



# **Session 1**

## **The Indian Act and Identity**

Information session designed for  
The Mohawks of Wahta  
February 24, 2017

# Presentation Overview

## **I. HISTORICAL OVERVIEW: THE SEEDS OF “THE CHOICE”**

- A. The Crown Indigenous Relationship in the Law
- B. The Indian Act: Original Intentions
- C. Changing Landscapes: “Indian Status” and Jurisdiction in relation to “Indians”

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# **I. HISTORICAL OVERVIEW: THE SEEDS OF “THE CHOICE”**

# A. The Crown Indigenous Relationship in the Law

1. *The Royal Proclamation 1763*
2. *Pre-confederate Treaties*
3. *Constitution Act of 1867 (s 91(24))*
4. *The Numbered Treaties ((1871-1881), including adhesions)*
5. *The Indian Act, 1876, section 6*
6. *Constitution Act 1982, sections 25 and 35*

# The Royal Proclamation 1763

*“And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...” [Emphasis added]*

# Pre-Confederate Treaties

None provide for the cession of the inherent freedom to determine whom is entitled to citizenship in an Indian “Nation” or “Tribe”.

# Constitution Act, 1867

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, 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.

# The Numbered Treaties (1871-1881)

None provide for the cession of the inherent freedom to determine whom is entitled to citizenship in an Indian “Nation” or “Tribe”.



# The *Indian Act*, 1876

## **Persons entitled to be registered**

**6 (1)** Subject to section 7, a person is entitled to be registered if

- a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
- b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
- c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
  - a) that person
    - I. is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,
    - II. is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,
    - III. was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and
    - IV. had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;
- d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
- e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,
  - i. under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or
  - ii. under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or
- f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

**Idem (2)** Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

**Deeming provision (3)** For the purposes of paragraph (1)(f) and subsection (2),

- a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a);
- b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision; and
- c) a person described in paragraph (1)(c.1) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

# The *Indian Act*, 1876

- 2 (1)** In this Act, ***band*** means a body of Indians
- (a)** for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
  - (b)** for whose use and benefit in common, moneys are held by Her Majesty, or
  - (c)** declared by the Governor in Council to be a band for the purposes of this Act;

# Constitution Act, 1982

## *Recognition of existing aboriginal and treaty rights*

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

*Definition of “aboriginal peoples of Canada”* (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

*Land claims agreements* (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.

*Aboriginal and treaty rights are guaranteed equally to both sexes*  
(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.

# Constitution Act, 1982 (cont.)

*Aboriginal rights and freedoms not affected by Charter*

**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.




## **B. The Indian Act: Original Intentions**

*“...that we have been pampering and coaxing the Indians; that we must take a new course, we must vindicate the position of the white man, we must teach the Indians what law is...along the whole frontier of the United States there has been war; millions have been expended there; their best and their bravest have fallen, I personally know General Custer, and admired the gallant soldier, the American hero; yet he went, and fell with his band, and not a man was left to tell the tale -  
- they were all swept away...” [Emphasis added]*





*“The executions...ought to convince the red man  
that the white man governs.”*

The background of the slide features a grayscale illustration of a dense evergreen forest in the foreground, with rolling mountains visible in the distance under a light sky.

*“The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion...”*



# C. Changing Landscapes:

## “Indian Status” and Jurisdiction in relation to “Indians”

Discrimination based on gender and constitutional incompatibility are the common threads. Many citizenship codes struck under the *Indian Act* have been responsive to the discriminatory foundation set by the status provisions of the *Indian Act*. The consequences are acutely felt today.

- *Lovelace v Canada*: C-31 1985 addressed gender discrimination in the legal entitlement to Indian status. Catalyst for Bill C-31.
- *Mclvor v Canada* 2006: addressed further gender discrimination in the legal entitlement to Indian status.
- *Descheneaux and Yantha v Canada (Attorney General)* 2015: addressed even further gender discrimination in legal entitlement to Indian status. Federal government abandoned its appeal. It has 10 months remaining to implement Justice Masse’s judgment.
- *Daniels v Canada* 2016 establishes that federal jurisdiction extends to all Aboriginal Peoples under section 35, including non-status Indians.

## II. TERMINOLOGY

**“Indian”**: Used in historic legal instruments, Constitution Act 1867, Status Indian (registered or entitled to be registered under section 6 of the *Indian Act*), some specific legal terminology.

**“Aboriginal”**: Constitution 1982, section 35 (definition and rights) and 25 (non-derogation) includes First Nations, Metis and Inuit. Term is also used in Australia.

**“First Nations”**: Originates in constitutional talks, term acquired by the *Indian Act* as the legal equivalent of “Band”, now used interchangeably with “Indian” in common speech.

**“Indigenous”**: Terms used in international fora referring to Indigenous Peoples generally. Current politically correct term.

# Key Concepts and Features

## **Citizenship:**

- the fact or status of being a citizen of a particular place;
- the qualities that a person is expected to have as a responsible member of a community.

## **Membership:**

- the state of belonging to or being a part of a group or an organization : the state of being a member;
- all the people or things that belong to or are part of an organization or a group.

# Key Concepts and Features

Citizenship	Membership
Contribution (formal or moral)	Entitlement
Inherent freedoms and responsibilities	Granted rights and freedoms
Participate in governance format	Legislated governance

Descendence/Ascendence	Blood Quantum
Canadian status regime leg entitlement	United States tribal enrolment regime
Section 6, Indian Act formula	Percentage of blood calculation

# III. THE REAL WORLD

## Social effects of section 6 on views of “mixed marriages”:

- Burials
- Matrimonial real property on reserve
- Access to programs and services
- Residency is distinct and separate from membership and citizenship

# Burials

- No current provision preventing the burial of non-Band members on reserve lands.
- Historically, non-members were prevented from burial on reserve lands. Non-members included those who were involuntarily enfranchised before 1985 and those of mixed ancestry who were non-members.

# Family Homes on Reserves and Matrimonial Interests or Rights Act

## Purpose:

**4** The purpose of this Act is to provide for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.



# Access to Programs and Services

## *Health, Vision, Dental*

- Access to most if not all programs and services on reserve is limited to status Indians. Non-status Indians, even if resident on reserve, cannot access programs and services intended for status-Indians.
- Status is determinative in this regard, not inter-marriage or blood-quantum.
- Status is governed by the *Indian Act* and administered by Indigenous and Northern Affairs Canada. Band lists may be kept by the Nation under a delegated authority.



# Residency

Residency is a distinct and separate concept from membership and citizenship.

## **Non-resident of reserve**

**50 (1)** A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

*Indian Act, sub-section 50(1)*

Entitlement to live on a reserve is determined by membership as listed on a Band List, administered by the Band or Indigenous and Northern Affairs Canada.



**Nai:wen**  
**Thank You**

# Engagement Questions

1. What is the difference between “Indian status” and “blood quantum” for Wahta Mohawks?
2. What is the difference between membership and citizenship for Wahta Mohawks?