

## WHO ARE THE INDIGENOUS PEOPLES OF CANADA AND NEW ZEALAND?

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*Ko Mataatua te waka,  
Ko Putauaki te maunga tapu,  
Ko Rangitaiki te awa,  
Ko Ngatiawa te iwi,  
Ko Pahipoto te hapu,  
Ā, ko Natalie Ramarhia Coates tōku ingoa.*

*Kiaora tātou.*

As I am discussing identity today I thought it would be appropriate to start by identifying myself in the traditional Māori way, by expressing my *pepeha*. One of the primary reasons that I choose to do this initial acknowledgement in the Māori language is because I proudly identify with my Māori side and I believe that no one has to right to tell me that I am not Māori.

This leads to the topic of my presentation today – identity. Identity is usually a very personal conception. However, I have found that in some instances it can be quite controversial. One of the more memorable times that I experienced controversy over a Māori identity was in 2005 when I overheard a conversation concerning alternative entry into Otago law school. To get into second year law at Otago is a difficult task as there are approximately seven hundred people contending for 200 places. However if you are Māori you may apply for alternative entry and get special consideration. Thus it is feasible that a person of Māori descent may get into law school with a slightly lower mark than other people. The conversation that I overheard involved a number of non-Māori who were angry that their friend qualified for alternative entry. This friend had some Māori ancestry. However, they had no interest in anything to do with the Māori world apart from identifying as Māori for the purposes of qualifying for alternative entry. These passions that were aroused ultimately lead to this presentation, as it directed my thoughts to the question of just who *should* be able to qualify as a “Māori” person. Should cultural considerations come into play? Should one’s affinity to Māori values and a “Māori way of life” be important? What do you need to be “Māori”?

The issue of identity in general is very broad. This presentation specifically focuses on how the law in New Zealand has defined “Māori” and also how the Canadian statutes have classified who can qualify as one of their indigenous people (with a particular focus on the *Indian Act 1951*). The primary reason I have focused on the law is that identity becomes more controversial and complex when identification with a particular group is attached to economic or political rights, the law being one of the primary mechanisms for conveying these types of rights. I chose to focus on New Zealand because I am Māori and therefore the definition of who is “Māori” directly affects me. I also chose Canada because their indigenous peoples have suffered similar colonisation processes to Māori but interestingly the

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legal definition of their indigenous people significantly differs to the one New Zealand has employed.

This presentation is split into four parts. I will first discuss how the law in both New Zealand and Canada has defined who can legally qualify as being an indigenous person. Second, I will proceed to examine whether the law in both countries is consistent with how the indigenous peoples think they should be defined. Third I will look at some of the implications that these legal definitions have had. Last, I will discuss where New Zealand and Canada may be heading with this issue in the future.

## THE LAW

In New Zealand before 1974 there were a number of definitions within the law as to who was considered “Māori”. One of the main definitions employed was ‘half-castes and people who were intermediate in blood between half-castes and of pure descent’. However since 1974, when the *Maori Affairs Act 1953* amended its original statutory definition (that “Māori” were people of half-blood or more), Māori in most instances have tended to be defined as ‘a person of the Māori race of New Zealand; and includes a descendant of any such person’. This definition can be seen in statutes such as the *Treaty of Waitangi Act 1985* and also *Te Ture Whenua Māori Act 1993*. Therefore, in New Zealand, the contemporary focus is solely on what Māori call *whakapapa* (genealogy). If you have one Māori ancestor, no matter how far back, you are legally entitled to qualify as being “Māori”. New Zealand has thus adopted a very broad and expansive definition of who can qualify as their indigenous peoples.

Compared to New Zealand, Canada has taken a completely different and very restrictive approach. In Canada there are a number of Acts that provide different definitions of the indigenous peoples. This presentation is going to focus on the *Indian Act 1951*, one of the main Canadian Acts pertaining to the rights of the indigenous peoples of Canada. This Act is extremely controversial as not only are the Inuit and Metis people excluded from its ambit, but under this Act, an “Indian” has been defined to mean ‘a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian’. This is where the term “status” and “non-status” derive from. If a person registers under this Act then they will be considered a status Indian, and so entitled to a number of privileges, such as being able to live on an Indian reserve. However, if they do not qualify, they are considered non-status Indians and are not given rights under the *Indian Act*. Census statistics reveal that over a million persons in Canada identify as Aboriginal people.<sup>1</sup> However, this includes several hundred thousand people who do not count as “Indians” for the purposes of the *Indian Act*. It is thus evident that there are considerably more people that identify as being indigenous than there are recognised by this legislation.

Who actually qualifies to register under the *Indian Act* is relatively confusing as some of the criteria from the old *Indian Act* were carried over to the new Act. Therefore some history is required to understand what entitles someone to qualify as “Indian”. Basically, the old *Indian Act* had a number of arbitrary and unfair provisions in it. For example, there were blood quantum provisions that required that a person have a certain amount of Indian ancestry. There were also provisions that provided that if a non-Indian woman married a status Indian man, then she and her children would gain status. On the other hand, if an Indian woman

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<sup>1</sup> Paul Chartrand, (ed) *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction* (2002) 15.

married a non-Indian man then she (and any children she had) would lose their status. As a result of these provisions there were a number of European women who did not have any Indian descent who were considered to be “Indian” and full-blooded Indian women who were not. Further, under the old law any Indian men who gained an education were automatically declared not to be “Indian”.

In 1985, the Canadian Parliament enacted *Bill C-31* which took away some of the discriminatory provisions from the Act and allowed some people to have their status restored. However, still within the Act are provisions carried over that continue to deny people the right to claim they are Indian. Thus, whether someone is registered or not is not premised on Aboriginal ancestry, regardless of whether they follow the traditional ways of their nation or participate in indigenous cultural activities. To be a status Indian, one must simply meet the requirements of having the right combination of parents on the right dates. Even now a second generation cut-off rule exists: if a child of a status Indian and a non-status person marries another non-status person then any children they have will not be considered “Indian” for the purposes of the *Indian Act*. The Canadian legislation therefore is arbitrary and legalistic in comparison to New Zealand with its broad encompassing emphasis on any degree of *whakapapa*.

### **IS THE LAW CONSISTENT WITH HOW THE INDIGENOUS PEOPLES SEE THEMSELVES?**

In regards to New Zealand there are a number of different Māori sources that support the emphasis that New Zealand law places on descent in determining ones eligibility to identify as a “Māori”. These sources in general propose that that one only needs some Māori descent and the desire to be considered Māori to be a “Māori”. This view arises from the importance that the Māori world places on the concept of *whakapapa* (genealogy). For example Pita Sharples, when discussing blood quantum as a means of identification, stated that:

The concept of dividing our blood into parts, how Māori are you, flies in the face of one of our strongest values, the concept of *whakapapa*, our genealogy. *Whakapapa* tells us everything about who we are, from whom we descend and what our obligations are to those who come after us.<sup>2</sup>

This view is further supported by Moana Jackson who stresses that ‘descent in terms of *whakapapa* is the essence of being Māori’,<sup>3</sup> and also by the Waitangi Tribunal (a specialist Māori courts) which has stated that:

The real test is the attitude and disposition of the person concerned. So long as he is descended from a Maori he can choose for himself whether he regards himself or is to be regarded by others as a Māori or as a Pākehā.... Being “Maori” rather than European is as much psychological as biological. A Maori is one who has Maori ancestry and who feels himself to be Maori.<sup>4</sup>

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<sup>2</sup> Pita Sharples, ‘Identity cannot be measured in parts’ *New Zealand Herald* (Auckland, New Zealand) Friday 29 September 2006, A15.

<sup>3</sup> Moana Jackson, ‘The part-Maori syndrome’ (2003) June-July *Mana* 52, 62; as cited in Shin Imai, Kent McNeil and Benjamin Richardson (eds) *Indigenous Peoples and the law: Comparative and Critical Perspectives*, (forthcoming, 2008).

<sup>4</sup> *Report of the Waitangi Tribunal on the Te Reo Maori Claim: Wai 11* (2003).

These sources thus suggest that the general Māori position is that any person wishing to identify themselves through their Māori ancestry is surely “Māori”. Any other elements from *te ao Māori* (the Māori world) that a person draws on, to add to that single crucial factor, can only make identification stronger. Thus, there is significant support indicating that the New Zealand legal definition, that emphasises any degree of descent in identifying who can qualify as “Māori”, is consistent with Māori thinking and the Māori world-view.

In comparison there are two general lines of indigenous thinking evident in Canada. First, one line of thinking is that the terms and the rules that have been adopted into legislation bear little resemblance to the original culture or ethnic categories of the people they describe. These people think that how they have been defined in the law is wrong, as the term “Indian” was never a racial category so long as First Nations defined themselves and instead is an ‘external descriptor’ meaningless to the indigenous peoples.<sup>5</sup> On this position, the arbitrary and legislated inequality perpetuated under the *Indian Act* through its strict definition of “Indian” violates First Nations traditions which emphasise equal participation, the enjoyment of resources collectively and decision making by consensus. Thus, there are some indigenous people who oppose the government classification of who is “Indian”, as they believe these legal labels are wrong, they are government imposed, they do not reflect how traditional membership was ascribed, and nor should they be followed today. On this view, the legislation is not consistent with how some indigenous people think their membership should be defined.

On the other hand, there is another camp of indigenous people who have deeply internalised the government definitions. These people think that to lose control over even a colonial-shaped Native identity would be to lose their last vestige of Native distinctiveness, the last defence against the colonising culture.<sup>6</sup> On this view, to open up the definition and boundaries of Nativeness would be to potentially blur those features that are distinctive about the culture.

Further entrenching this view, and the government imposed definitions of nativeness, are the privileges that attach to being “Indian” under the *Indian Act*. The problem that arises is that if the definition is opened up there may not be enough resources to cope with an influx of people claiming the rights that attach to being a legal “Indian”. Thus, there are some status Indians who do not oppose the government definitions because it will affect how they live and the rights they are entitled to. Thus, even though these legal definitions may not have originally been consistent with how Indians defined themselves, unfortunately for the non-status Indians these definitions are now consistent with how many contemporary status Indians think they should be classified.

## **IMPLICATIONS OF THESE LEGAL DEFINITIONS**

One of the implications of the broad legal definition that New Zealand employs in defining “Māori” is that, due to the high intermarriage rates, the number of people who are entitled to claim that they are “Māori” is increasing. According to Statistics New Zealand, the proportion of Māori in the population is expected to grow rapidly over the next few decades

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<sup>5</sup> Bonita Lawrence, *“Real” Indians and Others; Mixed Race-Urban Native People, the Indian Act, and the Rebuilding of Indigenous Nations* (Ph.D. dissertation, University of Toronto, 1999)

<http://muse.jhu.edu/journals/hypatia.v018/18.2lawrence.html> (Accessed 9 September 2007).

<sup>6</sup> Ibid.

because Māori birth-rates are more than twice that of white New Zealanders.<sup>7</sup> This is a problem when the right to identify as “Māori” is attached to a privilege that has limited resources attached to it, or is designed for a minority population suffering a disadvantage. An example of this is the 2006 abolishment of the Manaaki Tauira educational grants by the government. These grants were given out to all university students who could show that they were descended from a Māori. The government, however, ended these scholarships as the number of Māori tertiary enrolments was increasing. The eradication of these grants demonstrates how a broad definition of the term “Māori” can result in resources being stretched to the point where they cannot be sustained. Further, a broad definition of “Māori” can also result in those needing the privilege being denied it, as the wrong people are getting the leg up.

Another implication resulting from the New Zealand legal definition of “Māori” is that because *whakapapa* is the only requirement the Māori culture or *te ao Māori* is completely severed from Māori identity. This detachment allows people to claim that they are “Māori” *solely* for the advantages that entail without regard to any of the other factors that make Māori a distinct ethnic group. Thus, the New Zealand law currently permits a person who has never been involved in the Māori community, never intends to be involved in the Māori community, has absolutely no affinity with anything to do with the Māori culture, its values, its principles, or its beliefs, to legally classify as being “Māori”. On the other hand there are also people such as Professor John Moorfield (a former professor of Māori language at the University of Otago). He is a Pākehā (a European person) but an expert in the Māori language and has contributed greatly to Māori society. His books are used in most universities to teach people how to speak Māori. He has a great affinity to the Māori culture, but no blood. Under the NZ law he does not qualify as a “Māori”. There are likely to be differing opinions as to whether these people should be able to claim they are “Māori”. However, the important point is that these implications arise from the approach taken in the New Zealand legislation.

The Canadian legal definitions, in comparison, have some radical and somewhat dire implications, possible legislative extinction being one of the more extreme. A study conducted in 1992 showed that based on the restrictive membership criteria employed by the *Indian Act* and the criteria adopted by the bands themselves, legislative extinction is less than one hundred years away for some bands in Canada.<sup>8</sup> This does not mean that Indians will not exist but that people will no longer qualify under the strict legal criteria. Thus, if Indian bands continue to restrict their citizenship and members, ‘First Nations will author their own demise’.<sup>9</sup>

Another implication that arises under the *Indian Act* is that, due to its strict requirements, it may affect who status Indians choose to marry and bear children with. If a person is a status Indian under s6 (2) of the *Indian Act* (an Indian who only has one status parent), and they choose to marry a non-status Indian, then their children will not gain status. This is an important consideration for s6 (2) status Indians, as it directly affects the rights that their

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<sup>7</sup> Statistics NZ; Tatauranga Aotearoa, ‘National Maori Population Projections 2001 – 2021’ <http://www2.stats.govt.nz/domino/external/pasfull/pasfull.nsf/84bf91b1a7b5d7204c256809000460a4/4c2567ef00247c6acc256d3a0074df48> (Accessed 2 September 2007).

<sup>8</sup> S Clatworthy & A Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report* (1992).

<sup>9</sup> Pamela Palmater, ‘An Empty Shell of a Treaty Promise: *R v Marshall* and the Rights of Non-Status Indians’ (2000) 23 *Dalhousie Law Review* 118.

children will be entitled to and thus their own choice of a partner. Therefore, one implication of these provisions is that choice is restricted and contemporary realities such as high rates of intermarriage are ignored.

Another massive implication is the effect that these definitions have had on the non-status community. In many ways this legislation denies these people their right to human dignity. They are made to feel like criminals when they participate in their traditional hunting and fishing activities. They are effectively prevented from partaking in their culture and in the governance of the reserves and from keeping a connection with their families, their elders, and their communities. Thus, in Canada, particularly for the non-status Indians, there has been some terrible consequences and implications arising from these legal definitions.

### **WHERE ARE CANADA AND NEW ZEALAND HEADED WITH THIS ISSUE IN THE FUTURE?**

There are a number of roads that New Zealand may follow. Firstly, the definition of “Māori” is so wide that perhaps the reason why Māori are being distinguished within the law can no longer be justified. Thus if we continue with the current definition then special Māori rights under the law, such as the Manaaki Tauria scholarships, may gradually disappear.

Another possible avenue is that Māori policies will start to focus increasingly on why Māori are being distinguished in the law. For example, if New Zealand simply wants more brown faces within the medical and legal professions then descent should be the only requirement for consideration under alternative entry. However, if the reason for having allocated spaces is to have people who can culturally relate to Māori then perhaps further criteria that accommodate this rationale should be added. The law in New Zealand may therefore move to attach further criteria to certain privileges that take into account factors other than *whakapapa* and, as a consequence, we may start seeing a mixed approach in which different criteria attach to different statutes. This is already evident to some extent, for example, in the Ngarimu VC and 28<sup>th</sup> Māori Battalion Memorial scholarships that are administered under an Act of Parliament. The primary criterion is that the applicant must *whakapapa* back to a member of the 28<sup>th</sup> Māori Battalion (the Māori regiment of the NZ Army in World War 2). However, in conjunction with this, the applicant must also be able to address other characteristics such as demonstrating an ability to walk within both Māori and Pākehā worlds. Their first strength must be cultural competency, they should know the Māori language, they must be grounded among their people (from the flax roots), and they must have pulled their weight within that community.

Thus, although it is unlikely that legal definitions will move away from the *whakapapa* requirement, as it is simply too important a concept in the Māori world, due to an ever increasing number of Māori, either rights might start falling by the wayside or further criteria such as that in the Ngarimu scholarship may work their way into the law.

The future for Canada is more difficult to predict. Firstly, one of the major problems purporting to prevent change in Canada’s legislation is the limited resources that are attached to Indian identity. There is some trepidation among status Indians that if the Indian definition expanded then the floodgates would open and the limited resources made available to status Indians may not be sufficient to support the influx of people. For example, when *Bill C-31* was incorporated into law in 1985, many bands’ resources were temporarily overloaded by

the massive increase in band membership in their communities. The bands responded and alleviated this stress by excluding *Bill C-31* status Indians from their bands.

However, although the limited resources argument is persuasive in practical terms, arbitrary and discriminatory legislation and the denial of a constitutionally protected right (under s 35 of the Canadian *Constitution*) cannot be justified on the basis of administrative or financial difficulties. The Crown not only has a fiduciary duty to actively protect the interests of *all* Aboriginal people, but also there is also the historical fact that any political divisions that exist between Aboriginal people in this area have been created by the Government through their statutory definitions and should not now be used as a defence to continue the unfair and arbitrary definitions within the *Indian Act*. Thus action and change is required. Not only is there the issue of impending legislative extinction if Indian bands and the *Indian Act* continue their current approach to defining Indians, but also the indigenous peoples, and, in particular, the non-status Aboriginal people, 'deserve to exist and retain their dignity, pride and connection to their ancestors as part of their cultural evolution'.<sup>10</sup> Thus, if change in the Canadian legislation does not occur, the future looks bleak for both the status Indians (through legislative extinction) and for the non-status Indians (who will continue to be discriminated against and denied the right to an identity).

At the moment I believe that the indigenous peoples of Canada are going through a slow process of consultation and getting all the respected people together to discuss the issue. Hopefully something will come of this. Another potential avenue is that, as John Burrows (an Indian academic) has suggested, Indian communities should be permitted the opportunity to determine their own membership. However, perhaps this should be a fettered right, to prevent excessively narrow membership definitions. Bonita Lawrence has suggested that Canada and *all* Indigenous peoples (including those that are non-status) need to think carefully about the various categories of Native identity that have been legally defined under federal laws, and consider the possibility of choosing new paths that might create common goals.<sup>11</sup> Even a simple understanding of how governments have regulated Native identity is essential for Native People, in attempting to step away from these colonial structures that have dictated and defined their lives. Thus, although the future for Canada is uncertain, and there are no easy solutions, change is required as this legal identity and the attaching rights are one of the most pressing issues the indigenous peoples of Canada face today.

As a final thought on the issue of identity, the following quote sums up a lot of what lies behind the issues discussed: 'who is to plumb the depths of the human heart when people choose what they want to be'.<sup>12</sup>

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<sup>10</sup> Palmater, above n 9 at 148.

<sup>11</sup> Lawrence, above n 5.

<sup>12</sup> Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980's* (1990) 51.