

Study Note

The Origin of Blue-Eyed Blond Indians

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[要約] カナダ・インディアンは、カナダ政府と協定 (treaty) を結び、広大な領地を手放す代わりに、「カナダ市民以上」(citizens plus) の諸権利を獲得している。しかし、これらの諸権利を保持するには、法的にインディアンとして認められていなければならない。つまり、『インディアン法』(Indian Act) に規定された登録名簿に記載されている者のみがインディアンとして法的に認知されるのである。かつて民族的にインディアンでありながら、登録名簿から外された者も多かった。その一例として、インディアンの女性がインディアンでない男性と結婚した場合、登録名簿から除外され法的にインディアンでなくなり、諸権利を失ってしまった。また、その逆に、民族的にインディアンでない、たとえば「青い目をした金髪的女性」がインディアンの男性と結婚した場合、この女性はインディアンとして登録される。こうして、民族的定義とはなんら関係のない法的「インディアン」が誕生したのである。本稿では、カナダ先住民をめぐる「先住権」「先住民」「インディアン」などの法的定義を考察することによって、彼らの直面している諸問題に言及した。

Introduction

Neither the definition of aboriginal rights nor the definition of aboriginal peoples in Canada have been described clearly. Since these highly politicised terms are difficult to argue with, researchers seem to be rather

reluctant to bring them up in discussions. However, in the area of native studies, researchers will not be able to avoid coming across these fundamental, somewhat political, problems. This paper discusses a major aspect relating to both the conception of aboriginal rights and the conception of aboriginal peoples; that being the definition of "Indian".

1. Some Possible Interpretations of Aboriginal Rights

The legal definition of "Indian" is extremely important to classify those who can obtain aboriginal rights recognized under Section 35(1) of the *Constitution Act, 1982*. Currently, it is the federal government, through the *Indian Act*, who decides who is an Indian. The unilateral definition of "Indian" has been hotly contested by various Indian political organizations. Aboriginal rights, however, have not reached the consensus of a clear-cut definition among federal and provincial governments and leaders of native associations.

Michael Asch provides two possible constitutional definitions of aboriginal rights.¹⁾ The first definition is "rights of self-government and self-determination".²⁾ But this definition requires more practically applicable details in order to be realized. Donald J. Purich, the Director of the Native Law Centre at the University of Saskatchewan gives the widely accepted explanation that "native self-government would mean native control over education, justice, health, economic, industrial and cultural policy and local matters such as roads and parks."³⁾ He added that this government would resemble the role of a provincial government.⁴⁾ The definition of self-government remains as yet an idealistic concept in the sense of its realization in the Canadian society.⁵⁾

The second approach to defining aboriginal rights relates to "a property

right in land and/or a right to hunt, fish and trap”.⁶⁾ In fact, the origin of aboriginal rights historically⁷⁾ goes way back to the statement by Pope Paul III in 1537 which states in part that “Indians are truly men ... they may and should, freely and legitimately, enjoy their liberty and the possession of their property”.⁸⁾ In Canada, the legal basis of land claim by Indians essentially comes from the Royal Proclamation of 1763⁹⁾ which was issued by King George III in England, announcing a new policy with respect to Indians and their lands. Although the Proclamation does not clearly specify its geographical scope of “Indian Country”¹⁰⁾, it constitutes the legal source of aboriginal rights.

The definition of aboriginal rights has not yet been clearly stated. Brian Slattery, a professor of Osgoode Hall Law School, elucidates that the recognition of existing aboriginal and treaty rights in Section 35(1) of the *Constitution Act, 1982* only indicates “not extinguished”.¹¹⁾ Therefore, the insertion of Section 35(1) and (2) shows a partial victory for native peoples.

2. The Legal Definition of Indians

Section 35(2) of the *Constitution Act, 1982* defines those who receive aboriginal rights,

In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.¹²⁾

This Section, however, does not bring up any determinant criteria for the three groups mentioned. Hence, it is argued “whether the determination is to be made on the basis of race, kinship, culture (including language and life style), community acceptance, or a combination of these factors”¹³⁾. Both the Royal Proclamation of 1763¹⁴⁾ and Section 91(24) of the *British North American Acts, 1867*¹⁵⁾ refer to “Indian” but the term is limited to

the definition provided by the *Indian Act* initially introduced in 1867 and amended several times since then.

According to Section 2 of the *Indian Act*, the definition of “Indian” is as follows :

“Indian” means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian¹⁶⁾

This definition brought about two different classifications of Indians ; status Indians and non-status Indians.¹⁷⁾ Status Indians are those who are registered as Indians under the *Indian Act* and non-status Indians are those who lost their legal status. Indians often lose their status for two reasons. Firstly, until 1960 Indians had to surrender their status in order to vote in a federal election,¹⁸⁾ namely this is the enfranchisement which is stipulated in Section 12(1)(a)(iii) and Section 109 to 113 of the *Indian Act*. The second reason is that under Section 12(1)(b) of the *Indian Act*, any status female Indian who marries a male non-Indian loses the Indian status for herself and for her children.¹⁹⁾ In the opposite case, however, a female non-Indian who marries a male status Indian becomes a status Indian despite having no Indian ancestry. Therefore, a person with no Indian blood, even a blue-eyed blond woman, can be registered as an Indian and, moreover, a Canadian status Indian does not necessarily have to be a Canadian citizen.²⁰⁾

The legal definition of Indians has created many non-status Indians, resulting in the confusion over the definition of Indians. In the legal sense, race, tradition, tribe and language are no longer crucial factors of defining Indians. Furthermore, Métis (generally referring to people with mixed blood resulting from marriages between Indians and non-Indians) are not considered to be Indians under the *Indian Act*, even though they have Indian blood.

3. The Definition of Mixed Bloods ; Métis

For European traders, having an Indian wife was a matter of survival: Indian women took care of rendering the meat into pemmican, gathering berries, caring for gardens, drying and smoking fish, making clothes and cooking daily food.²¹⁾ By 1770 the Hudson's Bay Company insisted that the employees marry Indians and Metis by regulation. In 1835, to protect Indian and Métis women, the Company ruled that an employee had to take his wife and children with him when returning to Britain or assign part of his pension to his wife's upkeep if he left her behind.²²⁾ As a result, in the latter part of the eighteenth century Métis villages began to establish around many trading posts. Compared to other people of mixed bloods like mulatto (mixed between European and African ancestors) and half-caste (mixed between European and Asiatic ancestors) who are mostly assimilated by either of their parents' culture, it is remarkable that Métis developed their own identifiable history and unique culture. But as yet, it is still difficult to define a member of Métis.

A. S. Lussier has collected the following seven definitions of Metis ;

- (1) a person of mixed blood — Indian and European (no matter what amount)
- (2) one who considers himself/herself as a Métis
- (3) an enfranchised Indian — one who has given up his/her treaty rights
- (4) one who received land scrip during the 1870s
- (5) one who is identified with a group that identifies as Métis
- (6) a native but not a registered Indian
- (7) in some Manitoba Métis Federation locals, a non-native can

belong to the M. M. F. provided he/she is married to a Métis. For the sake of administrative records of the organization, that person is counted as a Métis.²³⁾

These definitions, however, still leave some exceptional cases. Definition (1) which may be the most commonly used meaning of Métis excludes a group of non-Indians who married Métis. By contrast, this non-Indians' group is counted an Métis in some Manitoba Métis Federation locals. according to definition (7),

In definition (2), each individual has a right to decide his/her Métis identity. While anyone has a fair chance to call himself/herself Métis, it is rather an unstable and unclear definition. The 1981 Census of Canada using a self-report style as a means of collecting data, for instance, reported that the proportions of native people in Saskatchewan is 6.2%, including Indians, non-status Indians, Métis and Inuit.²⁴⁾ This figure is considerably low in comparison with the Svenson report which shows 14.1% of the population being either Indian, non-status Indian or Métis in Saskatchewan in 1976.²⁵⁾ Since the number of status and non-status Indians is fairly accurate and Inuit in Saskatchewan are very few, the difference of these two figures may indicate the number of Métis who did not identify themselves as Métis. As such, definition (2) is also unreliable as an identification of Métis. In the same manner, definition (5) also provides an unclear meaning to the term, Métis.

Definitions (3) and (6) present unambiguous meanings based on legal statements. Neither definition, however, can distinguish full-blooded Indians from mixed bloods. With regard to definition (4) concerning land script, "in 1870 a Métis was defined as one who could prove he/she was the descendent of a European",²⁶⁾ in which emphasis was on the European blood,

rather than the Indian blood. In addition, some names of European ancestors were missed in the time of the 1871 Census, which does not imply that they are not Métis today.²⁷⁾ After all, none of the seven definitions provides a clear definition of Métis; certain groups are always excluded or discriminated against.

Nevertheless, the Métis have struggled to cooperate with status and non-status Indians. In Manitoba, the joint Indian-Métis conferences often did not take special interests of Métis into consideration. Métis finally reached the decision that they have to organize their own provincial association. Accordingly, the association was formed under the title of the Manitoba Métis Federation in December 1967.²⁸⁾ So, in order to place aboriginal rights in the hands of all aboriginal peoples, the important task is to establish a good relationship among status Indians, non-status Indians and Métis.

Conclusion

The ambiguity in the definition of "Indian" remains especially in the interpretation of Section 35(2) of the *Constitution Act, 1982* which identifies aboriginal peoples of Canada with Indian, Inuit and Métis. Despite this constitutional specification, Indians qualify for registration under the *Indian Act*, excluding Indians who have lost their status through intermarriage or enfranchisement. Métis are also denied their constitutional aboriginal rights in the same way as non-status Indians.

The definition of Indians and Métis is rather a matter of negotiation. According to terms outlined in the constitution, the First Ministers Meeting dealing with aboriginal rights held in 1987. This conference discussed constitutional matters of aboriginal peoples "including the identification and definition of the rights of those people".²⁹⁾ However, the representatives of

the Canadian governments (both federal and provincial) and native organizations could not achieve any agreement. The definition of “Indian” comprising Métis has consequently extended far beyond cultural, racial and linguistic identity. Its solution has been superceded at federal parliamentary level as a political issue between federal and provincial governments and native organizations.

Footnotes

- 1) Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), p. 6.
- 2) *Ibid.*, p. 6.
- 3) Donald J. Purich, “Defining Scope of Aboriginal Self-Government,” *Forum*, 5, No. 2 (Spring, 1985), 11.
- 4) *Ibid.*, p. 11.
- 5) Sally M. Weaver discussed the concept of Indian government in the aspect of the relationship between the National Indian Brotherhood and the federal government. She pointed out that the federal government received bitter experience from the Québec sovereignty-association in the late 1970’s which created negative opinions in the federal government towards any Indian-government initiatives. The concept of Indian government, she explained, is “as yet an unarticulated, vaguely conceptualized ideology or philosophy”. (Sally M. Weaver, “Indian Government: A Concept in Need of a Definition,” in *Pathways to Self-Determination: Canadian Indians and the Canadian State* eds. Leroy Little Bear, Menno Boldt and J. Anthony Long [Toronto: Univ. of Toronto Press, 1984], pp. 65-68.)
- 6) Asch, *op. cit.*, p. 6.
- 7) It is important to mention that aboriginal peoples have naturally held aboriginal rights without the proclamations by Europeans. Therefore, the expression “historically” only refers to the history of Western European authorities to confer the legitimacy of aboriginal rights.
- 8) Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada* 2nd rev. ed. (Toronto: The Indian-Eskimo Association of Canada, 1980), p. 14.
- 9) As a “Charter of Indian Rights”, Justice Sissons in *Koonungnak* (1964) described that the Proclamation includes: (1) the Indian allies are not to be disturbed in the posses-

sion of their hunting grounds, (2) the hunting grounds that have not been ceded to or purchased by the Crown are reserved for the Indians, (3) no patents should issue for lands beyond the bounds of the newly created colonies, (4) private individuals may not purchase the reserved lands and private persons settled on the lands must leave them, and (5) lands may only be purchased from the Indians by the king at a public meeting held for that purpose.

- 10) Cumming and Mickenberg, *op. cit.*, p. 30.
- 11) Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," Speech at the conference titled 1885 and After Conference, University of Saskatchewan, 4 May 1985.
- 12) Canada, *The Constitution Act* (1982), Sec. 35(2).
- 13) Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada," *Supreme Court Law Review*, Vol. 4 : 255 (1982), p. 261.
- 14) The Royal Proclamation of 1763, contained as supplementary material in Cumming and Mickenberg, *op. cit.*, Appendix II, pp. 291-292.
- 15) Canada, Department of Justice, *The British North American Acts : 1867 to 1975* (Ottawa: Supply and Services Canada, 1976), Sec. 91(24).
- 16) Canada, *Indian Act*, R. S. C. 1970, C. I-6, Sec. 2.
- 17) Adjectives such as "legal", "registered" and "status" are usually used interchangeably to imply a registered Indian.
- 18) James S. Frieders, *Native Peoples in Canada : Contemporary Conflicts* (Scarborough, Ontario: Prentice-Hall Canada., 1983), p. 10.
- 19) *Ibid.*, p. 10.
- 20) Lawrence M. Bezeau, "The Constitutional and Legal Basis for the Education of Canadian Indians," *Canadian Journal of Native Education*, 12, Vol. I (1984), p. 40.
- 21) D. Bruce Sealey and Anthoine S. Lussier, *The Métis Canada's Forgotten People* (Winnipeg: Pemmican Publications, 1981), p. 5.
- 22) *Ibid.*, p. 6.
- 23) Antoine S. Lussier, "The Métis: Contemporary Problem of Identity," in Vol. II of *The Other Natives*, eds. Antoine S. Lussier and D. Bruce Sealey (Winnipeg: Manitoba Métis Federation Press, 1978), pp. 190-191.
- 24) Canada, Supply and Services, *1981 Census of Canada : Canada's Native People* (Ottawa: Minister of Supply and Services, 1984), Chart 1.
- 25) Ken Svenson, "Indian and Metis Issues in Saskatchewan to 2001," Unpublished paper, December 1978, p. 5.

In this report, Svenson estimated that the Indian ancestry portion of the school age population in Saskatchewan would rise from 22% in 1976 to 46% in 2001. This figure was calculated on the basis of a maximum estimate of the population. On the other hand, the 1981 Census of Canada is considered as a low estimate of the Indian ancestry population. Applying the growth rate as calculated by Svenson to the 1981 Census of Canada figures, the Indian ancestry portion of the school age population in Saskatchewan will be about 20% by 2001, which is again a low estimate of the population. It seems to be reasonable to take a mean score between high and low estimates as a closer figure of the real portion. Hence, the mean score of 33% will more accurately reflect Indian ancestry estimates for 2001.

26) Lussier, *op. cit.*, p. 192.

27) *Ibid.*, p. 192.

28) Joe Sawchuk, "Development or Domination?: The Métis and Government Funding," in Vol. III of *The Other Natives*, eds. Antoine S. Lussier and Bruce Sealey (Winnipeg: Manitoba Métis Federation Press, 1980), p. 74.

29) Canada, *The Constitution Act* (1982), Sec. 37(2).

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