White by Definition:

status, identity and Aboriginal rights

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The issue of who can qualify as an Aboriginal person and who has access to *Aboriginal rights* is an issue which has long been a topic in Canadian society. The State, as creator and arbiter of the current system, cannot be separated from the issue of Aboriginal identification. My interest is in the relationship between *definition* and *right*, and how that relationship affects the various definitional parties through policy application. Related to this topic is the existence of individuals and groups who claim to hold rights as Aboriginal Peoples but who do not conform to the State definition, leading to the possible denial of rights because of the boundaries of exclusion. Through the exploration of these two themes I intend to illustrate how the current system fails to meet the needs of particular groups, and to examine the problems involved in its application. It is my hope that this examination will lead to greater understanding of the problems involved in setting boundaries of definition, and to prepare the way for a more liberal application of the current policy, or a search for a suitable alternative.

There are several points that need to be understood in order to clarify the existing system and its failure to address the concerns of specific groups. The first of these is to understand the history of formal *Indian* status and other definitional designations (Metis, non-status) and their link to attitudinal change in Canadian society. Secondly, a discussion of the debate surrounding inherent right and Aboriginal right is required in order to understand the complex nature of contemporary disputes. This will lead to a discussion of the link between *definition* and *rights* in contemporary policy. There is a conflict within these policies between old ideology in which Indian policy was created and contemporary legislative change. A case study examining the impact of the current system on one particular community - the Ardoch Algonquin First Nation (AAFNA) - will illustrate the need for policy makers to find new ways of operating in a changing ideological environment.

Defining Indians

Part of the answer to the question of who an *Indian* is lies in the means through which status[1] was normally granted. The Indian Act defines an Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian" (DIA 1981:2(1)). This is somewhat of a circular definition leaving much open to interpretation. Originally, status was assigned to those whom, for the most part, engaged in treaties or negotiations with the government and were 'recognized' as Aboriginal persons at that time (DIA 1981:s11(b)(I)). Therefor, status meant that the individual had been recognized as an Indian and had been included in the Indian register. While this did include those with whom the government met, it excluded many others. Those families or individuals who failed to be present at the treaty making location were effectively missed. Furthermore, the government only sought to negotiate for

land in areas where there was a need (Asch 1984). Since there are regions within Canada, which have never been ceded, it is clear that this process was not a systematic one. Due to this fact, status was applied in a somewhat haphazard manner - adding new members to the register as the treaty making process expanded across the landscape but leaving a variable number of individuals off the register who ostensibly qualified for inclusion as members of the Aboriginal group(s) residing on lands which came to comprise the territory now known as Canada. Status was then passed down to the children of status Indians according to the arbitrary rules laid out in the Indian Act (see below). Those who failed to be included in the Indian register were never acknowledged as Aboriginal Peoples and thus could not claim 'status', nor pass that 'status' on to their children regardless of their descent.

The great deal of ambiguity apparent in this situation begs the question of why First Peoples were defined at all. While the point may be contested, the purpose of defining First Peoples as distinct entities was to differentiate them from rest of the population specifically in order to identify those who were eligible for special treatment and/or compensation for lands and resources as original occupants. As RRC states:

> the Crown became the target of Indian grievances and claims respecting land, resources and the management of native affairs. These claims are based on Aboriginal rights or on agreements made with government which were based on the Indians' position as unconquered indigenous occupants of the land. To implement the policy of dealing with native peoples differently from other citizens, it became necessary to determine the membership of the native societies. RRC 1975

While the intention to create a bounded category appears to be for legitimate reasons the process of definition itself was somewhat less so. There was considerable concern regarding who could or should qualify for these so called 'special rights', and what made them so. The basis of this concern was that only those individuals that *should* be granted special rights be included in this category. An example of this concern can be seen in the report of Special Joint Committee of the Senate and House of Commons: Appointed to continue and complete the examination and consideration of the Indian Act, April 21, 1947. The report states that there was "an ever present difficulty in connection with the administration of Indian affairs… of ascertaining 'Indian status'… who is an Indian and what an individual must have or be to qualify for the special rights and privileges to which an individual is entitled by reason of his having Indian status" (Canada 1947:567). As a result of this concern to grant special status only to those who warranted such status subsequent years were visited by quite drastic redefinition and reclassification of the boundaries or criteria for membership.

The reasons for these changes, however, were far more than a process of just administration. Rather, they were the result of ideologically laden values and concerns of the larger settler population in relation to First Peoples. Prior to the mid-nineteenth century, both the French and British sought the co-operation of Aboriginal peoples in trade and resource use as well as in wars over the trading territories associated with the various Aboriginal nations (Francis 1992). As a result, relations remained relatively positive. However, once issues of war and military alliance were behind them, and the settler population

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[1] official recognition and inclusion in the 'Indian' register

was largely established and self-sufficient this relationship altered drastically. The new focus of settler governments was to consolidate European (especially British) settlements and control, and to establish a nation replicated on Britain. The result was a natural conflict between settlers and First Peoples over resource use and land allocation (Francis 1992).

The result of the changing political dynamic between First Peoples and the settler governments was a major shift in attitudes. Confederation is perhaps the major defining moment in this shift which resulted in considerable change to the policies settler governments maintained in relation to First Peoples and their descendants. These quickly became characterized by policies of isolation and assimilation, associated with heavy paternalism which largely remained the focus of Canada - Aboriginal relations up to the 1970's (Franks 1996). In fact, under the policies of Duncan Scott, deputy superintendent general of Indian Affairs in the early 1900s, there was a great emphasis on eliminating the 'Indian problem' through "the great forces of intermarriage and education…" (Quoted in Franks 1996). The intention was that through education and intermarriage, individuals would gradually move away from their uncivilized ways and move towards a more 'developed' sense of self within an advanced society (Asch 1984). Thus attitudes had shifted away from thinking of First Peoples as peoples with rights as original occupants to thinking of them as marginal, uncivilized and in need of protection. Thus, restrictive definitions merely encouraged the movement of suitable candidates from one category (uncivilized heathen) to another category (citizens of Canada), thus eliminating Crown responsibility for large numbers of individuals.

The other side of this shift in attitudes was the conflict over territory and control. If people could be moved from the category Indian, into the category Canadian, then any special rights to land as original occupants would be eliminated. As Boisvert and Turnbull state, "throughout the late nineteenth century and the twentieth century, the federal government continued to seek ways to limit or diminish the number of Indians for whom it accepted 'wardship' responsibilities" (1985). By reducing the number of those who qualified as *Indians*, lands were freed from the authority of those individuals who had previously been recognized as *original occupants* - *Indian* - and opened them up as 'empty lands', occupied by squatters rather than people with any authority or control. In this way, the intention to clarify who deserved special rights had shifted to an intent to limit the numbers of those deemed to be *Indians* - a shift which benefited settler society.

Many methods were employed to reduce the number of qualified recipients of recognition. The result was an extreme change in how those definitions were constituted. Prior to confederation there was no limiting criteria in assessing who an *Indian* was other than belonging. In <u>An Act for the Protection of the Lands and Property of Indians in Lower Canada (10 Aug, 1850)</u>, an 'Indian' was defined as:

> All persons of Indian blood reputed to belong to the tribe. All persons intermarried with them and residing among them and their descendants. All persons residing among them whose parents on either side were or are Indians of the tribe. All persons adopted in infancy and residing with them. (Peters 1996)

This very broad definition stands in marked contrast to later definitions. For example, An Act Respecting Indians (20 June, 1951), states that

> People excluded from Indian register are: People whose mother and father's mother are not Indians; a woman married to a non-Indian; an illegitimate child born to an Indian woman when the Registrar is 'satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered" (Peters 1996)

The changing needs of settler society let to shifts in attitudes and ideology regarding Aboriginal Peoples. This was met with a concurrent shift in Aboriginal policy that led, by the mid-nineteen hundreds, to dramatic shifts in how an 'Indian' was defined.

One of these definitional shifts was through the application of the 'male head of household' theory of 'family' to Aboriginal identification (Weaver 1993). This concept of 'family' held that a woman, and the children of the union, became the responsibility of the husband and thus should be classed in the same manner. In this way, a Cree woman marrying an Ojibwa man became an Ojibwa in the register and was no longer recognized as a member of the Cree nation. Whereas, if she married a non-status or non-Aboriginal male then the woman lost all official status and was stricken from the register. The reverse of this application assigned the status of a male registered 'Indian' to any woman who 'married in' (Weaver 1993). Since children were also deemed the responsibility of the 'male head of household', children automatically inherited their father's status. While status 'Indian' men were able to pass on their status to their children regardless of the mother's descent, a status 'Indian' woman who married 'out', lost her status and was no longer able to pass that status on to her children - regardless of the fact that these children had the same percentage of Aboriginal descent. This convoluted system of definition was far more dependent on kinship than on race or identity (Weaver 1993) and made for a highly discriminatory system of definition.

Enfranchisement policy was another means through which Aboriginal people could have their status revoked. Beginning in 1857, enfranchisement policy allowed for the enfranchisement of Aboriginal persons into Canadian society[2]. While this policy was not always mandatory, it did serve as a mechanism through which the Canadian government could reduce the number of people the government had wardship responsibilities for. As Barron states, "enfranchisement signified that the Indian had been sufficiently trained to assume full citizenship rights and obligations and it required that he legally surrender his Indian status and leave the reserve" (1984). As Franks notes, Scott (writing between 1913 and 1932) had a clear objective in making amendments to the Indian Act allowing for the enfranchisement of Indians. Scott stated that,

> "I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of People who are able to stand alone. That is my whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department" (Franks 1996).

[2] And concurrently out of their Aboriginal one.

Enfranchisement policy allowed for the incorporation of any Indian who was deemed ready to take up citizenship responsibilities into Canadian society. "The effect of these provisions, since 1876", as Boisvert & Turnbull state "has been to create a new class of native persons - persons who had, or whose ancestors had, lost their status under the Indian Act - a group called *Non-status Indians*" (original emphasis, 1985). These People suffered from the legal abrogation of their Aboriginal identities as well as their claim to authority over the lands, which they occupied. Thus, in the span of a century, increasing numbers of Aboriginal People were classified as non-status Indians, denied their identities as Aboriginal persons and assumed the status of Canadian citizens.

Tied up in this definitional abrogation of Aboriginal identity was the theory of blood quantum. While not an official policy, the theory of 'blood' and the density thereof, is imbedded in Canadian policy even today. Originally, blood quantum first applied to Aboriginal Peoples in 1869 when it was dictated that moneys would be distributed only to band members with ¼ Aboriginal blood (descent) (Peters 1996). In spite of the fact that the notion of a biological determinant of race has been discredited as a scientific tool (Jackson & Penrose 1993), 6(1) and 6(2) definitions of Indian status indicate the continuing influence of blood quantum as an idea on Canadian policy. Despite a potentially active identification with a heritage and even a 'status' community, individuals who fall below an arbitrary line of *Indianness*, are defined 'out'. This is ironic compared to Louisiana's history of the legal identification of those defined as 'Coloured' (Dominguez 1986). For example, as late as 1970, individuals were identified as mulattos, quadroons, or octoroons depending on their percentage of blood ties to black ancestry. To put it more bluntly, even a tiny fraction of African descent labelled an individual coloured in a place and time where being coloured was still a disadvantage (Dominguez 1986). On the other hand, First Peoples have had this same theory applied in an inverted form. In the Canadian context, once there is a certain percentage of mingling with non-Indians, there is an implication that the individuals are not Indian enough to be defined as 'Indians'. In effect then, they are not Indian enough to warrant special status or consideration. It is just one more way in which recognition of Aboriginal identity has been denied to certain individuals based on arbitrary classifications.

In 1969, the actions of Aboriginal women forced the implementation of Bill C-31 which reinstated women who had lost their status through marriage and further excluded from status, as of the passage of the bill, non-status (non-Aboriginal) women marrying (status) Indian men. However, new restrictions were incorporated into the definition, which continue to determine the qualifications of individuals in a discriminatory manner. Under these new restrictions, a 6(1) 'Indian' is one whose parents are both registered (status) 'Indians' (even if one of those is a non-Aboriginal woman who married 'in' and gained status under earlier provisions), while a 6(2) 'Indian' is one who has one parent who is not registered (whether or not that individual was of Aboriginal descent). Weaver writes that

> a 6(1) person can transmit legal status to her (his) children even if a partner has no status. Under 6(2) the government granted status to all persons with only one status parent… A 6(2) person

> cannot transmit legal status to her (his) children unless the partner is a status Indian.
> (Weaver 1993)

The implications of these criteria are that people who equally descend from those Aboriginal people, present at contact, are not equally recognized as such. Furthermore, marrying becomes a political act where children loose recognition of their heritage because they are deemed no longer 'Indian' enough.

By 1982, a further distinction was made between definition in policy (i.e. those registered and thus possessing status), and definition in law (as defined in the 1982 Constitution). These constitutional amendments defined Aboriginal peoples in a much broader manner (more in keeping with the 1850 definition). Section 35 of the Canadian Constitution now reads that "'Aboriginal Peoples of Canada' includes the Indian, Inuit and Metis Peoples of Canada (Isaac 1990). The implications of this definition are considerable. The main point of import is that the definition of an 'Indian' is now fixed in the Constitution and can not be arbitrarily altered, as has been the case in the past. An additional point is that all people of Aboriginal descent are now recognized as such under constitutional law.

Despite this change in legislation, there remained many people who identify as Aboriginal people but are not recognized as such under the Indian Act. The terms status, and non-status are used to differentiate between those who are and are not recognized under the Act. Status individuals are recognized as Aboriginal persons with access to a series of provisions (i.e. Government sponsored rights to education, health care, etc.…); whereas, non-status individuals are considered for all intents and purposes to be Canadian citizens with no claim those provisions.

The Rights Debate

If there were no issue of rights, there would not be such a fundamental dispute over identification. However, because there is a very real issue of rights, the issue has remained in the forefront of Canadian debates. It is not identifying as an Indian which is such a problem, rather it is being recognized by the State as one that matters. Those who are recognized as 'Indians' are recognized for the purpose of Indian policy through which the obligations of the State are to be carried out. Without recognition, no special status exists, and thus no measurable or verifiable proof of a legitimate claim.

The denial of a recognized identity and the associated *Aboriginal right* creates enormous disparity between Aboriginal groups. Boisvert & Turnbull state that "after 1885 the single most important circumstance structuring the identity of Native Peoples was federal Indian policy and the distinction created by federal Indian policy between persons of Aboriginal descent who benefited from treaty and had rights under the Indian Act and those who did not" (1985). Indeed, the government of Canada did not consider its responsibilities to be a matter of perpetuity, but as a measure of protection, alleviating distress during the transitional period from Aboriginal nature to civilized member of society (Asch 1984). Since the federal government denied the existence of a responsibility for Metis and non-status Indians (Boisvert & Turnbull 1985), they alienated those people from *Aboriginal rights*, which were allocated to status Indians alone. RRC states that

> non-status Indians and Metis are recognized as holding a status no different from that of other Canadians. While the Government of Canada has assumed special responsibilities for education, health, welfare and economic development for status Indians, the non-status and Metis people rely on the same agencies as other Canadians for these services; this usually means the provincial governments. The British North America Act assigned to the Dominion Government responsibility for 'Indians, and Lands reserved for the Indians' but gave no clearer specification of those terms. non-status Indians and Metis argue that the government does not have the constitutional authority to limit these responsibilities by restricting the meaning of 'Indian' only to those defined in the Indian Act. This question of status and membership in the status group is therefore an important element in the consideration of native claims and grievances. (RRC 1975)

The argument by non-status Indians and Metis people brings up an important question - what is the basis of Aboriginal right? Here again is an issue, which has undergone considerable debate.

The debate over what constitutes Aboriginal right and what that right is based upon are issues which are intertwined. One belief is that 'inherent' right was extinguished and that Aboriginal right is based on agreements with the Crown[3]. However, there is growing support for the argument that Aboriginal right is based on the right of original occupancy (Asch 1997; Courtoreille 1997; Isaac 1995; Imai, *et al*.. 1993; Asch 1984; RRC 1975). Canadian law places the basis for *Aboriginal right* in British Common Law (at least in areas outside of the province of Quebec) which maintains that the rights of Aboriginal Peoples remain intact until they are extinguished (Isaac 1990). British Common Law states that "the Aboriginal Peoples of Canada should retain, under English law, those property rights they possessed prior to colonization that have not been expressly extinguished by specific legislation and/or for which compensation has not been paid" (Asch 1984). Furthermore, the Royal Proclamation of 1763 served to 1) recognize Aboriginal interest in the land; and 2) provide a mechanism for the alienation of that interest (Surtees 1994). *Aboriginal rights* are recognized in Canadian law under the Royal Proclamation (1763) as existing until they are extinguished, sometimes in exchange for certain privileges and/or payments[4]. In Canadian law then, *Aboriginal right* flows not from status, but from original occupancy - the historical precedent over European immigrants by the Aboriginal Peoples of North America - thus through *inherent right*.

Despite this fact, the use of status for the allocation of rights to land and resources has, in practice, replaced identity[5] as a basis for *Aboriginal right* at least in the policy forum. In effect, non-status Indians have become '*white by definition*'[6] and therefore excluded from the ownership of any '*special right*' which

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[3] This point refers to treaty rights provided as a result of agreements between specific Aboriginal groups and the Crown representatives at the time of Treaty agreements. These rights are not universally held by all people with a treaty, but vary depending on which treaty involved. Some of these treaties are quite extensive (especially the more modern treaties like the James Bay agreement, or the Nunavut agreement) while others are quite scant in their provisions.

[4] I.e. through the treaty making process.

[5] Meant here to refer to those who identify as being descendants of the original occupants prior to contact.

[6] This quote is taken from a book by Virginia Dominguez called White by Definition: Social Classification in Creole Louisiana, Rutgers University Press:New Brunswick 1986. While I understand that Canadian society is far from 'white', the term here implies an absorption into the anglo (if not British Commonwealth) heritage vision of Canadian history.

flows from their Aboriginal heritage. The failure of the individual or group to qualify for identification leaves them with no justification for an allocation of land and resources tied to *Aboriginal right*. In effect, they are not Indian enough to warrant special consideration.

The fundamental principal of citizenship in democratic societies is that all people have a right to the benefits of membership - thus, access to citizenship rights. However, in practice, individuals (especially those belonging to minority groups: gays, women, Aboriginal peoples, disabled, etc.…) can effectively be denied access to those rights through policy formation. This is especially the case in the context of Aboriginal Peoples. Much contemporary conflict between the State and Aboriginal Peoples lies in the intersection between policies rooted in past ideology and new ideas reflected in contemporary legislation. While attitudes towards Aboriginal Peoples have liberalized since the 1960's, (i.e. the Sparrow case and the Constitutional amendments of 1984) policy application lags behind this liberalization process. As a result, individuals and groups (Aboriginal and otherwise) must pursue changes to policy through available mechanism (i.e. negotiation, confrontation or the courts).

Up to this point, this paper has explored two issues that are open to much debate - the definition of Aboriginal Peoples and the definition of Aboriginal rights. The fundamental question here is who has access to Aboriginal rights. Do all Aboriginal people with constitutionally guaranteed rights have access to those rights? Are there limitations or exclusions? Does the policy process actually deliver the access guaranteed in the Constitution? If not, why?

In practice, Aboriginal rights in the policy process often fail to reflect Aboriginal realities. For instance, while a great many non-status Indians lost their status through marriage to Europeans[7], there were others who were never granted status because they were not involved in the treaty making process. The Algonquin Peoples of the Ottawa valley, specifically those within the borders of the current day Ontario, are an example of a group who never signed a treaty with the Canadian government[8]. While a small number of Algonquin Peoples received a reserve allotment[9], and were later granted official Indian status, this was an extremely arbitrary act. As Reid states, they were "a nation arbitrarily divided" (Manoumin Productions 1997). Most Algonquin People were never granted status, and have failed to be granted a recognition of their *Aboriginal rights* (Sarazin 1990; Recollett 1995; Holmes 1995). Sarazin states that,

> when the government of Canada began to decide who was an 'Indian', according to the strange definitions written into the Indian Act, the People living on the reserve at Golden Lake were recognized as 'status Indians'. The Algonquins of all other parts of the Ontario side of the Ottawa Valley were not even granted that recognition. (1990)

Thus, both recognition as Aboriginal Peoples, and the associated rights, were granted on a relatively arbitrary basis to some, while others were denied.

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[7] Later reinstated through Bill C-31 as previously noted.

[8] British Columbia is almost wholly without treaty. Thus, the many Aboriginal nations living within that province have no treaty rights. As a result, it is entirely possible that British Columbia would be an appropriate site for further application of this research topic.

[9] "In 1864 the Indian department used Indian funds to pay $156.10 for 624 hectares (1,560 acres) that became the Golden Lake Reserve" (Sarazin 1989).

While changes to the criteria for status eligibility changed in response to Bill C-31 whereby persons who had lost status involuntarily were reinstated, not all persons of Aboriginal descent were granted status (Weaver 1983). Only those who had originally been recognized but had lost that status[10] because of restrictive policies were reinstated. Those, whose ancestors had never been formally recognized remained outside of the definition, and thus continued to be denied the recognition of their identities as Aboriginal Peoples. The Native council of Canada (NCC), in response to Bill C-31, stated that "all persons of Indian ancestry who identify as Indian should be granted status, including those who were never registered as status Indians" (Weaver 1983). Through Bill C-31, the Algonquin Peoples who had not been formally granted status remained excluded from their rights. In fact, they were denied all *Aboriginal rights*, protection of their unceded lands (as dictated by the Royal Proclamation (1763)), the provision of an area of land reserved to their exclusive use, or even a recognition of their rights to use the resources within their traditional territories (Perry 1995a:12, 21; Reid 1995b:pt. 16).

In 1973 the Canadian government implemented its comprehensive claims policies. However, in practice, *non-status* Algonquins have had difficulty in being recognized in the claims process. The position of the government has been to have one comprehensive Algonquin claim negotiated through the status band at Golden Lake. This presents a significant obstacle to the interests of non-status Algonquins in Ontario. As stated by Harold Perry, an elder of the Ardoch Algonquin non-status community, "Ontario has consistently refused to negotiate with 'non-status' communities" (Perry 1995a:pt. 28; supported by Recollett 1995). Lastly, he notes that "the province has been negotiating with the Algonquins of Golden Lake for many years. (They) are the only Algonquin band which is registered under the Indian Act as a 'band'" (Perry 1995a:pt. 31). While mechanisms exist to engage in a formal claims process, in practice non-status communities continue to be denied access to those mechanisms in contemporary times.

Status, as defined by the Indian Act, has acted as the formal recognition of Aboriginal identity. However, it has been shown that the identity it recognizes is restrictive, imposed from outside, and arbitrary in nature. The use of status as a basis for the Allocation of *Aboriginal right* has severely limited access to those rights for many people who fall outside of the policy definition. Further, since the recognition of an Aboriginal identity has been used as the basis for the allocation of rights, then a lack of recognition implies a lack of justification for a claim. In this way, status definitions of Aboriginal identity have indirectly limited access to the mechanisms for the claims process.

Case Study: The Ardoch Algonquin First Nation

To fully understand how these issues apply to the Ardoch Algonquin First Nation it is necessary to detail a number of historical developments, which have affected the community. Among these developments are a treaty made between the government and the Mississauga; the historical reality of encroachment and the lack of government action to protect Aboriginal lands; the Constitution Act of 1930 (defining provincial jurisdiction); several developments in case law; and the Constitutional amendments of

[10] This includes children of women who were reinstated, though there are restrictive criteria in this regard

1982. It will then be possible to assess contemporary issues in relation to the AAFNA community, including the ongoing court case regarding hunting and fishing rights for community members.

Though the Algonquin Peoples never signed a treaty, and despite the guarantees of the Royal Proclamation (1763), they have still undergone a process which has effectively alienated them from their lands. The William's treaty in 1923 was the formal means through which authority over Algonquin lands was acquired by the State. This treaty was signed by the Mississauga Peoples of Rice, Mud and Scugog Lakes and Alderville (Kuhlen 1985) without the consent, or even awareness of the Algonquin Peoples (Day & Trigger 1978; Surtees 1994). In spite of the fact that the Royal Proclamation (1763) prohibits the selling of lands through a third party, and the requirement that all transactions be held at a public forum where all Aboriginal Peoples affected are represented, the government still points to the William's treaty as their basis for jurisdiction over the lands of the Ottawa valley.

These concerns are a disturbing legacy of the past. However, the fact remains that even before the signing of the William's treaty, the Algonquin Peoples were being forced aside by the steady encroachment onto their lands. Surtees comments that between 1815 and 1824, the non-Aboriginal population in Ontario doubled (1994). The result of increasing numbers of settlements was a decrease in the viability of a hunting economy. As Sarazin states, "the number of settlements continued to grow in their hunting grounds, causing the game to become distant" (1990). As Algonquin lands and resources were consumed by white settlers, they sent petitions for the protection of their lands (PAC 11798:31057-8; PAC 1824:31027-32). Despite this fact, nothing (or very little) was done to protect Algonquin *rights*, and their land base was gradually eroded.

This erosion was exacerbated when the provinces gained legislative authority within their areas of jurisdiction. The Constitution Act, 1930 (formerly the British North America Act, 1930) provided that the provinces would have authority over the resources within their bounds (Isaac 1995). To enact this authority, legislation in Ontario was developed for conservation purposes, which limited the right of all people to hunt, fish and trap, the traditional means of subsistence for the Algonquin People. Usher, *et al.* state that "hunting, trapping and fishing were no longer seen as fundamental guarantees of native livelihood, much less as a proprietary right, but rather as mere licenses or privileges granted at the Crown's pleasure" (1992). Even status Algonquins were restricted to the reserve when hunting and fishing and were subjected to arrest or the application of fines for practising these traditions off reserve. non-status Algonquins were given no recognition for their traditional rights and means of livelihood. Further, in the 1960's, Algonquins living in the Ardoch region were told they had to purchase the lands they resided on or leave (Perry 1996). Those who could not afford to purchase the lands were forced to move further into the bush, or to urban areas such as Kingston. In this manner, Algonquins were alienated from their lands without compensation. Sarazin writes, "despite the Royal Proclamation, land was being taken from us without payment of any kind. And gradually, in the face of this encroachment, our People's way of life

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as noted in the discussion regarding 6(1) and 6(2) designations.

became less and less viable" (1990). For non-status Algonquins, even though their rights were supposedly protected under the Royal Proclamation (1763), the lack of status was an exclusion to rights[11]. The encroachment, and extension of the authority of the Canadian government into Aboriginal lands led to the erosion and even criminalization of Aboriginal life ways, especially Aboriginal harvesting (Usher et al. 1992)

Particularly because status was used as a basis for defining who had rights, those without status were also without a mechanism for recognition and negotiation. The government was certainly aware of the Algonquin claim. The Algonquin Peoples made repeated petitions for the recognition of their *rights* (PAC 1824:31027-32), but rather than a just process of settlement, they were informed that they had no rights because the lands had been purchased from the Mississauga. This came as an obvious surprise to the Algonquins. Petitioning for their rights, the formal means through which disputes were settled was ineffectual leaving them with no means to address their grievance. In this way, the process of settlement, white ideology, and the expansion of law making powers over the territory led to their alienation and the criminalization of their way of life. These processes of alienation have impacted on non-status communities like the Ardoch Algonquins and limited their ability to access their rights and to receive the recognition of their identities, which would validate their claims. The whole process of alienation results from the prevailing attitudes of the time. Attitudes, which regarded the state of Aboriginal Peoples as inferior compared to European society, led to a failure to validate their needs, or ways as a group. Since the Algonquin Peoples did not have status, they were considered (as were the Metis) to be already on the road to assimilation, and no longer the responsibility of the government (Boisvert & Turnbull 1985). Attempts to have their rights recognized were summarily denied (Holmes 1995). Their '<u>non</u>'-status limited progress towards a settlement because of the lack of recognition of their identity.

In spite of these processes of alienation and marginalization, Algonquin individuals continue to reside in their traditional territories. Usher *et. al*. state that "despite the history of denial, abrogation, encroachment and indifference by Canada and its settlers, Aboriginal People have not disappeared, nor have they abandoned their lands" (1990). Rather, Aboriginal People continue to live in rural and village communities through an economy which "consists of a mix of wage labour, commodity production, (and) subsistence production" (Usher *et. al*. 1990). Holmes detailed the ongoing presence of Algonquin families in the Ardoch region aptly illustrating the continuity of their presence in the region (1995). Many of them engaged in non-traditional wage labour. However, they maintain a deep attachment to their lands and are committed to a fight for the recognition of their rights in their traditional territories (Perry 1996). Thus, the weakening of their ability to subsist through traditional means has led to a process of integration and adaptation, not a denial and abandonment of traditional life ways.

The story of the Ardoch Algonquin non-status community is little different from that of the Algonquin Peoples in general. As Harold Perry states, "we have always wanted the settlers and their

[11] The Williams' treaty has been used as the justification for these issues. It is yet to be seen if AAFNA's

governments to recognize and respect the fact that we are the owners and custodians of our homeland" (1995a:pt.12). The earliest petition for which AAFNA has a record of was in 1842. At this time, Chief Peter Shawanipinessi petitioned the crown requesting that enough land be left alone so that "we can support our families" (Perry 1995a:pt.13). Despite ongoing petitions requesting that their rights be recognized and protected, the community was ignored. Many communities, in an effort to survive, learned to adapt by taking on 'wage' employment to supplement what could be acquired through traditional harvesting methods (*Usher et al.* 1990). In this way, the Algonquins living in the Ardoch region came to be fairly integrated into the settler communities, while maintaining an attachment to the land through traditional harvesting. However, the federal or provincial governments of Canada have never recognized the continuity of traditional value systems and life ways. This fact has led to an ongoing conflict regarding resource use in the area.

A closer examination of more recent events in the Ardoch community can serve to evaluate where things are in a contemporary sense with regard to status, identity and rights. In 1979 community rights were threatened when Ontario granted the right to harvest the wild rice crop in Mud Lake to a commercial operator (Lovelace 1982). The local residents recognized this rice as under the stewardship of Mr. Perry. Mr. Perry's family had been the stewards of this crop since it was first planted. It had been harvested jointly by Metis, status Indians, the Ardoch Algonquins and local settlers for many years. The actions of the province without notification to the community was a shock, especially considering that the rice was originally planted in the lake by Mary Buckshot, an ancestor in the community and Mr. Perry's grandmother (Lovelace 1982). The community eventually succeeded in guaranteeing that only 30% of the harvest could be taken by a commercial interest, however there were no guarantees that the People of the community would have uncontested rights to the remaining rice (1982). Efforts for recognition of their rights to the rice were tied up with the question of non-status rights to resource use. In fact, it was tied up with the larger question of recognition of identity, and the notion of Aboriginal right. To that end, the Ardoch Algonquin First Nation (AAFNA) organization was formed.

Several changes in the legal position of *'Indians'* in Canada have had significant implications for AAFNA. Among those which bear importance on this community are the two court cases R. *vs. Calder*, R. *vs. Sparrow* and the Constitution Act, 1982. The Calder case recognized the existence of an Aboriginal title to unceded lands (McNeil 1997; Isaac 1995). The ruling recognized "an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only be legislative enactment" (Asch 1984). This supports any Algonquin claim because they have never ceded their rights, even if another party (the Mississauga) ceded their lands.

The next major event which changed the dynamic affecting claims negotiations in Canada was the Constitutional Act, 1982. Sections 25 and 35 of this Act are particularly relevant to Aboriginal claims. Under section 25, *The Canadian Charter of rights and Freedoms*, protection is granted for "existing

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right will be upheld at the Supreme Court level.

Aboriginal, treaty and other rights of the Aboriginal Peoples of Canada" (Isaac 1990). Additionally, section 35, states that 1) The existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed, and that 2) in this Act, " 'Aboriginal Peoples of Canada' includes the Indian, Inuit and Metis Peoples of Canada (Isaac 1990). Additional to this point is that Constitutional law is recognized as the highest law, "thereby superseding federal, provincial, and territorial legislation inconsistent with its provisions" (Isaac 1990). Thus, any legislation which infringes upon the rights of Aboriginal peoples as expressed in the Constitution Act, 1982 are no longer applicable. These amendments have drastically altered the balance of power between the State and Aboriginal Peoples by both 'recognizing and affirming' existing rights. For groups who may have unsurrendered rights, there is now a constitutional recognition and affirmation to those rights in Canadian law. Further, the Constitutional amendments define an Indian as "Indian, Inuit and Metis Peoples of Canada" (Isaac 1990). Thus, communities denied access to their *inherent right* of original occupancy because they fall outside of the legal definition of 'status' Indian as dictated by the Indian Act, now have a precedent in Canadian law to seek redress for that denial.

The importance of this fact is recognized in R. *vs. Sparrow*. The two points of interest here are that 'existing' means "rights which were in existence when the Constitutional Act, 1982 came into effect on April 17, 1982" and that 'existing' also means "unextinguished rights" (Isaac 1990). In order for any legislation to override this ruling, it must be shown that there is a valid reason for the infringement, it must infringe as little as possible, and in the case where expropriation is necessary, that fair compensation be made and the Aboriginal group must be consulted (Isaac 1990). The importance of these rulings is unquestionable. Where Parliamentary control regarding Aboriginal Peoples had been 'absolute', it is now 'qualified and limited' through the Constitution Act, 1982 (Lyons 1991) with significant implications for judicial practice. Stating that *Aboriginal rights* 'are recognized and affirmed', "places a constraint on the Parliament of Canada, the provincial legislative assemblies and other members of the body politic to act in accord with the acknowledgement of these rights, *regardless of their political will to do otherwise*" (emphasis added, Asch 1984). Thus, the rights of Aboriginal Peoples have been mandated in a way, which sets a burden of responsibility on the representatives of the Crown to advance the rights of Aboriginal Peoples in accord with the Constitution.

It is obvious that the implications of these changes have significant import to any claims, especially for those who had previously been excluded under status definitions. In the case of AAFNA, the province constantly refused to recognize AAFNA, and to open negotiations on harvesting rights despite repeated requests (Perry 1995a:pt.27). With no other method of addressing their claims, the community elected to take the judicial avenue for a claim settlement. This began the contemporary challenge which may succeed in redefining non-status and Metis rights in Ontario and abroad.

In reviewing the case of R. *vs. Harold Perry* it is not necessary to detail the whole of the proceedings, but to illustrate how Mr. Perry's lack of status prevented him from exercising his *Aboriginal rights*, and how being non-status impeded the negotiations process for AAFNA and other non-status

groups in Ontario. On December 11, 1993 Harold Perry was charged with an offence against the Provincial Migratory Birds Convention Act (Canada) and the Game and Fish Act (Ontario) (Perry 1995a:pt.21). Mr. Perry presented his AAFNA card and explained that he was an Algonquin hunting within his traditional territory. However, under Provincial legislation, only status Indians have a mechanism for protection of their *Aboriginal rights* to hunt and fish through the Interim Enforcement Policy (IEP). There is no mechanism for assessing the rights of non-status individuals. As a result, Mr. Perry was charged and his weapon was confiscated.

In the case of status Indians, the IEP exists as a mechanism "to minimize instances where Aboriginal People are in conflict with the government of Ontario in the application of the Game and Fish Act, The Fisheries Act and the Migratory Birds Convention Act" (Lapierre 1995:pt.8). The IEP provides for a consultation process when a status individual is charges with an offence against these Acts. It also provides that if the status individual is hunting (fishing) for subsistence or ceremonial purposes, and is acting with safe conduct, that no charges shall be laid. If however, there is a need to charge the status individual in specific instances, there must be consultation with the affected First Nation (Perry 1995c:1-5). However, the IEP clearly states that the Acts will continue to apply to non-status Indians until a negotiated agreement is reached (Perry 1995c:5). In this way, the IEP differentiates between status and non-status Indians in a way that limits non-status rights pending negotiation. In light of the fact that the province has repeatedly denied requests to negotiate with AAFNA, this seems to be a questionable regulation. The province insisted this was reasonable because officers in the field needed a means through which they could determine if a person was indeed an Aboriginal Person, and if they had a legitimate claim to *Aboriginal rights* (Reid 1995b:pt.16). In light of the Constitutional amendments, 1982 which guarantee *Aboriginal rights* to all, including Indians, Inuit and Metis, this regulation infringes on the Constitutional rights of those persons who are without status.

Initially, the case revolved around the charges to Harold Perry. However, AAFNA notified the Court that the case had Constitutional bearing. The argument stated that the provinces IEP firstly contravened section 91(24) of the Constitution Act of 1867 because it took the authority to legislate regarding status and non-status Indians in a way which allowed for them to be treated differently (Reid 1995b:pt.4). Additionally, they argued that the IEP, by differentiating between status and non-status Indians, denied the Constitutionally protected rights of 'Aboriginal Peoples' in s.15(1) of the *Charter of rights and Freedoms* (Reid 1995b:pt.4). However, before the case was heard, the province elected to drop all charges (Nov. 28, 1995) against Harold Perry on the grounds that he 'qualifies' for status and therefore could not claim to have rights violated under the IEP (Lapierre 1995:pts. 4, 6, 12, and 15). The case was then expanded to include Mitchell Shewell, AAFNA, and a number of other organizations with interests in the proceedings (Cosgrove 1995:pts. 3, and 6). A further investigation was carried out into the matter of the constitutionality of the IEP. In response to this development, the province elected to rescind the IEP (Cosgrove 1995:pt.5). Judge Cosgrove, perplexed by the province's actions without forewarning, accepted the application of the applicants to move forward to clarify the issues addressed through the case. Mitchell

Shewell stated in his Affidavit that, it was crucial to "resolve the issue of whether we have the right to hunt in our traditional territory" (Shewell 1995:pt.11). To that end, the hearing continued to review the broader implications of the IEP and the rights of non-status Indians in the province of Ontario.

The real issues of the case were the continuity of the alienation of Algonquin Peoples from their lands and rights, and the lack of recognition in the present, which prevented a process of negotiation to move forward. It sought to show how Algonquin rights were denied in practice, through the ongoing criminalization of Aboriginal harvesting evidenced by the charges laid on Mr. Perry, and in law through the IEP and its failure to recognize non-status rights. One of the major arguments of the province against the application of the IEP to non-status individuals was the lack of clarity of rights and identification (Reid 1995b:pt.16), a return to the point of verifiability. As Reid states, "the submissions of the respondent have made it clear that the respondent has no intention of honouring the rights of 'non-status' Aboriginal People (1995:pt.16). Rather, the province has tried to side step its fiduciary responsibilities because of a lack of a means of identification and a clean interpretation of rights. The IEP states that the Acts will apply to non-status individuals *until a negotiated settlement was reached*. Thus, by refusing to negotiate, the province has effectively denied *all* rights to non-status individuals. By seeking to drop the charges against Mr. Perry and to rescind the IEP, the province sought to protect its interests and to continue the denial of non-status rights. On January 22, 1996 the Court ruled that:

> 1) The Interim Enforcement Policy shall not be withdrawn by the Government of Ontario without negotiations in good faith with Aboriginal People, as directed by the Supreme Court in R. vs. Sparrow.
> 2) A Declaration shall issue that the Government of Ontario has a Constitutional obligation to enact new game and fish enforcement measures to insulate all persons who have Section 35 rights (Constitution Act, 1982) from the enforcement of laws that are incompatible with such rights, and to that end:
>
> i) shall negotiate with all Aboriginal groups to determine methods of identification of such groups and membership in such groups in accordance with the rights and traditions of those groups; and,
> ii) shall grant reasonable funding to any Aboriginal group required to engage in the negotiations and required to defend test cases to clarify the scope of Section 35 rights and the persons entitled to exercise them.
>
> Cosgrove 1995:pt.11

As a result of the ruling, negotiations commenced. However, it was clear from the discussion process that the province was negotiating solely because of the court order (DeLisle 1996). The province has appealed the ruling to the Ontario Court of Appeal, and has successfully halted the negotiation process. Thus, in spite of increasing recognition of non-status rights in law, there is still a failure to recognize the rights of non-status Aboriginal Peoples in practice. At present (as of December 1997), this case is under review by a committee of the Supreme Court. There has not, as yet, been a decision as to whether this case will be approved for hearing by the Supreme Court of Canada.

Gradually, attitudes toward Aboriginal Peoples and rights have changed. The Canadian Constitutional amendments in 1982, as well as R. *vs. Sparrow*, have led to significant changes in the way *Aboriginal rights* are viewed, and even to how Aboriginal Peoples are defined. However, status as a

concept is so ingrained in the way Canadian society deals with *Aboriginal rights* that it impedes progress. Either policy needs to be applied in a more sensitive manner, or status needs to be withdrawn as a basis for the recognition of Canadian Aboriginal claims. Either way, Aboriginal identity needs to be defined in another way.

Status has been used to define Aboriginal identity, and as a basis for the allocation of *Aboriginal rights* for about a century. The result has been the creation of groups with no recognition of their Aboriginal identity, and with no recognition of a right to make a claim. Non-status effectively labels some Aboriginal Peoples as 'white by definition' and therefore provides no recognition of an Aboriginal identity with its associated rights. This has propagated a system whereby Aboriginal People have been alienated from their lands, denied their rights, and even suffered the criminalization of their way of life. Constitutional amendments and the Sparrow case have changed the basis of the recognition of *Aboriginal rights*, creating an inclusiveness in the claims process which status definitions did not allow. However, there is still a failure on the part of governments to recognize the rights and identities of Aboriginal Peoples, even in the negotiation process - especially those without status.

"DOG TURNED INTO CAT":

Oxford, England

The Dean of Worcester College has found an unusual way of getting around the ancient rules that bar dogs from his college. The governing body voted last week that his dog, Flint, is a cat.

-*San Francisco Chronicle*, November 10, 1975

As this interesting excerpt illustrates, identity is subject to manipulation by governing bodies. This manipulation may be harmless or not. However, one thing that can not be disputed is that it is illusory. Status definitions are equally so and thus represent an artificial basis for the recognition of *Aboriginal rights*. It is clearly time to look for a new way of defining First Peoples for the purpose of accessing *Aboriginal right* and to minimize government - Aboriginal conflict over policy application. It is my intent to further the research into Aboriginal identity in an attempt to grapple more fully with this difficult issue. It is my hope that other researchers will do likewise.

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