I of the *Constitution Act 1982* (the *Act of* 1982) has provisions, notably s.15, the equality and affirmative action provision, that include Aboriginal people within their reach. Perhaps more important, in Part II, the *Act of 1982* also recognizes and affirms the aboriginal and treaty rights of the "aboriginal peoples of Canada", which are described as including 'the Indian, Inuit and Metis peoples." In this brief essay, I comment on the influence that these provisions have had on the identity of Aboriginal peoples, and on the public perception that seems to have been created about the identity of Aboriginal people and about their rights in Canada. In order to do so, I must also venture some explanation and opinion about what are undoubtedly very complex aspects of the law of the constitution of Canada.

The constitutional category made up of the Aboriginal persons caught by s.15, the equality and affirmative action provision of the *Charter*, is quite distinct from the constitutional category of those who are entitled to aboriginal and treaty rights in Part II. The resulting distinction in the identity of those who fall within each category is not generally well understood. This ambiguity is exacerbated by various definitions of Aboriginal people found in special purpose legislation, such as the *Indian Act*, and a sentencing provision in the *Criminal Code* of Canada.

Added to the mix is the complexity of the concept of Aboriginal rights, which are group rights and which tend to get confused with concepts of individual rights. This widespread ambiguity and complexity tends to foster some incoherent public debates about Aboriginal policy. It also influences decisions that Aboriginal people and groups themselves make about their identity. Social scientists inform us that the extent to which the state and its institutions can influence the identity of a people is an indicator of the people's political weakness and vulnerability.

Let us first address the distinction between the identity of those caught by the *Charter* provisions and the identity of those who belong to groups that have Aboriginal rights guaranteed in Part II. Section 15 of the *Charter* permits affirmative action in respect to persons and groups made up of historically disadvantaged persons. Aboriginal persons, whether or not they belong to a rights-bearing community, are included within the objects of s.15 and one or other of the enumerated categories of disadvantaged persons or groups. To illustrate, a person with personal antecedents that include one or more Aboriginal ancestors in the family tree, and who now resides in a large city, may not identify as an Aboriginal person, and have no personal relationship with any historic Aboriginal community. Let us assume also that the hypothetical person physically resembles what Canadians view as a stereotypical Aboriginal person and is vulnerable as such to racism and disadvantage

in securing employment or rental accommodation. Such a person may not, without more, be entitled to enjoy any aboriginal or treaty rights, but would likely be included in one of the enumerated grounds in s.15, which include, *inter alia,* 'race, national or ethnic origin', and 'colour'. Furthermore, the hypothetical person might be viewed by the courts as falling within the meaning of the sentencing provision in the *Criminal Code* which makes reference to Aboriginal offenders. The courts construe legislation by examining the statutory objectives at issue, and a person who falls within the objects of a statute does not necessarily fall within the objects and meaning of another statute.

Let us turn now to examine the identity of those who fall within the aboriginal rights clause in Part II, which is s.35. S.35 recognizes two kinds of rights: aboriginal rights and treaty rights. These rights are vested in groups. They are collective rights that can only be enjoyed by members of a constitutionally recognized Aboriginal group. According to the present state of jurisprudence on the matter, individual persons do not seem to have aboriginal rights. As members or citizens of Aboriginal rights-bearing groups, a person may be entitled to act in the enjoyment of the benefits provided by the group right, or be bound by the duties or responsibilities that are integral to the group's right. Whether or not an Aboriginal person belongs to a s.35 'people' is a vexed question that the courts have only begun to pronounce upon. In the meantime, ambiguity reigns and the federal government, which has constitutional responsibility to respect aboriginal and treaty rights and to make them effective, nevertheless has little political incentive to extend its limited recognition of Aboriginal people upon which it has historically based its policies.

A closer look at the text of s.35 is needed to suggest some of the difficulties and ambiguities that attend its judicial interpretation and the way that Aboriginal people and the public understand its meaning in relation to Aboriginal identity. S 35 refers to three categories of Aboriginal peoples: the Indian, Metis and Inuit peoples. The term 'Indian' already appeared in section 91(24) of the *Constitution Act 1867*, which grants Parliament the exclusive power to make laws about 'Indians and lands reserved for the Indians". The Supreme Court of Canada (the SCC) had decided in 1939 that Indians include Inuit people for the constitutional purposes of that provision. The question whether the Metis are also 'Indians' within the meaning of section 91(24) had been resolved affirmatively by the Charlottetown Accord, at least as far as the western Metis are concerned, but the SCC has not positively and directly decided the issue. This leaves a gap of constitutional ambiguity that complicates the role of federal and provincial governments, troubles the making of Aboriginal policy, and adds to the frustration of Aboriginal organizations representing those who do not fall within the policy or statutory categories upon which the federal government bases its policy and spending.

The guarantee of aboriginal and treaty rights and their constitutional immunization from governmental infringement has created widespread expectations and assumptions among Aboriginal people. Access to the enjoyment of these rights has been seen as a desirable resource and consequently an object to be sought. But the meaning and substance of these rights is hardly defined yet. The First Ministers Conferences on Aboriginal Constitutional Reform of the 1980s failed to specify their nature and scope, and judicial interpretation has been by its nature and method slow and piecemeal, and inadequate for developing a clear and coherent policy framework. In the result no one is quite sure what it is that is worth fighting for, or fighting over.

The more certain expectations are based upon the continuation of federal policies that recognize the common law rights of the Inuit people and the 'Indian' or First Nations people who come within the terms of the *Indian Act.* Most federal spending and policy is aimed at these groups, including treaty negotiations and a range of programs administered by the department of Indian affairs. Largely on the outside looking in are the other, non-recognized Aboriginal people who have been excluded from traditional policy. These include the 'Metis' people as well as many 'Indians' who fall outside the ambit of the definition that the government unilaterally imposed upon First Nations people in its 19th century *Indian Act*, and who are on that account known as 'non-status Indians.' The members of these two groups constitute roughly as many as the 'status Indians' or First Nations, for a total of over a million persons or less than 3% of the Canadian population, according to self-identification in federal censuses.

Given that the term 'Indian' has historically been used as a generic term to refer to Aboriginal people, one might have expected that most Aboriginal individuals and groups would identify

as Indians, unless they belonged to the Inuit people of the northern regions, whose identity is not contested. Many such individuals historically identified as 'non-status Indians'. Interestingly, it appears that a shift has occurred in favour of identifying with the third group in s.35, the unique Metis people, unless one qualifies for registration as an 'Indian' under the amended federal Act. Census statistics show that this group has increased significantly in size since the 1980s, far beyond what can be accounted for by births within the statistical group of persons that self-identified in past censuses.

A closer look at Metis constitutional identity is warranted. The Metis people of Manitoba had obtained express constitutional recognition in section 31 of the *Manitoba Act 1870*, which is still part of the Constitution of Canada. S.31 recognized the aboriginal title of the Metis and provided for a land settlement scheme. The Metis in fact did not end up as landowners in the province and it has been argued that the purported implementation of this provision was not constitutionally valid. According to the rule of interpretation that all the terms of the Constitution of Canada must be read together to discern their meaning, the term 'Metis' in s.35 must be construed in light of s.31 of the *Manitoba Act 1870.* This approach, however, is not evident in the two cases that have so far been decided by the Supreme Court of Canada. In these cases the SCC has not shied away from deciding on the identity of individuals who claimed rights based upon their belonging to an Aboriginal people. In doing so, the Court has not undertaken to decide the meaning of 'the Aboriginal peoples of Canada', but it has purported to establish some tests to identify proper claimants. Both cases involved claims to 'Metis' identity. Arguably, this task is better left to the Metis people and its legitimate representatives. It does not seem right for appointed judges to decide the very identity of distinct political societies that have struggled to assert and defend rights that have ultimately acquired Constitutional recognition and protection. Perhaps a better option is for the Court to adopt a more mature doctrine of 'political questions' that are beyond the authority and power of the courts to decide because peace and justice are more likely to result from decisions made by others. The *Act of 1982* has drawn us closer to the American constitutional model and notably the courts there have developed a mature political questions doctrine, albeit not in the context of federal Indian law.

What seems clear is that Canada needs more experience and good faith to reach a just and workable balance between the roles of the various branches of government, and the way in which each branch shall relate with the Aboriginal peoples for various purposes. The Royal Commission on Aboriginal Peoples recommended negotiations and treaty agreements to establish just relations between Aboriginal peoples or 'nations' who have rights, and the rest of Canadian society. A significant part of these recommendations deal with the vexed question of identifying the Aboriginal peoples which have constitutional rights, but governments have not acted upon these proposals.

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The *Act of 1982* has also affected Aboriginal individuals at the personal and family level. Some who formerly identified as 'Metis' found themselves entitled to join the ranks of the recognized 'status Indians' in the *Indian Act* on account of a 1985 amendment to that Act that was enacted in response to the perceived requirements of the *Charter*'s equality rights provision. The story of those 'Bill C-31' people has been recounted many times, but it deserves to be recalled whenever the issue of *Charter* influence on Aboriginal identity is in issue. In these stories can be found not only personal accounts about identity and the way it is influenced by governments and the law, but also complex accounts of constitutional law issues that still pose challenges. An example is the constitutional validity of the *Indian Act,* which no longer allows a registered Indian person to opt out and resume a Metis identity or other identity, whether Aboriginal or not.

The *Act of 1982* has affected the identity of Aboriginal persons and groups in various ways which seem difficult to characterize in a positive light. However, the Aboriginal rights provisions

undoubtedly have quite appropriately enhanced the status of Aboriginal people and rights in Canada, and made the country a world leader in the recognition of the rights of indigenous peoples. The complex relationship between the *Charter* provisions and the external Aboriginal rights provisions in the *Act of 1982* is bound to remain a continuing challenge and source of contested accounts into the foreseeable future.