

What are Aboriginal rights?

Aboriginal rights are collective rights which flow from Aboriginal peoples' continued use and occupation of certain areas. They are inherent rights which Aboriginal peoples have practiced and enjoyed since before European contact. Because each First Nation has historically functioned as a distinct society, there is no one official overarching Indigenous definition of what these rights are. Although these specific rights may vary between Aboriginal groups, in general they include rights to the land, rights to subsistence resources and activities, the right to self-determination and self-government, and the right to practice one's own culture and customs including language and religion. Aboriginal rights have not been granted from external sources but are a result of Aboriginal peoples' own occupation of their home territories as well as their ongoing social structures and political and legal systems. As such, Aboriginal rights are separate from rights afforded to non-Aboriginal Canadian citizens under Canadian common law.

It is difficult to specifically list these rights, as Aboriginal peoples and the Canadian government may hold differing views. Some rights that Aboriginal peoples have practiced and recognized for themselves have not been recognized by the Crown. In a move towards addressing this gap, in 1982 the federal government enshrined Aboriginal rights in [Section 35](#) of the Canadian Constitution, and in Section 25 of the Charter of Rights and Freedoms, the government further ensured that Charter rights cannot abrogate or derogate from Aboriginal rights. Yet the ensuing First Ministers' Conferences could not reach a consensus on what specifically qualifies as an Aboriginal right, and the federal government has since recognized that, while Aboriginal rights exist, what these specific rights are will have to be determined over time through the court system.

A history of Aboriginal rights and the Crown

During settlement and colonization, treaties were negotiated between the Crown and local Aboriginal populations, guided by the Royal Proclamation of 1763. The Proclamation was a British Crown document that acknowledged British settlers would have to address existing Aboriginal rights and title in order to further settlement. During treaty negotiations, the Crown guaranteed certain rights to the local First Nations. There has since been much debate in and out of the courts over whether or not these agreements extinguished Aboriginal rights for the rights set out in the treaty. For many First Nations, this debate is ongoing.

Many of these rights, treaty and otherwise, have been infringed upon since the arrival of European settlers in what is now Canada. Aboriginal peoples have consistently asserted their rights since the arrival of settlers, but have received little to no recognition by the colonial institutions that facilitated these infringements. Historically, some non-Aboriginal politicians claimed to support the petitions and other actions Aboriginal peoples took in their fight to have their rights recognized. However, many non-Aboriginal politicians did not consider the question of Aboriginal rights to be a government priority and followed the general belief that the Crown's sovereignty extinguished any existing Aboriginal rights and title. In part due to this colonial mentality stemming from the Doctrine of Discovery—an assertion in international law that a European colonial power could claim title to newly discovered territory-- Canadian legal and governmental institutions were not set up to address Aboriginal rights.

Legal scholar Brian Slattery makes a distinction between *specific* and *generic* Aboriginal rights.

Generic rights are held by all Aboriginal peoples across Canada, and include:

- Rights to the land (Aboriginal title)
- Rights to subsistence resources and activities
- The right to self-determination and self-government
- The right to practice one's own culture and customs including language and religion. Sometimes referred to as the right of cultural integrity,
- The right to enter into treaties.

Specific rights, on the other hand are rights that are held by an individual Aboriginal group. These rights may be recognized in treaties, or have been defined as a result of a court case. For example:

- The *Sparrow* decision found that the Musqueam Band in Vancouver, B.C. had an existing Aboriginal right to fish. This right may not continue to exist for other First Nations.
- The *Powley* case ruled that Métis peoples of Sault Ste Marie have an existing Aboriginal right to hunt but this right does not apply to other Métis groups.

(Slattery, Brian. A Taxonomy of Aboriginal Rights. In *Let Right Be Done: Aboriginal title, the Calder Case, and the Future of Indigenous Rights*. Hamar Foster, Heather Raven, and Jeremy Webber, eds. Vancouver: UBC Press, 2007. 111-128.)

Many Aboriginal peoples understand their relationship to the Crown as a nation-to-nation relationship, and therefore understand their rights as falling within the domain of international law. Throughout periods of European colonization and settlement, Aboriginal leaders and delegations have taken their concerns to international forums such as the United Nations (UN) in order to argue against the British Crown's imposition of its own laws and regulations onto existing Aboriginal legal systems and institutions. Canada is bound by the UN Charter (1945) to foster friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. However, Canadian governments have been hesitant to acknowledge the Aboriginal right to self-determination due to uncertainty over what it would mean for Canada. In response to these concerns, many Aboriginal groups have assured the Canadian government that they would remain a part of Canada but with their own systems of governance.

Colonial governments in Canada initially practiced a policy of extinguishment, which meant that Aboriginal peoples' rights would be surrendered or legislated away, often in exchange for treaty rights. Treaties were negotiated between Canada and Aboriginal leaders in respect of the aforementioned nation-to-nation relationship. While each treaty differed, many historical treaties guaranteed that Aboriginal peoples would receive certain payments and rights, such as a right to hunt or fish, and rights to education. Over time, however, many Aboriginal people found that the Canadian state continued to subjugate them and infringe upon the very rights they thought would be respected. Many Aboriginal leaders and activists brought their concerns to the government, yet the Canadian government continually silenced Aboriginal peoples by obstructing the avenues in which they might seek recognition and redress. For example, the government added specific pieces of discriminatory legislation in the Indian Act that made it illegal for Aboriginal people to organize politically or to hire legal counsel to further land claims. The government did not repeal these discriminatory pieces of legislation until 1951. The repealing of these laws finally enabled Aboriginal peoples to pursue their legal and political interests in ways that had before only been available to non-Aboriginals. This, along with other events in the 1950s and 1960s such as the White Paper policy proposal, contributed to a surge of Aboriginal political organizing and activism toward recognizing Aboriginal rights. Many Aboriginal peoples have since returned to the court system to address grievances related to infringements of their rights.

How the court system is addressing Aboriginal rights

In the early 1980s, Canada was preparing to create a Charter of Rights and Freedoms as well as patriate the

Constitution. During this time, Aboriginal leaders and organizations such as the Union of BC Indian Chiefs (UBCIC) lobbied for the inclusion of Aboriginal rights with the hope that its recognition in the Constitution would contribute to the protection of these rights. After a long struggle with much debate, discussion and revisions, in 1982 the Canadian government formally recognized Aboriginal rights and enshrined them in Section 35 of the Canadian Constitution. The Constitution, however, does not define specifically what these rights are. The government stipulated that these rights were to be defined in the courts on a case-by-case basis.

There have since been a number of court cases that have contributed to this definition. The 1990 R v Sparrow decision, for example, created the Sparrow test which defined the scope of what constitutes an Aboriginal right and defined to what degree the Canadian government can reasonably infringe upon, or limit, it. This case was instrumental, albeit very controversial, in that it confirmed Aboriginal rights are not absolute. The 1996 R. v. Van der Peet decision created the Van der Peet test which further set parameters for the courts to determine what constitutes a valid Aboriginal right. These tests have come under criticism from both Aboriginal and non-Aboriginal people who claim that, in trying to achieve certainty over what constitutes an Aboriginal right, the courts may have instead limited the flexibility and fluidity of Aboriginal rights. For example, the Van der Peet test only recognizes as valid Aboriginal rights that were practiced prior to European contact. Some scholars and legal experts caution that this test then freezes Aboriginal rights in a post-contact era without accounting for the necessity of Aboriginal societies to adapt over time. Some scholars and legal experts, such as political scientist Avigail Eisenberg, argue that the perception of legitimate rights as only those that existed pre-contact is ethnocentric, as it is not equally applied to non-Aboriginal rights.²

Aboriginal rights as inherent

Although the court system has further defined Aboriginal rights, enabling the government to address Aboriginal rights within more clearly defined parameters, Aboriginal rights do not exist because the courts or the Crown has recognized them. The Crown cannot bestow Aboriginal rights upon a people who enjoyed these rights prior to the Crown's existence. Rather, these cases can be seen as a means by which the government and the legal system have attempted to accommodate Aboriginal peoples' rights within a system that had not been initially designed to recognize them.

Aboriginal perspectives on government-defined Aboriginal rights

Some Aboriginal leaders and key figures oppose the government's methods of defining Aboriginal rights. Mildred C. Poplar, formerly with the UBCIC, claims that section 35 distracts Aboriginal peoples from asserting a more meaningful definition of Aboriginal rights that does not rely upon colonial government structure:

Instead of cooperating with the government we have to remember that we are Nations of people, and remember what it was we were fighting for in the first place. We were never fighting for section 35, we were fighting to preserve our Nation-to-Nation relationship, for recognition as Sovereign Nations, and to Decolonize Our People. In some ways, section 35 has diverted our people, and the new leadership instead of fighting for our rights, is negotiating to help Canada and the provinces define them. Section 35 might be one more tool to uphold the fiduciary duty that the Crown owes to Our People, but our real fight is to rebuild our Nations and to gain recognition at the international level.³

In a similar vein, Mohawk scholar Taiaiake Alfred cautions that Indigenous leaders who use the court system to legitimize their rights in the eyes of the Crown cannot hope to protect the integrity of their nations. He explains:

To enlist the intellectual force of rights-based arguments is to concede nationhood in the truest sense. Aboriginal rights are in fact the benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state. After a while, indigenous freedoms become circumscribed and indigenous rights get defined not with respect to what exists in the minds and cultures of the Native people, but in relation to the demands, interests, and opinions of the millions of other people who are also members of that single-sovereign community, to which our leaders will have pledged allegiance.⁴

On the other hand, some scholars and leaders, such as law professor John Borrows, understand the use of court system as a means to work towards regaining the power of self-determination by legitimizing Aboriginal rights within Canadian legal institutions.⁵ Borrows further emphasizes that the Canadian legal system is not strictly a colonial construct, incompatible with Aboriginal law, as is commonly perceived, but has been built upon a foundation of British, American, and Aboriginal law.⁶

Indigenous philosopher and scholar Dale Turner has suggested that Aboriginal peoples must be central in defining their own rights if Aboriginal rights discourse is to become appropriately incorporated into the Canadian legal landscape. In the meantime, cases will continue to be brought before the court and will further contribute to definitions of Aboriginal rights, undoubtedly sparking further debate and discussion.

By Erin Hanson.

Discussion Questions & Topics to Consider

- How does the current federal government address Aboriginal rights? How about your provincial government?
- This section refers exclusively to Aboriginal rights in Canada. How are Aboriginal rights addressed in the United States?
- How do other nation-states acknowledge Aboriginal rights within their borders?
- What are some recent court cases addressing Aboriginal rights? Examine one carefully. What was the final decision? What were the main arguments from either side? What implications might this decision have (for the First Nation, for the government, for the public)?
- What are some of the ways in which Aboriginal peoples assert their rights?
- Have there been any recent events or situations where Aboriginal groups have publicly asserted their rights? Who were the groups involved? Why do you think this right is important for them? What would be the implications of losing this right?
- Despite some protections, Aboriginal rights can be overridden. Under what circumstances can a government legally infringe upon an Aboriginal right?

Recommended Resources

Asch, Michael. *Home and Native Land: Aboriginal Rights and the Canadian Constitution*. Agincourt: Methuen, 1984. 30.

Borrows, John, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005), 38 UBC Law Review 285.

----- *Recovering Canada: The Resurgence of Indigenous Law* (U. of Toronto Press 2002).

Foster, Hamar, Heather Raven, and Jeremy Webber, eds. *Let Right Be Done: Aboriginal title, the Calder Case, and the Future of Indigenous Rights*. (Vancouver: UBC Press, 2007).

Henderson, James Sákéj Youngblood. "Postcolonial Ledger Drawing." In Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision*. (Vancouver: UBC Press, 2000.) 161-171.

Mainville, Robert. *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach*.

(Saskatoon: Purich Publishing Ltd., 2001.)

Monture-Angus, Patricia. A First Journey in Decolonized Thought: Aboriginal Women and the Application of the Canadian Charter. In *Thunder in My Soul: A Mohawk Woman Speaks*. (Halifax: Fernwood, 1995). 131-151.

----- Constitutional Renovation: New Relations or Continued Colonial Patterns? In *Thunder in My Soul: A Mohawk Woman Speaks*. (Halifax: Fernwood, 1995). 152-168.

Newman, Dwight G. You Still Know Nothin Bout Me: Towards Cross-Cultural Theorizing of Aboriginal Rights. *McGill Law Journal* 52 (2007): 725-756.

Slattery, Brian. Understanding Aboriginal Rights. *The Canadian Bar*. 66 (1987): 727.

----- What are Aboriginal Rights? CPLE Research Paper, 2007.

----- A Taxonomy of Aboriginal Rights. In *Let Right Be Done: Aboriginal title, the Calder Case, and the Future of Indigenous Rights*. Hamar Foster, Heather Raven, and Jeremy Webber, eds (Vancouver: UBC Press, 2007.) 111-128.

Tennant, Paul. *Aboriginal People and Politics: The British Columbia Indian Land Question, 1849-1989* (Vancouver: UBC Press 1990).

Thom, Brian. "Aboriginal Rights and Title in Canada after Delgamuukw: Part Two, Anthropological Perspectives on Rights, Tests, Infringement & Justification" *Native Studies Review*. 14.2 (2001): 1-42.

Walkem, Ardith and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35*. (Vancouver: Theytus Books Ltd, 2003.)

Endnotes

¹ Article 1(2) of the United Nations Charter, <http://www.un.org/en/documents/charter/chapter1.shtml>.
Manitoba, Justice Institute. Aboriginal And Treaty Rights.
<http://www.ajic.mb.ca/volumel/chapter5.html#9>.

² Avigail Eisenberg, Reasoning about the Identity of Aboriginal People. Stephen Tierney (ed.), *Accommodating Cultural Diversity*. Aldershot: Ashgate Publishing, 2007, 80-1.

³ Mildred C. Poplar, We were Fighting for Nationhood, not Section 35. 27-8. In Ardith Walkem and Halie Bruce, eds., *of Treasures or Empty Box? Twenty Years of Section 35*. Vancouver: Theytus Books Ltd, 2003.

⁴ Taiaiake Alfred. *Peace Power Righteousness: An Indigenous Manifesto*. Second Edition. Toronto: Oxford University Press, 2009. 176.

⁵ John Borrows, Measuring a Work in Progress: Canada, Constitutionalism, Citizenship and Aboriginal Peoples. In Walkem and Bruce, 223-262.

⁶ John Borrows. With or Without You: First Nations Law (in Canada.) (1996) 41. *McGill Law Journal*, 634.