

**LEAF PERSON'S DAY BREAKFAST
October 18, 2010**

Aboriginal Law & Equality Rights

by

NAIOMI S. METALLIC

Thank you Kim for that introduction. I would like to thank LEAF for inviting me to be the guest speaker today. I am honoured to have been asked.

So my topic being "Aboriginal law and equality rights", what I hope to do this morning, is to catalogue and comment on the different types of equality issues faced by Aboriginal people in Canada – I've come up with five. My goal is to show you that the human rights issues Aboriginal face are varied and complex, and, not to mention, very real.

#1 - Blatant racism, stereotyping and marginalization:

I believe this is type of discrimination that most Canadians are familiar with; because this is what we hear about in the media. By this I am referring to situations like:

- The shooting of Dudley George by Ontario police at Ipperwash;
- Stories about police officers taking Aboriginal people to the outskirts of town in the winter and leaving them to walk back in freezing conditions; and
- Various accounts of missing and murdered Aboriginal women throughout Canada.

These are instances involving stereotyping and prejudice towards Aboriginal people taken to their extremes. As a society we recognize it is wrong; we view people who engage in such racist behaviour as relics from a darker period in our history, which we are moving on from. However, it is still a fact that such acts of

hatred and violence continue to occur, and sometimes are not just carried out by individuals, but are permitted to exist within institutions and become systemic.

This is the type of discrimination we know about; we know more work needs to be done in terms of greater sensitization, education and affirmative action initiatives. But the other types of discrimination I'm going to discuss this morning seem to be much less well known.

#2 – Inequalities arising from Federal neglect of its obligations to Aboriginal people

The starting point to this problem is the fact that, under our Constitution, the Federal Government has jurisdiction in respect of "Indian and lands reserved for Indians". This means that there are some areas where only federal laws can apply to native people and not provincial law. One problem with this constitutional arrangement, aside from the fact that it seems to leave little or no room for First Nations' inherent Right to self-determination, is that the Feds often fail to exercise this power.

The best example I can give of this is the issue of Matrimonial Real Property (what I'll call MRP) on reserve. Last Friday the Nova Scotia bar celebrated 30 years of having MRP legislation. But for First Nations living on reserves in the province (and throughout the country), we still don't have these kinds of laws. This stems from a ruling of the Supreme Court of Canada from 1986 that held that because provincial MRP legislation can affect the holding of land on reserve – something exclusively within the jurisdiction of the Feds – such law cannot apply on reserve. And while the *Indian Act* sets out a landholding regime, it is silent on MRP issues. One would have thought that the Federal government would have swiftly acted to amend the *Indian Act* to remedy this legislative gap, but for over 20 years it did nothing. As you might expect, this situation has had a disproportionate impact on First Nation women and their children, as land holdings on reserve tend to be held in the name of men. Recently, the Federal

Government has introduced a Bill to address this problem. It has died twice on the order table already, and has been criticized by a variety of native groups, including Native Women's groups, for not sufficiently addressing the problem. It remains to be seen whether the Bill as drafted will become law. I'm not putting any money on it.

Inequality arising from Federal neglect of its jurisdiction over Indians comes up not just with respect to legislation, but also in relation to funding. This issue is playing out now in the *First Nations Child & Family Caring Society* case before the Canadian Human Rights Tribunal. The complaint alleges that the Government of Canada has had a longstanding pattern of providing less government funding for child welfare services to First Nations children on reserves than is provided to non-Aboriginal children receiving funding through provincial regimes. One of the most astounding facts in the case is that due to lack of funding for more alternatives to apprehension, there are more First Nations children in foster care today than there were in residential schools when such schools were at their height. The case is of great importance to First Nations people, not just for its potential impact on First Nations child welfare, but for the many areas where First Nations programs and services are under-funded.

3 – Lack of respect for and accommodation of rights or benefits Aboriginal people possess by virtue of being Aboriginal

This has to do with the benefits First Nations may be entitled to under the *Indian Act*, or rights under Section 35 of the *Constitution Act*, which recognize and affirm Aboriginal and Treaty rights ~ rights that are premised on belonging to an Aboriginal society. These tend to be characterized as “collective” or even “special” rights and viewed separately from equality rights.

You don't have to look very hard to find proof that there is still a lot of public hostility towards these types of rights. For those who question this, I encourage you to read the comment section on any online news story talking about such

rights. The animus towards the existence of these types of rights is sometimes palpable ~ and the arguments against them is often couched in the language of equality, such as: *“Why should Indians have special rights? Everyone should be treated the same”*.

But such arguments are based in a very narrow conception of formal equality; one that Canadian law has progressed beyond. Our law recognizes that equality doesn't always mean treating everyone exactly the same, it can also require treating people differently in order to accommodate the special needs and circumstances of different groups. We recognize this for persons with disabilities, religious minorities and women, for example. I don't see how recognizing the rights that Aboriginal people are entitled to by virtue of being part of an Aboriginal society should be any different. I believe that framing Aboriginal rights issues as an equality and accommodation issue may assist in helping the general public understand these issues better.

#4 – Continued impact of historic discrimination

There are very few people in Canadian society who would deny that Aboriginal people were historically subjected to discriminatory laws based on race. If asked for examples of this, I would wager that your average Canadian would tend to point to two things:

- 1) Reserves – there is some general appreciation that native people were placed on reserves to clear the way for settler expansion in the hopes weaning them from their hunter / gatherer lifestyle.
- 2) Residential Schools – media coverage, particularly in the last decade , has brought some public awareness to the experience of residential schools: that these were specifically intend as institutions to assimilate Aboriginal children – “to take the Indian out of the child” – places where children were prohibited from speaking their language and where physical and sexual abuse and neglect were rampant.

Reserves and Residential Schools – seem to be the extent of many Canadians' awareness of past assimilations policies. Paired with that, I tend to encounter the belief that these things occurred in the distant past. Along with that, I do not infrequently meet with the reaction: "Well, it's ancient history. Indians should move on – just get over it."

Here's what's wrong with that attitude:

- 1) There were many many more discriminatory laws, both federal and provincial, that were aimed at erasing native cultures, languages, customs and laws.
- 2) These were passed in the last 125 years – not 250 – 300 years ago as some people would like to believe.
- 3) Although some of these laws have since been repealed, their impact continues to be felt profoundly by Aboriginal people.

Let me give you some examples:

- From 1880 until 1951, under the *Indian Act*, participating in traditional spiritual practices was banned on pain of fine or imprisonment.
- Similarly, during this time period, it was illegal for an Indian to participate in a dance or festival off reserve wearing traditional dress, without the permission of the Indian Agent.

It is no wonder from this that some Aboriginal people continue to feel ashamed at the thought of engaging in such practices, and that many traditional spiritual practices were lost, and native people are now struggling to rediscover them.

- From 1876 to 1951, a person would automatically lose their Indian status, and consequently their right to live in their reserve communities, upon becoming a doctor, lawyer, or otherwise obtaining a university degree, or joining the Holy Orders.

This law was premised on the notion that once an Indian became educated they would no longer want to be Indian anyway. And today we wonder why it is that, despite First Nations students getting “free” post-secondary education (which is far more limited than commonly believed), there continues to be a huge gap between Aboriginal people with some level of university or college training (24%) compared to non-Aboriginal with similar credentials (41%) - a 17% gap. With laws like these and residential schools, it's no surprise that many Aboriginal people are wary of western education!

- From 1869 onwards, the Minister of Indian Affairs had the unilateral power to remove the traditional government of a First Nation community and replace it with an Indian Act Band Council, serving two years terms and having very limited governmental powers, and every law passed subject to Indian Affairs' approval before taking effect.

Many First Nations are still under this system. The media is replete with stories of corrupt, dysfunctional, or incompetent Band governments. These stories seem so ubiquitous that sometimes I wonder if Canadians think that bad governance is somehow inherent to us? Of course, this is not the case, but it is what happens when a system almost designed to fail is imposed on a people without their consent. Slowly, but surely, First Nations are trying to get themselves out of this mess...

- (As a lawyer, here's one of my favourites.) From 1926 until 1951, it was illegal for a lawyer to accept payment or even the promise of payment to represent an Indian or an Indian Band to prosecute any claim they might have.

It blew my mind how this historical fact was never even mentioned in a 2007 Supreme Court of Canada decision that held there is no reason why native legal

claims should be exempted from the application of limitation period laws, even when it comes to historical claims about loss of reserve land or trust funds. It seems to me that being effectively banned from bringing a law suit for a quarter of a century is a pretty good reason. A similar ban on First Nations' exercise of their legal rights existed in the *Canadian Human Rights Act*, which for 30 years prohibited complaints of discrimination arising from the *Indian Act*. That was only repealed in 2008.

Here is my final example:

- This morning we are here celebrating the Persons case and the hard-won rights of women to vote and participate fully in public life. Canada first recognized women's right to vote in 1919. For First Nations, we only got the right to vote in Federal elections in 1960 and in the following decade all the Provinces followed suit.

The fact that First Nations were shut out of Canadian politics for so long goes some way to explaining why we don't see more political participation by native people within Federal and Provincial politics.

These are just some examples; I don't have the time to list them all. However, I think you get my point: Aboriginal people are still very much affected in *many* different ways by a whole slew of discriminatory laws that were in place not that long ago. In my view, this is an equality issue because Aboriginal people continue to experience the negative effects of these laws. I feel strongly that governments have an obligation to account for this.

#5 – Discrimination arising from government control of Aboriginal identity

This last equality issue overlaps with the previous category of historic discrimination, but deserves its very own special category. This is because it is not only historic, but continues today in many insidious forms, and, in my humble

opinion, rivals the issue of Residential School in terms of the devastating impact it has had on Aboriginal people. Yet, it's barely on anyone's radar...

Earlier I gave the examples laws of where a person would automatically lose their Indian status for becoming a lawyer, doctor, having a university degree, or joining the Holy Orders. Those laws are part of this issue, but not the whole story.

You see, for centuries, Aboriginal people determined for themselves who were citizens of their Nations, based on their own customs and laws. However, around the time that Canada decided it had an "Indian Problem" that it needed to eradicate, it very quickly realized that defining who is an "Indian" was a very effective way of advancing assimilation.

So by 1869, the definition of "Indian" became restricted so that it could only be passed down the male line. This meant that Indian women who married men not recognized as "Indians" under the Indian Act lost their Indian status (this included non-Aboriginals and also Aboriginal persons who did not have Indian status). Their children also lost status. As well, the illegitimate children of native women, for whom it was suspected the father was not a status Indian, also lost their status. However, the children of native men, legitimate or illegitimate, whether or not from a union with another status Indian, retained their status.

After 116 years and many attempts by First Nations women and their supporters to have these laws changed, it took a black eye on the international stage to force Canada to change. In 1981, the UN Human Rights Council found that Canada's status laws violated Article 27 of the International Covenant on Civil and Political Rights by depriving native women and their children from living in their communities and participating in their languages and cultures.

In 1985, Canada passed what is known as Bill C-31, which reinstated Indian status to those women who had lost it, and to their children. Over 100,000 thousand people regained their status as a result. But while Bill C-31 was an attempt to fix historic discrimination, it did so only partially and even introduced new discrimination!

First off, many of the grandchildren of the women who regained status are not entitled to Indian status. This is because Bill C-31 introduced what is known as the “second-generation cut-off rule”, which operates to prevent the passing of status beyond one generation of a mixed union between a status Indian and someone who does not have status. This means that if you are the product of two successive generations of a mixed union – you’re cut off. This works a bit like a 50% blood quantum rule, except that before this rule was introduced, there were many status Indian children (like yours truly) who were born of mixed unions and did not lose status because it was their dads who paired with a non-Indian, not their moms. Today, there are many status Indian with mixed ancestry, but from 1985 onwards, if you go beyond one generation of mixed parenting, no more status. There are many First Nations communities that project that because of these rules, they will be faced with having their last status Indian birth within the next 30 to 100 years. There may be no better way to characterize this than being a policy of “extinction by number” and it is discrimination on the basis of race, plain and simple, because it pits mixed race Aboriginal people against supposed “pure” race people, without regard for language, culture, shared history or identity, or family connections.

To add insult to injury, the descendants of the women who lost and later regained status, fare worse under this new order. The mixed children of Indian women are counted as being at the limit of allowable mixing, and so further mixed unions result in no more status. Meanwhile, the mixed children of Indian men get legally viewed as having “full” status, and so can pass status for an extra generation, whether or not our partners are status.

This was the focus of a case called *McIvor*, which found this result to be discriminatory on the basis of sex and marital status. This has led to the introduction of draft legislation to amend the *Indian Act* yet again. The Bill was before the House of Commons during the last sitting and continues to be there now. The bill proposes some minor tweaking to the *Indian Act* so that some of the grandkids will regain status (about 45,000 people in total), but there are date restrictions such that if you were born before or after certain dates you are ineligible. LEAF and many others groups made submissions before the Parliamentary Committee reviewing the bill that it is unacceptable as drafted, and it can and should go further in order to avoid further litigation by native women and their descendents. If the bill is passed as is, you will still see a situation where you could have a room full of first cousins; some status, some non-status, and some can pass on status, some can't.

Another highly problematic aspect of the 1985 amendments to the *Indian Act*, is that while it led to the reinstatement of over 100,000 people to Indian status, no additional lands or moneys were provided to the First Nations communities to whom all these reinstated people were now entitled to return. Band governments, understandably so, were very concerned about the impact this would have on their existing meager resources, and complained publicly. The government's response was not to provide additional lands or moneys, but to amend the *Indian Act* to allow Bands to adopt memberships codes in which they could choose to restrict membership to some of those people being reinstated. So basically, Canada just passed the buck and left bands, some of whom felt they had no choice, the ability to discriminate against these reinstated Indians. 1/3 of Canada's First Nations bands adopted membership codes, and about 90 of them adopted these sort of restrictive membership codes.

So what's the impact of all this? In addition to the very real concern of there eventually being no more legally recognized "Indians" in Canada, a much more

immediate problem that native people face today is the sheer amount of divisions the *Indian Act* status provisions have imposed on us: status vs. non-status, band member vs. non-band member, on-reserve vs. off-reserve, landless band vs. reserve-based bands, Indian vs. Metis, the list goes on. These are the classifications governments use to determine entitlement to benefits and programs targeted at Aboriginal people, not whether someone self-identifies or is viewed by others as being Mi'kmaq, or Maliseet, or Mohawk, or any one of the other 50 plus Indigenous nations living in Canada. How these nations define their own citizenship carries no legal significance to the Government of Canada

Because of this, government eligibility criteria tends to be under-inclusive and discriminatory and there is much litigation ongoing in Canada in this respect. LEAF has intervened in some of these cases, namely the Micmac of Gespeg case and the Cunningham case, which will be before the Supreme Court of Canada in December 2010. The main purpose of our intervention in both cases is to make the argument that just because governments may be doing a good thing in providing programs and benefits to Aboriginal groups, it cannot do so in a way that is under-inclusive and based on discriminatory distinctions.

Not only do governments rely on these discriminatory distinctions, but oftentimes, so do the courts. Many judges still only have a narrow view of Aboriginal people: native people are status Indians. Status Indians live on reserves. They don't appreciate that there is a large and growing non-status Indian population. Or that half the Aboriginal population live in urban settings, not on reserves. So even in Aboriginal rights and treaty cases, we tend to see *Indian Act* concepts dominating the analysis of who is entitled to these ancestral rights.

Finally, not only are the *Indian Act* discriminatory distinctions used by governments and courts, but most damagingly of all, we, First Nations people, have largely internalized these distinctions and view them as legitimate. We tend to see "real Indians" as status-Indians who grew up on reserve and question the

authenticity of those who call themselves non-status Indian, or those who grew up off-reserve. They are sometimes pejoratively called “wanna-be’s”. Yet these are the Aboriginal people who suffered most from the discriminatory status rules.

But there’s hope: I find that once the whole discriminatory background of the status rules is explained to people, they quite quickly see that it’s not the non-status or the off-reserve people who are the problem; it’s the government who came up this whole ‘divide and conquer’ strategy, and that the best way to combat this issue is to stand as a united front against it. We’ll see how that goes. This issue of Aboriginal identity is not going away – I think we’re just at the beginning of having to deal with it – and government, the courts and First Nations are all going to be required to confront it.

Thus completes my review of the major equality issues facing Aboriginal people.

I hope that it has perhaps led you to see some issues surrounding Aboriginal people in a new or different light.

Thank you / Wela’liq