Law Society
of British Columbia

Indigenous Intercultural Course (IIC)

Course Learning Materials

Updated October 2023

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Contents

MODULE 1 – INTRODUCTION (time estimate: 20 minutes)

The course begins with an acknowledgement of Indigenous territories, and a dedication, provided in this brief video: IIC: Land Acknowledgement (vimeo.com)

For guidance on acknowledging Indigenous territories, please see: Native-Land.ca | Our home on native land.

Course Introduction

This is an educational course that has been designed to help British Columbia lawyers increase their Indigenous cultural awareness and understanding. The course is not intended to be comprehensive or definitive, and will be revisited frequently for updating. The goal of this course is to provide a baseline knowledge of:

- the colonial history of Canada with a specific focus on British Columbia;
- how colonialism continues in the present day, with negative outcomes for Indigenous people;
- the role of law and lawyers in colonization; and
- the potential of lawyers to advance reconciliation.

In the current era of reconciliation, understanding how colonial law came into effect in British Columbia and how colonization continues in the present day is foundational knowledge for all lawyers in this province, whether or not they practice Indigenous law or have Indigenous clients.

Learning Outcomes

Upon completion of this course, you should be able to:

1. Acknowledge the existence of Indigenous nations, law, and governance systems prior to the arrival of Europeans on Indigenous territories;
2. Recognize that the Canadian legal system is rooted in colonialism;

3. Appreciate the ways in which colonization, systemic discrimination, and biases permeate the Canadian legal system;
4. Understand some of the past and present impacts of colonial laws and policies on Indigenous individuals and nations, including key challenges experienced by Indigenous people in their interactions with the Canadian legal system in the present day;
5. Identify Indigenous self-determination efforts that are occurring in Canada today; and
6. Reflect on your knowledge and your role in advancing reconciliation.

Key Themes

As you are going through the course, please reflect on:

1. The role of law and lawyers in relation to the issues that are covered in the course; and
2. The ways in which the colonial principles upon which Canada was built continue to operate in the present day.

Time Estimates

The estimated time for completion of the mandatory content for the course is approximately 6 hours:

- Module 1: 20 minutes
- Module 2: 40 minutes
- Module 3: Total = 3 hours, comprised of submodules:
    - 3.1: 30 minutes
    - 3.2: 40 minutes
    - 3.3: 60 minutes
    - 3.4: 50 minutes
- Module 4: 60 minutes
- Module 5: 30 minutes
- Module 6: 30 minutes

Welcome and Introduction

In December 2019, the Benchers of the Law Society of British Columbia voted that all practising lawyers in the province are required to take an Indigenous intercultural course. (Video link: Indigenous Intercultural Course: Welcome and Introduction - YouTube)

The Honourable Murray Sinclair [(Mizanay Gheezhik), Ojibway. First Indigenous Judge in Manitoba, Superior Court Judge, Adjunct Professor, and the Chair of the Indian Residential Schools Truth and Reconciliation Commission] reminds us that education got us (Canadian

society) into this mess, and education will get us out of it. (Video link: TRC Mini Documentary - Senator Murray Sinclair on Reconciliation - YouTube)

In the following video, Law Society Bencher Katrina Harry invites lawyers to truly engage with the content of the course. (Video link: Indigenous Intercultural Course introduction by Katrina Harry - YouTube

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How This Course Works

This is a self-paced independent study course.

Time Estimates

The time estimate for completion of the mandatory content for the course is approximately 6 hours. Time estimates are provided on the introductory page for each module. Module 3 is a large module, so time estimates for its submodules are also provided.

Note: the time estimates have been calculated for the mandatory components only. The calculations are based on: 1) the word count for each module; 2) an average reading speed of 250 words per minute; 3) the video content; and 4) time estimates for the self-reflection exercises.

Some learners may prefer to complete the mandatory components only, or to complete the mandatory components first and go back to review the supplementary materials later. Other learners may wish to spend more time reviewing both the mandatory and supplementary components that relate to their work, or that particularly interest them. Reviewing the supplementary materials will increase the amount of time it takes to work through the course.

Reporting Completion & Eligibility for CPD Credit

All practising lawyers in British Columbia are required to:

> (a) complete the Indigenous intercultural course, and
> (b) certify ... that the lawyer has completed the Indigenous intercultural course

within two years of engaging in the practise of law, or before January 1, 2024, whichever is later.

Lawyers must certify their completion of the Indigenous intercultural course through the Law Society Member Portal (lawsociety.bc.ca). You can do so under the “Law Society’s Brightspace” link on the landing page.

While lawyers may claim continuing professional development (CPD) credit for each hour spent working on the course, up to a maximum of six hours, certifying completion of the course does not automatically record it for CPD credits. You can claim CPD credits through the CPD

section: Recording CPD Hours | The Law Society of British Columbia. The course is accredited for the "professional responsibility, practice management, and ethics" requirement.

Text Boxes

Throughout the course, you will see the following "text boxes":

Self-Reflections

Reflective questions are posed under the "Self-Reflection" heading. They ask you to stop reading and reflect on how the content affects you, your thoughts, and your actions.

Want to Know More?

This course is a starting point, but a single overview course does not provide in-depth information on every topic. If you would like more information about topics of interest to you, supplementary resources are provided under the "Want to Know More?" heading. These materials are not mandatory to review.

Notes

Extra information is included under the "Notes" heading.

A note on references: references are embedded in the text. Where available, references may link to online sources (e.g., 2016 Census). The online sources are citations only, and are not part of the mandatory reading requirements.

Key Points

Significant content is highlighted under the "Key Point" heading.

Content Warnings

"Content warnings" signal that the course material may trigger emotional reactions for some people.

If you find the content emotionally distressing, it is important that you seek support from family, friends, and other support networks, such as:

- The Law Society of BC funds personal counselling services for all lawyers in BC through LifeWorks Canada. Lawyers may contact LifeWorks any time, 24/7, to speak with a caring consultant for guidance, resources, and a referral to a counsellor for short-term, solution-focused counselling.* To meet individual needs and preferences, employee assistance program counselling is available by phone, in person, live by video, by chat, and in group virtual format. If you're needing urgent support, please identify this upon calling. For non-urgent issues, the first counselling appointment is generally within a few days. (*If your issue is ongoing in nature, your counsellor will likely refer you to an appropriate resource in your community, and support you in how to access that resource. If you or someone in your immediate family is in a state of crisis, LifeWorks will offer the necessary support to stabilize the situation.)
- The Lawyers Assistance Program also provides confidential support and referrals for lawyers and other members of the legal community in British Columbia (phone: 604-685-2171 or 1-888-685-2171).

Mental health supports geared toward Indigenous individuals include:

- The Hope for Wellness Helpline for immediate mental health counselling and crisis intervention (phone: 1-855-242-3310, or confidential online chat function: hopeforwellness.ca).
- The Indian Residential School Survivors Society provides counselling services for Indigenous survivors and intergenerational survivors of residential schools (phone: 1-866-925-4419).
- The Kuu-Us Crisis Line Society provides mental health crisis services for Indigenous people across BC (phone: 250-723-4050 or 1-800-588-8717).
- The Métis Crisis Line provides mental health services for Métis individuals in BC (phone: 1-833-638-4722).
- The Murdered and Missing Indigenous Women and Girls' Crisis Line is available to assist individuals affected by the issue of murdered and missing Indigenous women and girls through a toll-free number: 1-844-413-6649.

Contact Us

If you have any issues with signing on or using the Law Society's Brightspace online learning platform, please contact professionaldevelopment@lsbc.org .

If you have questions or feedback on the Indigenous Intercultural Course, please contact Indigenous@lsbc.org .

MODULE 2 – INDIGENOUS PEOPLES, LAW, AND GOVERNANCE (time estimate: 40 minutes)

Indigenous peoples have lived in what is now known as British Columbia since time immemorial (at least 12,000 years). Over that history, they developed their own societies, laws, and systems of governance. It is not possible to give a full account of several millennia of Indigenous history prior to the arrival of Europeans within the time constraints of a six-hour introductory course. This section includes a very brief overview of Indigenous peoples, laws, and governance to provide some context as a necessary starting point for learning about colonization. Supplementary resources are provided for those interested in more detailed information about Indigenous peoples, laws, and governance.

Learning Outcomes

This module will help you to:

- Appreciate the distinctions among First Nations, Métis, and Inuit;
- Understand the significance of Indigenous law; and
- Recognize common components of Indigenous governance systems.

2.1 – Indigenous Peoples

Introduction

Indigenous individuals make up approximately 5% of the Canadian population. Indigenous Peoples include First Nations, Métis, and Inuit, and they live all over Canada. There have been many challenges imposed by colonization, including colonially imposed rules about who can be classified as "Indigenous." These imposed definitions and classifications have deprived many Indigenous individuals of their roots and historical identities. Today, Indigenous Nations and individuals are challenged by this legacy.

Indigenous Peoples

Indigenous means "originating in a particular place." In relation to Indigenous Peoples within the area now commonly known as Canada, it is a collective noun that includes First Nations, Métis, and Inuit. It is important to note that there may be regional, contextual, and personal preferences for terms. For example, in the legal context, the *Constitution* uses the term "Aboriginal," and the *Indian Act* uses the term "Indian."

Key Terms

Many of these definitions come from the Senate Committee Report entitled *How Did We Get Here? A Concise, Unvarnished Account of the History of the Relationship Between Indigenous Peoples and Canada, 2019* (Unvarnished History).

Indigenous: from the Latin term “indigena,” meaning “sprung from the land; native.” For many years, the term “Indigenous Peoples” was used primarily in the international context. Over the past few years, “Indigenous” has become the preferred term to collectively refer to First Nations, Métis, and Inuit in Canada. This shift in domestic usage relates in part to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the United Nations General Assembly in 2007, and Canada’s endorsement of UNDRIP in 2016.

Indigenous Peoples: commonly used as a collective term for all of the original peoples of Canada and their descendants.

Indigenous people: (with a lowercase “people”) refers to Indigenous individuals rather than the collective group of Indigenous Peoples.

Aboriginal: section 35(2) of the *Constitution Act, 1982* defines the "Aboriginal peoples of Canada" as including “the Indian, Inuit, and Métis peoples.” Accordingly, "Aboriginal" is sometimes used as an all-encompassing term that includes First Nations (Indians), Inuit, and Métis, and in reference to section 35 of the *Constitution*.

First Nation: a group of Indigenous Peoples that the federal government officially recognizes as an administrative unit under the *Indian Act*, or that functions as such without official status. The term came into common usage in the 1970s to (largely, but not entirely) replace the term "Indian band". The term excludes Inuit and Métis peoples. An individual may identify as a “First Nations person.”

Indian band: a group of "Indians" that that the federal government recognizes as an administrative unit under the *Indian Act.* The term "First Nation" has (largely, but not entirely) replaced the term "Indian band" in common usage.

Indian: an outdated descriptor that refers to individuals in relation to the *Indian Act*. In the context of Indigenous Peoples, it should only be used with specific reference to the *Indian Act*.

Status Indian: an individual who is registered as an “Indian” in accordance with the provisions of the *Indian Act*. Eligibility rules for Indian registration have frequently changed since the first *Indian Act* was passed in 1876.

Non-status Indian: an individual who does not meet the eligibility requirements to be registered as a “status Indian” under the *Indian Act* rules, but is nonetheless affiliated with an Indian band or First Nation (rather than with an Inuit or Métis community).

Inuit: a circumpolar people who live primarily in four regions of Canada: the Nunavut territory, Nunavik, Nunatsiavut and the Inuvialuit Settlement Region, collectively known as Inuit Nunangat. Inuk is the singular form of Inuit and is used when referring to a single person.

Métis: there is no uniformly accepted definition of Métis. Some describe the Métis people as descendants of the historic Métis Nation, including those persons whose ancestors inhabited western and northern Canada and received land grants or scrip. A broader definition includes all persons of mixed Indigenous and non-Indigenous ancestry who identify themselves as Métis.

Urban Indigenous people: all cities within North and South America have been built on Indigenous territories, and the original Indigenous inhabitants often continue to live where these cities have emerged. Many Indigenous individuals from other Indigenous territories also move to urban centres for a variety of reasons (e.g., education and employment).

Imposed Definitions

Some of these divisions or groupings do not reflect the ways in which Indigenous Peoples define or group themselves. For example, "First Nations" and "Indian bands" are subgroups of broader Indigenous nations that existed before Indigenous contact with Europeans, and "Indian," "status Indian," and "non-status Indian" are artificial categories that have been imposed by the federal government.

Indigenous identity is complex and fragmented. Externally imposed definitions continue to perpetuate "divide and conquer" tactics that lead to discord, isolation, and exclusion. Some consequences of externally imposed definitions will be examined later in the course.

Population Statistics

Nationally

The 2016 Census reported there were 1,673,785 Indigenous people in Canada, representing 4.9% of the Canadian population.

Of these:

- 58.4% (977,230) were First Nations
- 35.1% (587,545) were Métis
- 3.9% (65,025) were Inuit

From 2006 to 2016 the Indigenous population increased by 42.5%, which was four times the growth rate of non-Indigenous Canadians during that period.

British Columbia

The 2016 Census showed Indigenous people made up 5.9% (270,585) of the British Columbia population. Of these:

- 63.8% were First Nations
- 33% were Métis
- 0.6% were Inuit

Indigenous FAQs (supplemental)

The Indigenous Frequently Asked Questions (FAQs) section, including the subsections entitled "First Nations FAQs," "Metis FAQs," "Inuit FAQs," and "Urban Indigenous People" are offered as supplemental material. They are not part of the mandatory content.

The subsections include nuanced information that will be explained in later modules (e.g., who the *Indian Act* does and does not apply to). Learners without pre-existing knowledge about Indigenous issues may find it beneficial to return to this section after reviewing the mandatory components of the course.

First Nations FAQs (supplemental)

In Canada, "First Nations" is the term used to refer to people who are Indigenous and who do not identify as "Inuit" or "Métis". In the past, First Nations people were referred to as “Indians.” First Nations people have lived and thrived since time immemorial across North America. They have many different languages, cultures, traditions, and spiritual beliefs.

Today, there are 634 different First Nations in Canada, and approximately 60 different language groups. It is important to note that these 634 First Nations are a federal government creation under the *Indian Act* reserve system. Federal laws and policies sought to divide Indigenous Nations into smaller units ("Indian bands") whose composition was determined by the federal

government. "First Nations" is now the accepted term, replacing the term “Indian” (which is considered an offensive colonial term). The term "Indian" may still be used in specific legal contexts (e.g., in reference to the *Indian Act*).

Who are First Nations?

Section 35(2) of the *Canadian Constitution Act, 1982* establishes that “Aboriginal peoples of Canada” include the Indian, Inuit and Métis peoples. First Nations are one of the three recognized groups under the term "Aboriginal Peoples". They are different from Métis and Inuit. First Nations existed and thrived prior to contact with Europeans.

How many First Nations people are there?

First Nations make up the largest group of Indigenous people in Canada. According to the 2016 National Household Survey, there were 977,230 First Nations people in Canada which is over 60% of the total number of Indigenous people. There are currently around 634 recognized First Nations across Canada, approximately half of which are in the provinces of Ontario and British Columbia.

Where do First Nations people live?

First Nations live in every province and territory. The chart below shows the provincial and territorial population totals, as well as the First Nations, Inuit, and Métis populations (sources: 2016 Canadian Census and Aboriginal Population Profile, 2016 Census).

Province or Territory	Total Population (rounded)	First Nations	Inuit	Métis	Total Indigenous Population (at Dec 31 2016)
Alberta	4,430,000	6.4%	0.1%	2.9%	9.4% - 258,640
British Columbia	5,145,000	3.8%	0.00%	2.0%	5.8% - 270,585
Manitoba	1,380,000	10.5%	0.0%	7.2%	17.7% - 223,310
New Brunswick	781,000	2.4%	0.1%	1.4%	3.9% - 29,380
Newfoundland & Labrador	521,000	2.8%	.2%	1.7%	4.7% - 45,725
Northwest Territories	45,000	32.1%	9.9%	8.2%	48.2% - 20,860

Province or Territory	Total Population (rounded)	First Nations	Inuit	Métis	Total Indigenous Population (at Dec 31 2016)
Nova Scotia	979,000	2.8%	0.1%	2.6%	5.5% - 51,495
Nunavut	39,000	.5%	84.7%	0.5%	85.7% - 30,550
Ontario	14,733,000	1.8%	0.0%	0.9%	2.7% - 374,395
Prince Edward Island	160,000	1.3%	0.1%	0.5%	1.9% - 2,740
Quebec	8,576,000	1.2%	0.2%	0.9%	2.3% - 182,890
Saskatchewan	1,178,000	10.7%	0.0%	5.4%	16.1% - 175,015
Yukon	42,000	19.1%	0.6%	2.9%	22.6% - 8,195
Total 2020	**38,000,000**	**N/A**	**N/A**	**N/A**	**N/A**
Total 2016	**34,460,065**	**977,223**	**65,025**	**587,545**	**4.9% - 1,673,780**

Do all First Nations live on reserves?

No, they do not all live on reserves. In 2016, the statistics were as follows for the First Nations people who reported being "Registered First Nations":

Region	Percent of Registered First Nations on Reserve
Canada	49.3% (637,660)
B.C.	42%
Quebec	42.7%
New Brunswick	43.6%
Nova Scotia	36.4%
Ontario	21.9%

Newfoundland and Labrador	20%
P.E.I	28.8%
Manitoba	44.9%
Saskatchewan	44.4%
Alberta	18.7%

Many First Nations people would like to live on their reserves, but there are many reasons why they cannot, such as: there is no land available on reserve, there is insufficient housing, the reserves are too far away from employment opportunities, and inadequate infrastructure. (For example, as of January 7, 2022, there are 37 long-term drinking water advisories in effect in 33 First Nations communities.) (See: Ending long-term drinking water advisories)

Is it okay to use the word "Indian" to describe "First Nations"?

Unless you are making a specific reference to the *Indian Act*, it is not appropriate to use the word "Indian". The use of the term "Indian" in Canada is considered outdated and offensive. However, the term appears in legal documents such as the *Indian Act* and the *Constitution Act (1982)*.

The term "Indian" is used when referring to a First Nations person with "status" under the *Indian Act* (a "registered Indian"). The *Indian Act* defines who is and who is not an "Indian". Those with status have identification cards that certify their "Indian status". The federal government decides who has status and who does not.

The term "Indian" was initially used by the first Europeans to describe North America's inhabitants because Christopher Columbus and his compatriots believed they had come ashore in India, not knowing that they had in fact arrived in the Americas.

What does "status" or "registered Indian" mean?

A "status Indian" (or "registered Indian") is a person recognized by the federal government as being entitled to be registered under the *Indian Act* as an "Indian". The membership provisions of the *Indian Act* have been a source of frustration for First Nations. Federally imposed definitions of membership have led to divisions among families and communities, displacement of First Nations people (with disproportionate impacts on women), and unequal treatment of individuals.

You may hear the term "non-status" in reference to people who identify as First Nations, but do not meet the federal criteria for inclusion on the "Indian register" pursuant to the *Indian Act*. Some non-status First Nations people may have membership in a First Nation, but lack "status" under the federal government's rules.

Do First Nations people pay taxes?

Yes, in most cases First Nations people pay taxes. It is a misconception that First Nations people in Canada do not pay federal or provincial taxes. First Nations pay income tax and sales tax like other Canadian citizens, except in very limited situations. Status Indians do not have to pay tax on income that is earned on an Indian reserve. Any goods or services purchased by, or delivered to, a status Indian on an Indian reserve may be exempt from sales tax. In BC, all income earned and purchases made outside of an Indian reserve are taxable. "Non-status" First Nations, Inuit, and Métis people are not eligible for any tax exemptions.

Do First Nations people receive free housing?

No. There are two main categories of housing on reserve:

- Market-based housing
- Non-profit social housing

Market-based housing refers to households paying the full cost associated with purchasing or renting housing. This is not free housing. The Canadian Mortgage and Housing Corporation (CMHC) delivers housing programs and services across the country and on reserves.

Do First Nations students receive free post-secondary education?

No, First Nations students do not receive "free" post-secondary education, though some students do receive some financial support from their First Nations for tuition. Whether or not a student receives funding depends on the First Nation to which the student belongs, and whether the First Nation has funding available for students. The demand for funding is often greater than the funds available, so some students may not receive any funding. Even where funding is provided for post-secondary education, it is usually not for the full cost of tuition. Many First Nations do not have sufficient resources to provide any funding for professional degrees or graduate level education. Moreover, available funding often fails to provide for necessary learning tools such as computers, laboratory materials, safety equipment (e.g., steel toed boots for construction courses), and specialized equipment (e.g., knives for culinary training).

Métis FAQs (supplemental)

In the 17th and 18th centuries, many French and Scottish men migrated to Canada to work in the fur trade with the Hudson’s Bay Company, the Northwest Company, or as independent traders.

Some newcomers married and had children with First Nations women and formed new communities. The French mixed families, and their descendants, were most often referred to as Métis (from the French word “to mix”).

The Scottish mixed families and their descendants were often referred to as “half-breeds” by the government and other non-Indigenous people. Today the term “half-breed” is considered offensive, and is no longer used.

Who are the Métis?

The Métis People are one of the three constitutionally recognized Aboriginal Peoples in Canada. They trace their descent from mixed ancestry of First Nations and Europeans, and accordingly arise as a distinct people after Indigenous contact with Europeans.

Métis are not First Nations or Inuit. They are a distinct Indigenous group.

Not everyone agrees on the definition of who was Métis historically, or who is Métis today. However, in its 2002 General Assembly, the Métis National Council adopted the following definition of Métis:

> *"Métis means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation Ancestry and who is accepted by the Métis Nation."*

Are all “mixed” people Métis?

Many Canadians have mixed Indigenous and non-Indigenous ancestry, but that does not necessarily make them Métis. Some people draw a distinction between uppercase "M" Métis (i.e., recognized members of the Métis Nation) and lowercase "m" métis (i.e., individuals with mixed ancestries who are not members of the Métis Nation). (See: Identity | Indigenous Peoples Atlas of Canada.)

What distinguishes Métis People from others is that they have mixed Indigenous ancestry which can be traced back to a community of people who made a political decision to identify with each other because of their shared history and distinct culture within a specific region. (Module 3 contains a video that explains the origins of the Métis Nation.)

How many Métis are there, and where do they live?

In 2016, 587,545 people identified as Métis. They represented 35.1% of the total Indigenous population and 1.7% of the total Canadian population.

Historically, Métis communities and culture developed during the fur trade in south-eastern Rupert’s Land, primarily in the Red River Settlement (in Saskatchewan along the South Saskatchewan River).

Most of the South Branch Settlements were permanently settled after Manitoba became a province in 1870. The Métis found it difficult to continue to live as they had before, as the railway brought thousands of new settlers to the Red River Settlement.

In the present day, Métis people live throughout Canada and beyond (see: The Standing Senate Committee on Aboriginal Peoples).

Is there a legal definition of Métis?

There is no comprehensive legal definition of Métis people in Canada; this is in contrast to the *Indian Act*, which creates an Indian Register for all First Nations individuals with "Indian status". Alberta is the only province to have defined the term in law. The *Alberta Métis Settlements Act* defines a Métis as "a person of Aboriginal ancestry who identifies with Métis history and culture."

The *R. v. Powley* decision laid out criteria for who could be considered Métis for the purposes of claiming section 35 constitutional rights, as a "person of Aboriginal ancestry; who self-identifies as a Métis; and who is accepted by the Métis community as a Métis." The court did not define Métis identity for cultural purposes; it only defined criteria for Métis rights-holders.

What is Métis culture?

Traditional markers of (Prairie) Métis culture include use of creole Indigenous-European languages such as *Michif* and *Bungi*; distinctive clothing, such as the arrow sash (ceinture flechee); and a rich repertoire of fiddle music, jigs and square dances, as well as a traditional economy based on hunting, trapping and gathering.

In addition to English and/or French, Métis people have historically spoken languages which contain a mix of words taken from Indigenous and non-Indigenous languages.

Two examples are *Michif* (French-Cree-Dene) and *Bungi* (Cree-Ojibwa-English). Most of the Métis who were engaged in the fur trade spoke Cree because it was the trade language, and at least one other European language. They would often speak a mixed language like Michif or Bungi when they spoke with each other.

Do Métis pay taxes?

Yes. Métis pay taxes.

Some people wonder if the *Daniels v. Canada* decision changes the tax situation of Métis people. However, *Daniels* confirmed that Métis people fall under federal jurisdiction with respect to section 91(24) of the *Constitution.* Tax exemption occurs under section 87 of the *Indian Act*, and the *Indian Act* does not apply to Métis people.

Inuit FAQs (supplemental)

Inuit are a group of Indigenous Peoples living in the northern regions of Canada, Greenland and Alaska. They do not identify as First Nation or Métis.

Historically they have been referred to as "Eskimos," but this term is neither accurate nor respectful, and should not be used. Inuit have lived in the Arctic since time immemorial.

Who are the Inuit?

Inuit are people Indigenous to northern Canada. Some Europeans formerly called them "Eskimos" or "Esquimaux," but these terms are offensive, and the correct term is "Inuit". "Inuit" means “the people” in the Inuktitut language, so you do not need to say "Inuit people" (as that means "people people"). An "Inuk" is one person.

Where do Inuit live?

Inuit live in 53 communities across the northern regions of Canada. Most Inuit live in communities along the Arctic coast. In Canada, Inuit live in four settlement areas in the Northwest Territories, Nunavut, Northern Quebec, and Labrador.

Inuit no longer live in igloos, but igloos are still used as temporary shelter while Inuit are hunting.

How many Inuit are there?

Approximately 155,000 Inuit live across the world - in Canada, Greenland, Alaska, and Russia.

According to the 2016 Census, there were approximately 65,025 Inuit in Canada, of which 30,140 lived in Nunavut. There were approximately 8,395 Inuit living in urban centres in southern Canada.

Are Inuit First Nations?

The Canadian *Constitution* recognizes three groups of Aboriginal Peoples: First Nations, Métis, and Inuit. These are three separate groups with unique heritages, languages, cultural practices, and spiritual beliefs. Inuit are distinct from First Nation and Métis Peoples.

In *Re Eskimo*, the Supreme Court of Canada stated that Inuit fall under federal jurisdiction via section 91(24) of the *Constitution*. The 1939 decision was based on the historic description of the "Esquimaux" [Inuit] as an "Indian tribe" in numerous documents dating from 1760 to Confederation.

What language do Inuit speak?

Inuit have one language called Inuktitut. It is spoken in the Northwest Territories, Nunavut, Northern Quebec and Nunatsiavut (Labrador), but each region has its own dialects.

Do Inuit pay taxes?

Yes, Inuit pay taxes. Tax exemptions occur under section 87 of the *Indian Act,* and Inuit are not subject to the *Indian Act.*

Who are the Innu?

The Innu are a First Nation in eastern Canada. They are not Inuit. There is often confusion between the two. The Innu were formally known as the Montagnais-Naskapi in eastern Quebec and Newfoundland and Labrador.

Urban Indigenous (supplemental)

Well over half of Indigenous people in Canada live in urban centres. Vancouver has the third largest urban Indigenous population in Canada, with 40,310 Indigenous people.

Statistics

- From 2006 to 2016, the urban Indigenous population grew by 39.3% for First Nations, 51.2% for Métis and 29.1% for Inuit. The urban Indigenous population is the fastest growing segment of Canadian society.
- Métis are the most likely of the three Indigenous groups to live in a city with 62.6%.

Indigenous People in Large Urban Centres

Many Indigenous people move to cities seeking employment or educational opportunities. Some Indigenous people have lived in cities for generations, while for others, the transition from rural areas or reserves to urban settings is still very new.

Many Canadian cities occupy First Nations' traditional territories and reserves. For example, Vancouver lies on the traditional territories of the Musqueam, Squamish, and Tsleil-Waututh Nations.

Many urban Indigenous people consider the city they live in to be their "home". However, many urban Indigenous people maintain close connections to their Indigenous community of origin (e.g., the place where they were born, or where their parents or grandparents lived).

In Vancouver

Vancouver's urban Indigenous people are an important and visible part of the city's life. According to the Urban Aboriginal Peoples Study:

- 83% of Indigenous Vancouverites are "very proud" of their Indigenous identity;
- 52% are "very proud" of being Canadian;
- 44% are not concerned about losing their cultural identity. They feel it is strong enough to continue and that they can protect it;
- 70% think Indigenous culture has become stronger in the last 5 years;
- 25% hope that young Indigenous people from the next generation will stay connected to their cultural community; and
- 17% hope that young Indigenous people will experience life without racism and discrimination.

In Metro Vancouver, Surrey saw the biggest increase in its Indigenous population, which grew 77% between 2006 and 2016 to 13,460, according to numbers calculated from the Census by demographer Andy Yan, head of the City Program at Simon Fraser University.

Across Metro Vancouver, the Indigenous population topped 61,455, according to the 2016 Census, which is 3 times the Indigenous population in Victoria (17,245) and approximately 5 times the population in Prince George (12,395).

The Indigenous populations in other major cities (in 2016) were:

- Kelowna - 11,370
- Kamloops - 10,700
- Abbotsford/Mission - 9,755
- Chilliwack - 9,585
- Nanaimo - 8,265
- Duncan - 5,775
- Prince Rupert - 4,855

2.2 – Indigenous Law

Introduction

> *"As a matter of logic alone, our starting point has to be that, for a very long time, all Indigenous groups had self-complete, non-state systems of social ordering that were successful enough for them to continue as societies for tens of thousands of years.… We can logically assume that Indigenous legal traditions of the past, while not paragons of perfection (and no legal order is ever perfect), were reasonable legal orders managed by intelligent and reasoning people. This is our logical starting point."*
>
> Val Napoleon and Hadley Friedland, Roots to Renaissance at 3-4.

Indigenous Law

> *"Indigenous Legal Traditions have a long rich history in North America, stretching back hundreds if not thousands of years. Living together in societies long before the arrival of the first Europeans, Aboriginal peoples developed complex systems of laws based on social, spiritual and political values expressed through the teachings of knowledgeable and respected individuals and leaders. Enunciated in rich stories, ceremonies, and traditions within Native communities, Indigenous legal systems represent the accumulated wisdom and experience of Aboriginal peoples."*
>
> Law Commission of Canada, ed. Indigenous Legal Traditions, at ix.

Key Terms

Indigenous societies: share a history, land base, language, social and political orders, and law (see the Royal Commission on Aboriginal Peoples, 1996).

Indigenous law: originates within Indigenous societies, and is embedded in Indigenous legal orders, protocols, and laws that predate colonization.

Indigenous territories: "Historically, each Indigenous society's territory was the area they could defend both physically and legally according to their Indigenous legal orders" (Val Napoleon, "What is Indigenous Law?"). Later in the course, colonial processes that have fragmented Indigenous territories (e.g., through the creation of Indian reserves) will be examined.

Traditional territory: This term acknowledges that Indigenous Peoples have territorial connections to large tracts of land. It refers to the geographic area identified by Indigenous nations as the area of land which they use and occupy as their ancestors have done since time immemorial. Traditional territories extend beyond reserve lands.

Indian reserve: "a tract of land...that has been set apart by Her Majesty for the use and benefit of [an Indian] band" (*Indian Act*, s. 2(1)).

Unceded: title to the land was never transferred from Indigenous people to the Crown. A later section of the course will explain that much of the land in British Columbia remains unceded. Across the country, some Indigenous nations have "peace and friendship" treaties that did not cede title to land.

Aboriginal law: "a body of law, made by the courts and legislatures, that largely deals with the unique constitutional rights of Aboriginal peoples [as defined in section 35 of the *Constitution*] and the relationship between Aboriginal peoples and the Crown" (Making Space for Indigenous Law).

This video (produced by the Indigenous Law Research Unit, housed at the University of Victoria) will give you a brief overview of what Indigenous law is, where it comes from, and how it operates: IIC: Indigenous Law (vimeo.com)

Five Sources of Indigenous Law

Anishinaabe scholar John Borrows is from the Chippewas of the Nawash First Nation in Ontario and currently the Canada Research Chair in Indigenous Law at the University of Victoria Law School. Borrows categorizes Indigenous law into five sources, but cautions against treating these sources as separate because, in actuality, "Indigenous legal traditions usually involve the interaction of two or more . . . sources" (John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 55).

1) Sacred Law

Laws are sacred if they "stem from the Creator, creation stories or revered ancient teachings that have withstood the test of time. When laws exist within these categories, they are often given the highest respect." Examples of this type of law are the Creation Stories which contain "rules and norms that give guidance about how to live with the world and overcome conflict" (*Ibid,* at 25).

2) Natural Law

Natural law is developed by Indigenous people from "observations of the physical world around them...[and] this approach to legal interpretation attempts to develop rules for regulation and conflict resolution from a student of the world's behaviours" (*Ibid*, at 28).

3) Deliberative Law

Deliberative law is an "especially broad source of Indigenous legal traditions formed through processes of persuasion, deliberation, council and discussion," or to put it another way, it is formed by people talking to each other. This law demonstrates that Indigenous law is not static and can be continuously updated and responsive to change, time, and the environment *(Ibid,* at 35).

4) Positivistic Law

Positivistic law can be found in "proclamations, rules, regulations, codes, teachings, and axioms that are regarded as binding or regulating people's behaviours... [which are distinct from the other laws] because they do not necessarily depend on appeals to the Creator, the environment, or deliberative processes to possess their force.... [They] have weight because proclamations are made by people with authority and power such as hereditary chiefs, clan mothers, headmen, sachems, or band leaders" *(Ibid,* at 46).

5) Customary Law

Customary law can be defined as "those practices developed through repetitive patterns of social interactions that are accepted as binding on those who participate in them and they are often inductive, meaning that observations of specific behaviour often lead to general conclusions about how to act [thus producing obligations that] are regularly implied from a society's surround context" *(Ibid,* at 51).

Self-Reflection

- Do you notice any similarities between the sources of Indigenous law and those of Canadian law?

Some Aspects of Indigenous Law

Oral Traditions

Indigenous peoples transmit values, histories, and laws through oral histories.

Oral histories have been passed down from generation to generation and are essential to maintaining Indigenous identity, culture, and laws. People repeat their oral histories to keep information alive over generations. Often, particular people within Indigenous communities have a specific role to memorize and repeat oral histories with great care. These people are often called "witnesses." Elders often have a significant role in the transmission of oral histories.

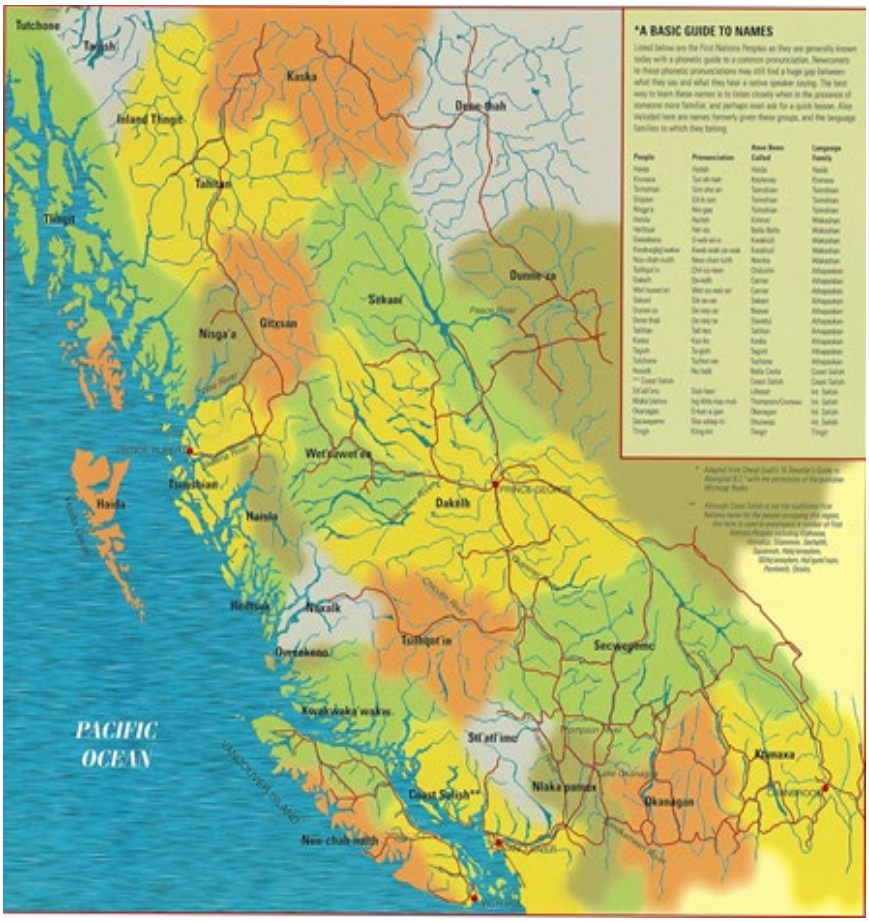
Many Indigenous societies convey oral histories through symbolic objects. For example, in Onondaga and Haudenosaunee societies, belts made of wampum shells are used as a form of visual communication. Wampum belts have been used to record agreements between Indigenous nations long before Europeans arrived in Indigenous territories. In accordance with Indigenous legal traditions, wampum belts were used to record early treaties between Indigenous and European nations. (See: Wampum – Onondaga Nation) On the Pacific Northwest Coast, totem poles and button blankets are examples of visual representations of oral histories.

Indigenous Territories

"Historically, each Indigenous society's territory was the area they could defend both physically and legally according to their Indigenous legal orders." (Val Napoleon, ""What is Indigenous Law?" at 2.) Indigenous territories have been impacted by colonial processes, such as the demarcation of Indian reserves, and the allotment of fee simple land to settlers. However, many Indigenous people continue to use, occupy, and assert ownership over Indigenous territories in their entirety.

Within Indigenous territories, specific tracts of land may be collectively owned and used by extended families, under the leadership of hereditary chiefs. There are often agreements among hereditary chiefs, including those from neighbouring nations, regarding shared territories. For example, where one territory is rich in fish, and another area is rich in wildlife, the hereditary chiefs of the respective areas may agree to an exchange of permissions within each territory (e.g., one may allow the other to use a fishing site in exchange for the use of a hunting site).

The land now known as British Columbia has 34 unique Indigenous languages and over 90 dialects, making up 60 per cent of all Indigenous languages in Canada. These language groupings generally align with the Indigenous societies that existed when newcomers first arrived in British Columbia, and the map below shows the location of language groups in the province. The colonial creation of Indian bands has fragmented Indigenous nations into smaller administrative units, now commonly referred to as "First Nations." British Columbia is currently home to 203 First Nations, which is about one third of all First Nations in Canada.



A larger version of the map is available online: [BC First Nations Map]

There were (and are) territorial conflicts, and Indigenous law includes dispute resolution processes, including treaty-making.

Indigenous Treaties

Indigenous nations have a long history of making agreements and alliances between and amongst themselves. One of the better known examples is the Haudenosaunee Confederacy, which united the Iroquois nations into the Great Law of Peace or the Kaianere'ko:wa. They used a wampum belt (see the image below) to symbolize this Peace Agreement, and it is still in effect today.

The Haudenosaunee Confederacy is said to be the oldest living participatory democracy on earth, founded in 1142 (Dating the Iroquois Confederacy). The intent was to preserve and protect the "independence and liberties of individuals, each clan, and each nation while uniting...[and committing]...to inward well-being and outward strength. Raw materials and hunting grounds were to be shared. All religions were to be accepted. Unauthorized search was prohibited. Immigration into a nation with the League was welcomed regardless of ethnicity, but predicated upon the acceptance of the Great Law." (Great Law of Peace).

Ownership of Cultural Property

Each Indigenous society has its own historical and traditional stories, songs, and dances. Different societies have different rules about ownership. Some songs, names, symbols, and dances belong to certain individuals or families, and it is a violation of Indigenous law for others to use such cultural property without permission. Some songs and dances are openly shared among different families, clans, and communities. For example, it is common for Potlatches to conclude with a "friendship dance" that uses a song shared among many nations, and all visitors are encouraged to participate.

Practical Applications of Indigenous Law

Val Napoleon cautions against romanticizing Indigenous law, as doing so may undermine the practical applicability of Indigenous legal orders. To restrain romanticization, we "have to apply the same critical thought to our Indigenous legal orders and laws as we do to western law." ("Thinking About Indigenous Legal Orders," *National Centre for First Nations Governance Report* (2007) at 16.) Indigenous laws have been practically applied in the following ways:

Recognized by Common Law

Indigenous law has been recognized by the common law. Indigenous marriage laws have been acknowledged and enforced in *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, (Qc. Sup. Ct.), aff'd (1869), 17 R.J.R.Q. 266, (Qc. Q.B.), and in *The Queen v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.W.T. Sup. Ct.) (Mark Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711-752). More recently, in *R. v. Côté*, the Supreme Court of Canada held that "under the legal principles of British conquest, the pre-existing laws governing the acquired territory of New France were received and continued in the absence of subsequent legislative modification" (at para. 49).

Basis of Aboriginal Law

Indigenous laws also form the basis of Aboriginal law. The Supreme Court of Canada has recognized the pre-existence of Indigenous societies on Indigenous territories prior to the assertion of Crown sovereignty as the basis for Aboriginal title and rights. In pursuit of Aboriginal title and rights claims under section 35(1) of the *Constitution,* Indigenous people have

relied on Indigenous laws to explain their ownership, rights, and responsibilities with respect to their lands, resources, and traditions.

Indigenous Assertions

Indigenous nations have also asserted their laws to:

1. conduct environmental assessments of proposed developments that threaten Indigenous territories (e.g., Tsleil-Waututh Environmental Assessment);
2. develop land use plans to inform resource management decisions in Indigenous territories (e.g., St'at'imc Land Use Plan); and
3. control alcohol use in Indigenous communities (e.g., Grassy Narrows)

Self-Reflection

As the Honourable Chief Justice Lance Finch stated in the "Duty to Learn: Taking Account of Indigenous Legal Orders in Practice", Indigenous intercultural competency requires lawyers to learn about and make space for Indigenous laws:

> *"How can we make space within the legal landscape for Indigenous legal orders? The answer depends, at least in part, on an inversion of the question: a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves." (at 44)*

He further proposed a three-step process of recognition:

> *"[F]irst, by recognizing the true nature and scope of the challenge; second by recognizing the perceptions and limitations which hamper the existing Canadian legal perspective; and third, by recognizing the need for humility, respect and receptivity in our individual and collective approaches to Indigenous legal orders." (at 8)*

- Take a moment to reflect on how you might apply this process of recognition in your legal work.

Want to Know More?

For more information on Indigenous law, see the following websites:

- Indigenous Law Research Unit (ilru.ca)
- Indigenous Law | West Coast Environmental Law (wcel.org)
- Indigenous Law & Canadian Courts (firstpeopleslaw.com)

Read John Borrows' book, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010)

2.3 – Indigenous Governance

Introduction

Since time immemorial, Indigenous societies have lived on this land now called Canada, and governed themselves according to their needs, values, and beliefs.

> *"At contact with Europeans, each of the hundreds of Indigenous Peoples of Indigenous America possessed all the elements of nationhood that were well-established by European settlers: territory, governing structures, legal systems, and a historical continuity with our territories."*
>
> Sharon Venne, Cree

Indigenous Governance

Prior to the arrival of newcomers to Indigenous territories, Indigenous nations had strong and effective governance systems. Although Indigenous governance has been interrupted by colonization, many aspects of Indigenous governance continue, and many Indigenous nations are in the process of rebuilding their governance systems. Later in the course, some of the ways Indigenous nations are working toward self-government and self-determination will be reviewed.

Key Terms

Governance: comprises all of the processes of interaction and decision-making among the actors in a social system. It includes the laws, protocols, societal norms, and power dynamics that groups apply in pursuit of collective goals.

Indigenous governance: the ways in which Indigenous Peoples have governed themselves since time immemorial, including through their: legal orders; traditional institutions; diplomatic practices and protocols; collective organization (e.g., nations, confederacies, tribes, clans, and extended families); and ceremonies. (Britannica) Indigenous governance systems predate colonization, and continue to operate in the present day.

Nation: "a large body of people united by common descent, history, culture, or language, inhabiting a particular state or territory." (Oxford)

Potlatch: Potlatches are a central feature of many Pacific Coastal First Nations' governance systems, and may be used to reaffirm family, clan, and international connections; to validate

legal matters such as births, adoptions, names, marriages, deaths, and the transmission of property; and to negotiate and affirm rights to specific territories and resources. (Wikipedia)

Sovereignty: the supreme authority within a territory. International law defines sovereign states as having a permanent population, defined territory, government, and the capacity to enter into relations with other sovereign states (Montevideo Convention on Rights and Duties of States).

In *R v. Sioui*, the Supreme Court of Canada unanimously found that the Huron Nation was an independent sovereign nation when it negotiated a treaty with a representative of the British Crown in 1760. The court suggested all Indigenous nations held a similar status at that time. The course will reveal that Indigenous sovereignty has been subverted through processes of colonization.

Self-determination: codified by article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which states: "Indigenous Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Self-government: codified under article 4 of UNDRIP, which states: "Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

Indigenous Governance

Indigenous governance involves patterns and practices of rule by which Indigenous people govern themselves. According to the Indigenous Governance Toolkit, what makes governance "Indigenous" is the role that Indigenous social and philosophical systems, cultural values, traditions, rules, and beliefs play in the governance of:

- processes—how things are done;
- structures—the ways people organize themselves and relate to each other;
- institutions—the rules for how things should be done.

Like all societies around the world, governance is intrinsically connected to the society, traditions, culture, and landscape from which the governance system has emerged. Indigenous governance systems are accordingly diverse.

Even so, in *Peace, Power, Righteousness: an Indigenous Manifesto* (Don Mills: Oxford University Press, 1999), Taiaike Alfred identifies a number of common aspects of many Indigenous governance systems in North America:

- Respectful coexistence is a fundamental principle of Indigenous government (at xiv).
- There is a recognition of a universal interdependency, not only among people, but among all elements of creation (at xvi).

- There is no central or coercive authority (at 25). Instead, decision-making is collective. Government is seen as the collective power of the individuals of a nation. Leadership is exercised by persuading individuals to pool their self-power in the interest of the collective good (Ibid).
- The clan or extended family is the basic unit of social organization, and larger forms of organization, from tribe through nation to confederacy, are all predicated on the political autonomy and economic independence of clan units through family-based control of lands and resources. Decision-making processes are organized around the clan (at 25 to 26).
- The governance process consists in the structured interplay of three kinds of power: individual power, persuasive power, and the power of tradition (at 26).

Example: Nuxalk Governance

A few aspects of Indigenous governance, including structure, citizenship, leadership, and territory are briefly outlined in the following example of the Nuxalk Nation, located on the central coast of British Columbia. The example consists of excerpts from Andrea Hilland, *Extinguishment by Extirpation: the Nuxalk Eulachon Crisis*, (LL.M. Thesis, University of British Columbia Faculty of Law, 2013).

Structure

"Nuxalk governance emerges from Nuxalk oral histories regarding the origin of Nuxalk people (ʔNuxalkmc'). Nuxalkmc believe that they arrived on earth in animal form before transforming into human form. Nuxalkmc remain connected to their ancestral animals through a clan system. Each clan consists of extended family members who share the origin stories, names, songs, dances, and prerogatives that their family's first Nuxalk ancestors brought with them to earth" (at 34).

Citizenship

"Each Nuxalk citizen holds a name that traces back to an origin story, and endows them with rights and responsibilities under the clan system" (*Ibid*). Nuxalk citizenship may be granted to non-Nuxalkmc through marriage and adoption.

Leadership

"Each extended family clan is headed by a hereditary chief. In the Nuxalk governance system, chieftainship does not automatically flow to a specific relation. Instead, chieftainships are, to some extent, merit based. Often a hereditary chief will choose a successor, but the successor must be endorsed by his or her extended family. If the extended family will not support the successor, then the successor will not be able to fulfill his or her obligations as chief, and the chief will lose credibility and authority" (at 38).

"A chief's authority is only as strong as the chief's reputation. A chief must repeatedly validate his or her name by redistributing wealth in potlatches. Societal expectations of reciprocity

motivate chiefs to take turns redistributing wealth; such expectations go far beyond the extended family to neighbouring villages and nations" (at 38-39).

Territory

"Each hereditary chief, with the endorsement of his or her extended family clan, receives an ancestral chief's name that ties each chief back to one of the original Nuxalk ancestors who descended to earth and settled at a specific area within Nuxalk territory. Each chief is responsible for the territory on which his or her origin ancestor settled" (at 38). "The Nuxalkmc perceive a sacred bond with their ancestral territories and therefore consider land to be inalienable. Although wars with neighbouring tribes were common in pre-contact times, land was never seized" (at 35). Indigenous Peoples developed laws and diplomatic protocols to resolve territorial disputes long before the arrival Europeans.

Want to Know More?

- The Royal Commission on Aboriginal Peoples, *Restructuring the relationship* (Ottawa, 1996).
- Gordon Christie's, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019).
- Taiaike Alfred's, *Peace, Power, Righteousness: an Indigenous Manifesto* (Don Mills: Oxford University Press, 1999).

MODULE 3 – COLONIZATION (time estimate: 3 hours)

Colonization is the practice of acquiring control over another country, occupying it with settlers, and exploiting it economically. Canada is a colonial country; colonialism is the foundation of Canadian institutions and policies. Colonization is ongoing, and Indigenous people continue to be oppressed under contemporary colonial conditions. This module will review Canada's past and present colonization, and some of the impacts of colonization on Indigenous people.

Learning Outcomes

This module will help you to:

- Review early processes of colonization in Canada;
- Acknowledge the racist and dehumanizing ideologies that underlie colonization;
- Understand that colonization is ongoing;
- Appreciate that colonization is at the root of many of the contemporary challenges experienced by Indigenous people; and
- Consider some of the negative societal repercussions of colonial oppression on Indigenous people.

3.1 – Contact (time estimate: 30 minutes)

Introduction

Since time immemorial, long before the arrival of newcomers, Indigenous societies have been organized into complex, self-governing nations throughout what is now called Canada. The arrival of newcomers into Indigenous territories has brought significant changes. This section will explore the history of contact and colonization, and some of the impacts on Indigenous nations and individuals.

In a video clip from the CBC series the *8th Fire*, Wab Kinew provides a brief overview of Canadian history: 8th Fire: Wab's Walk Through History (cbc.ca)

Contact

This section considers the early processes of colonization, and some of the impacts on Indigenous societies.

Key Terms

The following definitions are paraphrased from Oxford Languages and Wikipedia:

Colonialism: the ideology that underlies the acquisition of full or partial political control over another territory, subjugating its people, occupying the land with settlers, and exploiting the lands and resources for economic gain.

Colonization: the process by which colonialism is carried out.

Colonizer: a person involved in the implementation of colonialism.

Euro-Canadian: a Canadian who is of European descent.

Newcomer: a person who has newly arrived in a place. In the context of this module, "newcomers" include people who interacted with Indigenous people, but did not necessarily settle on Indigenous territories (e.g., explorers and traders).

Settler: a person who has come from somewhere else to live on Indigenous territories.

Settler colonialism: a distinct type of colonialism that functions through the replacement of Indigenous populations with an encroaching settler society that, over time, develops a distinctive identity and sovereignty.

First Contact

Contact between Indigenous Peoples and Europeans happened at different times across North America. In approximately 1000 CE, the Norse built a small settlement at the northernmost tip of what is now known as Newfoundland. From the late 15th century, European expeditions explored various places on the East Coast of what constitutes present-day Canada, with John Cabot landing in Newfoundland in 1497. On the West Coast, the first documented contact between Indigenous people and Europeans occurred in 1774, a couple of centuries after first contact and settlement in eastern Canada.

Competing Worldviews

Indigenous Worldviews

Although there is diversity among Indigenous societies, there are some commonalities within their worldviews.

Indigenous relationships with land and resources arise from beliefs about their origins. Many Indigenous people believe that their ancestors were put onto specific territories by a "higher power" that created the world and everything in it (e.g., "Creator"). Oral histories often convey the principle that the ancestral territories and all of the resources they contain should be protected for future generations. Accordingly, there are laws against using lands and resources in ways that would sever their transmission to future generations.

In many Indigenous worldviews, everything has a spirit and deserves to be respected. Some Indigenous societies believe that their citizens have ancestral connections to "clan animals" that form the foundation of clan systems of governance; clan animals are regarded as family. The natural world is not simply a resource to control or exploit.

The Colonizers' Worldview

In the early days of colonization in North America, the British, French, and Spanish were fighting for control of the continent, which they viewed as a rich source of raw materials. Generally, in their worldview, the natural environment was seen as a resource that could be exploited for individual gain and commercial profit. Individuals and companies could become very wealthy by controlling the resources of this “New World.” The worldview of the colonizers was competitive, individualistic, and extractive.

Competing Worldviews

Indigenous people and the colonizers held different worldviews on relationships to the land, concepts of ownership and resource use, and how society should be governed.

To justify colonization, the colonizers characterized Indigenous people as inferior, primitive, savages, and heathens. The colonizers used their laws, policies, and powers to gain control over Indigenous people and make them dependent. They did not consider Indigenous laws, governments, or worldviews to be legitimate. They believed that Europeans had the right and moral obligation to rule over Indigenous people because they believed that European culture was superior, and that Indigenous people needed to assimilate and become "civilized" like Europeans.

The Doctrine of Discovery

The following video clip comes from the Anglican Church documentary entitled *Doctrine of Discovery: Stolen Lands, Strong Hearts* and explains that the doctrine of discovery is the foundation of colonial law, including Canadian law.

The Myth of Terra Nullius

European mapmakers drew unexplored landscapes as blank spaces; instead of interpreting these blank spaces as areas yet to be mapped, they saw them as empty land waiting to be settled. When Europeans arrived in the South Pacific in the land that is now Australia and New Zealand, they regarded it as *terra nullius* or “nobody’s land.” They simply ignored the fact that Indigenous Peoples had been living in these lands for thousands of years, with their own cultures and civilizations. For the newcomers, the land was theirs to colonize; this narrative was also applied in Canada.

Self-Reflection

1. What was the legal basis for the Crown's assertion of sovereignty in Canada?
2. What would it mean to recognize that the legal basis for that assertion is illegitimate?
3. How would doing so influence Indigenous nations' relationships with the Crown?

The Impact of Disease

Content Warning

The content that follows may be emotionally disturbing for some people.

When the Europeans arrived, they brought smallpox, influenza, and other diseases that were previously unknown in North America. The Indigenous population had no immunity because, unlike the Europeans, they did not have centuries of exposure to these diseases.

In British Columbia, several epidemics hit the Indigenous population during the early contact period. Experts estimate that "the Indigenous population declined by 90% from pre-contact to 1890 as a result of diseases introduced by newcomers." (Mary-Ellen Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia, 1900-1950*. UBC Press: Vancouver, 1998 at 4.) "From an estimated population of over a million before the arrival of Europeans, the Indigenous population had plunged to 22,605 by 1929." (See: First Nations Health Authority at 19.)

> *"The drastic depopulations that accompanied the contact process…encouraged the [colonial] assumption that lands occupied for thousands of years were undeveloped…. The 30,000 to 40,000 [Indigenous] people in British Columbia in the mid-1860s, perhaps no more than 10 percent of the number a hundred years earlier, still claimed all the land in…their [traditional] territories, but used most of it far less intensively than they had. Large areas were almost completely depopulated."*
>
> Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia*, (Vancouver: UBC Press, 2002) at 47.

Indigenous people were seen as a "dying race," and their land was perceived as open for the taking by settlers.

There is historical evidence that colonizers deliberately infected Indigenous people with diseases. The first documented case of biological warfare occurred in the Seven Years' War in the 18th century. The British distributed contaminated blankets from a smallpox hospital to Indigenous people with the intent of initiating outbreaks. A smallpox epidemic killed more than 50% of affected tribes. (Elizabeth Fenn, "Biological Warfare in Eighteenth-Century North America: Beyond Jeffery Amherst" *The Journal of American* History, Vol. 86, No. 4 (Mar., 2000), pp. 1552-1580.) Some historians question whether the infected blankets actually caused the epidemic, but there is no doubt that the British devised and executed the strategy.

It is unclear how often the strategy was used, but many Indigenous oral histories convey the belief that colonizers deliberately infected Indigenous people with diseases. Some historians concur that intentional infection was a tactic that colonizers employed to subdue Indigenous uprisings and to clear Indigenous people from the land. (E.g., Tom Swanky, *The True Story of Canada's War of Extermination on the Pacific* (Dragon Heart Enterprises, 2012); Barbara Mann, *The Tainted Gift: The Disease Method of Frontier Expansion* (ABC-CLIO, 2009), pp. 62–63; Ann Ramenofsky, *Vectors of Death: The Archaeology of European Contact* (University of New Mexico Press,1987), pp. 147–148.)

Self-Reflection

1. What was the objective of distributing infected blankets to Indigenous people?
2. What are your thoughts about the use of biological warfare against Indigenous people?

Want to Know More?

Read Robert Boyd's book: *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline Among Northwest Coast Indians, 1774-1874* (Vancouver: UBC Press, 1999).

Changing Names and Rewriting History

The colonizers began to give their own names and descriptions to the land they had "discovered." For example, Vancouver and Vancouver Island are named after Captain George Vancouver, who was born in England in 1757. The colonizers did not consider that these places already had Indigenous names used by the Indigenous people who had been living there for millennia. This was another way colonizers rewrote history and excluded the contributions, knowledge, and existence of Indigenous people.

The Fur Trade and the Origin of the Métis Nation

Initially, relationships between Indigenous people and newcomers were cooperative. "Newcomers arrived in Indigenous territories in small numbers, and relied on Indigenous people's skills, knowledge and experience to succeed in the fur trade." (Unvarnished History at 11.)

In Eastern Canada, Indigenous nations made trade agreements and treaties with the Crown. "Between 1725 and 1779, Peace and Friendship Treaties were signed in the Atlantic region to end hostilities and encourage cooperation between the British and the Mi'kmaq, Maliseet, and Passamaquoddy Nations." (Ibid.) The Peace and Friendship Treaties did not attempt to extinguish Indigenous title; their purpose was to establish peace.

The Origin of the Métis Nation

The origin of the Métis is "situated in the fur trade, as European men married into Indigenous (Cree, Ojibwa, Saulteaux) families. The offspring of these unions eventually developed their own communities that nurtured their own unique language (Michif), culture, and a sense of nationalistic aspirations" (University of Alberta Indigenous Canada Course). Jean Teillet, a Métis legal expert, describes the origin of the Métis Nation in the following video: IIC: Métis History (vimeo.com)

As the fur trade economy began to decline, colonial interests shifted to land. The next section will examine colonial land policies that have subverted Indigenous ownership of traditional territories.

3.2 – Land Policies (time estimate: 40 minutes)

Introduction

Colonial laws, policies, and proclamations have been designed to remove Indigenous Peoples from Indigenous territories in order to facilitate colonial settlement. This section will explore some of the colonial land policies that have undermined Indigenous territorial sovereignty in Canada, with a specific focus on the British Columbia context.

Royal Proclamation and Treaties

> *"These lakes, these woods and mountains were left to us by our ancestors. They are our inheritance; and we will part with them to none."*
>
> Minweweh, Le Grand Sauteux.

A video clip from the documentary *Colonization Road* provides a brief introduction regarding the origin and operation of Canada's colonial land policies.[1]

The Royal Proclamation, 1763

By 1763, the Crown feared conflict from Indigenous nations due to growing concerns about settlers encroaching on Indigenous territories. In response, King George III issued the *Royal Proclamation* of 1763 to set out rules for European settlement of Indigenous territories in what is now North America. The *Royal Proclamation* explicitly acknowledged the presence of Indigenous people within the territory, confirmed that ownership of Indigenous lands would remain with Indigenous people until ceded or sold to the Crown, and forbade individual settlers from claiming Indigenous lands (i.e., Indigenous nations could only surrender their land to the Crown):

> *"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...****And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the*

[1] Access to Brightspace is required to view the video clip, but the entire documentary is available here.

> *use of the said Indians, all the Lands and Territories not included within the limits of Our Said Three New Governments, or within the limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."*

"While a foundational document in Indigenous-Crown relations, the *Royal Proclamation* was contradictory. It created a process whereby Indigenous nations could only surrender their land to the Crown. This placed the Crown in a position of authority over Indigenous lands, based on the myths of *terra nullius* and the doctrine of discovery" (Unvarnished History at 13).

Treaty of Niagara

Although the Crown unilaterally developed the *Royal Proclamation*, approximately 25 Indigenous nations agreed to its terms through a conference in Niagara Falls in 1764. The resulting treaty was recorded using a two-row wampum belt. As John Borrows indicates in Wampum at Niagara, "The two-row wampum belt illustrates an [Indigenous] Nation/Crown relationship that is founded on peace, friendship, and respect, where each nation will not interfere with the internal affairs of the other." The Crown does not officially recognize the Treaty of Niagara, but Indigenous people see it as foundational to their understanding of the Royal Proclamation as well as establishing a nation-to-nation relationship with the British Crown. (Treaty of Niagara)

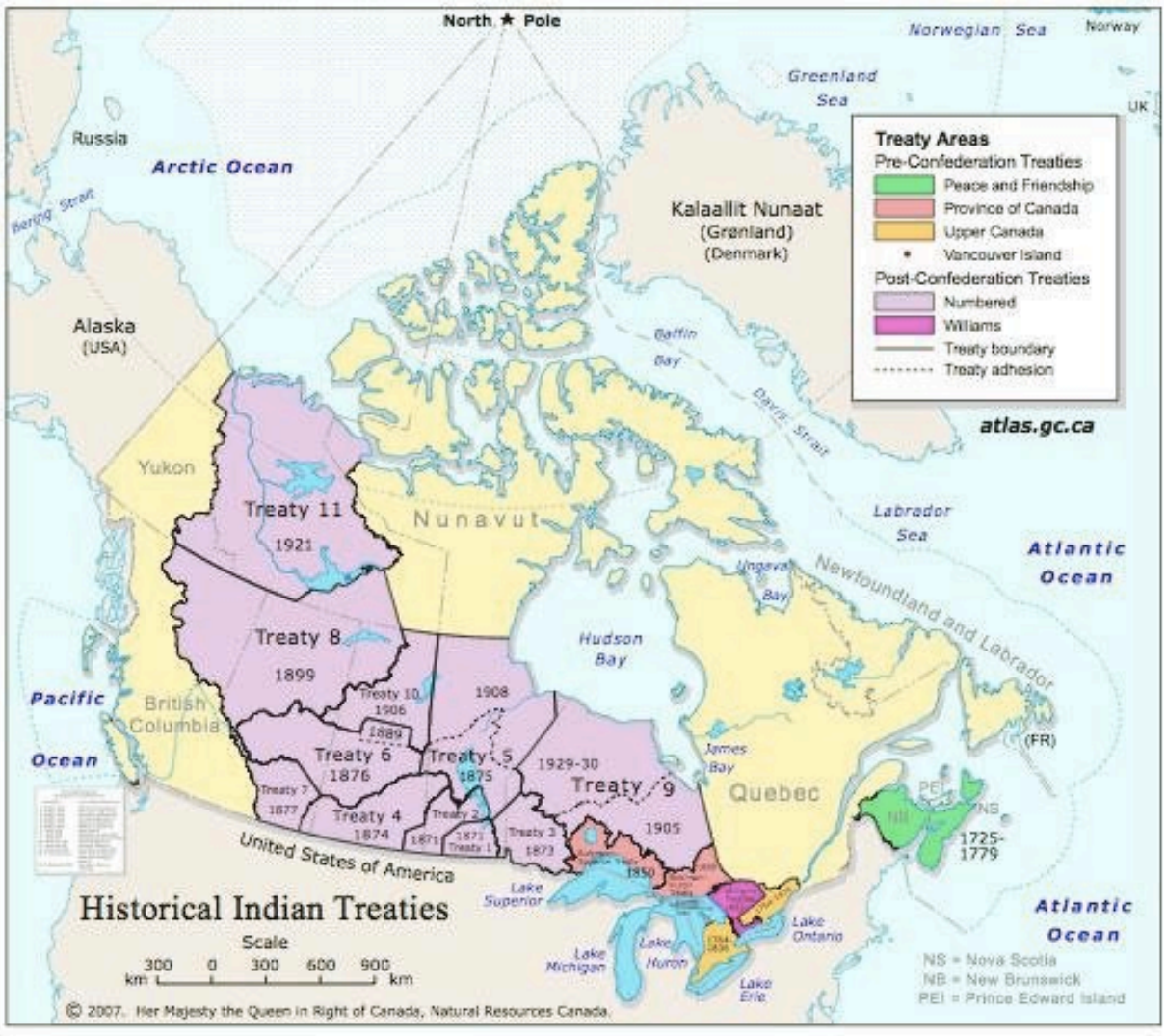
A video clip from *Colonization Road* provides some insight into the original meaning and intent of Indigenous-Crown treaties.[2]

Following the *Royal Proclamation*, the colonial view held that treaties provided the legal foundation necessary to transfer title and control of Indigenous land to the Crown in order to open the land for colonial expansion and settlement.

Treaty-Making

The process of treaty-making has created a unique political and legal relationship between Indigenous nations and Canada. This map shows the location of various types of historical (pre-Confederation) treaties in Canada (source: Natural Resources Canada):

[2] Access to Brightspace is required to view the video clip, but the entire documentary is available here.



In signing treaties with Indigenous nations, the Crown viewed treaties as the completion of transfer of Indigenous title to the Crown. Indigenous nations, however, viewed themselves as equal partners (i.e., independent sovereign nations) when signing treaties, and believed that under the treaties they would still have access to their way of life and their traditional territories. Many contend that because the Crown went to the trouble of treaty-making, they must have viewed Indigenous nations as self-governing nations, or else the effort would not have been required. The passage of time has revealed that both Indigenous nations and the Crown had (and continue to have) different understandings of the intent and extent of their treaties.

Differing Understandings

In theory, both parties to a treaty should gain something by signing, and each party has resulting obligations to the other. Indigenous nations entered into treaties in good faith, viewing the treaties as an alternative to conflict and a way to forge a better relationship. Indigenous worldviews had no concept of land "cession" or "surrender," so they assumed the land would still be available for their use.

The actual negotiations of the treaties were questionable, as many Indigenous nations were not fully informed of the real content and meaning of the treaties. The treaties were written in English, which they often could not read, and verbal translations were not always accurate. Indigenous leaders often had no way of verifying the content of the documents they were signing, and they assumed that the oral agreements surrounding the documents were just as important as the text.

> *"Our land is more valuable than your money. It will last forever. It will not even perish by the flames of the fire. As long as the sun shines and the water flows this land will be here to give life to men and animals. We cannot sell the lives of men and animals; therefore we cannot sell this land. You can count your money and burn it within the nod of a buffalo's head, but only the Great Spirit can count the grains of sand and the blades of these plains. As a present to you, we will give you anything we have that you can take with you; but the land, never."*
>
> Northern Blackfoot Chief, 19th Century

The colonial governments promised Indigenous nations the right to live as they always had done, including hunting and fishing for sustenance. They viewed the treaties and the treaty promises as compensation for the Indigenous land. In exchange, the newcomers were afforded the right to live on the land in peace, and to enjoy access to its many resources. Eventually the newcomers imposed their own systems of governance, justice, and other social institutions over the entire area, despite what was written in the original treaty, or what was understood by the Indigenous signatories.

Currently, historical treaties are being challenged based on the diverging perspectives regarding the meaning and intent of treaty promises, the inadequacy of the payments, and the Crown's alleged failure to honour the treaty promises as understood by Indigenous signatories. Many of the present day disputes about historic treaties involve negotiating or litigating about the different understandings of the treaty obligations in relation to the intended nature, scope, and compensation of the treaties.

Want to Know More?

This video provides a brief overview of Treaty Making in Canada.

Colonial Land Policies

Land Policy in British Columbia

In the land now known as British Columbia, contact between Indigenous people and newcomers began two centuries after contact on the East Coast. By the time colonizers arrived in British

Columbia, colonial perceptions of European superiority and Indigenous inferiority had materialized in relation to Indigenous land policy:

> *"At its most basic level, the settler discourse surrounding the [Indigenous] land question was simple and pervasive. White immigrants and settlers in British Columbia in the 1860s took it for granted that the land awaited them…. [T]he proposition that almost all of provincial land was unsettled and unused – or used slightly in ways that deserved to be replaced by more intensive, modern land uses – was not debated. [Indigenous people] were wanderers, primitive people who did not know how to use land effectively. They had legitimate claims to their principle settlement sites, also to their burial grounds and small cultivated patches, but not to much more."*
>
> Cole Harris, *Making Native Space*, at 46.

Agreements between Colonial Powers

Nootka Convention

Colonial powers divided Indigenous territories among themselves. In 1790, Britain claimed Vancouver Island by signing the Nootka Convention with Spain to avoid war with the Spanish. Then, in 1821, Britain gave the Hudson Bay Company the rights to Vancouver Island, including exclusive rights to trade with Indigenous people.

Oregon Treaty

In 1846, the United States and Britain signed the Treaty of Oregon, ending 28 years of joint occupancy of the Pacific Northwest. The treaty established the 49th parallel as the border between the two colonial countries. The pre-existing boundaries of Indigenous territories were not taken into account when the border was drawn. It cuts through several Indigenous territories, dividing Indigenous nations, impeding travel, and disrupting intercommunity relationships within Indigenous nations. In British Columbia, this affects Indigenous nations on the West Coast, on Southern Vancouver Island, in the Southern Interior, and along the Alaska border.

> *"The border is the ultimate symbol of colonization for Indigenous people. It has divided families and territories." (Bruce McIvor)*

The Supreme Court of Canada recently upheld the Aboriginal hunting right of an Indigenous person who is not a Canadian citizen and lives in the United States, based on the recognition that the international border divided Indigenous territory. (*R.* v. *Desautel*)

The Oregon Treaty has been judicially accepted as establishing British sovereignty over what is now British Columbia. (See: *Re A.-G. Can. and A.-G. B.C.* (1984), 8 D.L.R. (4th) 161 (S.C.C.) at pp. 173-6.) The date of sovereignty is a key date in the test for Aboriginal title. (Note: "Aboriginal" reflects the terminology of section 35 of the *Constitution*.) Claimants must prove: 1) occupation of the territory prior to the assertion of sovereignty, 2) continuity between pre-

sovereignty and present occupation; and 3) exclusive occupation at sovereignty. (*Delgamuukw v. BC*, at para. 143).

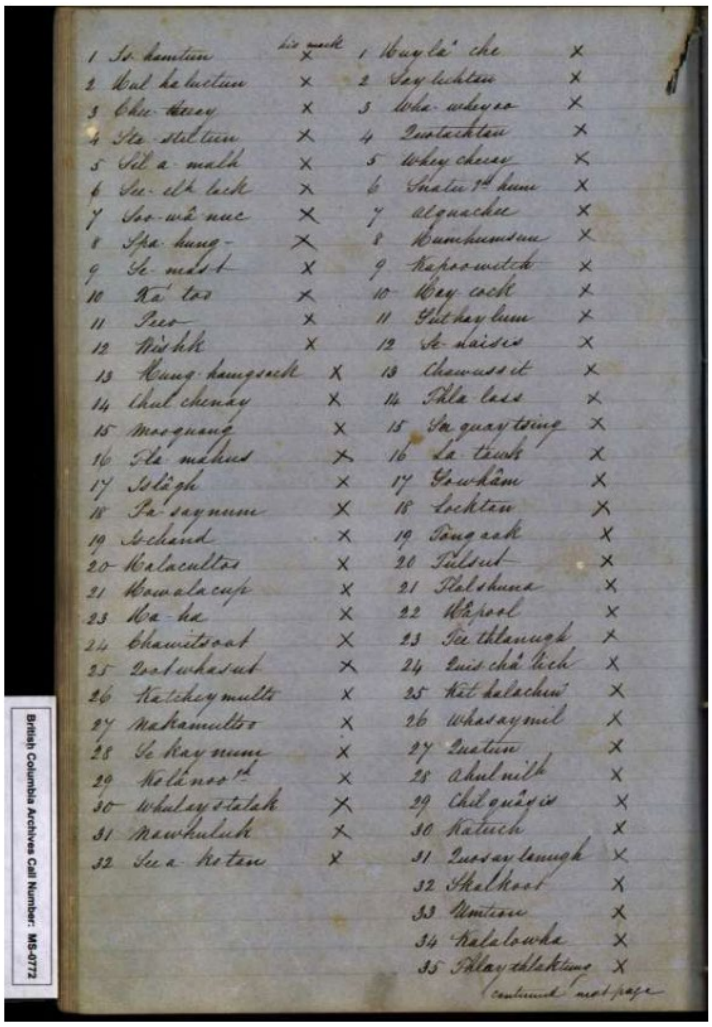
Douglas Treaties: 1850-1854

"James Douglas was the Chief Factor of the Hudson's Bay Company in 1849, when its western headquarters were moved from Vancouver, Washington to Victoria in the new British colony of Vancouver Island. Douglas became Governor of the colony and began encouraging British settlement on Indigenous lands. He acknowledged the *Royal Proclamation*, and the need to purchase land from Indigenous people. Over a period of four years, he made a series of fourteen land purchases, known today as the Douglas Treaties, in relation to small tracts of land around Victoria, Nanaimo, and Port Hardy." (Background on Indian Reserves in BC.)

The treaty-making process was questionable, and there is doubt as to whether there was a meeting of the minds. The treaties were written in English, and the Indigenous signatories did not fluently speak or read the language, so they were not able to assess whether the written document reflected their understandings of the agreements. Indigenous oral histories convey that the signatories believed the treaties were about friendship, and "letting settlers use some of the

land year to year with compensation"; they were meant to "lease" rather than "surrender" the land (see: Lost in Translation).

There is also doubt about whether Indigenous people actually signed the treaties. Instead of signatures, identical marks were made for the Indigenous signatories. For example:



"After the fourteen Douglas Treaties, the Colonial Office in Ottawa stopped funding efforts for the extinguishment of Indigenous title in British Columbia. However, the British Colonial Office still expected Douglas to proceed with extinguishing Indigenous title, but at the Colony's own cost. Despite the requirements of the *Royal Proclamation*, Douglas created Indian reserves between the years of 1858 and 1864 without addressing Indigenous title." (Background on Indian Reserves in BC.)

Douglas Proclamation

On February 14, 1859, Douglas issued a Proclamation that all lands in British Columbia and all mines and minerals thereunder belonged to the Crown.

> *"Unlike other parts of Canada, Crown authorities signed very few treaties with the Indigenous nations in what is now known as British Columbia. [February 14, 1859 is] the official date when the traditional territories of BC Indigenous nations were officially taken by the Crown without consent or compensation. This Proclamation by James Douglas is the source of the unresolved land question in BC that remains today."*
>
> Grand Chief Ed John

Reserve Cut-offs

"Joseph Trutch became governor of the Colony in 1864 and while in power, reduced existing reserves and was unwilling to allot new reserves or add to pre-existing reserves. Trutch refused to recognize Indigenous title and, like Douglas, acted without any formal policy. Trutch's reductions to Indian reserves were the first of many 'cut-offs' that have been made to reserves." (Background on Indian Reserves in BC.)

British North America Act, 1867

Although British Columbia would not join Confederation until 1871, the division of powers between federal and provincial governments that were set out in the constitutional document would have implications for Indigenous people in British Columbia. At Confederation in 1867, section 91(24) of the *British North America Act* gave the federal Crown jurisdiction over "Indians and lands reserved for Indians." This subverted Indigenous sovereignty by putting Indigenous people and lands under federal Crown authority. Indigenous people were not consulted, and did not consent to this provision that would have such a significant impact on their lives. Section 91(24) became applicable in British Columbia once the province joined Confederation.

The Supreme Court of Canada has since clarified that section 91(24) also applies to the Inuit (in the 1939 decision of *Re: Eskimo*) and the Métis (in the 2016 decision of *Daniels v Canada*).

British Columbia Joins Confederation

When British Columbia joined Confederation in 1871, the terms of union detailed the ways the Dominion (Canada) and British Columbia would divide their powers. Under Article 13 of the terms, the federal government held responsibility for "Indians and lands reserved for Indians." However, any lands removed from Indian reserves were to become provincial Crown land.

"The governments were at odds over Indigenous land policy. Federal and provincial governments held very different opinions regarding reserve size. The land surveyed in the province amounted to less than one acre per Indigenous person, whereas settlers were receiving 320 acres per family, even though Indigenous title had not been extinguished in the vast majority of the province [except perhaps in the areas covered by the Douglas Treaties, although, as

mentioned above, the Indigenous signatories likely did not perceive the agreements as surrendering land]." (Background on Indian Reserves in BC.)

"In other provinces, the federal government recognized Indigenous title by signing treaties and reserving between 160 and 640 acres per Indigenous family. However, British Columbia refused a federal government proposal to increase Indian reserves to 80 acres per family. The two governments temporarily agreed to 20 acres per family." (Background on Indian Reserves in BC.) Colonial officials attributed the "unusually small reserve acreage in British Columbia on the grounds that [Indigenous] peoples on the Pacific coast were primarily fishing peoples who did not need a large land base." (Douglas Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925*, at 6.)

British Columbia Land Act

"In 1874, the *British Columbia Land Act* proposal to allow the province to alienate land without regard for Indigenous title was initially disallowed by the federal government for failing to acknowledge Indigenous title. The revised legislation precluded settlers from claiming or pre-empting 'Indian settlement' lands, and was passed." (Background on Indian Reserves in BC.)

Indian Act

The *Indian Act* specifies that reserves are held by the federal Crown for the use and benefit of Indian bands, and vests underlying title and ultimate authority regarding the use of such lands with the Governor in Council. The *Indian Act* also empowers the Minister of Indigenous Services to authorize the use of reserve lands for a variety of band-related purposes, such as schools, health centres, administration offices, and burial grounds.

In 1905, the *Indian Act* enabled the government to remove Indians from reserves that were near towns with more than 8,000 residents. In 1913, the provincial government evicted Squamish people from their homes on the Kitsilano Reserve, because they were perceived as an impediment to “progress.” (See: Kitsilano Reserve.)

In 1911, the *Indian Act* allowed governments, municipalities, and companies to expropriate reserve lands for roads, railways and any other public works. Reserve lands in BC have been expropriated for a number of public works, including roads, railways, airstrips, irrigation, hydro-electric projects, and pipelines.

Commissions

> *"How did the Queen get the land from our forefathers to set it apart for us? It is ours to give to the Queen, and we don't understand how she could have it to give to us."*
>
> Testimony of Nisga'a Chief Charles Russ, Commission Appointed to Enquire into the Conditions of the Indians of the North-west Coast, *Papers relating to the Commission...* (Victoria: Government Printer 1888) at 20.

Indian Reserve Commission

"Ongoing land disputes resulted in the establishment of the Indian Reserve Commission in 1876 to determine Indian reserves in British Columbia. The Reserve Commission was authorized to create reserves to be used for the benefit of Indigenous nations. Dominion Crown lands were to be used to add land to reserves, while any land removed would become Provincial land. The decisions of the Reserve Commission were made without consent from Indigenous nations." (Background on Indian Reserves in BC.)

McKenna-McBride Commission

In 1912, the McKenna-McBride Royal Commission was established to gather evidence and make recommendations that might resolve the disputes between the federal and provincial governments regarding Indigenous lands. For three years, Commissioners traveled around British Columbia gathering testimony. "Once developed, the Commission's recommendations needed to be approved by both the provincial and federal governments in order to take effect, but neither government was satisfied with the Commission's findings. Both governments wanted the power to make changes to the report." (McKenna-McBride.)

"The federal government passed the *Dominion Indian Affairs Settlement Act* of 1919, independent of British Columbia. The provincial government responded by passing the *British Columbia Indian Lands Settlement Act*. Both Acts were attempts to claim power to adopt the recommendations of and make changes to the Royal Commission Report. With no solution to the conflict in sight, Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs for Canada, recommended a joint review of the McKenna-McBride Commission report." (*Ibid*.)

"The review committee gathered additional evidence and testimony from 1920 to 1924. The review committee's report convinced both federal and provincial governments to accept the McKenna-McBride Commission report on July 19, 1924. The McKenna-McBride Commission never did address the issue of Indigenous title." (*Ibid*.) "The governments cut off over 36,000 acres of land from reserves all over British Columbia without consultation, consent, or compensation of Indigenous Peoples." (Background on Indian Reserves in BC.)

Of course, Indigenous Peoples have been resisting colonial dispossession of Indigenous territories since the arrival of Europeans, using a variety of methods (which will be covered more fully later in the course). In 1926, the Allied Tribes petitioned the Canadian Parliament for an inquiry into the “Indian land controversy” since British Columbia entered Confederation. Due to the government approval of the McKenna-McBride recommendations, the Allied Tribes demanded a hearing at the Privy Council. In response, the Canadian government arranged a "Joint Special Committee" instead.

Joint Special Committee

In 1927, Canada appointed a Joint Special Committee of the Senate and House of Commons to inquire into Claims of the Allied Tribes as set out in their 1926 petition. "The Committee considered the position of the Allied Tribes for two weeks, then declared that the Indigenous

nations had not proven any rights to the land based on Indigenous or other title. The Committee recommended that the matter be closed, and, blaming outside agitators for Indigenous resistance, recommended a ban on hiring lawyers to advance Indigenous title claims." (UBCIC Timeline)

Indian Reserves in British Columbia

Key Point

It is important to know that, in British Columbia:

1. First Nations people opposed the colonially imposed reserve creation process. They did not consent to the resultant reserves.
2. First Nations were not compensated for the lands that were taken from them.
3. Since their creation, reserves have been moved, reduced, and had resources taken from them without compensation to First Nations.
4. Reserves were often created on less valuable land (e.g., in remote areas, with poor soil, and far from water sources).
5. Coastal reserves allocated in relation to fishing sites are smaller as compared to reserves in other provinces.

As a result of these land policies in British Columbia, Indian reserves comprise 0.2% of original Indigenous territories that existed prior to contact. The chart below shows the total land base and average reserve-size for Indian reserves in each region across Canada:

Region	BANDS	RESERVES	LAND BASE (ha)	AVE AREA (ha)
Atlantic	32	68	29,561.6	434
Quebec	26	31	77,131.5	2488
Ontario	113	189	709,985.8	3756
Manitoba	53	104	214,803.7	2065
Sask.	69	143	616,815.9	4313
Alberta	40	100	668,880.1	6688
B.C.	200	1606	353,324.2	217
NWT	1	2	562.1	281
Yukon	7	24	499.6	83
TOTALS	551	2267	2,671,564.5	1176

(Source: *Colonization Road: a Study Guide for All Ages* at 8.)

Two maps of BC help to illustrate Indigenous territories as compared to Indian reserves.

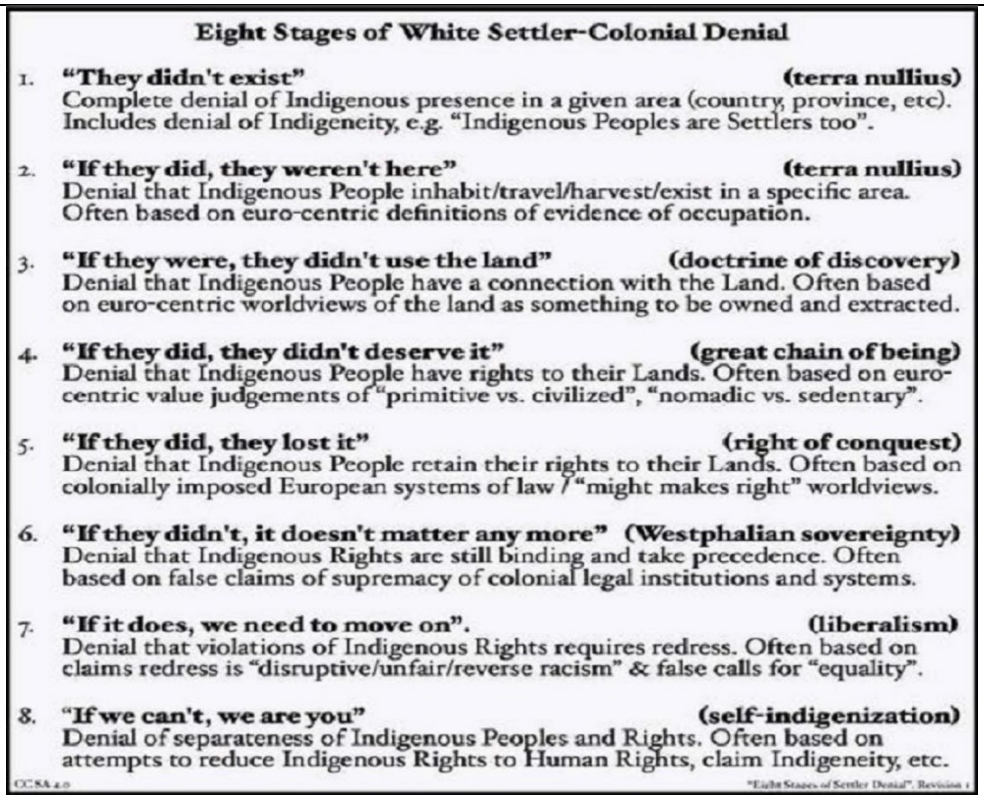
- This link will take you to a map that shows Indigenous territories in British Columbia prior to contact.
- This link will take you to a map that shows Indian reserves in British Columbia.

Self-Reflection

These statements were made during the Northwest Coast Enquiry in 1888:

> *"If an Indian conceives he has...a right which is unrecognized, or which he is restrained from exercising, he becomes...unyielding on the subject...and no amount of reasoning with him will enable him to disabuse his mind of his possibly ill-conceived convictions." (at 8-9)*
>
> *"They hold themselves above and beyond the existing laws which affect them as Indians." (at 11)*

1. What beliefs underlie these statements?
2. Have you heard similar statements in relation to Indigenous land protectors in the present day?
3. Please review the following list and reflect on the extent to which these sentiments persist in relation to Indigenous land issues:



Want to Know More?

Read Daniel Marshall's book, *Claiming the Land: British Columbia and the Making of a New El Dorado* (Vancouver: Ronsdale Press, 2018)

Impeding Legal Advice

In 1927, Indigenous efforts were thwarted by the *Indian Act* amendment that prohibited fundraising for Indigenous land claims. There is evidence that this prohibition was developed in direct response to Indigenous land claim efforts coming out of BC: "As early as 1924, [Duncan Campbell] Scott had proposed prohibiting Indians from paying lawyers to pursue claims without government approval." (Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*, at 59). In 1927, Scott prepared an amendment to the *Indian Act*, which was passed by Parliament:

> *Section 141: "Every person who, without the consent of the Superintendent General…receives, obtains, solicits or requests from any Indian any payment…for the prosecution of any claim [for the recovery of land or money by an Indian tribe or band]...shall be guilty of an offence and liable upon summary conviction for each such offence…"*

This amendment meant it was illegal for the Indigenous nations to provide for any of the necessary steps (such as research expenses, legal fees, or court costs) to advance their claims into court. (Paul Tennant, *Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989*, (Vancouver: UBC Press, 1992) at 113).

Prosecution of section 141 was not an idle threat. Arthur O'Meara was a lawyer assisting the Indigenous organizations to advance their claims prior to the 1927 *Indian Act* amendment. The federal government was gathering evidence to prosecute O'Meara for violating the ban on hiring lawyers, but he passed away in 1928 – before he could be prosecuted. (Titley, at 157).

> *"Indigenous nations were therefore denied those fundamental rights that are taken for granted in any democratic system. They were, as a matter of colonial and provincial policy, denied rights to lands they had occupied for centuries. This exclusion from the land was extended through the discriminatory provisions of colonial and provincial land legislation. And they were prohibited by federal law seeking a legal remedy for this injustice."*
>
> Chief Joe Mathias and Gary R. Yabsley, "Conspiracy of Legislation: The Suppression of Indian Rights in Canada" in BC STUDIES, no. 89, Spring 1991, at 36.

Moreover, Indigenous people could not become lawyers. From 1918 until 1949, membership in the Law Society of BC was linked to registration on the provincial voters list, and Indigenous people were excluded from the voters list between 1875 and 1948. In 1922, the Law Society informed Andrew Paull, a Squamish leader, that he would not meet the Law Society's admission requirements because he was not on the provincial voters list.

Self-Reflection

What are some of the past and present implications of:

- Section 141 of the *Indian Act* and
- The Law Society's admission requirements

for Indigenous people, and for the Canadian legal system?

Clearing the Prairies

"In the 1800s, the economy transitioned further towards agriculture. The Crown no longer needed Indigenous nations as trade partners, and began to pursue its economic and political interests of 'opening lands' for settlement and constructing the railway in Western Canada. Indigenous people owned and occupied the land that Canada desired, so the Crown removed Indigenous people from their territories through treaties, legislation, and policies of assimilation." (Unvarnished History at 14.)

Numbered Treaties

As treaties were being negotiated on the prairies, many Indigenous people were on the verge of starvation, largely as a result of a large-scale commercial bison hunt in the United States. As in other regions, disease epidemics also decimated the Indigenous population on the prairies. The Crown leveraged the dire circumstances of the Indigenous people in order to pressure them to sign treaties and clear the land for settlement by non-Indigenous people. This has been described as a "policy of starvation." (James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life,* 2019.) Numbered treaties involved the swapping of title to vast tracts of land across the prairies in exchange for the necessities of life.

> *"In the (United States) the Indian was the prey of the frontiersman and the cattle driver, in Canada he has been the prey of the government," Liberal MP Malcolm Cameron told the House of Commons in 1886. He charged John A. Macdonald of being "culpably negligent" in his duties to the Indians.*

The Indigenous Peoples who inhabited the Prairies and resisted the dispossession of their traditional territories were often met with violence.

"The Numbered Treaties 1 to 7 were concluded between 1871 and 1877, and solidified Canada's claim to lands north of the United States–Canada border, enabled the construction of a national railway, and opened the lands of the prairies to agricultural settlement" (Canadian Encyclopedia). Treaty 8, which includes an area in the northeast corner of British Columbia, was signed in 1899.

Want to Know More?

This brief video excerpt from Tasha Hubbard's documentary "nîpawistamâsowin: We Will Stand Up" provides an overview of Indigenous-Crown relations on the prairies.

See also James Daschuk's book *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life* (Regina: University of Regina Press, 2019).

Métis Land Issues

The Métis were part of the Indigenous population on the prairies that was impacted by starvation, the incursion of settlers, and expansion of the railway during the mid-to-late 1800s.

Manitoba Act

"The Métis began to protest the expansion of the Dominion of Canada over the Northwest lands. Louis Riel organized the Métis in protest to defend their territory, and a Provisional Government of the Assiniboia was struck in 1869. Representatives of the Provisional Government went to Ottawa and reached an agreement on rights for citizens of Assiniboia and the creation of a new province of Canada, Manitoba." (Unvarnished History at 29)

"Elements of this agreement are found in the *Manitoba Act* passed in 1870, which brought Manitoba into Confederation. The legislation set aside 1.4 million acres of land for the Métis and guaranteed that Canada would respect their existing land titles in the Northwest. The legislation was a powerful achievement for the Métis, as the Dominion recognized Métis rights to land title along with their collective rights to land." (Ibid.)

Scrip

"Despite this recognition, the Dominion Government's implementation of the *Manitoba Act* emphasized individual land rights by allocating individual lots of land by scrip. For the Dominion Government, scrip became a way to deal with Métis claims to land without creating ongoing obligations, as it had through treaty-making with First Nations." (Ibid.)

"By 1885, tensions ran high between Canada and the Métis over a number of matters, including political representation, farming assistance and title to their traditional lands, which were rapidly being infringed upon by settlers. Led by Louis Riel and Gabriel Dumont, Métis and First Nations engaged in armed conflict with Canada beginning at Duck Lake, Saskatchewan, and ending with the Battle of Batoche in May 1885. Louis Riel was later found guilty of treason and he, along with eight others, died in the largest mass execution in Canada. Other leaders, including First Nations Chiefs, were imprisoned, some without trial." (Ibid at 30)

"The scrip process of allocating land to individuals rather than to communities led the Métis to lose their land base over time. Scrip was still being allocated to Métis between 1885 and 1923; however, in some areas Métis were facing high tax rates on their lands, often as much as double or triple the amount being paid by European settlers. Many Métis could not afford the taxes, and within 15 years of the enactment of the *Manitoba Act*, two thirds of the Métis population left that province, and those people ended up landless. Without a land base, many Métis were left with the land that was not claimed by settlers. However, not all Métis lost their land base. In Alberta, 12 Métis settlements were created in the northern and central parts of the province in the 1930s, eight of which remain today." (Ibid at 30-31).

Want to Know More?

See the recorded presentation by Jean Teillet and Patricia Barkaskas regarding Métis Legal Issues.

Read Jean Teillet's book *The Northwest is Our Mother: The Story of Louis Riel's People, the Métis Nation* (Toronto: Harper Collins Canada, 2019).

Inuit

"Between approximately 1950 and 1970, the Government of Canada moved the Inuit into permanent, centralized settlements, and away from their traditional hunting and gathering ways of life on the land. Relocations occurred throughout the Arctic, including in what is now Nunatsiavut, Nunavik and Nunavut, displacing Inuit from their traditional territories and moving

them to places where food sources, weather patterns, seas, and landscapes were drastically different." (Unvarnished History, at 37.)

Inuit Relocations

"In 1953 and 1955, the Royal Canadian Mounted Police, acting as representatives of the Department of Resources and Development, moved approximately 92 Inuit from Inukjuak, formerly called Port Harrison, in Northern Quebec, and Mittimatalik (Pond Inlet), in what is now Nunavut, to settle two locations on the High Arctic islands: [Resolute and Grise Fiord, Nunavut . The Government of Canada ordered the relocations to establish Canadian sovereignty in the Arctic.] The Inuit were assured plentiful wildlife, but soon discovered that they had been misled, and endured hardships, including starvation and death." (Inuit High Arctic Relocations)

A map showing Inuit regions is available at this link.

Want to Know More?

See the following news report: Canada says sorry for Inuit relocation - APTN News

Land is Central to Contemporary Disputes

Colonial land policies are not only a historic problem. As explained in the video clip from the documentary *Colonization Road*, they continue to be central to contemporary disputes.[3]

3.3 – Assimilation Policies (time estimate: 1 hour)

Introduction

Indigenous nations were independent sovereign nations prior to contact with Europeans. However, processes of colonization have subverted Indigenous sovereignty. Colonial policies have been developed with the goal of absorbing Indigenous people into colonial society by encouraging or coercing Indigenous people to abandon their culture, languages, and ways of life, and adopt the culture of the colonizers. Canada's assimilation policies are often geared toward assimilating Indigenous children. These policies continue, and accordingly, Indigenous oppression is ongoing.

In the following video clip (from a webinar entitled "Overview of the Progress of the Calls to Action" hosted by the Canadian Institute for the Administration of Justice and Courthouse

[3] Access to Brightspace is required to view the video clip, but the entire video is available here .

Libraries BC), the Honourable Murray Sinclair describes how the twin myths of European superiority and Indigenous inferiority are central to Canada's assimilation policies.[4]

Assimilation Policies

In the 1800s, the Crown began making efforts to assimilate Indigenous people. For example, the *Gradual Civilization Act*, passed in 1857, had as its premise "that by eventually removing all legal distinctions between Indians and non-Indians through the process of enfranchisement, it would be possible in time to absorb Indian people fully into colonial society." (Royal Commission on Aboriginal Peoples, vol. 1 at 246.)

The colonial government applied a number of strategies to assimilate Indigenous people:

- Subverting Indigenous sovereignty, through the *Royal Proclamation*, section 91(24) of the *Constitution*, and the *Indian Act*;
- Undermining Indigenous sovereignty by replacing Indigenous governance structures with colonial constructs. This included the breakdown of Indigenous nations through the creation of Indian bands, the replacement of Indigenous leadership with band council chiefs and councillors, and the imposition of colonial definitions of citizenship that do not reflect Indigenous citizenship laws;
- Removing Indigenous people from their territories (e.g., demarcating Indian reserves and opening areas outside of the reserve boundaries for colonial settlement);
- Limiting Indigenous movement (e.g., requiring Indigenous people to get permission from an Indian agent to leave Indian reserves);
- Suppressing Indigenous economies (e.g., limiting access to traditional territories and resources, requiring Indigenous people to obtain a permit from an Indian agent to sell goods, and disrupting Indigenous patterns of redistribution of wealth [e.g., the Potlatch ban]);
- Outlawing Indigenous spiritual practices (e.g., the Sun Dance ceremony);
- Limiting expressions of Indigenous culture (e.g., requiring Indigenous individuals to obtain permission from an Indian agent to wear cultural attire off reserve);
- Stripping Indian status from Indigenous people who became educated, served in the Canadian military, and from Indigenous women who married non-Indigenous men; and
- Removing Indigenous children from their families and communities to be educated in the residential school system.

Canada's assimilation policies began decades before the *Indian Act* became law. In the 1820s, colonial administrators began initiatives to encourage Indigenous people to settle and become farmers, and the objective of "civilizing" Indigenous people began to emerge in legislation. Starting in 1857, the federal Crown imposed a series of acts aimed at assimilating Indigenous people.

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[4] Access to Brightspace is required to view the video clip, but the entire video is available here.

The Gradual Civilization Act, 1857

The *Gradual Civilization Act* was passed in 1857. The goal of the *Act* was to terminate distinct Indigenous identity by allowing "Indians" to become British subjects through a process of enfranchisement. Enfranchisement was initially voluntary: the colonial rulers assumed that Indigenous people would willingly surrender their legal and ancestral identities for the "privilege" of becoming British. The benefits of enfranchising included the right to vote and the opportunity to apply for a "land grant" from the federal government. Since women were not allowed to vote or own land at the time, only men were eligible to apply for enfranchisement.

At the individual level, if the "man of a family" became enfranchised, then his wife and children would automatically become enfranchised, based on the colonial view that regarded women and children as the property of their fathers or husbands. (This view was contrary to Indigenous views of women as being at least equal to men, and it contributed to the marginalization of Indigenous women.)

Enfranchisement required Indigenous applicants to be at least 21 years, have no debt, speak English or French, and be of good moral character. If all of these requirements were met, then the applicant "could be considered civilized and granted land and the right to vote," subject to the approval of a panel of non-Indigenous reviewers.

Enfranchised men were entitled to "a piece of land not exceeding fifty acres out of the lands reserved or set apart for the use of his tribe," as well as a sum of money. This land and money would become their property, but by accepting it, they would give up "all claims to any further share in the lands or moneys then belonging to or reserved for the use of their tribe, and [would] cease to have a voice in [their tribe's dealings]."

Ultimately, "only one man became enfranchised through this process." (Highlights of RCAP)

The Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs, 1869

Because the *Gradual Civilization Act* was ineffective, the *Gradual Enfranchisement Act* was introduced to advance the assimilation of Indigenous people.

The *Gradual Enfranchisement Act* established elected band councils with restricted governing powers. These new chiefs and councils had authority and powers that had nothing to do with traditional or customary roles and responsibilities of hereditary chiefs.

Under this *Act*, band councils were empowered to make band bylaws on minor matters, such as public health, intemperance, and construction and maintenance of communal property, but these bylaws could be overruled or dismissed by Indian Affairs.

This *Act* determined who would be eligible for band and treaty benefits. It also introduced an involuntary enfranchisement provision for Indigenous women who married men who did not have "Indian status."

Indian Act, 1876

The first *Indian Act* was a result of a combination of existing legislation and a continuing goal of assimilation of Indigenous people. It continues to govern all matters related to Indian status, bands, and reserves, and, therefore, still affects the lives of Indigenous people today. In this section we will examine some of the major restrictions and lasting implications of the *Indian Act*.

Self Reflection

As you read the following, please reflect on the implications of these restrictions on the present-day realities of First Nations communities and individuals.

Indian Act Restrictions Over Time

1876 – Status is removed from Indians who receive a degree, or become a doctor, clergyman, or lawyer. (Voluntary or involuntary removal of status shifts over time, ultimately ending in 1961.) The removal of status from Indian women who marry non-status men from the *Gradual Enfranchisement Act* of 1869 is brought into the *Indian Act*.

1880 – Indian farmers require a permit to sell cattle, grain, hay, or produce, and a permit to buy groceries and clothes.

1884 – Indians are banned from doing ceremonies, including Potlatches and Sun Dance Ceremonies.

1885 – The pass system is created, effectively prohibiting Indians from leaving their reserves without permission from an Indian agent.

1886 – Indians must have permission from an Indian agent before wearing any “costume” at public events.

1905 – Indians may be removed from Indian reserves near towns of 8,000 or more residents.

1911 – Municipalities and companies are given the power to expropriate portions of Indian reserves for roads, railways, and public works.

1918 – Government is given the power to lease out Indian reserve land to non-Indians if it is used for farming.

1920 – Every Indian child between the ages of seven and sixteen years is mandated to attend residential school *(Indian Act*, R.S.C. 1985, c. 1-5, s. 116).

1927 – Indians are banned from fundraising to pursue land claims without governmental approval.

1951 – Forced enfranchisement provisions are strengthened, including the removal of Indian status from women upon marriage to non-status men; a "double mother rule" is introduced to remove the Indian status of children whose mother and grandmother obtained Indian status through marriage.

The *Indian Act* severely affects First Nations and their existence in Canada. Though many of the discriminatory provisions have been removed, three key components continue to be oppressive: the imposed system of government, the definition of who is a "status" Indian, and the reserve system.

Want to Know More?

To learn more about how colonial policies disadvantaged Indigenous peoples and benefitted white settlers, read this two page article by Sheelah McLean: "We Built a Life from Nothing": White Settler Colonialism and the Myth of Meritocracy.

The article contains this chart:

Imposed System of Government

Indigenous systems of governance were subverted by an elected system. As mentioned earlier in the course, Indigenous governance systems emerge from Indigenous worldviews regarding "right relations." Indigenous governance effectively manages relationships among people, communities, and territories. Indigenous leaders have responsibility over Indigenous territories, beyond reserve boundaries.

On the other hand, under the *Indian Act*, governance resides with the band council, and its powers are limited to the powers set out under the *Indian Act*. The *Indian Act* does not provide authority for a chief and council to make decisions about lands beyond the boundaries of Indian reserves. Further, the *Indian Act* is silent on qualifications for who can run, how to settle disputes, and the parameters and limitations of leadership. Women were excluded from voting and running in *Indian Act* elections until 1951, which has left an ongoing legacy of underrepresentation of women in *Indian Act* governance.

The imposed system of governance has also been a source of ongoing controversies within Indigenous communities. One contemporary example is the dispute between the Wet'suwet'en Hereditary Chiefs versus the Elected Chiefs (or "*Indian Act* Chiefs"). The issue came to a head in 2019, when the Elected Chiefs signed an agreement with Coastal Gas while the Hereditary Chiefs opposed the agreement. The question became who has the authority to sign agreements and who should Canada look to as the authoritative voice for the Indigenous nations (see: Wet'suwet'en Explainer). Conflicts between the two systems are an ongoing challenge.

Imposed Definition of "Indian"

There is no other ethnic group in Canada for which the Government of Canada determines the membership. Since the earliest legislation regarding Indians, the federal government has determined who is an Indian, and who is not. The *Indian Act*'s imposed criteria do not align with Indigenous laws regarding citizenship. The federal government's approach is not only offensive, it is also divisive. It differentiates between Indians with status, and those without.

The federal government's main objective in creating the *Indian Act* was to remove all legal distinctions between Indians and non-Indians over time. The government wanted Indigenous people to assimilate, and many of the *Indian Act* restrictions were geared toward that goal. Small Indian reserves, restricted economies, and limited transfer payments have resulted in increased competition for scant resources. Given this context, it is not surprising that many bands internalized the exclusionary policies that were introduced by the *Indian Act*. Fewer band members would decrease demands on the limited resources, whereas more band members would increase demands.

In 1985, bands were permitted to determine band membership, within certain conditions set out in the *Indian Act*. The emergence of band membership codes has increased the complexities around defining who is (or is not) Indian. The Minister of Indigenous Services maintains an Indian Register which lists all status Indians in Canada. The *Indian Act* criteria for status must be

met before a person will be added to the Indian Register. Band membership codes may or may not align with the *Indian Act* criteria.

This leads to four possible outcomes. A person may be: 1) a status Indian member of a band; 2) a status Indian with no band membership; 3) a non-status member of a band; or 4) non-status with no band membership because the person was unable to meet the *Indian Act* or band membership code criteria, despite having Indigenous ancestry. The imposed definitions of both the *Indian Act* and band membership codes have led to fragmentation and discord within Indigenous communities, which is an ongoing issue (see: Peters First Nation).

As will be explained shortly, the *Indian Act* also contains unresolved gender inequities that disproportionately affect women.

The Reserve System

As explained in previous sections, before Europeans arrived, Indigenous peoples owned and used all of the land and water in what is now Canada. Colonizers demarcated "Indian reserves," which were small tracts of land in comparison to vast Indigenous territories, and opened the remainder of the (unreserved) Indigenous territories to colonial settlement.

Prior to the creation of reserves, Indigenous Nations lived traditionally by hunting and gathering in broad territories that were rich with all the resources they needed. Their confinement to small, uninhabitable places disrupted their access to traditional food and medicine. This disruption has contributed to poverty, decreased nutrition, and poor health outcomes for many Indigenous communities, and these problems persist in the present day.

Until as recently as 1958, people living on reserve needed written permission from the Indian Agent to leave the reserve for any reason, and any "non-status" person (Indigenous or non-Indigenous) who wanted to enter the reserve for any reason needed written permission from the Indian Agent. The *Indian Act* also required Indians to obtain a permit to sell goods that were produced on the reserve.

In the present day, section 89(1) of the *Indian Act* provides that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band." Section 89(1) poses an impediment for First Nations individuals or bands looking to secure loans. (There are ways to overcome this impediment that are beyond the scope of this course, such as CMHC insured loans for on-reserve housing.)

As a result of *Indian Act* restrictions, many First Nations people living on reserves found that they could not sustain themselves or their families. However, leaving the reserve meant facing discrimination and assimilation in the cities, and possibly losing their Indian status.

The Reserve System Today

Many First Nations continue to live on small reserves, which the federal government still controls. The provincial government has asserted authority over land beyond the reserve boundaries. Land issues remain a source of much of the conflict between Indigenous people and the federal and provincial governments. Indigenous people still live with the legacy created by the reserve system.

1. Often, there is not enough land for all members to have housing on reserve.
2. Some services, such as home care and education support, are provided only to members living on reserve, so people living off reserve do not get the same services, creating tensions between on and off reserve members.
3. Many reserves do not have basic services, such as electricity, running water, or drinkable water. (Notably, there are boil water advisories on urban reserves, so these issues are not confined to remote reserves.)

The following video contains an excerpt of a speech to the BC Treaty Commission, in which Satsan (Herb George) discusses some systemic limitations of the *Indian Act*: IIC: Satsan (Herb George) The Indian Act (vimeo.com)

Key Point

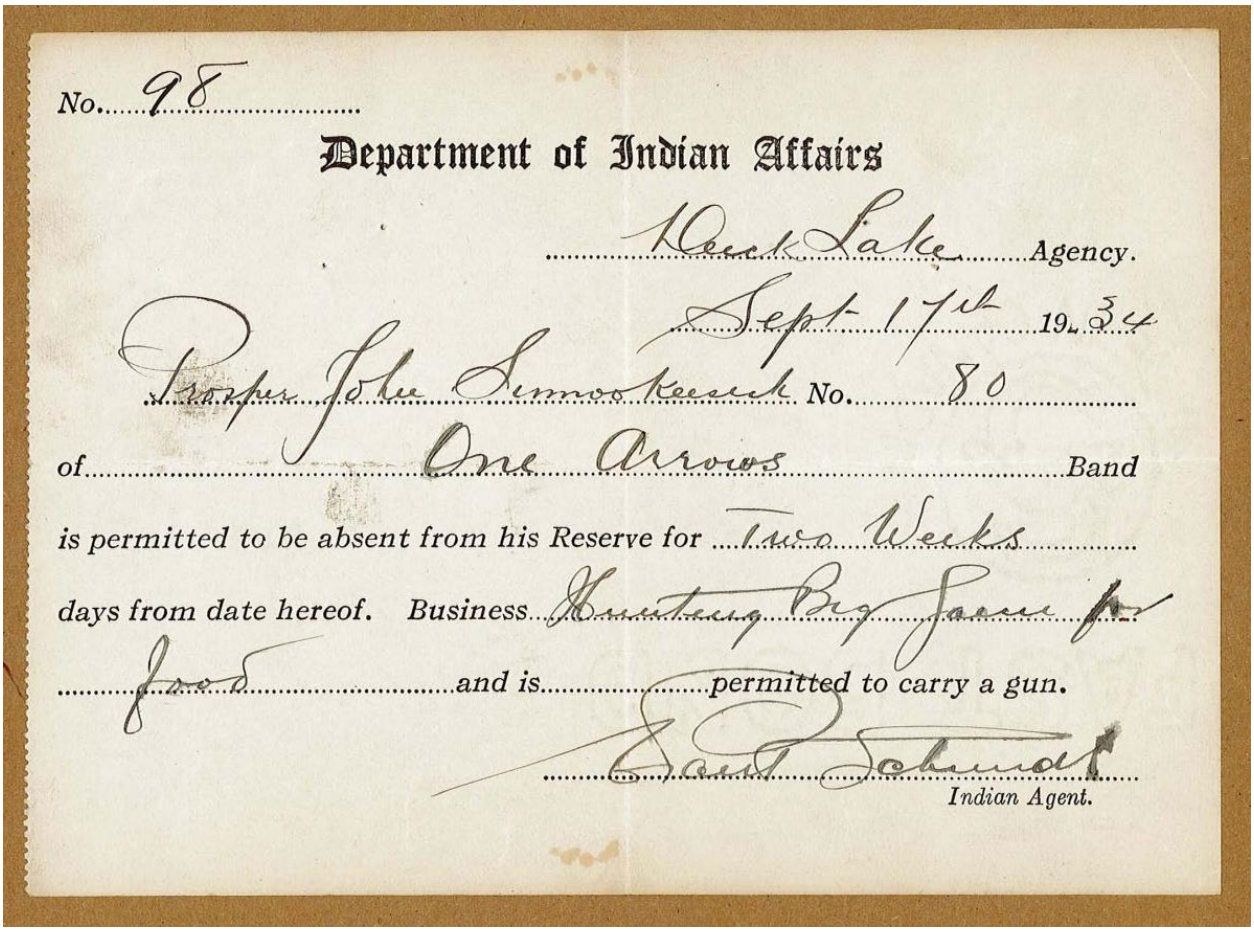
The *Canadian Human Rights Act* prohibits discrimination in employment and services within federal jurisdiction. However, section 67 of the *Act* shielded decisions or actions made pursuant to the *Indian* Act from complaints.

In June 2008, section 67 of the *Act* was repealed to enable individuals to make complaints of discrimination to the Canadian Human Rights Commission relating to decisions or actions arising from the *Indian Act*. The revision came into effect in 2011.

Want to Know More?

Read Bob Joseph's book *21 Things You May Not Know About the Indian Act* (Port Coquitlam: Indigenous Relations Press, 2018).

Images of *Indian Act* documents



No. 98

Department of Indian Affairs

Oak Lake Agency.

Sept 17th 1934

Prosper John Simmookeesick No. 80

of One Arrows Band

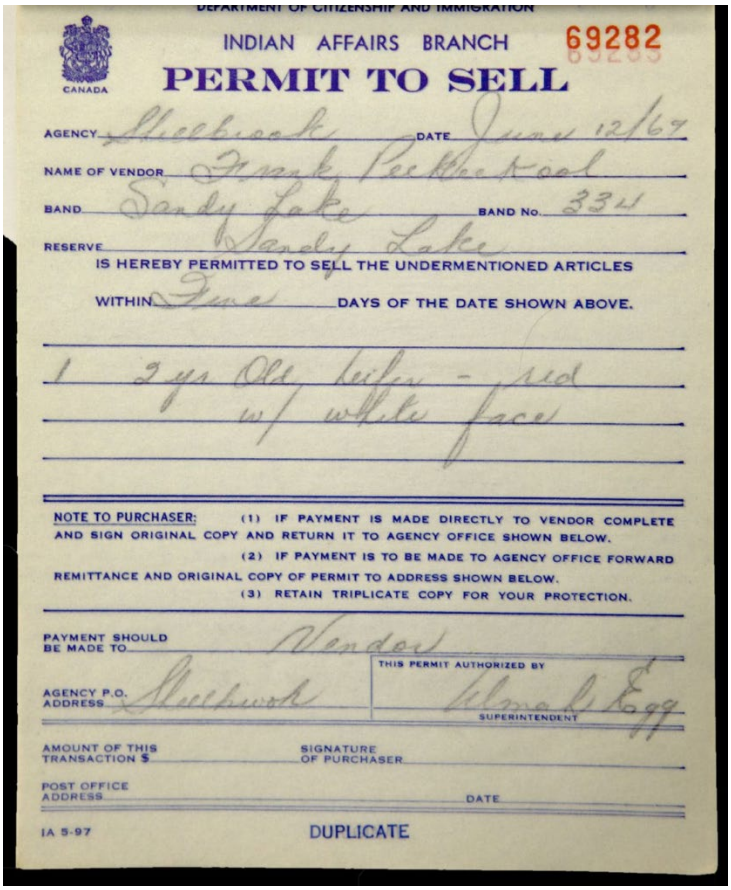
is permitted to be absent from his Reserve for Two Weeks

days from date hereof. Business Hunting Beef Same for

food and is permitted to carry a gun.

David Johnson

Indian Agent.



DEPARTMENT OF CITIZENSHIP AND IMMIGRATION

CANADA

INDIAN AFFAIRS BRANCH 69282

PERMIT TO SELL

AGENCY Sheshegwaning DATE June 12/67

NAME OF VENDOR Frank Peshkeskoot

BAND Sandy Lake BAND No. 334

RESERVE Sandy Lake

IS HEREBY PERMITTED TO SELL THE UNDERMENTIONED ARTICLES

WITHIN Five DAYS OF THE DATE SHOWN ABOVE.

1 2 yrs Old heifer - red w/ white face

NOTE TO PURCHASER: (1) IF PAYMENT IS MADE DIRECTLY TO VENDOR COMPLETE AND SIGN ORIGINAL COPY AND RETURN IT TO AGENCY OFFICE SHOWN BELOW.

(2) IF PAYMENT IS TO BE MADE TO AGENCY OFFICE FORWARD REMITTANCE AND ORIGINAL COPY OF PERMIT TO ADDRESS SHOWN BELOW.

(3) RETAIN TRIPLICATE COPY FOR YOUR PROTECTION.

PAYMENT SHOULD BE MADE TO Vendor

AGENCY P.O. ADDRESS Sheshegwaning

THIS PERMIT AUTHORIZED BY Elmer D. Egg SUPERINTENDENT

AMOUNT OF THIS TRANSACTION $

SIGNATURE OF PURCHASER

POST OFFICE ADDRESS

DATE

IA 5-97 DUPLICATE

CANADA

NOTICE

THIS IS AN INDIAN RESERVE

Any person who trespasses on an Indian Reserve is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month, or to both fine and imprisonment.

Department of Indian Affairs and Northern Development,
OTTAWA.

IA 242 18 69i 9905 21 023 4561

Métis

The colonial policies with regard to the Métis have largely been based on denial: denial of their existence as a distinct people, and denial of their rights to territories and governance. The Métis strongly resisted denial, and "after the Métis Resistance of 1885, many were forced to 'hide' their Métis heritage, for fear of retribution. Métis people recalled the punishment and deaths of Métis and First Nations leaders during the late 1800s and carried the fear of persecution all their lives. Ultimately, this fear contributed to the decline of the use of the Michif language in Métis communities in Manitoba and across Canada." (Unvarnished History at 31.)

In the 20th century, Métis children were affected by assimilationist policies of residential schools and the Sixties Scoop alongside other Indigenous children, but they have been excluded from compensation. (Residential schools and the Sixties Scoop will be discussed in later sections of the course.)

In the following video, Jean Teillet, a Métis lawyer, provides ten reasons Métis people are "invisible" in Canada: IIC: Ten Reasons the Métis Are "Invisible" (vimeo.com)

Inuit

"Eskimo" is an offensive term that is used in this section to convey historical facts about the federal government's treatment of the Inuit.

In 1922, the Department of the Interior was reorganized to include a Northwest Territories and Yukon Branch with an "Eskimo Affairs Unit". This is the first time that Inuit administration was formally recognized by the government.

"E-Disc" System

The government wanted to keep track of the Inuit. "With very little infrastructure and a highly mobile population that was spread out across a vast area, keeping track of the Inuit posed many challenges for the government. Even if the government was able to locate Inuk individuals, the Inuit did not use surnames, and in each family, several people often had the same name." (Erik Anderson and Sarah Bonesteel, "A Brief History of Federal Inuit Policy Development: Lessons in Consultation and Cultural Competence" (2010). *Aboriginal Policy Research Consortium* International, vol. 70 at 8).

"In an effort to keep track of the Inuit, the government started the 'Eskimo Disc' system in 1941. There was no consultation with the Inuit in the development of the system. Each person was assigned a number and an English first name, engraved onto a disc that was to be worn around their necks at all times." (Ibid at 9).

"The first letter and number on the tag indicated the region where they lived, and the last digits were a personalized identification number. Often, Inuit individuals would simply be addressed as a number, and children would indicate their presence in school by saying their number. The last tag was issued in the early 1980s." (See: The Little-Known History of How the Canadian Government Made Inuit Wear 'Eskimo Tags'.)

Sled Dog Slaughter

"In 1958, the Department of Indian and Northern Affairs released a paper entitled *Culture Change: Fast or Slow.* The main objective of this policy was to assimilate Inuit into colonial society as quickly as possible. The Inuit were encouraged to move into settlements. The Inuit living in the new settlements with their sled dogs had no means of securing them. The Government of the Northwest Territories introduced rules authorizing the RCMP to shoot stray dogs, but they did not explain this to the Inuit. Many dogs were killed by the RCMP, leaving many Inuit without transportation. Inuit livelihood depended on their ability to travel great distances to hunt to provide food for their families. Without sled dogs, they were unable to do so." (Unvarnished History at 39).

Residential Schools

Content Warning

The following content may be emotionally disturbing for some people.

> *"For roughly seven generations nearly every Indigenous child in Canada was sent to a residential school. They were taken from their families, tribes and communities, and forced to live in those institutions of assimilation.*
>
> *The results...have been devastating. We witness it first in the loss of Indigenous languages and traditional beliefs. We see it more tragically in the loss of parenting skills, and, ironically, in unacceptably poor education results. We see the despair that results in runaway rates of suicide, family violence, substance abuse, high rates of incarceration, street gang influence, child welfare apprehensions, homelessness, poverty, and family breakdowns.*
>
> *Yet while the government achieved such unintended devastation, it failed in its intended result. Indians never assimilated."*
>
> The Honourable Murray Sinclair, United Nations Speech 2010.

One of the most infamous legacies of the *Indian Act* was mandating Indigenous children to attend schools, beginning in 1884. Because there were very few schools on or near Indian reserves, the requirement for Indigenous children to attend school resulted in most children being taken away from their communities to attend residential schools.

Duncan Campbell Scott, head of Indian Affairs from 1913 until 1932, stated the goal of residential schools was "to get rid of the Indian problem." Residential schools did not get rid of "the Indian problem," but did severely disrupt Indigenous societies. Whole generations of children were taken away from their communities, and prohibited from speaking their languages, engaging in their cultural practices and spiritual beliefs, and living Indigenous ways of life.

Today, Indigenous people are living with the legacy of residential schools in the form of post-traumatic stress and intergenerational trauma. As will be described later in the course, there are currently more Indigenous children in foster care in Canada than ever attended residential schools.

History of Residential Schools

The history of residential schools began in the 1600s with French missionaries establishing a boarding school for Indigenous children in 1620 (Truth and Reconciliation Commission Report, 2015, at 41), to indoctrinate them through teachings in religion, reading, writing, and the French language. These efforts were largely unsuccessful because Indigenous parents were reluctant to send their children, and could not be forced to.

However, residential schools became part of government and church efforts to assimilate Indigenous people. The Anglican Church established a residential school in Brantford, Ontario in 1831 (History of Residential Schools), marking the beginning of a new colonial experiment.

Bagot Commission (1842-1844)

The Bagot Commission recommended separating Indigenous children from their parents by putting them in federally run residential schools to speed up assimilation. This would happen if children were separated from their parents and traditional way of life. Egerton Ryerson's Report on Native Education (1847) further recommended that education for Indigenous children should focus on religious instruction and agricultural training. The first federally run residential school in Canada opened in 1848.

There were 140 Indian residential schools, funded by the federal government, and run by churches. More than 150,000 Indigenous children attended. The government wanted to assimilate Indigenous people into Euro-Canadian society.

Since the intent of the government was to erase Indigenous culture from the children, and to stop the transmission of culture from one generation to another, residential schools have been described as a central element in Canada's policy of "cultural genocide" (TRC Report, at 1).

When and Where Did They Operate?

The first government-funded Indian residential schools opened in the 1840s, and operated in all parts of Canada. Indigenous children lived at residential schools for months or years at a time, rather than going home every day after class. Many of these children did not see their families for very long periods of time, if at all. The last federally funded Indian Residential School closed in 1996 in Saskatchewan.

In British Columbia, the first Indian residential school was started in Mission in 1861, run by the Catholic Church. This residential school was the last to close in the province, shutting down in 1984. The locations of residential schools in BC are shown in the map available at this link.

Was Attendance Optional?

In 1884, it became mandatory for Indigenous children to attend school. The Canadian government initially relied on Indian day schools (often run by Christian churches) to assimilate Indigenous children, until the late 1870s when residential schools became more prominent. Many children were as young as 4 years old when they were sent to school. Parents could be fined or imprisoned if they tried to keep their children at home.

The Royal Canadian Mounted Police helped Indian Agents bring children to schools (sometimes forcibly), fined parents whose children did not go to school, and searched for and returned students who had run away from school (Role of RCMP Report).

What Were the Schools Like?

In a brief film produced by the CBC entitled *Namwayut: we are all one. Truth and reconciliation*, Chief and Elder Robert Joseph shares his memories of residential school.

The majority of children experienced neglect and abuse at the schools. They suffered the disconnection from their families, communities, languages, and cultures. Children did not get enough food and lived in buildings that were hot in the summer and cold in the winter. Overcrowding and poor diet meant that diseases spread rapidly. Many children were physically, mentally, and sexually abused. Some students died by suicide, and many died trying to escape and return to their home communities.

For most Indigenous people, their memories of residential school are negative and life altering. They remember feeling lonely, hungry and scared. They remember being told that their culture was strange and inferior, that their beliefs and practices were wrong, and that they would never be successful.

The Tk'emlúps "Discovery" (or Confirmation)

The TRC Final Report (volume 4) focuses on "Missing Children and Unmarked Burials". The TRC found 4,118 recorded deaths of children at residential schools, but estimates that approximately 6,000 children died in the schools.

On May 27, 2021, the Tk'emlúps te Secwépemc Nation reported the discovery of an unmarked burial site containing the bodies of 215 children on the former Kamloops Indian Residential School grounds. Although the discovery was shocking to many Canadians, many Indigenous residential school survivors had previously reported the existence of unmarked burial sites, and the unexplained disappearances of children; the discovery confirms what survivors have been saying all along.

The discovery in Kamloops has led to searches of other former residential school sites, and additional burial sites are being located.

Want to Know More?

Read:

- Truth and Reconciliation Commission Final Report, Volume 4, Missing Children and Unmarked Burials.
- News article: International Criminal Court called on to investigate Kamloops residential school findings | CBC News

Listen:

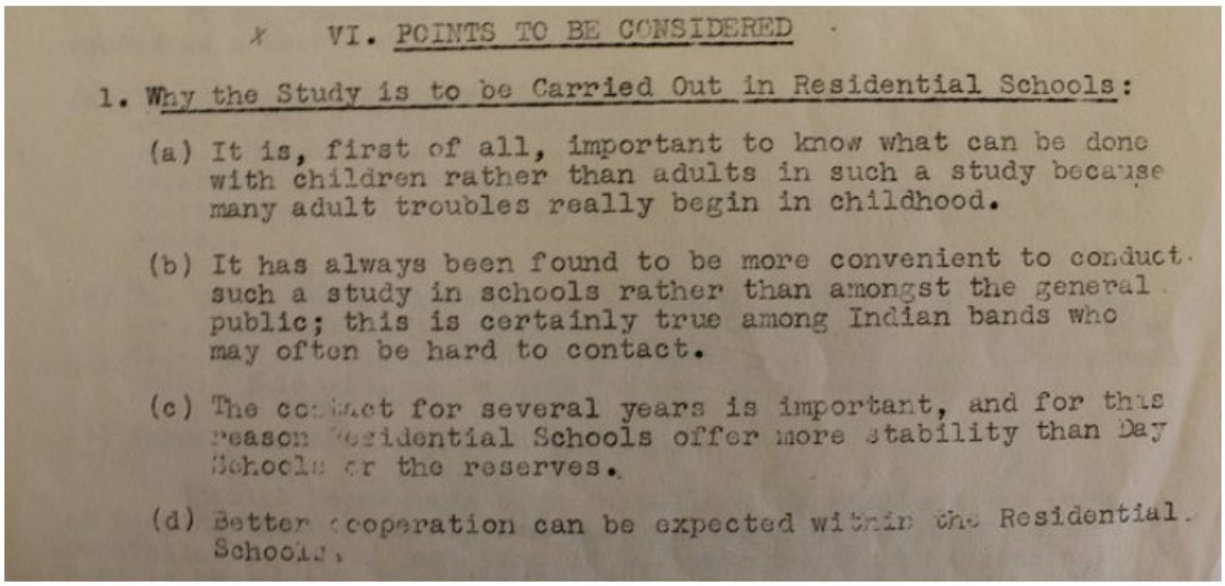
- Radio interview: Discovery of Kamloops remains confirmed what they suspected. Now action must match words, says survivor | CBC Radio

Watch:

- Investigative journal program: The reckoning: Secrets unearthed by Tk'emlúps te Secwépemc | CBC News

Experimentation

In some cases, students were used for scientific experimentation, such as forced starvation or other medical procedures. (See: Aboriginal nutritional experiments had Ottawa's approval | CBC News.)



VI. POINTS TO BE CONSIDERED

1. Why the Study is to be Carried Out in Residential Schools:

(a) It is, first of all, important to know what can be done with children rather than adults in such a study because many adult troubles really begin in childhood.

(b) It has always been found to be more convenient to conduct such a study in schools rather than amongst the general public; this is certainly true among Indian bands who may often be hard to contact.

(c) The contact for several years is important, and for this reason Residential Schools offer more stability than Day Schools or the reserves.

(d) Better cooperation can be expected within the Residential Schools.

Part of a 1949 document explaining why researchers decided to experiment in residential schools. **Library and Archives Canada**

Want to Know More?

See the following news report: Apology to residential school survivors used in experiments | CBC.ca

Intergenerational Impacts

Residential schools have had, and continue to have, serious consequences for Indigenous people. Many residential school survivors:

- Internalized a belief that it is shameful to be Indigenous;
- Were unable to speak their Indigenous languages, so they could not communicate with their family members and elders who would have been important sources of knowledge;
- Found it hard to fit into Euro-Canadian society due to racism and discrimination; and

- Left residential school with very little education, which made it difficult to find employment.

As many survivors were unable to fit into their Indigenous communities and were not accepted by mainstream society, they felt they did not belong anywhere.

Lasting Effects

Some of the lasting effects of residential schools on survivors include:

- **Post-traumatic stress disorder (PTSD)** is a condition of persistent mental and emotional stress occurring as a result of injury or severe psychological shock. People with PTSD can experience nightmares and flashbacks, among other things.
- **Survivor syndrome** is experienced by people who have survived a life-threatening situation that others did not survive. Survivors feel guilty that they survived.
- **Psychological challenges** include anger, anxiety, low self-esteem, depression, post-traumatic stress disorder, substance use issues, and high rates of suicide, among other things.

Some impacts on Indigenous communities include:

- **Intergenerational trauma** is where the effects of traumatic experiences are passed to the next generation. For example, the psychological challenges experienced by many residential school survivors often affect their relationships with their children and grandchildren.
- **Historical trauma** is multigenerational trauma experienced by a specific group of people arising from major events that oppressed the group, such as the atrocities committed against Indigenous Peoples.
- **Loss of culture:** Traditionally, Indigenous histories, traditions, beliefs, and values were passed from one generation to the next through experiential learning and oral histories. With the children away at school, there was no one left to receive this knowledge. Many cultural and spiritual practices have been lost.
- **Loss of language:** Many Indigenous languages in Canada are on the verge of extinction.
- **Family breakdown:** Families suffered from the separation for many years. Many children grew up without the knowledge and skills to raise their own families due to being taken away from their families as children, and lacking parental role models at residential schools. Children were not able to learn from their elders, could not live on their land with their families, and became disconnected from their extended family networks. As will be discussed in a later section of the course, one legacy of residential schools is that there are now more Indigenous children in foster care than ever attended residential schools.

This CBC news report explains how the cycle of trauma from residential schools lasts for generations.

Self-Reflection

Many Indigenous lawyers are survivors or intergenerational survivors of residential schools; for survivors and intergenerational survivors, this is not a hypothetical exercise. For non-Indigenous lawyers, please take this mental test (excerpted from Licia Corbella's piece in the Calgary Herald, entitled Take this Mental Test to Better Understand Residential Schools):

> Imagine the following scenario: One day, armed government officials come into the neighbourhood and forcibly remove every child without warning, including yours. No time for goodbyes or sage final words of advice from parent to child. No last minute "I love yous."
>
> Try as you might — despite all of the resources at your disposal — you can't find where your children have been taken. Your neighbours know as little as you do. You're told this is the law. It's for the best. Your children will be well educated....
>
> Then put yourself into the shoes of the children. One day you're out with your father and grandpa on their trapping line, the next you're grabbed by strange men, thrown into a boat and taken far from home. One moment you're picking berries with your mom, the next you're hauled away by RCMP officers.
>
> You are young and you don't understand what's going on. You cry for your mother and father. You're slapped and told to shut up. The place you're taken to cuts your long hair off. You're stripped naked, "deloused," your clothes and any other possessions you have are taken away and burned. None of the adults in this faraway location speak your language. Indeed, many of the children who come from numerous other communities don't speak your language, either.
>
> When you do see people you know who speak your language, you're beaten for trying to communicate with them. When you start to understand the only language allowed to be spoken, you're told that your language isn't important and your culture is evil.
>
> Like many congregate settings, when one person gets sick, everyone gets sick. Some of your young friends die from the flu, measles or tuberculosis. In some cases, you're tasked with carrying your friend's body to a hole dug in the ground. Their body is covered with dirt, a few prayers are said over the mound but no grave marker is placed there.
>
> You may be beaten. You may be sexually abused....

The food is not very nutritious. In some instances, you aren't given enough. It's part of a federal government experiment to see what will happen to children if you are underfed and denied nutrition.

You are just six years old when you arrive at the residential school. By the time you see your family again you're 16. Your parents are unrecognizable when you are dropped back "home." If your parents and grandparents are still alive, they seem much older than the vague memory you have of them. There is no spark left in their eyes. They're lethargic and depressed...

1. How would you feel if your child (or a child close to you) was taken away from you?
2. How would you feel if you were a child who was abruptly taken away from your parents and institutionalized in a residential school?

Apologies and Reparations

In the 1990s, Indigenous people turned to the legal system in their search for justice. Groups of residential school survivors sued the Canadian government and the churches that ran the schools.

Indian Residential Schools Settlement

One of the largest class action lawsuits in Canadian history was settled in 2007. It resulted in the establishment of the Residential Schools Settlement and payment of $1.9 billion. The Indian Residential Schools Settlement Agreement (IRSSA) came into effect in September 2007 and had five main components: the Common Experience Payment, Independent Assessment Process, the Truth and Reconciliation Commission, Commemoration, and Health and Health Services.

This settlement made several promises. It gave more funds to the Aboriginal Healing Foundation (now closed) for healing programs in communities, and offered payments to survivors as reparation. This settlement was also the source of funding for the Truth and Reconciliation Commission.

The IRSSA distribution of funds was open to abuse, including by unethical lawyers who charged their clients high fees in addition to the 15% they received from the Canadian government. Chief Adjudicator, Dan Ish, led investigations into several lawyers involved in the Independent Assessment Process that led to one disbarment and expulsions from the IRRSA.

Federal Apology

On June 11, 2008, the Government of Canada issued an apology. Here is an excerpt:

> *"The treatment of children in Indian Residential Schools is a sad chapter in our history….*
>
> *Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child." Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country….*
>
> *To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognise that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry…"*

Want to Know More?

Watch the video of the 2008 Federal Apology to Residential School Survivors

Read the transcript of the Statement of apology to former students of Indian Residential Schools.

Healing

Overcoming and healing from the residential school legacy is daunting, but many communities and groups are working together to support the survivors.

The Indian Residential School Survivors Society (IRSSS) grew out of a committee of survivors in 1994. Its many projects include crisis counselling, court support, workshops, conferences, information and referrals, and media announcements. The society researches the history and effects of Indian Residential Schools. The IRSSS also advocates for justice and healing in traditional and non-traditional ways.

Want to Know More?

The Truth and Reconciliation Commission's collection and resources are available online: Truth and Reconciliation Commission of Canada (TRC)

For first-hand accounts from residential school survivors, see: Stories – Legacy of Hope Foundation

Read John S. Milloy and Mary Jane Logan McCallum's book *A National Crime: The Canadian Government and the Residential School System, 1879 - 1986,* 2nd ed. (Winnipeg: University of Manitoba Press, 2017)

Read Tamara Starblanket's book *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State* (Atlanta: Clarity Press, 2018).

The "Sixties Scoop"

The "Sixties Scoop" was a policy that began in 1951 and ended in 1991 that involved thousands of Indigenous children being removed from their homes by child welfare services, without the consent of their families, and placed in non-Indigenous homes all over Canada, the United States, United Kingdom, and other countries.

Even though Indigenous families may have had the desire and the capacity to care for their children, the Sixties Scoop was essentially a continuation of the residential school policy that sought to solve the "Indian problem" by removing Indigenous children from their families in order to terminate the transmission of Indigenous worldviews to future generations of Indigenous people. Both the residential school and Sixties Scoop policies were grounded in the Eurocentric assumption that non-Indigenous families were superior to Indigenous families, and drew upon racist stereotypes that Indigenous parents were not capable of taking care of their own children. The Sixties Scoop policy ended in the 1990s, but Indigenous children continue to be overrepresented in the child welfare system (as will be considered in the next section).

Section 88 of the *Indian Act* in 1951 gave the provinces jurisdiction over Indigenous child welfare, which had previously been a matter of federal jurisdiction. The provinces were now responsible for Indigenous children and families. These families experienced immense social challenges after nearly 100 years of colonization and forced assimilation. The provinces began to remove Indigenous children from Indigenous families and place them with non-Indigenous families. It is estimated that at least 20,000 Indigenous children were adopted in this manner.

In the following video, Betty Ann Adam, a Sixties Scoop survivor, describes the Sixties Scoop as a continuation of the residential school policy of removing Indigenous children from Indigenous communities: "What was the Sixties Scoop"

The physical and emotional separation from birth families continues to impact adoptees and Indigenous communities today. Many Indigenous people are unable to locate their families or discover their history, leaving them disconnected from their Indigenous communities and cultural identities.

After numerous law suits and court challenges, the federal government agreed to compensate Sixties Scoop survivors. Canada's class action settlement agreement with Sixties Scoop survivors, signed in November 2017, set aside $750 million to compensate First Nations and Inuit children who were removed from their homes and placed with non-Indigenous foster or adoptive parents between 1951 and 1991, and lost their cultural identities as a result. It will provide First Nations and Inuit who were adopted out of their families and communities as part of the Sixties Scoop with between $25,000 and $50,000 in compensation, depending on the number of claimants who come forward. It also establishes a $50 million endowment for an Indigenous Healing Foundation, and $75 million in legal fees to plaintiffs' counsel.

Métis and non-status First Nations individuals were excluded from compensation under the settlement, and have since launched their own class action lawsuit seeking compensation for loss of identity and culture. (See: Métis and non-status class action.)

Below is an image advertising the "Adopt Indian Métis" program that ran in Saskatchewan in the 1960s and 70s:

Want to Know More?

Read an article from the Prince George Citizen

Watch a video about Separating children from parents: The Sixties Scoop in Canada

Listen to a radio report about Saskatchewan's Adopt Indian Métis program

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Children in Care

There are more Indigenous children in the child welfare system today than were ever held at Indian residential schools. Although the Indigenous population of BC is only 6%, over 65% of all children in care in BC are Indigenous. (Children in Care (gov.bc.ca))

In the following videos:

- The Honourable Murray Sinclair clarifies connections between the *United Nations Genocide Convention*, residential schools, and the child welfare system (from the webinar on the *Overview of Progress on the Calls to Action* hosted by the Canadian Institution for the Administration of Justice and the Courthouse Libraries); and
- Lee Maracle (Sto:lo) explains that assimilationist policies against Indigenous peoples are ongoing (from the documentary entitled *Colonization Road*).[5]

Ongoing Legacy

This "severe disproportionality is a continuation of Canada's colonial past. Canada's history of assimilationist policies, including residential schools and the Sixties Scoop, resulted in Indigenous children being uprooted from their families and communities and being disconnected from loving child-rearing practices, parental role models, their cultures and identity.... This history of oppression and the continued discrimination that Indigenous people experience has led to multiple negative social and economic disadvantages that increase the likelihood of child welfare investigations and the removal of Indigenous children from their homes." (Interrupted Childhoods)

Biases in the Child Welfare System

Racial profiling that draws upon stereotypes of Indigenous parents as incompetent to raise their own children, and Eurocentric biases that misinterpret or devalue Indigenous familial norms (e.g., the role of extended family members in childcare responsibilities) are also factors in the disproportionate number of Indigenous children in care. (See: Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations.)

Systemic Discrimination in the Child Welfare System

Systemic discrimination also plays a role. In 2016, the Canadian Human Rights Tribunal found that the federal government discriminated against First Nations children on reserve through its design, management, control, and funding of child welfare services. (See: *First Nations Child and Family Caring Society v. Canada*.) Among the discriminatory impacts were that the federal government did not provide adequate funding for prevention services, and incentivized placing children in care by enabling reimbursement of certain costs. (Interrupted Childhoods)

The overrepresentation of Indigenous children in care perpetuates the cycle of social disparities:

> *"The cost of involvement within the child welfare system by Indigenous children and youth, families and nations is very high. Long-term impacts on Indigenous children of being raised in care include: risk of low education attainment; higher risk of addictions; higher*

[5] Access to Brightspace is required to view the video clips, but the entire videos are available through the links provided.

risk of street involvement; more likely to age out of the system (without a permanent adoption or other solution); and higher contact with the criminal justice and child welfare system in their own lives."

Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family, and Community Services Act (Guidebook)

The consequences for children on an individual level include mistrust, post-traumatic stress disorder, disconnection from family and culture, and feelings of being unloved or unwanted. Further, there are limited resources to support Indigenous children while in care, and they are often not adequately prepared to transition to adulthood after aging out of care. They are often left with insufficient resources to further their education, skills, and training, and they may not have any supportive adults or mentors in their life. Separating children from their families risks perpetuating the cycle of dysfunction.

There have been many initiatives to change the system and better support children in care, but many of the initiatives have been fraught with delays, challenges, and inaction.

Delegation Agreements

Indigenous nations have long resisted the removal of children from Indigenous communities. For example, in 1980, the Spallumcheen (now Splatsin) Indian Band passed a bylaw to take ownership of the care of their children. A meeting with the provincial Minister of Social Services led to an agreement recognizing Splatsin control over their own child welfare program.

Many other First Nations have since followed suit. "To date, 148 of the approximately 198 First Nations bands in BC are represented by agencies that either have, or are actively planning toward, delegation agreements to manage their own child and family services" (Delegated Aboriginal Agencies in BC - Province of British Columbia (gov.bc.ca).)

Legislative Change

As of January 1, 2020, the *Act Respecting First Nations, Inuit and Métis Children, Youth and Families* (S.C. 2019, c. 24) came into force. The *Act* affirms the rights of Indigenous peoples to exercise jurisdiction in relation to child and family services for their communities. It also establishes guiding principles, including the best interests of the child, cultural continuity, and substantive equality, to guide the provision of child and family services in relation to Indigenous children.

Example: Promising Practice - Cowessess First Nation, Treaty 4, Saskatchewan

On April 1, 2021, the Cowessess First Nations asserted child welfare jurisdiction under their *Miyo Pimatisowin Act* (Cree for 'living a good life'). This process began with the Cowessess First Nation after they created their own *Constitution* in 2018.

An Act Respecting First Nations, Inuit and Métis, Children, Youth and Families provides Indigenous communities with the opportunity to assert their inherent jurisdiction to develop their own child welfare systems. On July 6, 2021, Cowessess First Nation became the first Indigenous nation to finalize an agreement for federal funding of locally controlled child welfare services under this *Act.*

Cowessess First Nation began to focus on their children in care, bringing their members back to their community wherever possible, and supporting parents to be able to keep their children. They also created two homes: one for girls 14 years and older who would not be able to return to their families, and the other for children to stay in their community.

Want to Know More?

The following reports are available online:

- Final Report on Indigenous Child Welfare in British Columbia
- Wrapping Our Ways Around Them (an Indigenous community guidebook regarding the *Child, Family and Community Service Act*)
- Why Indigenous Children Are Overrepresented in Canada's Foster Care System (McLean's video report by Kyle Edwards)

3.4 – Discrimination

Introduction

This section examines gender discrimination, paternalistic discrimination experienced by Indigenous veterans, and systemic discrimination. Criminal law is used to exemplify systemic discrimination. The challenges experienced by Indigenous people should not be perceived in isolation, but rather in relation to broader systems of colonization, racism, and discrimination.

Gender Discrimination

As mentioned earlier, the colonial government introduced a policy of "enfranchisement" whereby Indigenous individuals could assimilate into non-Indigenous society and become dissociated from Indigenous communities. In 1867, the *Indian Act* enacted a "forced enfranchisement" provision that removed Indian status from certain individuals, including Indians who became educated, and Indian women who married non-status men. In contrast, non-status women who married status Indian men gained status. These *Indian Act* provisions were

based on the patriarchal principle that traces kinship through the male line (despite the fact that some Indigenous societies trace kinship through the female line). Women who had status taken from them could not pass Indian status to their children. As a result, many Indigenous women and children have been displaced from their Indigenous communities.

Take note of the choice of language in this module. Discussions about gender discrimination in the *Indian Act* are often framed in terms of women "losing" their status. This wording implies that the women were somehow at fault, and that the situation was inadvertent. However, the legislation was intentional: "a woman who marries a person who is not an Indian…[is] not entitled to be registered" (s. 12(1)(b) of the *Indian Act*, prior to 1985). Indian status was accordingly "taken away from" Indigenous women, by the legislation, and by the institutional actors who carried out the discriminatory provision. Reframing the discussion helps to draw out the ways in which law impacts Indigenous people.

This short video (created by the *Canadian Encyclopedia*) highlights Mary Two-Axe Earley's fight against gender discrimination in the *Indian Act*: Women in Canadian History: Mary Two-Axe Earley

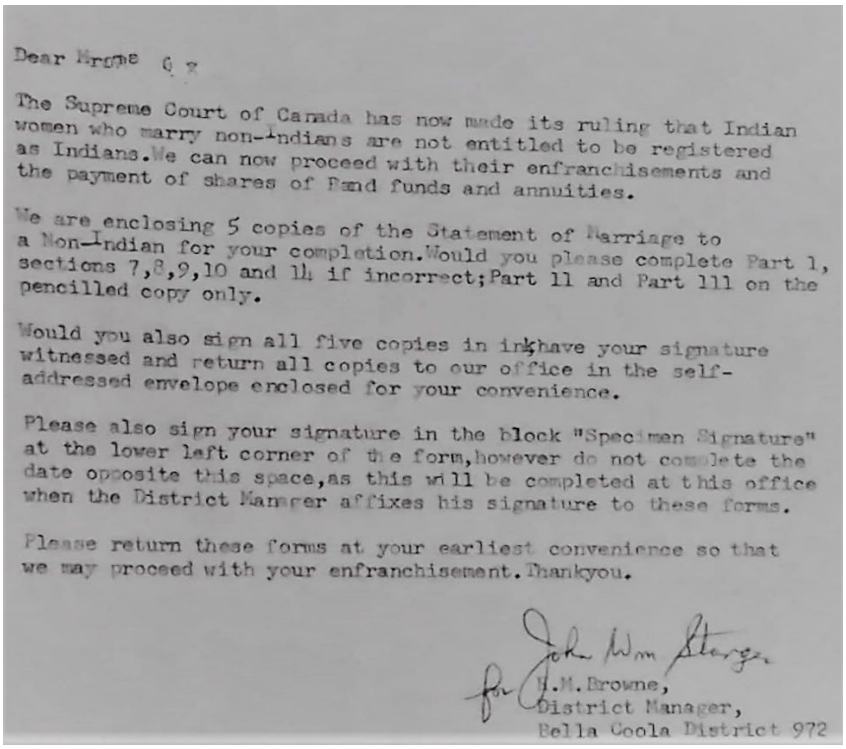
Exclusion

First Nations women who have had status removed and their children are excluded from:

- access to federal programs and services intended for registered Indians, such as post-secondary education, and uninsured health benefits;
- band membership and related benefits, including the ability to live on reserve with their families and communities, access to on reserve kindergarten to grade 12 education, housing, training, and cultural programs;
- political voice, as they cannot run or vote in band council elections; and
- Indigenous identity, as their ineligibility to live on reserve creates a significant barrier to accessing elders, language speakers, and community ceremonies.

(UN Ruling Backgrounder, at 3.)

This is a photo of an "enfranchisement" letter, from 1976:



Dear Mrs. [illegible]

The Supreme Court of Canada has now made its ruling that Indian women who marry non-Indians are not entitled to be registered as Indians. We can now proceed with their enfranchisements and the payment of shares of Band funds and annuities.

We are enclosing 5 copies of the Statement of Marriage to a Non-Indian for your completion. Would you please complete Part 1, sections 7,8,9,10 and 11 if incorrect; Part 11 and Part 111 on the pencilled copy only.

Would you also sign all five copies in ink, have your signature witnessed and return all copies to our office in the self-addressed envelope enclosed for your convenience.

Please also sign your signature in the block "Specimen Signature" at the lower left corner of the form, however do not complete the date opposite this space, as this will be completed at this office when the District Manager affixes his signature to these forms.

Please return these forms at your earliest convenience so that we may proceed with your enfranchisement. Thankyou.

John Wm Sterger
for J.M. Browne,
District Manager,
Bella Coola District 972

Legal Challenges

Over the past decades, many Indigenous women have fought this gender inequality through court cases, in both the domestic and international courts, from the 1970s to the present day.

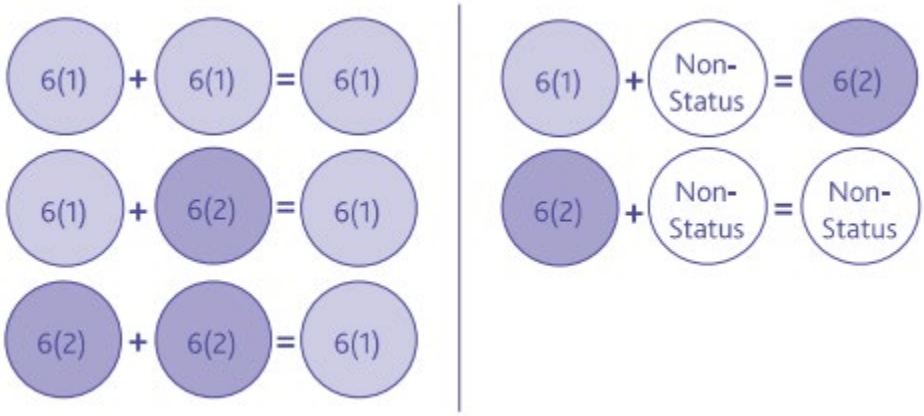
Jeanette Corbiere Lavell and Yvonne Bédard challenged the registration provisions that caused their status to be removed as a result of marrying non-Indigenous men, but they were unsuccessful when the appeal was heard by the Supreme Court of Canada (*Attorney General of Canada v. Lavell*, [1974] SCR 1349).

Sandra Lovelace turned to international law to challenge the provisions. In 1981, the United Nations Human Rights Committee concluded that provisions denying Lovelace the legal right to reside on her reserve violated the Optional Protocol to the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, Human Rights Committee, Communication R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981))

Bill C-31

In response, the federal government enacted Bill C-31 in 1985 to end the marriage-based status provisions: women would no longer have status given or taken away upon marriage. Moreover, women who previously had their Indian status removed could apply to regain their own and their children's status. But inequities persisted.

Bill C-31 created more categories of status Indians. Status Indians who had never had their status removed were categorized as 6(1)(a) status Indians, whereas women whose Indian status was reinstated were categorized as 6(1)(c) status Indians. Children who received Indian status from a reinstated mother were categorized as 6(2) status Indians. The 6(2) status category had limited capacity to pass status onto future generations: Indians with 6(2) status could only pass status to their children if the other parent was also a status Indian. This issue is depicted in the following image from a Bill C-31 Fact Sheet:



Sharon McIvor challenged this disparity. The BC Court of Appeal found discrimination in the *Indian Act,* and gave the federal government one year to resolve the inequities (*McIvor v. Canada*). In 2010, Parliament passed Bill C-3, the *Gender Equity in Indian Registration Act*.

However, in the 2015 case of *Descheneaux v. Canada*, the Superior Court of Quebec found that Bill C-3 continued to perpetuate sex-based differential treatment between:

- "First cousins, depending on the sex of their Indian grandparent, where the grandparent was married to a non-Indian before 1985; (Descheneaux Case Summary) and
- "Siblings, where a male and female child were born out of wedlock between the 1951 and 1985 amendments to the *Act*." (Ibid.)

The differential treatment resulted in an unequal ability to pass on Indian status, depending on whether the person's Indian grandparent (or parent) was male or female. The court found the registration provisions to be discriminatory and gave Canada 18 months to develop the appropriate amendments.

Bill S-3

Bill S-3 came into effect in 2017, and Canada was of the view that all gender discrimination had been removed from the *Indian Act.* However, in January 2019, the UN Human Rights Committee found that the *Indian Act* continued to discriminate against Indigenous women in Canada (see: CCPR/C/124/DR/2020/2010 (ohchr.org)). It recommended that the Canadian government ensure that First Nations women receive Indian status in the same way that men do.

The second part of Bill S-3, related to restoring status to women and their children who had status removed before 1951 (known as the "1951 Cut-off"), was brought into force in August of 2019. According to the government, "While all known sex-based inequities in the registration provisions have now been eliminated, the Government of Canada continues to collaborate with First Nations and other partners to address the remaining inequities in registration." (Bill S-3: Eliminating known sex-based inequities in registration (sac-isc.gc.ca).)

Membership Code Exclusions

While "enfranchised" Indian women and their descendants may now be able to obtain status and be included on the Indian Register, they may still be excluded from band membership. As federal instruments, band membership codes must comply with the equality provision of the *Charter,* and membership decisions are subject to procedural fairness. However, some First Nations are putting up barriers to band membership (e.g. *Engstrom v. Peters First Nation*), so gender discrimination due to the *Indian Act* is an ongoing issue.

Indigenous Veterans

Thousands of First Nations, Métis, and Inuit people served as soldiers and nurses in the First and Second World Wars, both overseas and at home, even though many were not even considered Canadian citizens. Of the more than 4000 First Nations soldiers who volunteered in the First World War, at least 300 died in battle (Indigenous Peoples and the First World War). In the Second World War, more than 4200 Indigenous soldiers served, and at least 500 of them died in battle (this number is likely woefully understated as many Indigenous people did not identify as Indigenous when they signed up to fight for Canada, and Canada only tracked statistics for status Indians, not for Métis or non-status Indigenous people). (Indigenous Peoples and the World Wars). Despite fighting for freedom, Indigenous veterans continued to experience discrimination upon returning to Canada.

Benefits

During the World Wars, the federal government provided allowances to non-Indigenous soldiers' families, but they did not do the same for the dependents of Indigenous soldiers because of the paternalistic stereotype that Indigenous people were incapable of handling their money. While researching the treatment of First Nations veterans, R. Scott Sheffield discovered documents in which Indian Agents had shared their views:

> *"Knowing these Indians as I do, a cheque for $100 or even $200 would be gone in less than a week. They have no idea of the value of money….money is just squandered in the hire of cars, liquor, …most of the women are only led into trouble by the handling of more money than they have any legitimate need for."*

R. Scott Sheffield, *A Search For Equity: A Study of the Treatment Accorded to First Nations Veterans and Dependents of the Second World War and the Korean Conflict* (Prepared for the National Round Table on First Nations Veterans' Issues, April 2001), at 23.

At the end of the wars, not only did their service and sacrifice go unacknowledged, but they were also denied veterans' benefits that were available to their fellow settler soldiers, money that was crucial to the post-war prosperity many Canadian settlers enjoyed (Indigenous Peoples and the First World War).

"Status Indians who wanted to obtain pensions or apply for vocational courses needed to get permission from Indian Agents first, who might or might not be sympathetic or willing to take action on their behalf." (Magdalena Paluszkiewicz-Misiaczek, "They Should Vanish Into Thin Air and Give no Trouble": Canadian Aboriginal Veterans of World Wars," *Journal of Military and Strategic Studies*, 2018, volume 19, issue 2 at 120).

Land Programs

Following the First World War, the government introduced the *Soldier Settlement Act*, meant to help soldiers begin farming. (Indigenous Peoples and the First World War) The land grant program was not equally available to Indigenous veterans: "land for status Indian veterans was limited to allotments on their reserves, unless the veteran opted to enfranchise" (Paluszkiewicz-Misiaczek, at 122). Moreover, "the government confiscated an additional 85,844 acres from reserves to provide for non-Indigenous soldiers." (Indigenous Peoples and the First World War)

Following the Second World War, "loans were made available to soldiers to purchase property, but status Indians were largely precluded from accessing them because their on-reserve assets could not be used as security for the loans" (Paluszkiewicz-Misiaczek, at 128). (Section 89 of the *Indian Act* prohibits the seizure of the personal property of Indians from Indian reserves.)

"All of the potential benefits for status Indians were at the discretion of Indian Agents. This approach blocked many status Indian veterans from accessing benefits, and undermined their capacity to make their own decisions. Indigenous soldiers fought against discrimination, only to learn upon their return to Canada that their enlistment and sacrifice changed nothing in their social position, nor did it give them equal access to veterans' benefits" (Paluszkiewicz-Misiaczek, at 119).

Note: National Indigenous Veterans Day is observed on November 8th each year.

Want to Know More?

Read this article from the Canadian Museum for Human Rights: Dick Patrick: An Indigenous veteran's fight for inclusion .

Racism

There is a sentiment among some Canadians that everything that happened to Indigenous people happened so long ago that they should just "get over it." The Honourable Murray Sinclair responds to the suggestion for Indigenous people to "get over it" in the following video clip from CBC program, *The Current*.

Key Terms

Genocide includes acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. (United Nations Convention on the Prevention and Punishment of the Crime of Genocide)

Racism is the belief that a group of people are inferior based on the colour of their skin or due to the inferiority of their culture or spirituality. It leads to discriminatory behaviours and policies that oppress, ignore, or treat racialized groups as 'less than' non-racialized groups. (See: *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care*, at 10.)

Indigenous-specific racism refers to the unique nature of stereotyping, bias and prejudice about Indigenous peoples in Canada that is rooted in the history of settler colonialism. It is the ongoing race-based discrimination, negative stereotyping and injustice experienced by Indigenous peoples that perpetuates power imbalances, systemic discrimination and inequitable outcomes stemming from the colonial policies and practices. (*Ibid*.)

Systemic racism is where acceptance of discriminatory and prejudicial practices has become normalized across our society and institutions. (*Ibid*.)

Prejudice refers to a negative way of thinking and attitude toward a socially defined group and toward any person perceived to be a member of the group. (*Ibid*.)

Profiling is creating or promoting a pre-set idea of the values, beliefs and actions of a group in society and treating individuals who are members of that cohort as if they fit a pre-set notion, often causing them to receive different and discriminatory treatment. (*Ibid*.)

A **microaggression** is statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group, such as a racial minority. (See: Microaggressions)

Content Warning

The following content may be emotionally disturbing for some people.

Genocide

According to the *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:
>
> - Killing members of the group;
> - Causing serious bodily or mental harm to members of the group;
> - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> - Imposing measures intended to prevent births within the group;
> - Forcibly transferring children of the group to another group.

The National Inquiry into Missing and Murdered Women and Girls found that violence against Indigenous women and girls "amounts to race-based genocide of Indigenous Peoples" (National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place*, Volume 1a, p. 50). The Commissioners supported their finding with a Supplementary Report containing a legal analysis of genocide (see: "Legal Analysis of Genocide"). Even so, many Canadians deny that Canada has committed genocide.

Self-Reflection

Please watch this video Is it really genocide? In Canada? | TVO.org (courtesy of TVO | Current affairs, documentaries and education) and respond to the questions that follow:

1. What are your thoughts about whether Canada has committed (and continues to commit) genocide against Indigenous Peoples?
2. Why do many people deny that Canada's treatment of Indigenous Peoples amounts to genocide?

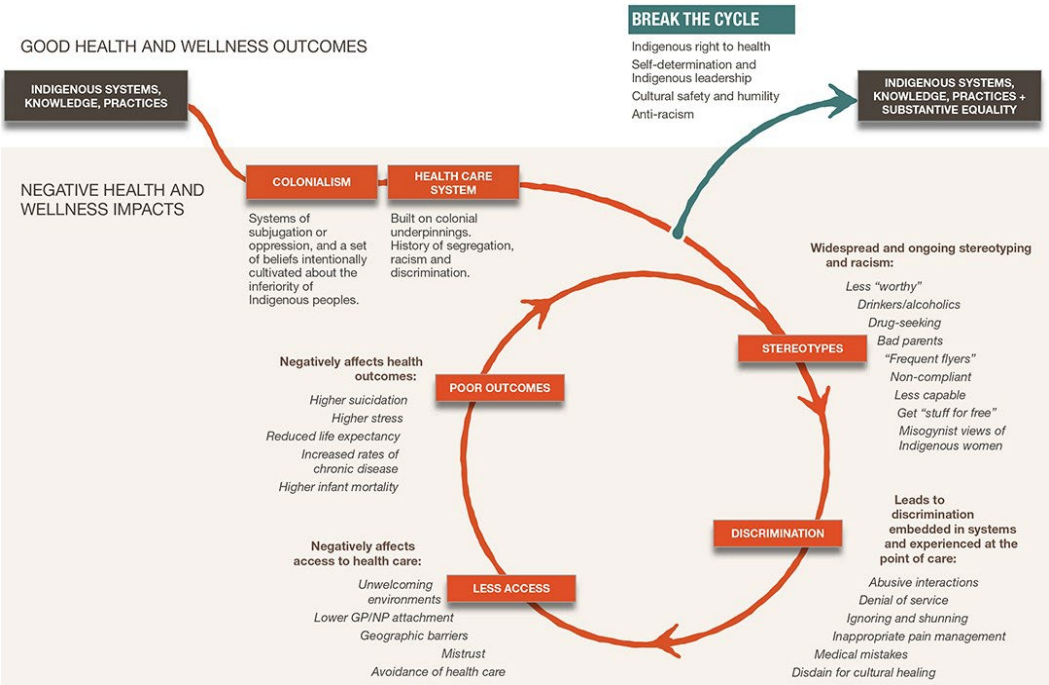
Systemic Racism

In British Columbia, the government commissioned a study on racism in the healthcare system (see: In-Plain-Sight-Summary-Report). The Report contains information that is applicable to the legal system.

Cycle of Oppression

Although the diagram below was created in relation to the health care system, the basic cycle of oppression is evident in the legal system as well: colonialism feeds into stereotypes and discrimination, which lead to limited access and poor outcomes, which then feed back into stereotypes and discrimination, and the cycle continues. (A

larger image of the diagram is available in the In-Plain-Sight-Summary-Report at page 19 [or "digital page 21 of 74"].)



An Example of Systemic Racism

Cindy Blackstock explains how systemic racism operates in Canada's unequal funding of services for First Nations children in this video How to change systemic racism in Canada | TVO Today (video courtesy of TVO | Current affairs, documentaries and education).

Prevalence of Indigenous-Specific Racism

The BC Human Rights Tribunal commissioned a report, *Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights*, that provides many examples of discrimination experienced by Indigenous people in British Columbia. Few Indigenous people report human rights violations, in part because their experiences with racism are so pervasive. Comments shared by Indigenous informants include: "We have always been treated like second or third class citizens everywhere," Discrimination is "…not perceived as a big deal," "We are invisible," "When I tried to address the situation I was ridiculed and debased," and "If I filed a complaint every time, I wouldn't have time to sleep or eat or live." Many Indigenous people feel that Indigenous-specific racism is ingrained in Canadian society.

Self Reflection

1. Do you perceive any connection between Canada's colonial legal history and the pervasiveness of discrimination against Indigenous people?

2. Do you think that discriminatory laws of the past have any influence on the current Indigenous perception that it would not make any difference to file a human rights complaint?
3. In what ways might current laws and processes impede Indigenous engagement with the Canadian legal system?

Impacts of Racism

The National Collaborating Centre for Indigenous Health produced "Indigenous Experiences with Racism and Its Impacts" with the following observations:

- Racism must be understood as something that is lived and experienced by individuals, families, communities, and nations through interactions and structures of the everyday world.
- Indigenous peoples continue to be "othered" by settler groups in an attempt to rationalize colonial actions that disadvantage, oppress, and ultimately harm them.
- The continued existence of "Indian reserves" serves as one of the most visible reminders of the race-based segregation of First Nations people in Canada.
- During the mid-1700s, Edward Cornwallis placed a bounty for the scalp of every Mi'kmaq man, woman or child, thus inciting the killing of Mi'kmaq citizens, yet streets and schools have been named after him, and statues have been erected to honour him.
- Historical and contemporary trauma resulting from loss of land, subversion of governance, marginalization, incarceration, residential schools, abuse, and violence intersect to dramatically affect the mental health of Indigenous people in Canada.
- The cumulative impacts of structural racism have been felt throughout generations of Indigenous and have caused collective wounds that are not easily mended.

Want to Know More?

Fact sheet: Indigenous experiences with racism and its impacts

Microaggressions

Examples of Indigenous-specific Microaggressions

Indigenous people regularly experience microaggressions, such as statements that:

- Repeat or affirm stereotypes about Indigenous people;
- Position Euro-Canadian culture as normal, and Indigenous cultures as abnormal;
- Express discomfort with Indigenous people;
- Assume all Indigenous people are the same;
- Minimize the existence of discrimination against Indigenous people;
- Deny the perpetrator's own biases against Indigenous people; and
- Minimize real conflict between Indigenous and non-Indigenous societies.

Some common microaggressions against Indigenous people are listed below:

Theme	Microaggression	Message
Foreigner in own land Indigenous people are assumed to be foreign-born or their ancestors crossed a "land bridge."	“Where are you from?” followed by “No, where are you really from?” “Where were you born?”"	You are not really from here. Everyone (including Indigenous people) is from somewhere else, so Indigenous people should not have "special rights."
Trivializing language	"Can you teach me how to say X in your Indigenous language?" "Lowest man on the totem pole." "Let's have a pow wow to discuss..."	Your language is simple. Disregards disruption of language (e.g., due to residential schools). Misapplies Indigenous concepts as slang.
Pan-Indianism Assuming all Indigenous people are the same.	"Your people..." "Why do Indigenous people do X?"	All Indigenous people are the same. An Indigenous person can speak for all Indigenous people.
Ascription of Intelligence Assigning intelligence to an Indigenous person on the basis of their race.	“You are a credit to your race.” “You are so articulate.”	Indigenous people are not as intelligent as white people. It is rare or unusual for an Indigenous person to be so articulate.
Colour Blindness Statements that indicate that a white person does not want to acknowledge race.	“When I look at you, I don’t see colour.” “Canada is a multi-cultural country, and we are all equal." “There is only one race, the human race.”	Denying an Indigenous person's racial/ethnic background and experiences. Assimilate/acculturate to the dominant culture. Denying a person as a racial/cultural being.
Assumption of criminal status An Indigenous person is presumed to be dangerous, a thief, drunk, or deviant on the basis of their race.	When an Indigenous person approaches, others clutch their purse/wallet. An Indigenous person is followed around a store.	You are a criminal. You will steal. You are poor. You do not belong. You are dangerous.

Denial of individual racism A statement made when white people deny their racial biases.	"I'm not a racist. I have several Indigenous friends." "As a woman, I know what you go through as a racial minority."	Having an Indigenous friend means I understand Indigenous perspectives. Your racial oppression is no different than my gender oppression. I can't be racist. I'm like you.
Myth of Meritocracy Statements which assert that race does not play a role in life successes.	"I believe the most qualified person should get the job." "Everyone can succeed in this society, if they work hard enough."	Indigenous people only get jobs due to affirmative action programs. Indigenous people are not as qualified as others. If Indigenous people worked harder, they could succeed. There are no other barriers or reasons they do not succeed.
Pathologizing cultural values/communication styles/mannerisms The notion that the values and communication styles of the dominant culture are ideal.	"Why are you so quiet? You should learn to speak up." "Indigenous people never look me in the eye." "He had a weak handshake." "Why do you have to be so emotional?"	Assimilate to the dominant culture. Behave like us. Leave your "cultural baggage" outside. You're irrational.
Second-class citizen Occurs when a white person is given preferential treatment over an Indigenous person.	An Indigenous person is mistaken for a service worker. An Indigenous lawyer is mistaken for a client or Native Courtworker. An Indigenous lawyer is asked to leave the Barristers' Lounge. Taxis pass by Indigenous people. Others are served before Indigenous people in a store or restaurant.	Indigenous people are servants. Indigenous people couldn't possibly occupy high-status positions. You don't belong here. You are dangerous. You probably can't afford... [to pay for a taxi, or to be shopping/dining here.] You don't belong. You are a lesser being.

Environmental microaggressions Surroundings or conditions convey that Indigenous people are not valued.	Reserves do not have clean drinking water. Indigenous schools are funded at 50% of non-Indigenous schools. More policing occurs in poor neighbourhoods. Buildings are named after colonizers. Statues of colonizers are prominent. TV and movies feature predominantly white people, especially in the positive, powerful roles.	You don't need what the rest of society needs. Educating you is not important. Your neighbourhood has more crime. Indigenous perspectives on history are not important. Oppressors of Indigenous people are commemorated and celebrated. Indigenous people are invisible, or not seen as contributors to society.
How to offend without really trying	"I have Indigenous ancestry." "I would love to get free gas." "I wish I didn't have to pay taxes."	Indigeneity is about genetics; there is no need for an attachment to culture, community, or nation. You get free stuff. Lack of empathy, and disregard for impacts of colonialism.

Adapted by Kory Wilson from: Wing, Capodilupo, Torino, Bucceri, Holder, Nadal, Esquilin (2007). Racial Microaggressions in Everyday Life: Implications for Clinical Practice. American Psychologist, 62, 4 271-286

The Effects of Microaggressions

Indigenous people who experience microaggressions may feel frustrated due to the incessant nature of microaggressions. They may feel exhausted from constant expectations that they will educate non-Indigenous people, and from continuous pressure to represent and defend Indigenous people. Further, they are often expected to suppress their true opinions and cultural expressions in order to fit into non-Indigenous society.

Self Reflection

1. Have you ever (perhaps inadvertently) said or done something that might be considered a microaggression? Did anyone correct you at the time, or did you come to realize it was a microaggression later?
2. Have you ever experienced microaggressions? If so, how did you react?
3. Have you ever witnessed a microaggression? If so, how did you react? Did you intervene to interrupt the microaggression? Why or why not?

Want to Know More?

The Law Society of BC and the Continuing Legal Education Society of BC have developed two videos regarding microaggressions experienced by:

1. Indigenous lawyers (But I Was Wearing A Suit - YouTube), and
2. Indigenous people accessing the justice system (But I Was Wearing A Suit: Part II — Experiences of Indigenous Peoples Accessing the Justice System - YouTube).

A useful resource to learn about how to interrupt microaggressions is available online: Tool for Interrupting Microaggressions

Socio-Economic Disparities

Statistical disparities between Indigenous and non-Indigenous populations provide some insight into the negative consequences of systemic discrimination. Though Indigenous people make up 4.9% of the Canadian population and 5.9% of BC's population, there are a number of socio-economic gaps in some areas such as:

Education

In 2016, the rate of high school completion was 48% for on-reserve First Nations, 75% for off-reserve First Nations, and 84% for Métis, compared to 92% for non-Indigenous people (2016 Census).

The rate of high school completion for Indigenous people living on-reserve in BC was 63% compared to 83.6% of the non-Indigenous population (Aboriginal Community Data Initiative).

Employment

Indigenous people have a lower employment rate compared to non-Indigenous people. For example, in 2016, the unemployment rate for Indigenous people living on reserve in BC was 22% compared to 5.8% for non-Indigenous people (Aboriginal Community Data Initiative).

Income

Nationally, in 2016, the average after-tax income of non-Indigenous people was $39,313; for First Nations it was $28,108; for Métis it was $35,440; and for Inuit it was $32,647 (2016 Census).

In BC, for 2016, the median employment income for Indigenous people living on reserve was $17,866 (Aboriginal Community Data Initiative) compared to $32,166 for non-Indigenous individuals (2016 Census).

Poverty

In 2016, 24% of Indigenous people in Canada lived in poverty compared to 14.2% of non-Indigenous people (2016 Census).

In BC, in 2018, 40.7% of Indigenous children lived in poverty compared to 18.5% of non-Indigenous children (First Call Report Card at 9).

Housing

According to the 2016 Census, nationally, 19.4% of Indigenous people lived in a dwelling that required major repairs, compared to 6% for non-Indigenous people.

The number was higher in BC, where 35% of Indigenous people living on a First Nations reserve lived in a dwelling that required major repairs (Aboriginal Community Data Initiative).

Nationally, the 2016 Census revealed the overcrowded housing rate was 18.3% for First Nations reserves and 40.6% for Inuit settlements, compared to 8.5% for the non-Indigenous population.

In BC, 11% of Indigenous people living on First Nations reserves lived in overcrowded conditions (Aboriginal Community Data Initiative).

Food Security

In 2019, 48% of First Nations on-reserve households did not have enough income to cover their food expenses, compared to 12% of the overall Canadian population (First Nations Food, Nutrition, and Environment Study). (BC-specific numbers are not readily available because the study examined eco-zones that do not align with provincial boundaries.)

Child Welfare

The 2016 Census showed that 52.2% of the children in care in Canada were Indigenous, whereas they only represented 7.7% of all children under 14 years of age.

At the provincial level, in 2018, 63% of children in care in BC were Indigenous even though Indigenous children made up less than 10% of the provincial population (Children in Care (gov.bc.ca)).

Health

Nationally, Métis life expectancy is 4 years lower, and First Nations life expectancy is 5 years lower than that of the non-Indigenous population (Projected life expectancy (statcan.gc.ca)).

However, in BC, the most recent numbers show that First Nations life expectancy is 8 years lower than that of the general population (Indigenous-Health-and-Well-Being-Report.pdf).

A 2018 report revealed the national infant mortality rate was 2 to 4 times higher for Indigenous people compared to the overall Canadian population (Inequalities in Infant Mortality).

In BC, between 2011 and 2015, the infant mortality rate was 2.5 times higher than that of the non-Indigenous population (Indigenous-Health-and-Well-Being-Report.pdf).

Indigenous people are disproportionately affected by HIV/AIDS, cardiovascular disease, cancer, and type-II diabetes. In 2017, the Inuit rate of tuberculosis was 300 times higher than the national average, while the rate for Indigenous people living on First Nations reserves was 40 times higher than the national average (Tuberculosis in Indigenous Communities).

In BC, in 2018, the rate of tuberculosis was 7.5/100,000 for the First Nation population compared to 6.0/100,000 for the general population (see: TB_Annual_Report_2018 and First-Nations-Peoples-and-Tuberculosis-in-BC).

Mental Health

From 2011-2016, suicide rates were 3 times higher for First Nations, 2 times higher for Métis, and 9 times higher for Inuit compared to non-Indigenous people (Statistics Canada).

From 2011-2015, the suicide rate for First Nations youth in BC was 3.5 times higher than that of non-Indigenous youth (Indigenous-Health-and-Well-Being-Report.pdf).

Justice

Nationally, Indigenous adults make up 5% of the Canadian population but they represent 30% of total admissions to correctional services. Indigenous women are admitted at a rate of 42% (Correctional Investigator of Canada).

At the provincial level, in 2017, Indigenous people made up about 5.4%of the population, but accounted for 30% of male adult inmates and 47% of female adult inmates in prisons in BC (Adult and youth correctional statistics in Canada, 2016/2017 (statcan.gc.ca).

Self Reflection

Consider the ways in which Canadian laws and policies contribute to the socio-economic disparities described above.

Criminal Law

Previous sections have discussed some of the consequences of centuries of colonization in Canada, including the subversion of Indigenous legal orders, breakdown of Indigenous social structures, disruption of Indigenous economies, and oppression of Indigenous people (including

the psychological impacts of that oppression). These factors, as well as ongoing systemic discrimination against Indigenous people (e.g., over-policing of Indigenous communities and racial profiling based on negative stereotypes of Indigenous people), have contributed to the current reality that "Indigenous people are overrepresented in the criminal justice system, both as offenders and as victims." (See: Overrepresentation of Indigenous People.)

Overincarceration

"Overall, in Canada, Indigenous people represent only about 5% of the general population but as of January 2020, they account for 30.4% of the overall federal prison population; Indigenous women account for 42% of federally incarcerated women." (Office of the Correctional Investigator) "Indigenous youth make up 8% of the general population, but account for 46% of incarcerated youth; Indigenous girls account for 60% of incarcerated youth." (Department of Justice)

"Indigenous inmates are disproportionately classified and placed in maximum security institutions, over-represented in use of force and self-injurious incidents, and historically, were more likely to be placed and held longer in segregation (solitary confinement) units. Compared to their non-Indigenous counterparts, Indigenous offenders serve a higher proportion of their sentence behind bars before granted parole." (Office of the Correctional Investigator).

Criminal Code Section 718.2(e)

> *"A court that imposes a sentence shall...take into consideration the following principles:...all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."*

This provision was intended to ameliorate the high rates of incarceration of Indigenous people. Before the amendments came into force in 1996, "sentencing was the exclusive purview of judges who balanced the principles of deterrence, denunciation, incapacitation, and rehabilitation in their own personal fashion, subject only to appellate review" (Jonathan Rudin, 2007 at 40-41). "The amendments reflected in s. 718 introduced a degree of restriction on judges' decision making by imposing legislated sentencing guidelines. The primary aim of the amendments was to reduce the frequency of custodial sentences imposed by Canadian courts." (Overrepresentation of Indigenous People.)

Gladue

In 1999, *R. v. Gladue* was the first Supreme Court of Canada decision to consider s. 718.2(e). The Court found that:

> *"The drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out Aboriginal offenders for distinct*

sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree." (Ibid *at para. 64.)*

*"It arises also from bias against Aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for Aboriginal offenders." (*Ibid *at para. 65)*

Section 718.2(e) does not mean an Indigenous person will automatically receive a lesser sentence. Academic analyses of judicial applications of section 718.2(e) have found that:

- *Gladue* principles are often resisted by sentencing judges and are given little to no weight as compared to other factors in the minds of sentencing judges. (See: Ipeelee and the Duty to Resist.)
- There is no guarantee that *Gladue* reports will be used to contextualize the unique systemic cultural and historical factors specific to Aboriginal offenders and to recommend alternatives to incarceration. Instead, many judges are influenced by actuarial risk logic that frames race as a factor in the calculation of risk. Judges who perceive Indigeneity as a risk factor (rather than a mitigating factor) may use Indigenous self-identification via a *Gladue* report to increase (rather than decrease) the severity of sentences given to Indigenous offenders. (See: Re-contextualizing pre-sentence reports: risk and race.)

R. v. Ipeelee found that "section 718.2(e) of the *Criminal Code* has not had a discernable impact on the overrepresentation of Aboriginal people in the criminal justice system" and "statistics indicated that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened" (at paras 62-63). *Ipeelee* further emphasized that the "application of the *Gladue* principles is required in every case involving an Aboriginal offender…and a failure to do so constitutes an error justifying appellate intervention" (at para. 87). In *Ipeelee*, the SCC denounced the legal system's failure to live up to *Gladue*, and renewed its call for changes in the way Indigenous offenders were sentenced by the court. (Overrepresentation of Indigenous People.)

Want to Know More?

See: The Gladue Principles: a Guide to the Jurisprudence, and user guides for Crown Counsel, Defence Counsel, and Gladue Report Writers.

Victimization

Content Warning

The following content may be emotionally disturbing for some people.

According to the Statistics Canada 2014 General Social Survey on Victimization of Aboriginal People:

- 28% of Indigenous people (aged 15+) reported being victimized in the previous 12 months, compared to 18% of non-Indigenous Canadians.
- The rate of violent victimization among Indigenous people was more than double that of non-Indigenous people (163 incidents per 1,000 people vs. 74 incidents per 1,000 people).
- Indigenous women had an overall rate of violent victimization that was double that of Indigenous men and close to triple that of non-Indigenous women. The rate of violent victimization per 1,000 people was: 220 for Indigenous women, 110 for Indigenous men, 81 for non-Indigenous women, and 66 for non-Indigenous men.
- Indigenous women also reported a sexual assault rate of 115 incidents per 1,000 population, much higher than the rate of 35 per 1,000 reported by non-Indigenous women.
- Indigenous people have lower confidence in the criminal justice system than non-Indigenous people. Close to one-third of Indigenous people reported having not very much confidence (22%) or no confidence at all (9%) in the criminal courts compared with just under one-quarter of non-Aboriginal people (17% and 5%, respectively).
- When Indigenous people are the victim of a crime and charges are laid, there is a higher rate of dismissed charges or not guilty outcomes.

There is a broader distrust of the Canadian legal system among many Indigenous people based on the legal system's role in colonization. This distrust is further fed by high profile cases, such as those involving Colten Boushie and Cindy Gladue.

Colten Boushie

On February 9, 2018, Gerald Stanley, a white farmer in rural Saskatchewan, was acquitted of murder and manslaughter in the killing of Colten Boushie, a 22-year-old Cree man. The acquittal caused great controversy. Stanley's counsel "exercised five of 14 peremptory challenges to exclude all visibly Indigenous people" from the all-white jury that acquitted Stanley (Gerald Stanley case). Stanley's counsel also presented questionable evidence in support of a hang-fire defence.

The acquittal was not appealed by prosecutors. However, it led the federal government to abolish peremptory challenges. In 2021, an investigation conducted by the Civilian Review and Complaints Commission concluded that the RCMP was insensitive and racially discriminatory toward Boushie's mother, and that the police mishandled witnesses and evidence. A Globe and Mail investigation also found that the RCMP "destroyed records of police communications from the night Colten Boushie died." (Gerald Stanley case)

Want to Know More?

Documentary: nîpawistamâsowin: We Will Stand Up by Tasha Hubbard - NFB

Podcast: Listen to CBC Saskatchewan's original podcast 'Boushie' | CBC News

Cindy Gladue

"On February 18, 2021, a jury found Bradley Barton guilty of manslaughter for the 2011 killing of Cindy Gladue. Cindy Gladue bled to death as a result of a wound inflicted upon her by Bradley Barton. This was Bradley Barton's second trial. In the initial 2015 trial, the jury accepted the defence argument that Cindy Gladue had consented to 'rough sex' and acquitted Bradley Barton. The 2015 trial failed to uphold Cindy Gladue's dignity and humanity. Racist and sexist stereotypes about Indigenous women consistently influenced and pervaded the proceedings." (Women's Legal Education and Action Fund.)

In the Supreme Court of Canada decision (*R. v. Barton*), the majority acknowledged that "Indigenous people — and in particular Indigenous women, girls, and sex workers — have endured serious injustices, including high rates of sexual violence against women" (at para. 198). In response, the majority conveyed that "as an additional safeguard going forward, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls" (at para. 200).

Want to Know More?

R. v. Barton, 2019 SCC 33

Scott Franks, "Barton jury instructions may raise racial prejudice" *CBA National Magazine* (June 5, 2019).

MODULE 4 – RECOGNITION (time estimate: 1 hour)

Since contact with colonizers, Indigenous people have been resisting the colonial government's assimilationist efforts to erase Indigenous peoples and their distinct laws, cultures, beliefs, and practices. The centuries-long Indigenous resistance is grounded in Indigenous law, guided by the teachings of the ancestors, and led by the Indigenous leaders who envision a more equitable future.

The 20th century saw changes in Canadian legislation that would expand Indigenous rights and elevate Indigenous voices. Parallel to the significant world-wide human rights and civil rights struggles, Canada was reflecting and re-examining its treatment of marginalized groups, including Indigenous people.

Learning Outcomes

This module will:

- Review examples of Indigenous resistance;
- Examine the progression in legislative developments leading up to the constitutional recognition of Aboriginal and treaty rights;
- Provide an overview of significant Aboriginal and treaty rights cases; and
- Consider key commissions, inquiries, and reports regarding Indigenous people.

4.1 – Turning the Tide

This section provides a brief overview of Indigenous resistance, the formation of Indigenous organizations, and their efforts toward equality and recognition.

Indigenous Strength and Resistance

Indigenous people have been resisting colonial dispossession of Indigenous territories since the arrival of Europeans, using a variety of methods.

In what is now British Columbia, there were over 30 Indigenous nations with diverse governing structures prior to contact with newcomers. Each independently resisted colonial incursions into Indigenous territories. There were many independent acts of resistance. Two examples, the Tsilhqot'in War, and the Metlakatla relocation, are highlighted below.

Tsilhqot'in War

A well-known example of Indigenous resistance is the Tsilhqot'in War of 1864, in which a number of Tsilhqot'in leaders stood up against colonial violations of Tsilhqot'in law, including illegal occupation and unauthorized incursions into Tsilhqot'in territory, the mistreatment of Tsilhqot'in citizens, and the threat of germ warfare. (See: Edward Hewlett, *The Chilcotin Uprising: a Study of Indian-White Relations in Nineteenth Century British Columbia* (MA Thesis, University of British Columbia, 1972), and Tom Swanky, *A Missing Genocide and the Demonization of its Heroes* (Vancouver: Dragonheart, 2014)). Tsilhqot'in warriors carried out a series of attacks in April and May 1864, killing 19 non-Indigenous people. On April 30, 1864 the Tsilhqot'in warriors attacked and killed 14 non-Indigenous road-builders who were attempting to build a road from the coast into the interior through Tsilhqot'in territory. Several days later, five additional non-Indigenous people, including packers and a settler, were killed.

The Tsilhqot'in leaders were invited to discuss terms of peace, "and then in an unexpected act of betrayal, they were arrested, imprisoned and tried for murder" (October 23, 2014, Speech by Premier Christy Clark in the British Columbia Legislature). Six Tsilhqot'in leaders were sentenced to death by hanging (five in 1864 and one in 1865). The Tsilhqot'in leaders were posthumously exonerated by the provincial government in 2014, and by the federal government in 2018.

Want to Know More?

Videos of the exoneration speeches are available online:

- Premier Clark's Exoneration of "The Tsilhqot'in Chiefs"
- Prime Minister Trudeau exonerates six Tsilhqot'in chiefs

Metlakatla Relocation

Largely influenced by the unfair land policies underway in British Columbia, some Indigenous people fled to the United States. In 1887, to remove themselves from oppression under the *Indian Act* and associated land policies, 823 Tsimshian citizens emigrated from their original village in British Columbia to the Annette Islands in Alaska.

Want to Know More?

The Metlakatla relocation is mentioned in this video clip: Ketchikan Stories

At the collective level, as newcomer interest in settling on Indigenous territories increased, Indigenous Nations began forming alliances to assert their rights, with a view to protecting their territories from colonial incursion.

Indigenous alliances have made declarations about Indigenous title, demanding that colonial officials recognize and address Indigenous territorial rights. They have sent petitions to government officials, protested in front of government offices, and sent delegations of Indigenous leaders to meet with provincial and federal officials, the King of England, and even the Pope. They have also applied to have their claims adjudicated by the colonial courts (which, as described earlier, led to the *Indian Act* ban on fundraising for land claims). The emergence of Indigenous alliances is described below.

Early Alliances

In 1909, the Indian Rights Association (comprised of coastal Indigenous nations) and the Interior Tribes of British Columbia emerged as intertribal political organizations. In 1916, a province-wide Indigenous organization was formed: the Allied Tribes of British Columbia. The Allied Tribes opposed the findings and recommendations of the McKenna-McBride Commission. The Allied Tribes were able to raise their concerns with federal officials, but, as mentioned in a previous module, their efforts were thwarted by an amendment to the *Indian Act* in 1927 that made it illegal to fundraise or hire a lawyer in pursuit of land claims. Indigenous organizations that had emerged around land claims were accordingly forced underground.

Native Brotherhood of BC

In 1931, the Native Brotherhood of British Columbia formed "to continue the ideals of the Allied Tribes while avoiding any explicit pursuit of the now-prohibited land claim" (Tennant, *Aboriginal Peoples and Politics*, at 116). They continued to push for the recognition of Indigenous rights throughout traditional territories, the removal of the Potlatch ban, equality (such as the right to vote, and the removal of discriminatory laws that singled out Indigenous people), and the building of schools within Indigenous communities (instead of being forced to send their children to residential schools).

National Organizations

Nationally, the following organizations emerged (listed chronologically):

- The National Indian Brotherhood was formed in 1967, and became the Assembly of First Nations in 1982. (Indigenous Political Organizations.)
- The Native Council of Canada was formed in 1970, representing Métis and non-status Indians, and was renamed the Congress of Aboriginal Peoples in 1993. (Ibid.)

- The Inuit Tapirisat of Canada was formed in 1971, and renamed the Inuit Tapiriit Kanatami in 2001. (Inuit Tapiriit Kanatami.)
- The Native Women's Association of Canada was incorporated as a non-profit organization in 1974. (Native Women's Association of Canada.)
- The Métis Nation separated from the Native Council of Canada in 1983 to form the Métis National Council, a Métis-specific national representative body. (Governance | Métis National Council (metisnation.ca)).

The Red Power Movement

In 1969, the federal government released the White Paper - a policy paper that proposed to abolish the *Indian Act*, eliminate treaties, and assimilate all Indigenous people fully into the Canadian state, thereby eliminating "Indian" as a distinct legal status. Dr. Harold Cardinal, an Indigenous Chief and lawyer, characterized the White Paper as "a programme [offering] nothing better than cultural genocide." Chief Harold Cardinal, *The Unjust Society* (Seattle: University of Washington Press, 1999) at 1). Backlash to the White Paper was monumental, and became known as the "Red Power" movement.

Red Paper

The Red Paper, prepared by the chiefs of Alberta, was put forth as an Indigenous response to the White Paper. The Alberta chiefs viewed the White Paper as offering "despair instead of hope," and they outlined their objections to the measures set out in the White Paper:

> *"Under the guise of land ownership, the government has devised a scheme whereby within a generation or shortly after the proposed* Indian Lands Act *expires our people would be left with no land, and consequently the future generation would be condemned to the despair and ugly spectre of urban poverty in ghettos…. [T]he only way to maintain our culture is for us to remain as Indians. To preserve our culture, it is necessary to preserve our status, rights, lands, and traditions."*
>
> (Excerpt from the Preamble of the Red Paper reproduced in Indian Chiefs of Alberta, 2011, at 190)

Brown Paper

Published November 17, 1970, the Brown Paper was the response from the newly formed Union of British Columbia Indian Chiefs. The Brown Paper proposed the following matters for the federal government to address:

1. Settlement of land claims in the province of British Columbia.
2. Recognition of the various Indian nations.
3. Recognition of all rights due Indians such as: land title, foreshore, water and riparian rights, forest and timber, hunting and fishing on a year-round basis, mineral and petroleum, and all other rights basic to Indian life that are acquired by hereditary, historical, usufructuary, moral, human, or of legal obligation.

4. Establishment of an unbiased claims commission which will recognize these native rights and prepare just compensation awards for settlement of all land and other native claims.
5. Reconciliation of injustices done by the imposition of restrictions by all forms of federal or provincial legislation.
6. Complete and continued consultation with [Indigenous nations] during revisions of pertinent legislation, and in setting policy on all matters affecting Indians by both senior governments, including revisions and alteration of existing programs.
7. Assumption of government administrations at the local level.
8. A continued federal government commitment to [Indigenous] people.
9. Equal rights and opportunities in all spheres of public activity: economic, educational, health, social, cultural, civic, and political.
10. Improved services and programs.

Pierre Trudeau subsequently recognized the White Paper as a failure and stated, "We had perhaps the prejudices of small 'l' liberals and white men at that time who thought that equality meant the same law for everybody…but we learned in the process we were a bit too abstract, we were not perhaps pragmatic enough or understanding enough." (Sally Weaver, *Making Canadian Indian policy: the hidden agenda 1968-70* (Toronto: University of Toronto Press, 1981) at 185).

Union of BC Indian Chiefs

In British Columbia, 144 Indigenous leaders from all over the province met to develop a response to the White Paper, and united to form the Union of BC Indian Chiefs (UBCIC) in 1969. In 1980 and 1981, UBCIC organized a very effective campaign (the Constitution Express) to ensure that Indigenous rights would be protected in the patriation of the *Constitution* from Britain to Canada. By late January 1982, after extended negotiations with Indigenous leaders, the federal government agreed to the demands of Indigenous organizations. Section 35 was added to the *Constitution* to specifically recognize and affirm Aboriginal and treaty rights. The UBCIC is still active today.

BC Assembly of First Nations

The BC Assembly of First Nations (BCAFN) was formally established in 1985 as the regional arm of the national Assembly of First Nations (AFN).

First Nations Summit

The First Nations Summit, the second province-wide organization, was established to oversee modern treaty negotiations under the BC treaty-making process (in 1990). Approximately 150 First Nations currently participate in First Nations Summit assemblies to discuss and address issues of common concern.

BC First Nations Leadership Council

The political executives of the three provincial First Nations organizations in BC (i.e., the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs) work collectively through the First Nations Leadership Council to coordinate collective efforts and raise issues of common concern and, where mandated, represent those interests in a common front.

Métis Nation BC

Métis Nation BC emerged as a grassroots organization for Métis living in BC, and was incorporated under the former *Society Act* in 1996. It is recognized by the Métis National Council, Provincial Government of British Columbia, and the Federal Government of Canada, as the Governing Nation for Métis citizens in BC.

Idle No More

Idle No More describes its emergence as follows: "Idle No More started in November 2012, among Treaty People in Manitoba, Saskatchewan, and Alberta protesting the Canadian government's dismantling of environmental protection laws, endangering First Nations who live on the land. Born out of face-to-face organizing and popular education, but fluent in social media and new technologies, Idle No More has connected the most remote reserves to each other, to urbanized Indigenous people, and to the non-Indigenous population."

Land Back

Land Back is an Indigenous-led movement to reclaim Indigenous jurisdiction within Indigenous territories. Land Back involves the resurgence of Indigenous political and legal orders and the ongoing protection of land, waters, and peoples that has persisted despite hundreds of years of colonization. (For more information, see: Land Back: A Yellowhead Institute Red Paper and What Is Land Back?.)

Fundamental Human Rights

Indian Act Amendments (1951)

As a result of the atrocities of the Second World War and the increasing awareness of the need for fundamental human rights, Canada found itself being scrutinized about its treatment of Indigenous people, resulting in pressure on the Canadian government to make changes to the *Indian Act* in 1951.

In 1951, many of the most offensive prohibitions of the *Indian Act* were removed, such as the ban on ceremonies, prohibition of fundraising to hire lawyers, and restrictions against status Indians owning property off-reserve. The amended legislation allowed status Indian women to run and vote in band council elections, but the removal of status from Indian women who married non-status men remained. The 1951 amendments increased the application of provincial laws to Indians through the introduction of s. 88: "all laws of general application...in force in any province are applicable to and in respect of Indians in the province," despite federal authority over Indians under s. 91(24) of the *Constitution*.

Although many of the most restrictive provisions were removed, the assimilationist objectives remain to this day, including the imposed system of governance, definitions of who is and who is not an Indian, and the reserve system. The amendments of 1951 were not intended to increase Indigenous governance and self-determination.

Canadian Bill of Rights (1960)

In 1932, the Civil Liberties Subcommittee of the Canadian Bar Association recommended entrenching key rights into the *Constitution,* but with the subsequent passing of the *War Measures Act* and the interning of Italian and Japanese Canadians during the Second World War, this seemed far off.

In 1960, the *Canadian Bill of Rights* was passed, thus protecting human rights and fundamental freedoms. As a result, Indigenous people became full citizens of Canada, gaining the right to vote in federal elections. (Government of Canada - Justice Laws Website.)

By the 1960s, a consensus began to emerge among civil rights activists in Canada that these federal policies were not only ineffective but also harmful to the well-being of Indigenous peoples: Indigenous peoples were disproportionately living in poverty, and facing higher infant mortality and lower life-expectancy rates.

In *R. v. Drybones*, the Supreme Court of Canada applied the *Bill of Rights* to strike down a provision in the *Indian Act* which prohibited Indians from being intoxicated off-reserve. The provision was found to violate the defendant's right to equality.

Following the *Bill of Rights,* and with the ever-increasing awareness of the disparities and inequities in society, the federal government realized that it would have to do something to document and rectify the situation. This resulted in the Hawthorn Report.

Hawthorn Report (1967)

In 1963, in response to expanding social awareness of the systemic discrimination experienced by Indigenous people, the federal government commissioned anthropologist Harry Hawthorn to investigate the socio-economic conditions of the Indigenous population in Canada. (The Hawthorn Report).

This resulted in the 1967 *Hawthorn Report: A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, which concluded that Indigenous people were Canada's most disadvantaged and marginalized population. The Report made two high-level recommendations:

1. Integration or assimilation are not objectives which anyone else can properly hold for the Indian. The efforts of the Indian Affairs Branch should be concentrated on a series of specific middle range objectives, such as increasing their real income, and adding to their life expectancy.
2. Indians should be regarded as "citizens plus"; in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community.

The Report made specific recommendations to put significant amounts of money into economic development, with an emphasis on industrial work off-reserve and the transfer of responsibility for Indians to the provinces. As well, local Indigenous governments were to be encouraged to develop within the provincial municipal framework.

4.2 – Aboriginal and Treaty Rights

Introduction

The *Calder* decision of 1973 was significant for Indigenous people. The Supreme Court of Canada acknowledged the potential existence of Aboriginal title, and found that Aboriginal title originated from the Indigenous occupation of traditional territories prior to contact with Europeans. Accordingly, Aboriginal title pre-existed (and was not created by) colonial law. The Court was split on the outcome: three judges were of the view that Aboriginal title continued to exist, three judges were of the view that Indigenous title had been extinguished, and one judge dismissed the case based on the technicality that the claimants had not obtained permission from the Attorney General to sue the Government of British Columbia. Although the Court did not formally recognize Aboriginal title, the decision triggered a modern land claims process, and further Indigenous efforts toward rights recognition.

The legal pursuit of Indigenous claims increased following constitutional protection of Aboriginal and treaty rights in 1982. This section will provide an overview of the progression of Aboriginal and treaty rights litigation.

Constitutional Protection

The patriation of the *Constitution* solidified Canada's independence from Britain. Indigenous Peoples made great efforts to ensure that the *Constitution* would protect Aboriginal and treaty rights.

Aboriginal and Treaty Rights

Section 35 of the *Constitution Act* recognizes and affirms Aboriginal and treaty rights:

> *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.*
>
> *35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part,*
>
> *(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and*
>
> *(b) the Prime Minister of Canada will invite representatives of the Aboriginal peoples of Canada to participate in the discussions on that item.*

Equality Rights

The *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Everyone has the following fundamental freedoms:

1. freedom of conscience and religion;
2. freedom of thought, belief, opinion, and expression,
3. freedom of the press and other media of communication;
4. freedom of peaceful assembly; and

5. freedom of association.

Section 15 of the *Charter* guarantees equality:

> *(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*

Section 15(2) provides that the equality provision does not prevent government action meant to improve the situation of disadvantaged groups:

> *[Section 15(1)] does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*

Section 25 specifies that Aboriginal rights are not affected by the *Charter*:

> *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.*

Constitutional Conference

Section 37(1) called for the Prime Minister and premiers to hold a constitutional conference with Indigenous representatives before April 17, 1983 to discuss the rights of Indigenous Peoples. The following video (from the *CBC News* archives) contains some highlights from the first constitutional conference: Indigenous leaders meet to amend the Canadian Constitution | CBC.ca. (Note: Bill Wilson - shown telling Pierre Trudeau that his daughters want to become Canada's Prime Minister - is the father of Jody Wilson-Raybould.)

Want to Know More?
The following videos show the background and highlights of the constitutional conferences:

Dancing Around the Table, Part One , Maurice Bulbulian, provided by the National Film Board of Canada

Dancing Around the Table, Part Two, Maurice Bulbulian, provided by the National Film Board of Canada

Aboriginal and Treaty Rights Cases

"Aboriginal rights refer to practices, traditions and customs that distinguish the unique culture of each Indigenous nation and were practiced prior to Indigenous contact with Europeans. These are rights that some Aboriginal peoples of Canada hold as a result of their ancestors' longstanding use and occupancy of the land. Aboriginal rights vary from group to group depending on the customs, practices and traditions that have formed part of their distinctive cultures." (Aboriginal Rights)

Aboriginal title is the inherent Indigenous right to territory (which includes lands and waters). "The Canadian legal system recognizes Aboriginal title as a *sui generis* and collective right to the use of an Indigenous nation's ancestral territories. This right is not granted from an external source, but is a result of Aboriginal peoples' own occupation of, and relationship with their home territories, as well as their ongoing social structures and political and legal systems." (Indigenous Foundations)

Both Aboriginal rights and title are protected under s. 35 of the *Constitution*. Since 1982, the meaning and extent of Aboriginal rights and title has been the subject of much Indigenous litigation in Canada. Since the first court case that considered Indigenous issues, the court cases continue to further define what this meant by "rights" and "title," and the extent and limitations of section 35.

In this video, Satsan (Herb George) provides an overview of the Supreme Court of Canada Decisions Leading to the Recognition of Title (vimeo).

Want to Know More?

The University of Alberta has a free online course entitled "Indigenous Canada" with a brief video overview of Aboriginal rights jurisprudence in Canada.

What follows is a high-level summary of the major Supreme Court of Canada (SCC) Indigenous cases and their contribution to the legal landscape. Note that these cases have significance beyond the key points mentioned here which you are encouraged to explore. Links to the full text of each case are provided for reference (and those interested in learning more), but it is not mandatory to read each case.

Aboriginal Title

St. Catherine's Milling and Lumber Co. v. the Queen, (1887) 13 SCR 577

Outcome

In *St. Catherine's Milling*, the SCC held that Aboriginal title is "a personal and usufructuary right, dependent upon the good will of the sovereign" (para. 5). This decision characterized Aboriginal title as having been granted by the Crown via the *Royal Proclamation* in 1763; Aboriginal title existed (and could be extinguished) "at the pleasure of the Crown".

New Legal Landscape

Until the *Calder* case in 1973, this case set out the legal framework of Aboriginal rights and title in Canada. This case presented legal barriers for the recognition and protection of Aboriginal rights and title.

Calder *et al v. Attorney General of Canada* [1973] 34 D.L.R. (3rd) 145

Outcome

In the *Calder* case, for the first time, the SCC recognized the existence of Aboriginal title to land, and acknowledged that Aboriginal title arose from pre-contact occupation, possession, and use of traditional territories. The court determined that Aboriginal title existed at the time of the *Royal Proclamation* in 1763, and that it existed outside of, rather than being derived from, the *Royal Proclamation* or other colonial laws.

New Legal Landscape

The SCC was split on whether or not Nisga'a title had been extinguished by colonial legislation or treaty. Shortly after the *Calder* case, the federal government agreed to enter into treaty negotiations with the Nisga'a Nation and with other Indigenous nations across Canada.

Guerin v. The Queen, [1984] 2 S.C.R. 335

Outcome

Guerin established that Aboriginal title is a *sui generis* right, and that the Crown has a fiduciary duty to act in the best interests of Aboriginal people.

New Legal Landscape

The concept of "fiduciary duty" has been essential to the development of Aboriginal rights in Canada, and has played a role in protecting Aboriginal rights under section 35 of the *Constitution*.

Delgamuukw *v British Columbia*, [1997] 3 SCR 1010

Outcome

In *Delgamuukw*, the SCC established a test to determine if Aboriginal title exists in which the following three criteria must be satisfied:

1. The Aboriginal society claiming title must have occupied the land before the Crown's assertion of sovereignty;
2. There must be continuity of occupation between pre-sovereignty to the present day, but an unbroken chain of continuity is not required;
3. At the time of sovereignty, the occupation must have been exclusive.

The SCC also established a new test to assess the infringement of Aboriginal title:

1. There must be a compelling and substantial legislative objective; and
2. The infringement must be consistent with the fiduciary relationship that exists between the Crown and Aboriginal peoples, a duty which involves consultation, consent, and compensation (done in good faith as previously established in *Guerin*).

The court also recognized Aboriginal oral histories as potential evidence to support a land claim noting that oral histories "must be placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." (at para. 86.)

New Legal Landscape

In this case, the SCC further clarified the distinction between "Aboriginal title" and "Aboriginal rights".

The SCC defined Aboriginal title as a right to the land itself, which includes the right to choose the use of the land, and use is not limited to pre-contact practices, customs, and traditions.

Aboriginal title is constitutionally protected; inalienable to anyone except to the Crown who has a fiduciary duty to act in the best interests of Aboriginal peoples; it exists because of pre-sovereign occupation; and it is held communally.

But the SCC also held that Aboriginal title is not absolute, and the Crown can infringe or extinguish Aboriginal title if it satisfies an infringement test.

This case also laid the foundation for Indigenous sovereignty and self-government and further clarified the nature of the fundamental, fiduciary relationship between the Crown and Aboriginal peoples.

Osoyoos *Indian Band v. Oliver,* [2001] 3 SCR 746

Outcome

In the *Osoyoos Indian Band* case, the SCC held that Aboriginal rights in reserve lands have an undisputable cultural component that cannot be evaluated using common law conceptions of property.

New Legal Landscape

This case expanded on the Crown's duty to consult: "if the Crown wishes to extinguish the Band's interest in part of its reserve…they must express a clear and plain intention to do so, minimizing the infringement on Aboriginal rights as much as possible in order to ensure that they can enjoy the lands." (Indigenous Jurisprudence)

Tsilhqot'in *Nation v. British Columbia,* [2014] SCC 44

Outcome

In *Tsilhqot'in*, the SCC reiterated the findings in *Delgamuukw* namely, that Aboriginal law and common law can co-exist; that an Aboriginal claim of title does not need to fit into a common law conception of title; and that Aboriginal laws should also be recognized, in addition to practices, customs and traditions.

The SCC also clarified the type of occupation that could substantiate a claim of Aboriginal title: explaining that a wide variety of actions (cultivating, fishing in tracts of water, and even perambulation) could be used to infer occupation; and that it was no longer necessary to piece together intensive use of specific tracts of land over long spans of time.

New Legal Landscape

The SCC affirmed its finding in *Delgamuukw* of a "territorial use-based approach to Aboriginal title." (at para. 57)

The court expanded on the rights conferred by Aboriginal title by finding that the Tsilhqot'in Nation not only had the "right to decide how the land will be used" but also "the right to benefit from those uses" (at para. 5), the right to proactively manage the land, and the right to withhold consent to unjustified infringement.

Want to Know More?

See the following blog post: The Plant Rant: What do a bottle of ginger beer and aboriginal title have in common?

Aboriginal Rights

R. v. Sparrow, [1990] 1 SCR 1075

Outcome

The SCC established the *Sparrow* test to determine whether an Aboriginal right exists; whether the Crown is infringing upon or trying to override these rights; and whether or not the Crown may be justified in infringing upon an existing Aboriginal right. The SCC also confirmed that the Crown bears the burden of proving that an infringement is justified.

New Legal Landscape

This case confirmed that Aboriginal and treaty rights still exist, and that Aboriginal people have the right to protect those rights now entrenched in the *Constitution*. This further solidified the legal foundation of Aboriginal rights.

The court ruled that the Musqueam Band in Vancouver, BC had a specific, existing Aboriginal right to fish, but held that this right may no longer exist for other Aboriginal peoples: the *Sparrow Test* would need to be applied on a case-by-case basis.

The SCC also held that the *Constitution* cannot resurrect Aboriginal rights that have been "properly" extinguished.

R. v. Van der Peet, [1996] 2 SCR 507

Outcome

In *Van der Peet*, the SCC established the "integral to the distinctive culture" test (the *Van der Peet* test) to determine what constitutes “an existing Aboriginal right” within section 35(1) of the *Constitution*. According to this test, Aboriginal claimants must show:

1. The precise nature of the claim being made;
2. That the practice, custom, or tradition was integral to their distinctive culture at the time of Aboriginal contact with Europeans; and
3. There is continuity between the claimed right and the pre-contact practice, custom or tradition.

New Legal Landscape

This case helped further define Aboriginal rights and how to pursue their protection under section 35(1) of the *Constitution*. In practice, The *Van der Peet* test is difficult to satisfy, and it has been widely criticized. Two key criticisms are that the test only considers discrete (rather than broad) rights, and "freezes" Aboriginal rights at the "date of contact," thus denying practices, customs, or traditions that may have emerged following (or in response to) colonization. (John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-1998) 22 *Am Indian L Rev* 37)

R. v. Gladstone, [1996] 2 SCR 723

Outcome

Gladstone offers guidance on how to determine a specific Aboriginal right like commercial fishing: the court should look for evidence of "historical practices, customs, and traditions" of the particular Aboriginal people claiming the right.

New Legal Landscape

The SCC further expanded on the Crown's fiduciary duty and set out a non-exhaustive list of criteria that should be used to determine if an infringement on an Aboriginal right is justified: had the government prioritized Aboriginal rights or made efforts to accommodate them?

The SCC found that while Aboriginal rights should be given priority, their rights are not exclusive or unlimited.

The Duty of Consultation

Haida Nation *v. British Columbia,* [2004] 3 S.C.R. 511

Outcome

In *Haida,* the SCC held that the Crown has a duty to consult with Indigenous people and accommodate their interests before Aboriginal rights or title are proven in court or confirmed in a treaty. The level of consultation and accommodation is proportionate to the strength of the Aboriginal claims, and the potential impact of the proposed activity on the asserted claims.

The court suggested that consultation should occur early in the planning phases of a project or decision.

New Legal Landscape

The SCC expanded the Crown's duty to consult, and found that private enterprises are not held to the same duty to consult as the Crown. The decision has led to:

- practical changes to the ways in which federal, provincial, and territorial governments approach decision-making that may affect Aboriginal or treaty rights, and
- an entire body of case law regarding the nature and extent of the duty of consultation.

Want to Know More?

For more information about consultation and accommodation, see:

Accommodation Spectrum

The Duty to Consult Indigenous Peoples (parl.ca)

Three Frameworks of Consent Factsheet (yellowheadinstitute.org)

Right to Self-Government

R. v. Pamajewon, [1996] 2 SCR 821

Outcome

In *Pamajewon*, the SCC held that "section 35(1) includes self-government claims [and], the applicable legal standard is nonetheless that laid out in *Van der Peet*…[as] claims to self-government are no different from other claims to the enjoyment of Aboriginal rights and must, as such, be measured against the same standard." (at para. 6)

New Legal Landscape

Aboriginal peoples were required "to prove their right of self-government on a piecemeal basis, activity by activity. Any possibility of establishing a broad right of self-government over their lands and peoples appeared to have been foreclosed by this decision." (Kent McNeil, "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance" (2001) 31 *Am Rev Cdn Studies* 317, at 327.)

Treaty Rights

R. v. White *and Bob,* 1965 CanLII 643 (SCC)

Outcome

In *White and Bob*, the SCC affirmed the BC Court of Appeal's finding that, based on a "Douglas Treaty," the Saalequun tribe had a treaty right to hunt on Vancouver Island.

New Legal Landscape

White and Bob was the first decision in modern Canadian judicial history to consider the impacts of the *Royal Proclamation, 1763* on contemporary relations between the Crown and Aboriginal peoples. The decision, confirming the existence of a treaty right to hunt for food for the Saalequun tribe, laid down the legal framework for the development of the Aboriginal rights theory upon which the SCC would later base its decision in *Calder*. The Privy Council had already explored some of the implications of the Royal Proclamation in *St. Catherine's Milling*. However, in *White and Bob*, the court affirmed that the *Royal Proclamation* confirmed the existence of Aboriginal rights, instead of creating them.

Want to Know More?

See the following newspaper article: Resurrected treaty made history | Snuneymuxw

Simon v. Queen, [1985] 2 SCR 387 and *R v. Sioui*, [1990] 1 SCR 1025

Outcome

In *Simon* and *Sioui*, the SCC gave some guidance on how to interpret historical treaties with Aboriginal peoples.

New Legal Landscape

The SCC held that due to the Crown's fiduciary duty, treaty terms, both oral and written, should be interpreted generously, in a manner that is favourable to the Aboriginal parties and takes full account of their concerns and perspectives in entering into the treaty.

R. v. Marshall*,* [1999] 3 SCR 456; *R. v. Marshall*, [1999] 3 SCR 533

Outcome

In *Marshall 1*, the SCC set out a test for treaty rights based on "determining what modern practices are reasonably incidental to the core treaty right in its modern context" (at para. 78.). Modern treaty rights may include incidental rights.

The SCC held that the Mi'kmaq have a constitutionally protected right to fish which includes the right to sell the fish they catch in order to support themselves and earn a "moderate livelihood."

Marshall 2 was issued on a motion for re-hearing the case brought by fishermen's associations in which the court elaborated in particular about such things as the relationship between treaty rights and conservation that had been more implicit in the first decision. In *Marshall* 2, the SCC elaborated that the Mi'kmaq fishing rights are subject to regulation when conservation is proven to be a concern.

New Legal Landscape

The SCC gave some guidance on how treaties should be interpreted: the terms should be generously rather than rigidly construed; treaty rights aren't frozen in time; and are not limited to specific rights or practices intended by the parties when the treaty was signed.

The SCC recognized that the Mi'kmaq have a treaty right to a "small-scale commercial [fishing] activity" (at para. 8). Even so, implementation of the treaty right continues to be a source of controversy more than 20 years after the SCC ruling.

Want to Know More?

Read the following *Maclean's* article: Mi'kmaq fishers won at the Supreme Court. But they're still fighting for their livelihoods.

R. v. Marshall, [2005] SCC 43 and *R. v. Bernard,* [2005] 2 SCR 43

Outcome

In *Marshall and Bernard*, the SCC confirmed the test to determine modern treaty rights: the modern activity must be the logical evolution from the traditional trading activities at the time the treaties were made.

The SCC held that the Mi'kmaq had not established a treaty right, an Aboriginal right, or Aboriginal title to support their claim for commercial logging.

New Legal Landscape

These cases narrowed the kinds of activities, customs, and practices that could be used to prove an Aboriginal right or title.

The SCC also failed to recognize the *sui generis* nature of Aboriginal title, laws, or land systems. The majority decision seemed to harken back to the false colonial notion of *terra nullius* that has been used to justify colonization.

Incidental Rights

R. v. Mitchell, [2003] 2 SCR 396; *R. v. Sundown,* [1999] 1 SCR 393; *R. v. Badger* [1996] 1 SCR 771; *R. v. Simon,* [1985] 2 SCR 387; *R. v. Côté,* [1996] 3 SCR 139

Outcome

The SCC has acknowledged that the exercise of Aboriginal and treaty rights may require incidental activities that may be protected when an Aboriginal or treaty right is established. Examples include incidental rights to:

- build cabins (*Sundown*), access unoccupied land (*Badger*), and carry firearms (*Simon*) for hunting;
- access waterways and teach youth in relation to fishing (*Côté*); and
- travel and mobility for trading (*Mitchell*).

New Legal Landscape

Aboriginal and treaty rights may include incidental rights.

Métis Rights

Jean Teillet, Métis lawyer, provides an overview of Métis legal history in this video: IIC: The Métis in Legal History (vimeo.com)

R. v. Powley, [2003] 2 SCR 207

Outcome

In *Powley*, the SCC provided a list of criteria to define what might constitute a Métis right, and also who is entitled to assert those rights.

To be entitled to Métis rights, there needs to be "a distinctive collective identity, living together in the same geographic area and sharing a common way of life" (at para. 12). A claimant must be a member of "an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific Aboriginal right" (Ibid).

The SCC also held that although it might be difficult to determine precise membership, that is no basis for disentitling Aboriginal people of their constitutionally protected rights.

New Legal Landscape

This was the first SCC case that dealt with Métis rights and claimants.

The SCC held that s. 35(1) should be generously and liberally interpreted in favour of Aboriginal people, and that Métis rights are constitutionally protected under s.35(1).

The *Powley* test should be used to define Métis rights in the same manner that the *Van der Peet* test is used to define Aboriginal rights. However, unlike *Van der Peet* which temporally ties Aboriginal rights to pre-contact times, *Powley* ties Métis rights to a time after European contact, but before the Crown had effective control over the community in question.

Want to Know More?

Legal Aid BC has prepared a guide for preparing an Aboriginal rights defence: Preparing an Aboriginal Rights Case: An Overview for Defence Counsel (lss.bc.ca)

The following is a link to a video tribute to Thomas Berger, QC's contributions to the development of Aboriginal law: Theatre of Fire Choices (theatreoffire.org)

4.3 – Commissions and Inquiries

Introduction

There have been many commissions and inquiries over the years that have examined various aspects of the consequences of colonial oppression on Indigenous people. All have provided insight into the issues as well as recommendations to address the challenges experienced by Indigenous people. This section considers some key commissions and inquiries.

Royal Commission on Aboriginal Peoples

The Royal Commission on Aboriginal Peoples Report ("RCAP") was established in 1991 in the wake of the 78 day stand-off between the Kanien'kehá:ka (Mohawk) and the Sûreté du Québec and the Canadian Army in what became known as the "Oka Crisis". The RCAP's primary goal was to help restore justice to the relationship between Indigenous and non-Indigenous people in Canada.

The RCAP released its final 4,000-page report in November 1997 and made 400 recommendations on a wide array of issues including health, housing, culture and

education. These recommendations encompassed some key issues such as a renewed relationship, as well as legislative, policy, and programmatic changes needed to support and empower Indigenous nations in the quest for self-government and resilience. The Commissioners visited 96 communities, held 178 public hearings, heard briefs from over 2000 people, and commissioned more than 350 research studies.

The RCAP encouraged non-Indigenous people to acknowledge, many for the first time, Canada's true history of passing laws and policies designed to extinguish the right of Indigenous people to exist as distinct peoples, with their own governments, laws, languages, and cultures.

Most of the RCAP's recommendations have not been implemented. In recent years, people have been returning to the RCAP Report, as it is still relevant and contains a significant amount of information about Indigenous Peoples and their relationship with Canada.

Missing and Murdered Indigenous Women's Inquiries

Earlier in the course, gender discrimination in the *Indian Act* was examined, revealing how the legislation intentionally treated women differently from men, and has led to the displacement of Indigenous women and children from their home communities. The unequal treatment has ongoing consequences in the present day. Indigenous women continue to disproportionately suffer violence and the consequences of the systemic inequities in Canadian institutions. Inquiries into the issue of murdered and missing women have been held at the provincial and national levels.

BC Missing Women Commission of Inquiry

In British Columbia, "Indigenous women and girls account for 10% of all women reported missing but make up only 4% of Canada's female population" (Department of Justice, 2017). They are also "approximately seven times more likely to be murdered than non-Indigenous women and girls" (Baum and McClearn, 2015). Although thousands of Indigenous women and girls have been murdered or gone missing in the last thirty years, "non-Indigenous people have largely ignored this national tragedy for decades" (Brammer, 2016).

In British Columbia, this collective apathy was challenged after the conviction of serial killer Robert Pickton, and the provincial police inquiry that it generated. On September 27, 2010, Wally Oppal was appointed to lead British Columbia's Missing Women Commission of Inquiry ("MWCI,"). The MWCI's mandate was to investigate why the Crown stayed many of the serious criminal charges against Pickton, and how the police handled and responded to reports of missing and murdered women. In the MWCI's Final Report released on November 15, 2012, Commissioner Oppal "did not make any legal findings of discrimination" but he "condemned the police for failing to stop Pickton from preying on Indigenous women and girls living in the Downtown Eastside." (Inter American Commission on Human Rights, ("IACHR"), at 94).

Commissioner Oppal found that the "pattern of predatory violence was clear and should have been met with a swift and severe response by accountable and professional institutions, but it was not" (MWCI Volume I, at 4). However, the MWCI was widely condemned as flawed from the beginning by many organizations. The Union of British Columbia Indian Chiefs criticized the MWCI because it didn't "address the social and economic conditions of Indigenous women and girls in Vancouver and in BC that play into a complex set of conditions that 'normalize' violence against Indigenous women and girls" (IACHR at 98).

The BC Civil Liberties Association, West Coast Legal Education and Action Fund, and Pivot Legal Society also found the MWCI wanting because it "excluded the voices of individuals and communities that it should have worked the hardest to include: Aboriginal women, sex workers…and who remain at extremely high risk for violence" (Bennett et. al., 2012, at 5). These organizations were also of the view that lawyers were complicit in the flawed design of the inquiry: "potential witnesses were deterred from testifying because they were not provided with legal representation, and the two lawyers appointed to represent the Downtown Eastside failed to make culturally appropriate supports available to Indigenous witnesses" (*Ibid*, at 7).

National Inquiry into Missing and Murdered Indigenous Women and Girls

On December 8, 2015, the federal government announced the creation of a National Inquiry into the Missing and Murdered Indigenous Women and Girls (the "MMIWG Inquiry"). The mandate of the MMIWG Inquiry was much wider in scope than that of the BC Missing Women Commission of Inquiry, covering "all forms of violence." It had two primary objectives:

1. To report on "the systemic causes of all forms of violence against Indigenous women and girls, including sexual violence; examining the underlying social, economic, cultural, institutional, and historical causes that contribute to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada"; and
2. To "evaluate the institutional policies and practices in place aimed at reducing violence and increasing safety" (MMIWG Inquiry, Executive Summary, at 5).

In 2014, an RCMP report acknowledged nearly 1,200 missing and murdered Indigenous women between 1980 and 2012. However, Indigenous women's groups document the number of missing and murdered to be over 4,000.

The discrepancy results from the underreporting of violence against Indigenous women and girls, the lack of an effective database, and the failure to identify cases by ethnicity. Between 1997 and 2000, the homicide rate for Indigenous women was nearly seven times higher than the rate for non-Indigenous women.

Increased awareness has resulted in tremendous support for Indigenous families and communities. Annual marches, vigils, the making of documentaries, and other awareness campaigns have brought people together with the common goal of seeking justice.

On June 3, 2019, the MMIWG Inquiry released its final report. The Inquiry had heard testimony from over 2,000 witnesses, many of whom were the family members of murdered and missing

women and girls (Tasker, 2019). These witnesses shared "truths about state actions and inactions rooted in colonialism and colonial ideologies, built on the presumption of superiority, and utilized to maintain power and control over the land and the people by oppression and, in many cases, by eliminating them" (MMIWG, at 54). The Inquiry centered the stories shared by survivors and their families and communities because it recognized that "this inclusion is key to healing and to understanding the strength and resilience that lie at the heart of each person, each family, and each community" (MMIWG, at 57).

The final report reveals that persistent and deliberate human and Indigenous rights violations and abuses are the root cause behind Canada's staggering rates of violence against Indigenous women, girls and 2SLGBTQQIA [two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual] people. The two-volume report calls for transformative legal and social changes to resolve the crisis that has devastated Indigenous communities across the country. It delivers 231 individual Calls for Justice directed at governments, institutions, social service providers, industries, and all Canadians.

The 231 Calls to Justice outline the systemic challenges and ways to address them. The Calls for Justice cover every facet of life in Canada (e.g., culture, health, and justice), and demand that law societies and lawyers take action:

> *Call for Justice 10.1 We call upon the federal, provincial, and territorial governments, and Canadian law societies and bar associations, for mandatory intensive and periodic training of Crown attorneys, defense lawyers, court staff, and all who participate in the criminal justice system, in the area of Indigenous cultures and histories, including distinctions-based training. This includes, but is not limited to, the following measures:*
>
> i. *All courtroom officers, staff, judiciary, and employees in the judicial system must take cultural competency training that is designed and led in partnership with local Indigenous communities.*
> ii. *Law societies working with Indigenous women, girls, and 2SLGBTQQIA people must establish and enforce cultural competency standards.*
> iii. *All courts must have a staff position for an Indigenous courtroom liaison worker that is adequately funded and resourced to ensure Indigenous people in the court system know their rights and are connected to appropriate services.*
>
> (MMIWG, Executive Summary, at 79).

Lawyers have the opportunity to engage with these Calls for Justice, and help to ensure the legal system protects Indigenous women, girls, and 2SLGBTQQIA people.

Self Reflection

The MMIWG Inquiry found that, too often, murder investigations regarding Indigenous women are "marked by indifference" and negative stereotypes that result in Indigenous deaths and disappearances being investigated and treated differently from other cases.

- What are some of the factors that underlie such differential treatment?

Want to Know More?

This documentary examines the murdered and missing women along the "Highway of Tears" in northern British Columbia: Highway of Tears (highwayoftearsfilm.com)

Truth and Reconciliation Committee

> *"The Truth and Reconciliation Commission of Canada (TRC) was a commission like no other in Canada. Constituted and created by the Indian Residential Schools Settlement Agreement, which settled the class actions, the Commission spent six years travelling to all parts of Canada to hear from the Aboriginal people who had been taken from their families as children, forcibly if necessary, and placed for much of their childhoods in residential schools."*
>
> (*TRC Executive Summary Report* at v.)

The federal government established the Truth and Reconciliation Commission in 2008 to deal with the legacy of residential schools. In 2015, the Truth and Reconciliation Commission released its final report and 94 Calls to Action.

Goals of the TRC

The TRC had two goals:

1. To document the experiences of all survivors, families and communities personally affected by Indian Residential Schools. This included former residential school students, their families, communities, representatives from the churches, former school employees, government officials, and other Canadians; and
2. To teach all Canadians about what happened in Indian Residential Schools, as well as the origin, impacts, and legacies of these schools, as part of our shared history. (*TRC Executive Summary Report* at 32.)

The TRC pursued truth by gathering people's statements, researching government records, and providing public education.

The report urges all levels of government to work together to change policies and programs in a concerted effort to repair the harm caused by residential schools and move forward with reconciliation.

Truth

The TRC heard from over 6,000 residential school survivors who were forcibly removed from their families and communities, and required to attend institutional schools far from home. The TRC found that Canada's treatment of Indigenous peoples amounts to cultural genocide:

> *For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The…policy…can best be described as "cultural genocide."*
>
> (*TRC Executive Summary Report* at 1.)

The TRC reported that colonial law has been used to facilitate Canada's assimilationist policies. As a result:

> *Many Indigenous people have a deep and abiding distrust of Canada's political and legal systems because of the damage they have caused. They often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests. Not only has Canadian law generally not protected Indigenous land rights, resources, and governmental authority, despite court judgments, but it has also allowed, and continues to allow, the removal of Indigenous children through [residential schools] and [the] child-welfare system.... As a result, law has been, and continues to be, a significant obstacle to reconciliation.* (Ibid at 202.)

The TRC also stated that some lawyers were deficient in their provision of legal services with respect to residential school claims, highlighting the need for lawyers to develop a greater understanding of Indigenous history and culture, including the legacy of residential schools:

> *The criminal prosecution of abusers in residential schools and the subsequent civil lawsuits were a difficult experience for Survivors. The courtroom experience was made worse by the fact that many lawyers did not have adequate cultural, historical, or psychological knowledge to deal with the painful memories that the Survivors were forced to reveal. The lack of sensitivity that lawyers often demonstrated in dealing with residential school Survivors resulted, in some cases, in the Survivors not receiving appropriate legal service. These experiences prove the need for lawyers to develop a greater understanding of Aboriginal history and culture as well as the multi-faceted legacy of residential schools.* (Ibid at 215.)

Accordingly, the TRC's Call to Action 27 states:

> *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 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.

This course is meant to provide a baseline of information for all lawyers in respect of the topics and skills identified in Call to Action 27. Of course, reconciliation requires more than education.

Reconciliation

> *Reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for that to happen, there has to be awareness of the past, an acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour.*
>
> (*TRC Executive Summary Report* at 6.)

The TRC acknowledged the potential of law to advance reconciliation:

> *In Canada, law must cease to be a tool for the dispossession and dismantling of Aboriginal societies. It must dramatically change if it is going to have any legitimacy within First Nations, Inuit, and Métis communities. Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force. A commitment to truth and reconciliation demands that Canada's legal system be transformed. It must ensure that Aboriginal peoples have greater ownership of, participation in, and access to its central driving forces.* (Ibid at 205.)

The law and the legal system have the potential to be a driving force for reconciliation. Reconciliation will require the legal system to be transformed, not only for the benefit of Indigenous peoples, but also to improve Canada's national and international reputation in relation to human rights. Because lawyers are integral to the development, interpretation, and application of laws, transformation of the legal system to further reconciliation will be contingent on lawyers.

Self Reflection

1. How has Canadian law been an obstacle to reconciliation?
2. What was the role of Canadian law (and lawyers) in implementing the residential school system?
3. How might the role of Canadian law (and lawyers) in implementing the residential school system affect Indigenous perceptions of the legal system in the present day?
4. How might Canadian law be used to advance reconciliation?

Want to Know More?

See this (1 hour) presentation on the TRC Report and Recommendations by the Honourable Murray Sinclair: A Story Canada Needs to Know.

Justice Commissions and Inquiries (supplemental)

There have been numerous Justice Commissions, Inquiries, and Reviews over the years that highlight "examples of inequity and sometimes gross misconduct in the relations between Indigenous people and policing and justice systems in Canada." (Toward Peace, Harmony, and Well-being: Policing in Indigenous Communities, at 37).

Brief summaries of some of the key reports are provided for people who are interested in learning more. The following information is not mandatory for the course, but is presented as supplemental material:

1989 – Royal Commission on the Donald Marshall, Jr. Prosecution

- Prosecution (NS) Chair: Chief Justice T. Alexander
- Trigger: Wrongful murder conviction of Donald Marshall, Jr.
- Outcome: The Commission provided 82 recommendations to improve policing and the justice system in Nova Scotia, including suggestions to improve relations with Indigenous people, such as the appointment of visible minority judges and the establishment of a Native Justice Institute.
- See: Royal Commission on the Donald Marshall Jr Prosecution_findings.pdf (novascotia.ca)

1990 – Report of the Osnaburgh-Windigo Tribal Council Justice Review

- Committee (ON) Chair: Alan Grant
- Trigger: Arrest and injury of Stanley Shingebis for drunkenness; Shingebis became a quadriplegic between arrest and date of release.
- Outcome: The Committee recommended that policing in northern Ontario be undertaken by a First Nations police service and controlled by a police commission with a majority of First Nation members. In the interim, OPP members serving in northern Ontario should receive proper training and education on the language and culture of First Nations.
- See: Report of the Osnaburgh-Windigo Tribal Council Justice Review Committee : Grant, Alan|Ontario. Dept. of the Attorney General|Ontario. Ministry of the Solicitor General

1991 – Policing in Relation to the Blood Tribe

- Report of a Public Inquiry (AB) Commissioner: Chief Judge C. H. Rolf
- Trigger: Increasing incidents of deaths and murders of Blood Tribe members under mysterious circumstances, including the murder of Bernard Tallman, Jr. (1988) and questions surrounding the investigation.

- Outcomes: Inquiry findings showed that Blood Tribe members viewed the RCMP as enforcers rather than as protectors. The inquiry produced 36 recommendations including an urgent need for cross-cultural training for Indigenous and non-Indigenous officers, more timely missing persons investigations, and consultations with the Blood Tribe to ascertain the model of policing best suited to the community.
- See: Policing in relation to the Blood Tribe : report of a public inquiry : Commission of Inquiry--Policing in Relation to the Blood Tribe (Alta.)

1991 – Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis

- People of Alberta (AB) Chair: Justice R. A. Cawsey
- Trigger: Indigenous and government concerns about the level of justice provided by the criminal justice system to Indigenous people.
- Outcomes: The Task Force found that Indigenous people are victims of racism and discrimination in the criminal justice system, and recommended decentralization to make criminal justice systems accountable to the communities they serve, as well as the inclusion of Indigenous people, including Elders, in all levels of decision-making in the criminal justice system.
- See: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta

1991 – Report of the Aboriginal Justice Inquiry of Manitoba

- Commissioners: Associate Chief Justice Alvin Hamilton and Honourable Murray Sinclair
- Trigger: The 1987 trial of two men for the 1971 murder of Helen Betty Osborne in The Pas, Manitoba, and the 1988 death of J.J. Harper following an encounter with a Winnipeg police officer.
- Outcomes: The Commissioners identified priority areas of work: Indigenous rights, justice system reform, and the need for crime prevention through community development. They also recommended the creation of the Aboriginal Justice Commission.
- See: Report of the Aboriginal Justice Inquiry of Manitoba (ajic.mb.ca)

1991 – Law Reform Commission of Canada Report on Aboriginal Peoples and Criminal Justice: Equality, Respect, and the Search for Justice

- President: Gilles Létourneau
- Trigger: Requested by Federal Minister of Justice, the Honourable A. Kim Campbell
- Outcomes: The Commission recommended the more equitable treatment of Indigenous people in the justice system by overcoming language difficulties and cultural barriers through recognition of Indigenous people's right to use their own languages in court proceedings, an increase in community involvement in the justice system, and greater police accountability to communities they serve.
- See: Report on Aboriginal Peoples and Criminal Justice (lareau-law.ca)

1992 – Report of the Saskatchewan Indian Justice Review Committee, and Report of the Saskatchewan Métis Justice Review Committee

- Chair: Judge Patricia Linn
- Trigger: Established to make justice systems more responsive to the needs of Indigenous and Métis communities.
- Outcomes: The Committee recommended improved data collection to help understand the relationship between Indigenous people and the justice system, the implementation of special measures focused on young Indigenous offenders, and programming to assist Indigenous officers in handling the pressures of employment.
- See: http://IndianJusticeReview.pdf and https://MetisJusticeReview.pdf

1993 – Cariboo-Chilcotin Justice Inquiry

- Commissioner: Anthony Sarich
- Trigger: Established to report on the relationship between the Cariboo-Chilcotin Aboriginal community and the police, Crown prosecutors, courts, probation, and family court counsellors in the administration of justice in the Cariboo-Chilcotin Region.
- Outcomes: In addition to policing and the court system, Aboriginal witnesses complained of all non-Indigenous authority structures bearing on their lives. The Commissioner made 55 recommendations relating to: government agencies, police, courts, legal aid, native courtworkers, and community law centres.
- See: Report on the Cariboo-Chilcotin Justice Inquiry (leg.bc.ca)

1995 – Report of the Advisory Committee on the Administration of Justice in Aboriginal Communities

- Author: Jean-Charles Coutu
- Trigger: This study sought to consult with Aboriginal communities in Québec to devise a model of justice specific to Aboriginal communities that could respond to the needs of the community and be respectful and inclusive of Aboriginal traditions, customs, and socio-cultural values.
- Outcomes: The report presents suggestions for very specific areas of the justice system, including mediation, diversion, sentencing, legal aid, judges, interpreters, youth, and local authorities.
- See: Advisory Council on the Administration of Justice in Aboriginal Communities (crrf-fcrr.ca)

1996 – Royal Commission on Aboriginal Peoples

- Chairs: René Dussault and Georges Erasmus
- Trigger: The Oka Resistance. The Commission created a 20-year agenda to better the lives of Indigenous Peoples in a variety of areas.
- Outcomes: The Commission pointed to a critical need for a new relationship between Indigenous Peoples and non-Indigenous society that rejects the colonial model. The

Commission recommended the establishment of systems of Indigenous justice that would provide Indigenous communities with a greater measure of control.
- See: Report of the Royal Commission on Aboriginal Peoples (bac-lac.gc.ca)

2000 – Tsuut'ina First Nation Inquiry

- Judge: Thomas R. Goodson
- Trigger: The shooting death of Constance Jacobs and her son, Tyundanaikah (nine years old), on the Sarcee Reserve.
- Outcomes: The Inquiry recommended that tribal police services be properly equipped and trained, including having more than one officer on duty, and that control of child and family services be returned to First Nations or other local communities.
- See: Report to the Attorney General Public Inquiry Under the Fatality Inquiries Act, into the Deaths of Constance Brenda Jacobs and Tyundanaikah Jacobs, from the 1st Day of February, 1999 to the 16th Day of March, 2000. May 15, 2000. (alberta.ca)

2004 – Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild

- Commissioner: Justice David H. Wright
- Trigger: The 1990 death of Neil Stonechild from hypothermia and accusations that police misconduct contributed to his death.
- Outcomes: The Inquiry found that the police failed to properly investigate the death of Neil Stonechild. Recommendations included: the establishment of a program for the training and hiring of Indigenous officers at the Saskatchewan Police College, improved procedures to deal with public complaints regarding improper police conduct, and that municipal officers receive in-depth training relating to Indigenous culture, history, and social structures.
- See: Report of the Stonechild Inquiry (gov.sk.ca)

2007 – Ipperwash Inquiry Report

- Commissioner: Sidney B. Linden
- Trigger: The 1995 shooting death of Anthony O'Brien "Dudley" George during an occupation at Ipperwash Provincial Park.
- Outcomes: The Inquiry provided recommendations to help the provincial government respond to future occupations and demonstrations, including greater resources directed at settling land claims, clarification of the role of police in such situations, and the involvement of Indigenous police officers and mediators. The inquiry also recommended the creation of a Treaty Commission in Ontario and a new Ministry of Aboriginal Affairs.
- See: The Ipperwash Inquiry - Final Report (gov.on.ca)

2009 – Alone and Cold: Inquiry into the Death of Frank Paul

- Branch Response (BC) Commissioner: William H. Davies.
- Trigger: The 1998 death of Frank Paul, a Mi'kmaq man who died of exposure and hypothermia after police refused him a spot in a detoxification cell and left him in an alley on the night of December 6, while he was severely intoxicated and wet.
- Outcomes: The Commission recommended that the city of Vancouver and the Indigenous community develop joint policies to respond to the needs of individuals who are experiencing homelessness and chronic alcoholism, and that a civilian oversight model be used to investigate police-related deaths.
- See: Alone and Cold (gov.bc.ca)

2012 – Forsaken: The Report of the Missing Women Commission of Inquiry

- Commissioner: Wally T. Oppal
- Trigger: Concerns about the ineffectiveness of police investigations into the disappearances of women from Vancouver's Downtown Eastside between January 1997 and February 2002.
- Outcomes: The Commission found that clear predatory violence was occurring and that institutions failed to protect vulnerable women. The Commission recommended efforts to ensure equality of services to protect marginalized and Indigenous women from violence, the development of a strategy to enhance the safety of vulnerable women, and improved standards for investigating missing persons cases.
- See: Forsaken: The Report of the Missing Women Commission of Inquiry (gov.bc.ca)

2013 – Qikiqtani Truth Commission

- Commissioner: James Igloliorte
- Trigger: A call for a public inquiry into the killing of qimmiit (sled dogs) between 1950 and 1975.
- Outcomes: The Commission reported on the history of policy decisions and events that affected Inuit in the Qikiqtani region from 1950 to 1975. The Commission recommended that the Government of Canada acknowledge the social harms caused by historical wrongs, and that sufficient mental health and addiction programs be provided to meet the needs of Nunavut communities.
- See: Qikiqtani_final_report.pdf (qtcommission.ca)

2018 – Broken Trust: Indigenous People and the Thunder Bay Police Service, Office of the Independent Police Review Director

- Director: Gerry McNeilly
- Trigger: Concerns from First Nations leaders and community members that the Thunder Bay Police Service (TBPS) had failed to properly investigate the deaths of Indigenous people, and that TBPS members routinely devalued Indigenous lives.

- Outcomes: The review found that TBPS's investigations into the sudden deaths of Indigenous people were so problematic that at least nine cases required reinvestigation. Systemic racism provided a partial explanation for these failures. The review resulted in 44 recommendations to improve the investigation into sudden deaths, including improvements to the TBPS Criminal Investigation Branch and other operational areas.
- See: Broken Trust Indigenous People and the Thunder Bay Police Service (oiprd.on.ca)

2018 – Thunder Bay Police Services Board Investigation

- Lead Investigator: Honourable Murray Sinclair
- Trigger: Concerns raised by First Nation leaders from Nishnawbe Aski Nation, Grand Council Treaty 3, and Rainy River First Nation regarding TBPS Board oversight of police services following a series of deaths of Indigenous people.
- Outcomes: The investigation found systemic racism in the TBPS that can be traced back to an absence of leadership within the TBPSB. The investigation resulted in 45 recommendations, including the disbanding of the current TBPSB, the creation of new Board policies, and the diversification of the TBPS.
- See: Thunder Bay Police Services Board Investigation - FINAL REPORT (tribunalsontario.ca)

2019 – Quebec Inquiry Commission on relations between Indigenous Peoples and certain public services in Quebec, Val-d'Or Inquiry

- Commissioner: Jacques Viens
- Trigger: Concerns about discriminatory practices toward Indigenous individuals in Quebec in the delivery of public services, including allegations of police abuse against Indigenous people (especially women) in Val-d'Or.
- Outcomes: Recommendations to improve data collection, translate public service communications and forms to Indigenous languages, and improve intercultural competence training for public service providers.
- See: Val-d'Or Final_report.pdf (gouv.qc.ca)

2021 – Chairperson-Initiated Complaint and Public Interest Investigation Into the RCMP's Investigation of the Death of Colten Boushie

- Chair: Michelaine Lahale
- Triggered: Concerns about the RCMP's investigation of the death of Colten Boushie.
- Outcomes: The report concluded that police racially discriminated against the bereaved mother of Colten Boushie when its officers notified her of his death; media releases sent by police early in the investigation fueled perceptions that Boushie's death at the hands of Stanley was deserved; and that police failed to protect key evidence. Recommendations highlighted the need for more police training.
- See: Commission's Final Report: Chairperson-Initiated Complaint and Public Interest Investigation Into the RCMP's Investigation of the Death of Colten Boushie and the

Events that Followed | Civilian Review and Complaints Commission for the RCMP (crcc-ccetp.gc.ca)

MODULE 5 – RECONCILIATION (time estimate: 30 minutes)

Please note that, based on feedback we have received with respect to modern treaties and treaty negotiations, we have made adjustments to Module 5 of the Indigenous Intercultural Course regarding treaties.

Introduction

This module is focused on reconciliation efforts. Across the country, Indigenous nations are making efforts to move beyond colonial constructs to build a better future. Reconciliation efforts take on many forms, and some approaches will be reviewed.

Learning Outcomes

This module will enable you to:

- Review some approaches to Indigenous self-determination; and
- Consider innovative methods to advance reconciliation.

5.1 – Indigenous Assertion of Rights

Moving beyond colonial governance is a priority for many Indigenous nations across Canada. The mechanisms they choose are as varied as the different regions in Canada and the cultural diversity of Indigenous Peoples. Regardless of the method, the goals are to right the wrongs of the past, and to ensure full participation in decisions regarding their citizens and territories. This section explores some of the Indigenous efforts aimed at revitalization, recognition, and reconciliation.

Reviving Indigenous Laws

Indigenous nations have continued to uphold Indigenous laws despite colonization, but many Indigenous laws have been subverted by colonial laws. Indigenous nations are working toward reviving Indigenous laws to deal with contemporary issues.

Indigenous Law Research Unit

The Indigenous Law Research Unit (ILRU) at the University of Victoria's Faculty of Law is committed to the recovery and renaissance of Indigenous laws. ILRU partners with Indigenous peoples and communities to ascertain and articulate their own legal principles and processes, in order to effectively respond to today's complex challenges. The ILRU team develops and employs innovative methods for engaging with the full scope of Indigenous laws, including:

- Social (human to human, gender and equality, fairness, violence and vulnerability, and harms and injuries),
- Economic (economies, trade, and distribution of wealth),
- Environmental (land, water, non-human life forms),
- Political (governance, institution-building, inter-community and inter-societal relations, legitimacy, and accountability).

One of the primary methods involves examining Indigenous oral histories to identify legal principles that can be applied to contemporary problems.

West Coast Environmental Law's RELAW Program

West Coast Environmental Law's RELAW Program is supportive of, and supported by, ILRU. Indigenous nations participating in RELAW projects have access to free legal services and co-learning opportunities for community members, focused on approaches to researching, applying and enforcing Indigenous law.

Through RELAW projects, legally trained staff from West Coast work collaboratively with Indigenous nations to:

- Draw on stories and the wisdom of Elders to develop a summary of legal principles related to land and resources/environmental governance in their legal tradition;
- Develop a written law, policy, agreement or plan grounded in their own laws and community dialogue; and/or
- Develop and put into action a plan for implementing and enforcing their own laws on a particular environment or resource development issue.

Land Back

Land Back is an Indigenous-led movement to reclaim Indigenous decision-making authority in relation to Indigenous territories. Indigenous Peoples are deploying strategies and practices to

enforce their visions of consent-based jurisdiction, such as environmental assessments and monitoring, consent protocols and permitting, and reoccupying the land.

Want to Know More?

See the following online resources:

- Indigenous Law Research Unit Resources
- RELAW | West Coast Environmental Law (wcel.org)
- Land Back: A Yellowhead Institute Red Paper
- What Is Land Back? - David Suzuki Foundation

BC First Nations Justice Strategy

The BC First Nations Justice Strategy (the "Strategy") was developed by the BC First Nations Justice Council (comprised of representatives appointed by the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs) and the Province of British Columbia. At the most basic level, the Strategy is aimed at improving Indigenous experiences with the current justice system as an interim measure, with a longer-term objective of rebuilding Indigenous justice systems. The Strategy focuses on the following seven areas:

1. Reconciliation with Indigenous people;
2. Decreasing the overrepresentation of Indigenous people in the justice system;
3. Improving the experience of Indigenous people within the justice system;
4. Addressing violence against Indigenous people, especially women and girls;
5. Engaging with Indigenous communities and organizations in a respectful and culturally appropriate manner;
6. Improved access to justice services by Indigenous people; and
7. Designing services that provide Indigenous people with culturally relevant, flexible and user-focused processes.

This Strategy received support from the province on October 29, 2019, and was endorsed in principle by the First Nations Leadership Council on October 30, 2019.

> *"It has become clear over the past generation that there is an urgent need for specialized training and education for every major institution in Canadian society about First Nations, their history, and relations with Canada, and how all of that has shaped the current reality and experience of First Nations people and those institutions. This is true of British Columbia's legal and justice systems wherein lawyers play a central and defining role. For this reason, the BC First Nations Justice Council applauds and supports the important work of the Law Society of BC in establishing such training for BC's lawyers.*

In March of 2020, the BC First Nations Justice Council and the government of BC ratified the BC First Nations Justice Strategy (BCFNJS) – a joint roadmap for change in the justice system to respond to the Truth and Reconciliation Calls to Action, the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, the Murdered and Missing Indigenous Women and Girls Inquiry Report, and the imperative to act in response to deepening overincarceration of First Nations in BC. Strategy 20 of the BCFNJS speaks directly to the need for recognizing and implementing new competencies for all actors in the justice system and new training – just as the Law Society is doing through this new initiative."

Douglas S. White III, Q.C., J.D. | Kwulasultun | Tliishin | L'om fore de shenn, former Chair, BC First Nations Justice Council

The Strategy is built upon four foundational philosophies. The Strategy must:

1. Adopt an integrative, holistic, and comprehensive approach that addresses all forms of interaction between First Nations and the justice system.
2. Pursue two tracks of change at once: (1) Reform of the existing justice system; (2) Transformation through the rebuilding of Indigenous justice systems.
3. Be proactive in creating conditions where First Nations people are no longer disproportionately interacting with, nor being impacted by, the justice system.
4. Achieve a 180-degree shift from the current reality of First Nations people being overrepresented in all stages of interaction with the justice system, while at the same time being underrepresented as actors with roles and responsibilities within the system.

Want to Know More?

See: Reform the Justice system - BC First Nations Justice Council (bcfnjc.com)

Métis Nation British Columbia is currently developing a Métis Justice Strategy.

BC Prosecution Service Changes

On January 15, 2021, the British Columbia Prosecution Service (BCPS) announced policy changes aimed at increasing fairness and reducing overrepresentation of Indigenous individuals in the criminal justice system. As Peter Juk, KC, Assistant Deputy Attorney General, and head of the BC Prosecution Service states:

"Acting alone, Crown Counsel cannot eliminate systemic discrimination or the unacceptable overrepresentation of Indigenous persons in the criminal justice system. But Crown Counsel play a critical role and must be part of the solution. Working with Indigenous people and our justice system partners, we are confident we can keep our communities safe, while making the criminal justice system better and fairer for all British Columbians."

In April of 2019, the BCPS publicly announced its Indigenous Justice Framework along with an initial series of policy changes. According to the BCPS Media Statement for January 15, 2021, the specific changes include the following:

- **Charge Assessment Guidelines** – The charge assessment policy now includes additional advice about tracking when the accused or victim identifies as an Indigenous person, to aid in data collection and in monitoring results, which have been hampered somewhat by concerns about the reliability and completeness of existing data.
- **Alternatives to Prosecution** – This policy has been significantly revised and expanded. It requires Crown Counsel to consider all reasonable alternatives to prosecution. The revised policy increases the number and types of offences that can be considered for an alternative to prosecution and confirms that a person's previous involvement in the criminal justice system is not a bar to being dealt with by alternative measures. It also provides more specific guidance to Crown Counsel for handling files involving an Indigenous accused or Indigenous victim.
- **Resolution Discussions** – The revisions to this policy include additional advice on handling files involving an Indigenous accused or an Indigenous victim.
- **Sentencing** – This new policy emphasizes the need for principled restraint in all sentencing matters. It recognizes that custodial sentences, particularly those under two years in duration, should be seen as a last resort. The policy also speaks directly to the situation of Indigenous offenders and Indigenous victims, seeking to give full force and effect to the principles laid down in the *Criminal Code* and the Supreme Court of Canada's judgment in *R. v Gladue* and subsequent cases.
- **Vulnerable Victims and Witnesses** – This policy now includes an expanded set of factors to be addressed in order to support an individual's effective participation in the criminal justice system, including additional advice specific to files involving Indigenous victims.
- **Youth Criminal Justice Act** (Extrajudicial Measures) – This policy has been extensively revised to mirror changes in the Alternatives to Prosecution policy (mentioned above), giving youth the benefit of the same considerations for alternatives to prosecution as those that apply to adults.
- **Introduction** – A definition of the term "Indigenous persons" has been added to the "Introduction" to the *Crown Counsel Policy Manual*.
- **Bail – Adults** – This policy has been updated to reflect recent amendments to the *Criminal Code* and the Supreme Court of Canada's decision in *R. v Zora*. It provides Crown Counsel with additional guidance for the exercise of prosecutorial discretion, emphasizing the need for principled restraint in all bail matters, with particular attention to the circumstances of Indigenous accused.
- Additional policies have been revised or updated as part of the ordinary process of policy review, to align with revisions to the **Alternatives to Prosecutions – Adults** policy, above, or to reflect developments in the law. The other affected policies are: **Hate Crimes; Intimate Partner Violence; Sexual Offences Against Adults**; and **Trial Without Jury – Section 469 Offences – Consent of Attorney General**.

Nation Rebuilding Efforts

> *"We the Original Peoples of this land know the Creator put us here. The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind. The Laws of the Creator defined our rights and responsibilities. The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provided us with all our needs. We have maintained our Freedom, our Languages, and our Traditions from time immemorial. We continue to exercise the rights and fulfill the responsibilities and obligations given to us by the Creator for the land upon which we were placed. The Creator has given us the right to govern ourselves and the right to self-determination. The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation."*
>
> A Declaration of First Nations from the Assembly of First Nations.

Whether or not an Indigenous nation has a pre-confederation treaty, historical treaty, modern treaty, or no treaty, they need to be able to freely determine their political status and pursue their economic, social, and cultural development. In Canada, for many years, colonial governments did not recognize Indigenous governance. Instead, the colonial objective was to assimilate Indigenous individuals into Canadian society. Over the years, Indigenous nations have made efforts to assert their sovereignty and move away from paternalistic and inefficient colonial governance, such as the *Indian Act*.

There have been many hopeful "legislative moments" that Indigenous nations have utilized to advocate for self-government. The process of decolonization is difficult, and while the Crown has not always been supportive, there has been progress towards self-determination by Indigenous governments. There are now 29 groups that are self-governing.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes that all Indigenous Peoples have a fundamental right to self-determination and self-government. Section 35 of the *Constitution* recognizes Aboriginal rights, which include the inherent right to self-government. The Royal Commission on Aboriginal Peoples states that “there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to engage in serious negotiations designed to implement their rights of self-determination.” (RCAP, vol. 2 at 175).

Indigenous Peoples have been fighting for their rights and title since contact, and this resistance continues. Indigenous resistance includes defending their right to govern themselves and to determine their structures of internal governance, who is a citizen of their nation, and how they make decisions - including the process for making laws and enforcing them. "Societies that govern well simply do better economically, socially and politically than those that do not. Strong and appropriate governance increases a society’s chances of effectively meeting the needs of its people." (Jody Wilson-Raybould)

Some approaches are listed below.

Comprehensive and Specific Claims

Following the *Calder* decision in 1973, federal policy was changed to allow the negotiation of "comprehensive claims" based on Indigenous title and "specific claims" based on specific obligations under treaties, other agreements, or the *Indian Act* (e.g., reserve lands).

Comprehensive Claims

Comprehensive claims are based on Indigenous Peoples' traditional use and occupancy of the land. The Comprehensive Claims policy confirmed the responsibility of the government to meet its lawful obligations through fulfillment of the terms of the treaties, and to negotiate settlements with Indigenous groups in those areas of Canada where Indigenous rights based on traditional use and occupancy of the land had not been dealt with by treaty or superseded by law. The areas of land and the number of peoples involved are usually greater than in the case of specific claims. "Settlement of these claims comprises a variety of terms including money, land, forms of local government, rights to wildlife, rights protecting language and culture, and joint management of lands and resources." (Comprehensive Land Claims: Modern Treaties | The Canadian Encyclopedia)

In 1976, the Nisga'a began negotiating a comprehensive land claim with the federal government. The province attended negotiations as an observer, and formally joined the negotiations in 1990. The Nisga'a Final Agreement became law in British Columbia in 2000. The Nisga'a Agreement was the only comprehensive claim settlement in British Columbia, as the "British Columbia Treaty Process" (a tripartite process involving the federal, provincial, and Indigenous governments) emerged in 1993, after the Nisga'a negotiations were well underway.

Want to Know More?

The following report analyzes the comprehensive claims process, and offers recommendations for a new reconciliation framework, as well as reforms to modern treaty making processes:

Douglas Eyford, A New Direction: Advancing Aboriginal and Treaty Rights (Government of Canada, 2015)

Specific Claims

Specific claims arise when specific obligations have not been met. Typical claims emerge when First Nation groups believe that the government failed to deliver on specific obligations under treaties, other agreements, or the *Indian Act*. "Specific claims are based on problems arising from the administration of treaties, the *Indian Act*, First Nations funds and disposition of land. Although negotiation is the preferred course of action by both parties to settle these claims, settlement may also be reached by administrative remedy or court action. Specific claims are usually made by Indigenous groups living in the provinces, as opposed to the territories, and most settlements consist of compensation and land (sometimes land only)." (*Ibid*) Although the specific claims are often limited to financial compensation, land may be included when the province is involved in the process.

Want to Know More?

For more information on how to use Indigenous laws to advance specific claims, see: Our Laws Arise from the Land.

Modern Treaties

Today over 50% of the landmass of Canada is covered by modern treaties, mostly north of the 60th parallel. Modern treaties can be characterized as an agreement involving undefined Aboriginal rights for defined treaty rights that pertain to the particular Indigenous group that enters into the treaty. While there is some consistency in the provisions across modern treaties, the terms vary depending on the region of Canada and the era in which they were negotiated. All modern treaties in BC include self-government provisions. The negotiation of modern treaties continues, primarily in BC, Quebec, and the Maritimes, where there are still large areas of land that have never been ceded to the Crown.

BC Treaty Process

It is important to recognize that there are different perspectives and not all Indigenous peoples hold the same views. While some groups find benefits in participating in the treaty process, others may prefer to go to court or use international mechanisms to have their rights recognized. There is no right or wrong approach for Indigenous peoples to have their rights affirmed, as the needs of each person and nation vary.

As of July 2021, 65 Indigenous groups in British Columbia are participating in the BC Treaty Process that is overseen by the independent BC Treaty Commission. Three treaties, with seven First Nations have been concluded through the BC Treaty negotiations framework. The three treaties are the Tsawwassen Treaty, the Maa-nulth Treaty, and the Tla'amin Treaty. Some negotiations in BC have been ongoing for over 25 years. The process is improving, including the introduction of the Recognition and Reconciliation of Rights Policy for Treaty Negotiations in BC ("RRR Policy"). The RRR Policy was endorsed in 2019 by the "Principals." The Principals consist of the Province of British Columbia, the Government of Canada and the First Nations Summit. The RRR Policy has transformed the policy underpinnings for treaty negotiations in BC.

Modern treaty negotiations in BC involve three levels of government:

1. a First Nation or a group of First Nations,
2. the Government of Canada, and
3. the Province of British Columbia.

The first modern-day treaty in British Columbia was completed in 1999 with the Nisga'a First Nation, although this treaty was negotiated outside of the BC Treaty Process.

The federal government states that the treaty settlements since 1973 have provided:

- Recognition of Indigenous ownership over 600,000 km² of land (almost the size of Manitoba)
- Capital transfers of over $3.2 billion
- Protection of traditional ways of life, including the preservation of languages
- Access to resource development opportunities
- Participation in land and resource management decisions
- Certainty with respect to Indigenous land rights in approximately 40% of Canada's land mass
- Associated self-government rights and political recognition

Potential Modern Treaty Making Challenges

For many years, the Government of Canada tried to stop First Nations from organizing a treaty process. For example, from 1927 to 1951, the *Indian Act* made it illegal to fundraise for Indigenous land claims issues. There remain many challenges to modern treaty-making, such as:

- **Incentive:** For some Indigenous groups, modern treaties do not provide great incentive. Entering into a modern treaty can be viewed as an abandonment of constitutionally protected Aboriginal rights for rights that may be narrower. The fear of potentially losing some rights and gaining others is not a risk some groups are ready to take.
- **Difficulty determining the proper title and rights holder:** When modern treaty negotiations commenced, the Crown would not concede that Indigenous groups had pre-existing rights, and instead took the position that rights would only crystalize after settlements were reached.
- **Expense and time:** Significant resources are required for the parties to participate in complex negotiations. Almost all negotiations are table-by-table.
- **A Difference in Goals:** Although the parties to negotiations speak of a mutual desire to achieve certainty through negotiations, not every party to the negotiations desires the same outcome. For the government, achieving certainty over who owns the land is paramount. For Indigenous groups, the objective is the recognition of their collective rights including the title to land.
- **Challenges in addressing the colonial legacy:** For Indigenous groups, addressing the social repercussions of colonization in the absence of self-government is challenging. Some *Indian Act* band councils, their administrative staff and their community members are focused on meeting day-to-day community and social needs, as well as strategic and political decision making, which often take priority over intergovernmental negotiations.

Rejecting the BC Treaty Process

For these and other reasons, some First Nations in British Columbia do not agree with the current BC Treaty Process. The Union of BC Indian Chiefs has explained their opposition to the process:

> *"The Government of Canada gets recognition of its sovereignty, but First Nations do not. First Nations get limited recognition of their right to a piece of land that is always much smaller than their traditional territory. They have to co-manage that land with the*

government. The First Nation may achieve self-government, but they have to obey Canadian and provincial laws. Canada does not have to obey any First Nations laws. Modern treaties are the 'full and final settlement' between First Nations and the government. The First Nation agrees it will not make any legal claims against Canada or BC to right historical wrongs. For example, it will not seek compensation for any past extraction of resources or destroyed habitat."

Potential Benefits to making Modern Treaties

The Indigenous Groups who have moved forward in the Modern Treaty negotiations share another perspective of the process. Modern Treaty negotiations have continued to advance and they can provide some benefits to those groups who engage in them.

- **RRR Policy:** This policy is the first co-developed treaty policy between First Nations in the negotiation process, Canada, and British Columbia. It is a guide for treaty negotiations in BC. The policy provides for the recognition of Indigenous rights and title, including the rights of self-determination and jurisdiction. The RRR policy supersedes any other federal or provincial policies or directives.
- **Table-by-table Process:** Modern Treaty negotiations take a table-by-table approach because each Nation has unique legal systems, governance structures, interests, and relationships. The First Nations Summit and the Chief Negotiator's Forum provides forums for leaders and chiefs to discuss issues of common concern.
- **Significant Policy Changes:** In 2018 there was a significant change to the funding model for the treaty negotiation process. Previously First Nations participating had to borrow money to engage in negotiations. The federal government has since moved to 100% contribution funding and forgiven all negotiation loans that had been borrowed during the comprehensive claims' negotiations process.

Want to know more about Modern Treaty Negotiations?

Visit: First Nations Summit and BC Treaty Commission

Self-Government Agreements

These negotiations may be bilateral or tripartite between the First Nations, the federal government, and province or territory, with the goal of reaching an agreement that includes recognition of the group's ability to establish its own governing structures (typically set out in a constitution) and then exercise law-making authority or other powers over a number of jurisdictions (e.g., lands, natural resources, child and family services, health, education, and so on). Treaties can be stand-alone self-government agreements and others are partial, which include some self-government provisions. There are 29 self-government agreements in Canada

with around 50 groups currently at various stages of negotiations. From the First Nations' perspective, the goal is to receive some sort of compensation for loss of territory, to be self-determining, and to offer a better future for their members.

According to the Government of Canada's website on self-government, agreements address (among other things) the following key aspects:

- the structure of the new government and its relationship with other governments;
- new funding arrangements;
- the relationship of laws between jurisdictions, such as how different laws will work together;
- how programs and services will be delivered to community members;
- ways to promote improved community well-being, often with a focus on Indigenous languages, heritage and culture, and socio-economic initiatives; and
- preparations for when the agreement takes effect, such as implementation planning.

This map (link) from the federal Department of Indigenous and Northern Affairs shows some of the major modern treaties and self-government agreements.

Many of these agreements have been made in British Columbia, in part reflecting the fact that there was limited historical treaty-making in the province. Examples of modern treaties, self-government agreements, and alternative approaches include the following:

Sechelt (1986) – Not a part of a modern treaty, and there was no formal self-government agreement, but there are arrangements brought into effect through federal and provincial enabling legislation and the *Sechelt Indian Band Constitution*, which was approved by Sechelt members in a referendum.

Nisga'a Treaty (2000) – Arrangements were tripartite, negotiated by the Nisga'a with Canada and British Columbia as part of treaty negotiations conducted outside of the BC Treaty Commission Process. It contains components of a self-government agreement. The Nisga'a process included both an agreement in principle and a final agreement, and has been implemented by Nisga'a ratification and federal and provincial legislation.

Westbank First Nation (2005) – This is a stand-alone self-government agreement. It was not a part of a modern treaty, and was negotiated bilaterally with Canada (BC was not a party to the agreement). Implemented through ratification by Westbank members in a referendum and by Canada, by way of federal legislation.

The **Tsawwassen, Maa-nulth, Yale and Tla'amin (2008, 2009, and 2014) –** Arrangements were negotiated as part of the BC Treaty Process and included both an agreement in principle and final agreement in accordance with the six stages under the BC Treaty Process. All were ratified in First Nation referendums and through federal and provincial legislation. They are not full self-government agreements, but do contain self-government provisions. The Tsawwassen and Maa-nulth agreements are currently being implemented. The Tla'amin agreement has also

been ratified in First Nation referendums and through federal and provincial legislation. It came into effect in April 2016. The effective date of the Yale treaty has been postponed indefinitely.

Yukon Umbrella Agreement (1993) – Unique as each Yukon First Nation had to sign onto the Yukon Umbrella Agreement, and then sign their own final agreement and also sign a separate self-government agreement.

The First Nations signatories under the Yukon Umbrella Agreement are:

- Vuntut Gwitchin First Nation (1995);
- Champagne and Aishihik First Nations (1995);
- Teslin Tlingit Council (1995);
- First Nation of Nacho Nyak Dun (1995);
- Selkirk First Nation (1997);
- Little Salmon/Carmacks First Nation (1997);
- Tr'ondek Hwech'in First Nation (1998);
- Ta'an Kwach'an Council (2002);
- Kluane First Nation (2004);
- Kwanlin Dun First Nation (2005); and
- Carcross/Tagish First Nation (2006)

Three of the 14 Yukon First Nations have not signed self-government agreements.

Inuit land claim agreements have been signed in all four Inuit regions in Canada:

1. Nunavik (as part of the James Bay and Northern Quebec Agreement) in 1975
2. Inuvialuit of the Western Arctic in 1984
3. Nunavut of the Eastern Arctic in 1993
4. Nunatsiavut of Labrador in 2005

Inuit title to certain blocks of land is recognized under their respective agreements.

The Nunavut land claims negotiations led to the creation of Nunavut Territory – the newest, largest, and northernmost territory of Canada. It was separated officially from the Northwest Territories on April 1, 1999, via the *Nunavut Act* and the *Nunavut Land Claims Agreement Act,* which provided this territory to the Inuit people for independent government. The boundaries had been drawn in 1993.

Sectoral Agreements

Sectoral agreements pursue a specific subject area or jurisdiction that requires federal or provincial legislation to recognize the powers of a First Nation or other Indigenous group. These are often Indigenous-led. In some cases, an *Indian Act* band takes an incremental step towards comprehensive self-government on-reserve, such as in land management. In other cases, sectoral agreements involve broader grouping and governance off-reserve, but within the ancestral lands of the group (such as with the Haida Nation). Different types of sectoral agreements include:

Land Codes

The First Nations Land Management Resource Centre refers to Land Codes as a comprehensive law, created by the First Nation, to take them out from under the land management sections of the *Indian Act*. Once a Land Code is passed by the First Nation community, the Government of Canada no longer has jurisdiction over the community's reserve land. The Framework Agreement on First Nation Land Management was signed in 1996, and 14 First Nations began the process. Today, there are over 70 First Nations in the process of creating Land Codes. First Nations with Land Codes move closer to self-government by gaining more control as they come out from under the *Indian Act* with regard to all aspects of their reserve land. Depending on the type of Land Code the community adopts, and its internal policies, having a Land Code can facilitate economic development opportunities. First Nations governing and managing their lands have turned assets into capital and generated significant own-source revenue (i.e., funds collected from business ventures, property taxes or other activities, including commercial leasing and tax revenues).

Provincial Reconciliation Agreements

In 2005, British Columbia and the First Nations Leadership Council signed the New Relationship Accord. This has resulted in several Reconciliation Agreements which cover all areas of the province. A list of the agreements can be found on the BC government website: Reconciliation and Other Agreements. The province states, “Reconciliation and related agreements focus on closing socio-economic gaps that separate Indigenous people from other British Columbians, and building a province where all citizens can participate in a prosperous economy.”

The first reconciliation agreement was signed in 2009 between the Haida Nation and BC. The agreement is called the Kunst’aa guu — Kunst’aayah Reconciliation Protocol, 2009 (*Haida Gwaii Reconciliation Act*, S.B.C. 2010, c. 17). In this agreement, the parties, building on the spirit of the New Relationship Accord, acknowledge that they hold differing views regarding sovereignty, title, ownership, and jurisdiction over Haida Gwaii, and they commit to seeking a more productive relationship notwithstanding this divergence of viewpoints. The agreement supports true shared decision-making.

There is also the Métis Nation Relationship Accord, which renews a commitment to work together for the betterment of Métis people. The accord sets out objectives to address health, housing, education, economic opportunities, Métis identification, and data collection, as well as opportunities for engaging in a tripartite relationship with the federal government.

Memoranda of Understanding

Memoranda of Understanding (MOUs) may be signed between First Nations and governments or industry. MOUs create a more collaborative, coordinated, and efficient approach to the management of land and natural resources, and develop new economic opportunities and initiatives that enable First Nations to make progress toward their socio-economic objectives. They cover areas such as watershed, engagement, and health.

Strategic Engagement Agreements

These are mutually agreed-upon procedures for consultation and accommodation. They are intended to encourage positive and respectful government-to-government relationships. They address some of the challenges in treaty negotiation where the issues “can extend to matters beyond the lands that the nation will govern (former reserve lands and additional settlement lands), it is possible to negotiate additional arrangements for the broader territories of the proper title holder(s). There are opportunities for nations to enter into co-management or shared decision-making arrangements with BC in advance of, or perhaps instead of, a treaty under what are referred to as Strategic Engagement Agreements (SEAs). For First Nations in the treaty process, SEAs can be used to create decision-making mechanisms that can be put in place after a treaty is reached. For First Nations not in the treaty process, SEAs can be a way to be more involved in decision-making and relationship-building on a government-to-government level." A list of Strategic Engagement Agreements can be found on the government website.

Indian Act Governance

For most First Nations that continue to govern as bands under the *Indian Act,* there are some options to take over greater local control and change the role that the Department of Indigenous Services plays in the life of the community. Two options are available to bands to take some “self-governing” initiatives in the areas of membership and elections.

Membership Codes

Bands can develop membership codes to set out the process that a band will use to determine band membership. Membership codes must comply with the *Charter* equality provisions. Membership codes are separate from determining eligibility for Indian status, as Indian status remains an area of federal control. Over a third of First Nations in Canada have created their own membership codes, and they vary widely.

Election Codes

Earlier sections have discussed the disruption and ongoing challenges of the imposed system of governance on First Nations. All forms of Indigenous governance were ignored, made illegal (i.e., Potlatch), and replaced by the imposed *Indian Act* system of governance that excluded women. Currently, there are options for bands to establish their own Custom Election Codes to replace the prescribed rules in the *Indian Act*. Bands can create a Code that changes the makeup of their leadership, the length of term, governance procedures, qualifications and requirements to run for leadership, and ways to adjudicate disputes. (The latter two components are currently absent in the prescribed rules in the *Indian Act*.)

The courts have defined "custom" as having to “include practices generally acceptable to members of the band and upon which there is a broad consensus.” To adopt a custom election code, a community must seek to be exempted from the election provisions of the *Indian Act*.

Indigenous Economics

The continuing operation of colonial institutions is at the root of many of the contemporary economic challenges experienced by Indigenous people. Colonial systems continue to hold Indigenous people back and perpetuate disparities in socio-economic indicators. A more fair and just society would suggest closing these gaps, particularly as all of Canada has been built on Indigenous land.

Worldwide, Indigenous peoples have, “ownership and use of management rights over more than a quarter of the world’s land surface ... spread across 87 countries and overlapping with about 40% of all terrestrial protected areas on Earth." (Mongabay) Two thirds of Indigenous lands are essentially "natural” and, within Canada, Indigenous Peoples own or control approximately 40-45% of the land mass.

MST Development Corporation

The MST Development Corporation was established to oversee properties owned by the MST Partnership, a historic partnership of the Musqueam Indian Band, Squamish Nation and Tsleil-Waututh Nation. These three nations are full or co-owners of six properties throughout Metro Vancouver, which total more than 160 acres of developable land and are currently valued at over $1 billion. The MST Development Corporation describes itself as poised to be a "key driver of growth, opportunity and well-being" for its members and the region. (MST Development Corporation.)

Want to Know More?

The "supplementary materials" provided at the end of the course include a section on Indigenous economics. See also:

- Indigenomics Institute website
- Indigenomics video

Self Reflection

Pre-contact, Indigenous peoples used and occupied all the land that is now Canada. Colonial land policies have interfered with Indigenous access to lands and resources. Today, statistics indicate that, as a group, Indigenous peoples are at the negative end of the majority of socio-economic indicators. Indigenous peoples are fighting for rights recognition in Canada. Each nation is deciding their own path to self-determination and how best to support their socio-economic goals.

- What is the role of the Canadian legal system in supporting Indigenous socio-economic goals?

5.2 – International, Federal and Provincial Commitments

Indigenous efforts in the international arena for more than 25 years have led to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the United Nations General Assembly in 2007. Canada endorsed UNDRIP as an aspirational document in 2010, and committed to implementing it in 2016. This section considers UNDRIP, British Columbia's *Declaration on the Rights of Indigenous Peoples Act*, and Canada's principles regarding relationships with Indigenous Peoples.

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") was adopted by the United Nations General Assembly on September 13, 2007. Initially, Canada opposed UNDRIP, but in May 2016, Canada endorsed it, and committed to its full and effective implementation.

UNDRIP establishes international legal norms and standards to support "the survival, dignity, and well-being of the Indigenous Peoples of the world." (UNDRIP, Article 43). UNDRIP consists of 46 articles recognizing the basic human rights of Indigenous Peoples along with their rights to self-determination. The declaration includes articles affirming the right of Indigenous Peoples to create their own education systems, receive restitution for stolen lands, and participate in all decision-making that affects their interests.

When states endorse international instruments, they commit to uphold the standards in those instruments. International standards are incorporated into domestic legislation to become legally binding at the state level. In December 2020, the Government of Canada introduced legislation to implement UNDRIP (see: Bill C-15). The federal *United Nations Declaration on the Rights of Indigenous Peoples Act* was passed in 2021.

Many Indigenous Peoples want to see UNDRIP fully adopted in Canada. Implementation will require Canada and BC to enact new laws or amend existing laws and, as required by both the federal and provincial legislation, work with Indigenous peoples to ensure that all federal and provincial laws and policies are consistent with the minimum standards set by UNDRIP.

Want to Know More?

See the following video: How UNDRIP Changes Canada's Relationship with Indigenous Peoples.

Read the following resources:

- Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook (the-irg.ca)
- Implementing-the-UN-Declaration-Factsheet-2020.pdf (quakerservice.ca)
- The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from B.C. - Yellowhead Institute
- Indigenous and non-Indigenous concerns with Bill C-15 are set out in this article: https://www.aptnnews.ca/national-news/battle-brewing-over-undrip-a-primer-on-government-bill-c-15/

Declaration on the Rights of Indigenous Peoples Act

In November 2019, the government of British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*), which "mandates government to bring provincial laws into harmony with [UNDRIP]....and...provides a framework for decision-making between Indigenous governments and the Province on matters that impact their citizens" (Province of British Columbia).

In March 2022, the Province released the Declaration Act Action Plan, which identifies goals and outcomes that form the long-term vision for implementing the UN Declaration in BC.

Terry Teegee, BC Regional Chief of the Assembly of First Nations, provides an overview of the legislation in the following video: IIC: DRIPA (vimeo.com)

Want to Know More?

See the Province's webpage: B.C. Declaration on the Rights of Indigenous Peoples Act

View the Courthouse Libraries Webinar Series "Indigenous Peoples and the Law" *Declaration on the Rights of Indigenous Peoples Act*, 3rd Webinar

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Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

The Crown's policies towards Indigenous people have evolved. Initially, policy was based on the recognition of rights in 1763 and the pre-confederation treaties, and then outright denial with the objective of assimilation in the 1800 and 1900s. The policy approaches reflect the period of history in which they were made, driven by the political views of the governments of the day. More recent policy shifts of the later 1900s and early 2000s were driven by court decisions regarding Aboriginal rights and title, starting with *Calder* and gaining momentum after section

35 was added to the *Constitution Act* in 1982. There has also been greater public awareness of these public policy issues in more recent years.

On July 14, 2017, the Honourable Jody Wilson-Raybould, then Minister of Justice and Attorney General of Canada, and Chair of the Working Group of Ministers on the Review of Laws and Policies, released Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. They are:

1. All relations with Indigenous Peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
2. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act*, 1982.
3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous Peoples. "It requires the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples." (Principles respecting the Government of Canada's relationship with Indigenous peoples (justice.gc.ca))
4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
5. Treaties, agreements, and other constructive arrangements between Indigenous Peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
6. Meaningful engagement with Indigenous Peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources.
7. Respecting and implementing rights is essential and any infringement of section 35 rights must, by law, meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
9. Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

Want to Know More?

For more information, see the federal government's website: Principles respecting the Government of Canada's relationship with Indigenous peoples

MODULE 6 – REFLECTIONS: MOVING FORWARD (time estimate: 30 minutes)

Lawyer Responsibilities

By now, it should be clear that Canadian colonialism has proceeded via discriminatory laws and policies that continue to perpetuate ongoing disparities between Indigenous Peoples and the broader Canadian society. The role of law in colonial oppression has led many Indigenous people to have a deep and abiding distrust of Canada's legal system. As central actors in the legal system, lawyers are key to reversing the damage of colonialism and improving Indigenous confidence in the legal system.

Code of Professional Conduct

Competence

The *Code of Professional Conduct for British Columbia* (the "*Code*") recognizes that competency is critical to professional, ethical practice, and requires legal services undertaken on a client's behalf to be performed to the standard of a competent lawyer. Rule 3.1-1 of the *Code* defines a "competent lawyer" as "a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement."

Intercultural competence is "the ability to interact effectively with people of different cultures, and a willingness to understand and respect their differences." (Robert Wright) In relation to legal services, it includes:

> *"The ability to properly understand client instructions, an appreciation of the client's social context, and an awareness of systemic factors that may have implications for a client's legal issues. It goes beyond knowledge to include self-reflection, positional awareness, interpersonal skills, critical thinking, attitudinal consciousness, and behavioural change."* (Ibid)

With respect to Indigenous people, intercultural competence includes:

> *"[The ability] to comprehend the implications of the unique worldviews, histories, and current realities of Indigenous people, in order to provide effective legal services in a respectful way and to understand how Canadian law has been used in different ways to the detriment of Indigenous peoples ... [it] involves learning about Indigenous perspectives on Canadian history and laws to enhance lawyers' understanding of the legal system"*
>
> (Law Society Report at 7).

Indigenous cultural competence requires lawyers to learn about the ongoing implications of the intergenerational trauma experienced by Indigenous individuals and communities; the resilience of Indigenous communities; the need to challenge institutional racism and discrimination; and the opportunities to contribute to reconciliation. Intercultural competence is a life-long commitment that requires humility and a willingness to continuously learn, adapt, and improve.

Self Reflection

1. What are your thoughts about the proposition that intercultural competence is a core legal competence?
2. How might improving intercultural competence affect your legal practice?

Want to Know More?

See this editorial opinion from the Honourable Murray Sinclair: The legal industry needs to understand the truth of Canada's Indigenous history if we truly want to move forward

Read this article by Professor Pooja Parmar: RECONCILIATION AND ETHICAL LAWYERING (cba.org)

Non-Discrimination

Rule 6.3-5 of the *Code* states: "A lawyer must not discriminate against any person." The commentary to this rule explains: "A lawyer has a special responsibility to comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws."

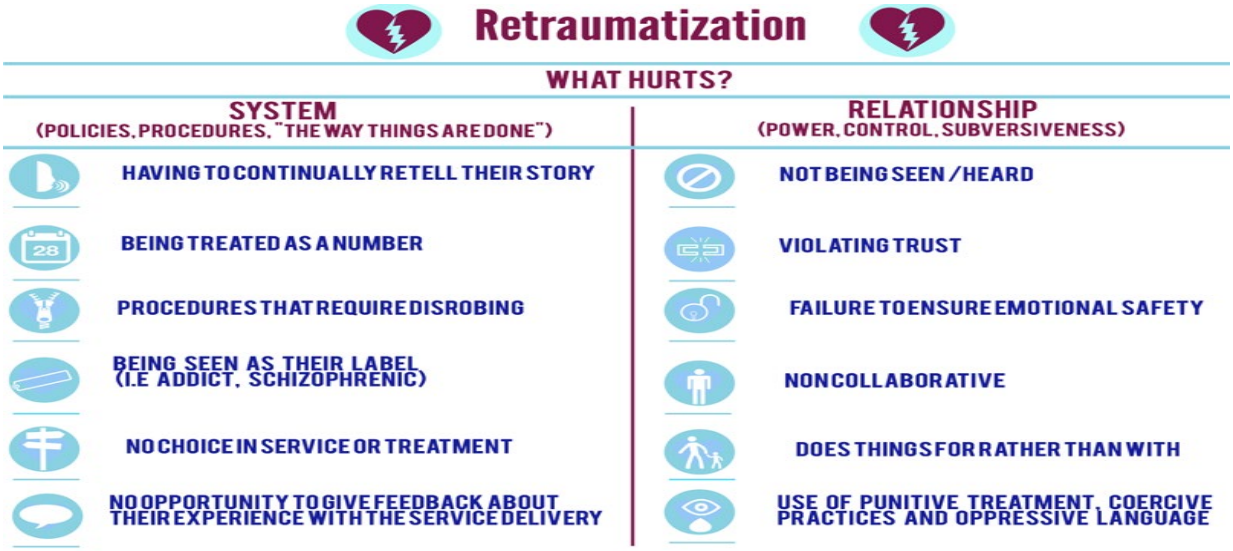
Accordingly, lawyers should not deliberately or inadvertently discriminate against Indigenous people. Moreover, reference to a "special responsibility" suggests that lawyers have a higher duty of non-discrimination than the average citizen. Lawyers are in a powerful position to challenge discrimination.

Trauma-Informed Lawyering

As this course has demonstrated, centuries of ongoing colonization have had psychological impacts on many Indigenous people. Care should be taken to avoid re-traumatizing, or causing further trauma to, psychologically vulnerable individuals.

Trauma-informed lawyering is an approach to practice that recognizes and acknowledges the role that trauma may play in the lives of our clients and ourselves, as professionals who routinely engage with clients who are experiencing trauma or distress. It is an approach to legal practice that has been influenced by trauma-informed care in the medical and health care field. It aims to minimize re-traumatizing the client by ensuring that interviewing and litigation strategies to avoid re-traumatization are prioritized, and that clients have access to support providers as they engage in a variety of legal processes. Trauma-informed lawyering changes our practice to include asking the question: "what has happened to this person?" rather than "what is wrong with this person?"

The figures below show the differences between the two approaches:



Whereas a trauma-informed approach includes:

Institute on Trauma and Trauma-Informed Care (2015) from University at Buffalo, Buffalo Center for Social Research, What is Trauma-Informed Care?

For lawyers interested in providing trauma-informed legal services, an important resource is a Trauma-Informed Toolkit for Legal Professionals. The Toolkit has been designed to educate legal professionals on how to avoid or minimize the re-traumatization impacts on clients seeking advice and advocacy from lawyers. Further, it aims to educate legal professionals on the symptoms of vicarious trauma, and to provide self-assessment tools to help minimize the risk of vicarious trauma when working routinely with traumatized persons or graphic and disturbing evidence. It is very important that legal professionals and justice workers understand and recognize trauma in their clients, witnesses, and themselves, in order to avoid furthering trauma, build better and stronger relationships, improve communication styles, and foster confidence in a legal system that many people fear or distrust.

Want to Know More?

See the: Trauma-Informed Toolkit for Legal Professionals

Review these trauma informed legal advocacy scenarios:

- TILA_Traumatic_TriggersApr22 (nationalcenterdvtraumamh.org)
- TILA_PreparingforCourt_MH_Apr22doc (nationalcenterdvtraumamh.org)

This podcast has been developed by Myrna McCallum, a Métis-Cree lawyer and leader in the field of Trauma-Informed Lawyering, in partnership with the Canadian Bar Association: The Trauma-Informed Lawyer

Self-Reflection and Action

What can we do?

This course has covered a lot of difficult content. The information about Indigenous experiences with colonization often motivates people to want to take action. Self-reflection about our own biases and privilege is a good place to start, and then taking concrete steps toward reconciliation. This section will provide examples of biases and privilege, including questions meant to encourage self-reflection, and concludes with suggested actions individuals can take to advance reconciliation.

Biases

A bias is a prejudice in favor of or against another person or group compared with another. Cognitive biases are often a result of your brain's attempt to simplify information processing. Biases often work as "mental shortcuts" that help you make sense of the world and reach decisions with relative speed.

We all have biases, both implicit (meaning they are internalized and we may not realize we have them) and explicit (which are closer to the surface). Biases are developed through our lived experiences and through the messages we get (from family, peers, education, media, etc.) about what is considered positive and negative.

Some common types of biases are:

Similarity bias – the tendency to favour people who look or act like us, and to avoid people who do not look or act like us.

Confirmation bias – noticing behaviours that confirm beliefs about a certain group of people (e.g., you've heard left-handed people are artistic, and you meet a left-handed artist, which further confirms your perception that left-handed people are artistic).

Appearance bias – favouring people who are conventionally attractive, or who look or dress "the part," and dismissing people who are not conventionally attractive, or who do not (visually) meet our expectations.

Conformity bias – being influenced by the actions of those around us (e.g., peer pressure).

Contrast effect – where two things are judged in comparison to one another, instead of being assessed individually (e.g., comparing CVs directly against each other, rather than assessing each on the basis of skills and abilities required for the job).

Halo effect – seeing one great thing about someone, and focusing on that aspect while ignoring negative factors.

Horns effect – is the direct opposite to the halo effect: seeing one bad thing about a person, and focusing on that aspect while ignoring positive factors.

Attribution bias – attributing the cause of someone's situation based on assumptions that often do not accurately reflect reality (e.g., assuming that a racialized person was hired through an "affirmative action" program, while overlooking the possibility that the person was hired due to merit, skills, and experience).

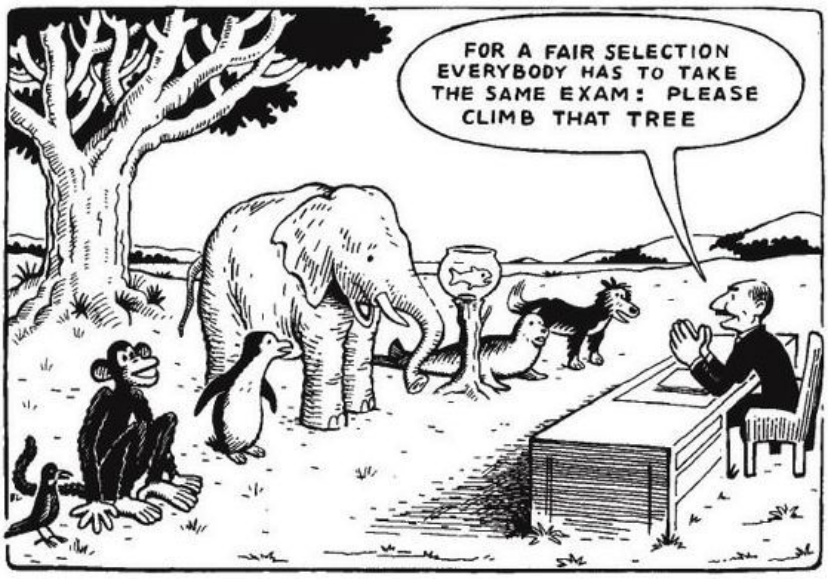
According to an article by Social Talent, biases affect our decision-making processes in a number of different ways, including our:

- Perception – how we see people and perceive reality.
- Attitude – how we react towards certain people.
- Behaviours – how receptive/friendly we are towards certain people.
- Attention – which aspect of a person we pay most attention to.
- Listening skills – how much we actively listen to what certain people say.
- Micro-affirmations – how much or how little we comfort certain people in certain situations.

All of these biases can cause inequities. Biases are often implicit and require a conscious effort and true self-reflection in order to minimize their negative implications.

Systemic Bias

Systemic bias is the inherent tendency of a process to support particular outcomes. The image below shows how systemic bias may play out in a hypothetical candidate selection process:



If the test for a job is to climb a tree, then the monkey will come out ahead. The penguin, elephant, seal, and dog will not be able to climb the tree, and the fish will not even survive if it leaves the bowl.

We need to be mindful of the ways in which systemic biases contribute to the marginalization of certain groups, and work toward removing systemic barriers.

Self-Reflection

Take a moment to reflect on the biases that you have in your personal life and your professional life.

1. How do biases influence your perceptions of and interactions with people?
2. How might a lawyer's biases affect the provision of legal services?
3. How might systemic biases affect legal outcomes for marginalized individuals?

Privilege

Privilege is an advantage or benefit enjoyed by an individual or group beyond what is available to others. Everyone has some aspects of privilege (e.g., lawyers have a high level of education). You likely experience privilege when you are included in the "majority" group (e.g., if you are right-handed), and likely lack privilege when you are in the "minority" group (e.g., you are left-handed). The following self-reflection exercise will help you to identify your areas of privilege.

Self-Reflection

Please note whether you have or lack privilege in relation to these identities, and then answer the questions that follow:

- Socio-economic
- Sexual Orientation
- Religion
- Sex
- Gender
- Employment
- Physical Ability
- Language
- Nationality
- Geographic Location
- Education
- Modern Utilities
- Age
- Other

1. Which aspects of your identity provide you with the most access and opportunities? How?
2. Which aspects of your identity impede opportunities most often? How?
3. Which aspects of your identity have the strongest effect on your self-image?
4. Which aspects of your identity play a greater role in how others perceive you?
5. How do you use your aspects of privilege in the practice of law?

Reconciliation

Here is a brief overview of a few things that you can do to move reconciliation forward:

As an individual:

You can commit to learning more about Indigenous issues by:

1. Self-reflecting on your biases about Indigenous people and Indigenous issues, and working to reverse negative biases;
2. Seeking out Indigenous perspectives (e.g., academics, authors, journalists, and directors);
3. Participating in Indigenous-focused educational opportunities; and
4. Attending Indigenous events and celebrations.

As a lawyer:

1. You can reflect on the various ways that Indigenous issues may affect your practice.
2. Even if you think that Indigenous issues are not related, review the *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*) and the Declaration Action on the Rights of Indigenous Peoples Act Action Plan and consider whether legislation in your area of practice aligns with *DRIPA*.
3. Review the Law Society's Practice Checklists Manual to see whether there are Indigenous-specific considerations in your area of practice.
4. If you work with (or may work with) Indigenous clients, review the:
    1. Guide for Lawyers Working with Indigenous Peoples and the Guide for Working with Indigenous Peoples (first supplement)
    2. Guide for Communicating Effectively with Indigenous Clients; and
    3. Guide for Using the Legal System to Advance Equality for Indigenous Women, Girls, and 2SLGBTQQIA People.
5. If you work in any area of civil litigation, review the BC Government's Directives on Civil Litigation involving Indigenous Peoples.
6. Continue to participate in Indigenous-focused continuing professional development opportunities.

As a law firm:

At the firm level, you may consider developing a "reconciliation action plan" that could identify goals such as:

1. The recruitment, retention, and advancement of Indigenous individuals (e.g., summer students, employees, and lawyers);
2. Providing Indigenous-focused educational opportunities for all lawyers and staff;
3. Supporting Indigenous legal organizations (e.g., Indigenous law students associations, the Indigenous Bar Association, and the CBA BC Aboriginal Lawyers Forum, and RAVEN Trust);
4. Participating in Indigenous events (e.g., CBA BC's Aboriginal Lawyers Forum National Indigenous Day event and annual year-end banquet); and
5. Using Indigenous goods and services (e.g., artwork, venues, and catering).

Want to Know More?

See the following resources published by the Canadian Bar Association:

- Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence," (2019) 97 Canadian Bar Review, 526.
- Reconciliation Toolkit for Law Firms

Dates to be aware of:

- National Indigenous Peoples Day – June 21
- National Day for Truth and Reconciliation – September 30
- National Aboriginal Veterans Day – November 8

Want to Know More?

- Consult the references and resources included in each module, or the list of resources that is provided at the end of the course.

Concluding Thoughts

In the following video, Don Avison, KC, provides some concluding thoughts: IIC: Concluding Thoughts (vimeo.com)

Reporting Completion & Eligibility for CPD Credit Congratulations on reaching the end of the course. Please note:

- All practising lawyers in BC are required to complete the Indigenous intercultural course and certify completion before:
    - the lawyer has engaged in the practice of law for two years in total, whether or not continuous, or
    - January 1, 2024 (whichever is later)
    - The specific date upon which each lawyer is required to complete the course is available in the Member Portal under the “Law Society’s Brightspace” link on the landing page.
- Lawyers must certify completion of the course through the Law Society Member Portal, under the “Law Society’s Brightspace” link on the landing page.
- All lawyers who have completed the course may also claim continuing professional development (CPD) credit for each hour spent working on the course, up to a maximum of six hours.
- The course is accredited for the "professional responsibility, practice management, and ethics" requirement.
- Lawyers are responsible for reporting all earned CPD credits to the Law Society of British Columbia through the Law Society website: Recording CPD Hours | The Law Society of British Columbia .

Thank you for taking this educational journey. We trust that you have learned something, and that you will take this information into consideration in your work and personal life. We encourage you to continue learning.

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The Truth and Reconciliation Advisory Committee (2020-2021):

- Dean Lawton, KC (Co-Chair)
- Nicole Bresser (Co-Chair)
- Martin Finch, KC
- Katrina Harry
- Claire Marshall
- Michael McDonald, KC
- Christopher McPherson, KC
- Terri-Lynn Williams-Davidson
- Ardith Walkem, KC (2020)

Video permissions provided by:

Anglican Church of Canada, *The Doctrine of Discovery: Stolen Lands, Strong Hearts*

BC Courthouse Libraries and the Canadian Institute for the Administration of Justice for:

- *Overview of the Progress on the Calls to Action Lecture*
- *Looking at British Columbia's Declaration on the Rights of Indigenous Peoples Act*

BC Treaty Commission, *Satsan (Herb George) presentation*

Canadian Broadcasting Corporation for:

- *Namwayut: we are all one*
- News reports including: *Constitutional Conference* and *Cycle of Intergenerational Trauma*
- *The Current* (for the Honourable Murray Sinclair's comments on "getting over it")
- *The 8th Fire*

Canadian Encyclopedia, Women in Canadian History: Mary Axe-Earley

Michelle St. John, *Colonization Road*

Star Phoenix, *What was the Sixties Scoop?*

Theatre of Fire (tribute to Thomas Berger, QC)

Truth and Reconciliation Commission, *Mini Documentary*

TVO, *How to Change Systemic Discrimination in Canada* and *Is it Really Genocide? In Canada?*

University of Victoria Faculty of Law, *What is Indigenous Law?*

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The development of the course was a collaborative effort. The Law Society contracted Kory Wilson, a Kwakwaka'wakw lawyer and educator, to provide the base content for the course. The Truth and Reconciliation Advisory Committee provided feedback and further direction on the base content. Under the guidance of the Truth and Reconciliation Advisory Committee, Andrea Hilland, KC, a Nuxalk lawyer working as Policy Counsel with the Law Society, drafted additional written content, and Jason Kuzminski and Tamara Kuckovic of the Law Society's Communications Department, with the assistance of contractor Tyler Spraggs, created and compiled additional video content. Katie McConchie, the Legal Editor for the Professional Legal Training Course, edited the written content. The Law Society contracted Bryan Fair to upload the content onto the online learning platform. Claire Marchant, the Law Society's Director, Practice Advice, also provided technical support. The course development process was overseen by Lesley Small, the Law Society's Senior Director of Credentials, Professional Development, and Practice Support.

Resource List

Key Resource

How did we get here? A concise, unvarnished account of the history of the relationship between Indigenous Peoples and Canada (sencanada.ca)

Statutes

British North America Act

Constitution Acts, 1867 to 1982 (justice.gc.ca)

Declaration on the Rights of Indigenous Peoples Act

Indian Act (justice.gc.ca)

UN Declaration on the Rights of Indigenous Peoples

Royal Proclamation

Douglas Proclamation

Reports, Commissions, and Inquiries

British Columbia's Missing Women's Commission of Inquiry

Commission Appointed to Enquire into the Conditions of the Indians of the North-west Coast, *Papers relating to the Commission...* (Victoria: Government Printer 1888)

Civilian Review and Complaints Commission (Boushie Police Complaint)

Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights (BC Human Rights Commission)

Final Report on Indigenous Child Welfare in British Columbia

Final Report | Murdered and Missing Indigenous Women and Girls (mmiwg-ffada.ca)

In-Plain-Sight-Summary-Report.pdf (gov.bc.ca) (Racism in the BC Healthcare System)

McKenna-McBride Commission

Missing and Murdered Indigenous Women in British Columbia, Canada, Inter American Commission on Human Rights

Royal Commission on Aboriginal Peoples

Truth and Reconciliation Commission Report

Case Law

Attorney General of Canada v. Lavell, [1974] SCR 1349

Calder v. Attorney General of Canada [1973] SCR 313

Connolly v. Woolrich, (1867), 17 R.J.R.Q. 75, (Qc. Sup. Ct.), aff'd (1869), 17 R.J.R.Q. 266, (Qc. Q.B.)

Daniels v Canada, [2016] 1 SCR 99

Delgamuukw v. BC, [1997] 3 SCR 1010

Descheneaux v. Canada, [2016] 2 CNLR 175

Engstrom v. Peters First Nation, 2020 FC 286

First Nations Child and Family Caring Society v. Canada, 2016 CHRT 2

Guerin v. The Queen, [1984] 2 SCR 335

Haida Nation v. British Columbia, [2004] 3 SCR 511

Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981)

McIvor v. Canada, 2009 BCCA 153

Osoyoos Indian Band v. Oliver, [2001] 3 SCR 746

Re: Eskimo, [1939] SCR 104

Reference re Ownership of the Bed of the Strait of Georgia, [1984] 1 SCR 388

R. v. Badger [1996] 1 SCR 771

R. v. Côté, [1996] 3 SCR 139

R. v. *Desautel*, 2021 SCC 17

R. v. Drybones, [1970] SCR 282

R. v. Gladstone, [1996] 2 SCR 723

R. v. Gladue, [1999] 1 SCR 688

R. v. Ipeelee, 2012 SCC 13

R. v. Marshall, [1999] 3 SCR 456

R. v. Marshall, [1999] 3 SCR 533

R. v. Marshall, [2005] SCC 43 and *R. v. Bernard,* [2005] 2 SCR 43 (*Marshall and Bernard*)

R. v. Mitchell, [2003] 2 SCR 396

R. v. Pamajewon, [1996] 2 SCR 821

R. v. Powley, [2003] 2 SCR 207

R v. Sioui, [1990] 1 SCR 1025

R. v. Sundown, [1999] 1 SCR 393

Simon v. Queen, [1985] 2 SCR 387

R v. Sparrow, [1990] 1 SCR 1075

R. v. Van der Peet, [1996] 2 SCR 507

R. v. White and Bob, 50 DLR (2d) 613 (SCC)

St. Catherine's Milling v the Queen, (1887) 13 SCR 577

The Queen v. Nan-E-Quis-A-Ka (1889), 1 Terr. L.R. 211 (NWTSC)

Tsilhqot'in Nation v British Columbia, [2014] SCC 44

Books

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Boyd, Robert. *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline Among Northwest Coast Indians, 1774-1874* (Vancouver: UBC Press, 1999)

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Ramenofsky, Ann. *Vectors of Death: The Archaeology of European Contact*, (Albuquerque: University of New Mexico Press, 1987)

Starblanket, Tamara. *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State,* (Atlanta: Clarity Press, 2018)

Tom Swanky, *A Missing Genocide and the Demonization of its Heroes*, (Vancouver: Dragonheart, 2014)

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Law Society Resources

Indigenous intercultural competence education for BC lawyers

Chapter 3 – Relationship to Clients | The Law Society of British Columbia

Chapter 6 – Relationship to Students, Employees, and Others

Practice Checklists Manual

Law Society of BC Truth and Reconciliation Symposium in partnership with the Continuing Legal Education Society of British Columbia

Practical Guides

Guide for Lawyers Working with Indigenous Peoples
Guide for Lawyers Working with Indigenous Peoples (first supplement)
Guide for Communicating Effectively with Indigenous Clients
Guide for Using the Legal System to Advance Equality for Indigenous Women, Girls, and 2SLGBTQQIA People

Our Laws Arise from the Land (on how to use Indigenous laws to advance specific claims)

Preparing an Aboriginal Rights Case: An Overview for Defence Counsel

Tool for Interrupting Microaggressions

Trauma-Informed Toolkit for Legal Professionals

Wrapping Our Ways Around Them (Indigenous community guidebook regarding the *Child, Family and Community Service Act*)

Video Resources

A Story Canada Needs to Know

But I Was Wearing A Suit

But I Was Wearing A Suit: Part II — Experiences of Indigenous Peoples Accessing the Justice System - YouTube

Christy Clark Apology to Tsilqhot'in Nation

Colonization Road: The path of reconciliation is long and winding

Doctrine of Discovery: Stolen lands, Strong Hearts - The Anglican Church of Canada

Federal Apology to Residential School Survivors

Highway of Tears

How residential school trauma of previous generations continues to tear through Indigenous families

How UNDRIP Changes Canada's Relationship with Indigenous Peoples

Is it really genocide? In Canada?

Indigenomics

Indigenous, law, justice

Ketchikan Stories

Land Governance: Canada's colonial history - David Suzuki Foundation

Land Governance: Current crisis and rise of Land Back - David Suzuki Foundation

Land Governance: Honouring rights and responsibilities - David Suzuki Foundation

Namwayut: we are all one

nîpawistamâsowin: We Will Stand Up by Tasha Hubbard

Separating children from parents: The Sixties Scoop in Canada

Stories – Legacy of Hope Foundation

Tribute to Thomas Berger, QC

Wab Kinew's Walk through History

What was the Sixties Scoop

"Why don't residential school survivors just get over it?" Senator Murray Sinclair's reply.

Women in Canadian History: Mary Two-Axe Earley

Podcasts

CBC Saskatchewan's original podcast 'Boushie'

Missing & Murdered

The Trauma-Informed Lawyer

Online Resources

Courthouse Libraries, Courthouse Libraries Webinar Series "Indigenous Peoples and the Law"

Lance Finch, "Duty to Learn: Taking Account of Indigenous Legal Orders in Practise"

Bruce McIvor, Canada Top Court Rules US-based First Nation has Cross-border Rights

Sheelah McLean, We Built a Life from Nothing": White Settler Colonialism and the Myth of Meritocracy

Pooja Parmar, Reconciliation and Ethical Lawyering

Val Napoleon, What is Indigenous Law?

Val Napoleon, "Thinking About Indigenous Legal Orders," *National Centre for First Nations Governance Report* (2007)

Jonathan Rudin, Aboriginal Peoples and the Criminal Justice System

Jean Teillet, Microsoft PowerPoint - Metis Legal Issues Full Presentation June 23, 2020

Sharon Venne, Is five hundred and seven years too long for justice?

Robert Wright, Aspiring to Intercultural Competence ppt download

Aboriginal nutritional experiments had Ottawa's approval

Aboriginal Rights

Aboriginal Victimization in Canada

Addressing Aboriginal education gap benefits all Canadians

Background on Indian Reserves in British Columbia

Battle brewing over UNDRIP: A primer on government Bill C-15

B.C. Declaration on the Rights of Indigenous Peoples Act

BC First Nations Justice Strategy

B.C. natives sue federal government for millions over 'Sixties' Scoop'

Bill C-15

Bill C-31 Fact Sheet

Bill S-3: Eliminating known sex-based inequities in registration

Blueprint for an Inquiry Report-Missing-Women-Inquiry

Brown Paper (UBCIC)

Census 2016 Topic: Aboriginal peoples

Children in Care

Closing the Gap: 2015 Federal Election Priorities for First Nations and Canada | Assembly of First Nations

Community Well-Being index

Comprehensive Land Claims: Modern Treaties

Constitution Express

Correctional Investigator of Canada

Dating the Iroquois Confederacy, by Bruce E. Johansen

Declaration of First Nations - Assembly of First Nations

Declaration on the Rights of Indigenous Peoples Act

Declaration on the Rights of Indigenous Peoples Action Plan

Delegated Aboriginal Agencies in BC - Province of British Columbia

Department of Justice (Corrections)

Descheneaux Case Summary

First Call Report Card

First Nations Food, Nutrition, and Environment Study

First Nations Land Management Resource Centre

Fiscal Realities Economists

Gerald Stanley case

Government of Canada - Justice Laws Website

Government of Canada - Self-Government

Grand Chief Ed John (Comments on Douglas Proclamation)

Grassy Narrows

Hawthorn Report

History of Residential Schools

How did we get here? A concise, unvarnished account of the history of the relationship between Indigenous Peoples and Canada

Idle No More

Implementing the Vision: BC First Nations Health Governance

Indian day schools

Indian Residential Schools Settlement Agreement

Indian Residential School Survivors Society

Indigenomics - Indigenomics Institute

Indigenous Foundations

Indigenous Law Research Unit Resources

Indigenous peoples control one-quarter of world's land surface, two-thirds of that land is 'essentially natural'

Indigenous Political Organizations

Indigenous Veterans

Inequalities in Infant Mortality

Interpreting the UN Declaration on the Rights of Indigenous Peoples

Interrupted Childhoods

Inuit High Arctic Relocations

Investing in Aboriginal Education in Canada: An Economic Perspective

Iroquois Confederacy

Iroquois Great Law of Peace

Just Facts (Indigenous victimization rates)

Kitsilano Reserve

Land Back (David Suzuki Foundation)

Land Back: Yellowhead Institute "Red Paper"

Lost in translation: The Douglas treaties

Making Space for Indigenous Law

Métis and non-status class action (Sixties Scoop)

Métis Nation Relationship Accord

MST Development Corporation

No More Stolen Sisters

Office of the Correctional Investigator

Overrepresentation of Indigenous People

Peters First Nation

Poverty in Canada

Prime target: How serial killers prey on Indigenous women

Principles respecting the Government of Canada's relationship with Indigenous peoples

Province of British Columbia, Civil Litigation Directives

Reconciliation and Other Agreements

RELAW | West Coast Environmental Law

Resurrected treaty made history

Saskatchewan's Adopt Indian Métis program

St'at'imc Land Use Plan

Statistics Canada

Strategic Engagement Agreements

The Little-Known History of How the Canadian Government Made Inuit Wear ‘Eskimo Tags’

The UN Declaration on the Rights of Indigenous Peoples: Lessons from BC

Trauma Informed Legal Advocacy: Preparing for Court

Trauma Informed Legal Advocacy: Traumatic Triggers

Treaty of Niagara, 1764

Tsleil-Waututh Environmental Assessment

Tuberculosis in Indigenous Communities

UBCIC Timeline

UN Ruling Backgrounder (re: *Indian Act* Sex Discrimination)

Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook

Victimization of Aboriginal People

Wampum – Onondaga Nation

Wet'suwet'en Explainer

What is Trauma-Informed Care?

Why thousands of Indigenous women have gone missing in Canada