Defining Aboriginal Identity: What the Courts Have Stated
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Since the recognition of Aboriginal and Treaty rights by the courts, there have been an increasing number of individuals who now claim Aboriginal identity. In Nova Scotia, as Citizenship Coordinator for Kwilmu’kw Maw-klusuaqn Negotiation Office (KMKNO), I have heard from our Elders that this is a fairly new trend. Many of our elders recall a time when people were ashamed of their Aboriginal identity and often hid it. As times have changed, Aboriginal identity seems to be celebrated and even sought out by many. This has led to perplexing questions, with which the courts often have to deal, regarding whether one is an Aboriginal person and whether they are then able to exercise the rights to go hunting, fishing, and so on.

At KMKNO, we are in the process of getting feedback from Nova Scotia Mi’kmaq on what is important to preserve about being Mi’kmaq. During conversations, I’m often asked “hasn’t the court already dealt with this matter?” My answer is “not really” and I go on to explain what the courts have stated while being mindful that Mi’kmaq have never relinquished our right to determine who is a citizen of our Nation. Only Mi’kmaq, have jurisdiction to decide who is a Mi’kmaw. In this article I hope to clarify what guidance the courts and laws have offered in deciding who is a Mi’kmaw.

It is important to note that the term “Aboriginal” in the Constitution of Canada includes Inuit, Métis, and Indians. The term Aboriginal is used in Canada due to its constitutional status. Internationally many prefer the term Indigenous Peoples. In the 2003 Powley case, the Supreme Court of Canada attempted to determine how one can identify as belonging to the Métis people. The test developed by the Courts to determine who is Métis focused on three important factors: 1) Ancestral connection 2) Self Identification and 3) Acceptance by a Métis group or community.

In plain English, to be Métis, (i) an individual must have some ancestral connection to a Métis people; (ii) the individual must identify himself to others as a member of the Métis community; and lastly, that individual must provide evidence that he or she has been accepted by a group of Métis, whether it be provincial or regional body. While the Powley decision was meant to offer guidance on how to determine whether one was able to practice Métis rights, in recent years this test has crept into First Nations/Indian case law and has been used when deciding who is Mi’kmaq.

Prior to 1985, Indian Status was the method most communities and governments used to determine whether one was or wasn’t an Indian. Over the years the Indian Act has been found to be discriminatory against women. The 1985 Lovelace case found that the Indian Act discriminated against women, and which led to Bill C-31. As recently as 2009, the McIvor case stated that the Indian Act still discriminated against women in their ability to gain status. In response, the federal government created temporary “band aid” solutions, but have yet to replace the rules in the Indian Act that causes many to lose or be denied Indian status because of inter –parenting (inter-marriage) between Status Indians and partners who are not Status Indians.
The way in which the *Indian Act* determines whether one gets Indian status is an issue for many Mi’kmaq. In 2007, in the *Lavigne* case from New Brunswick the question of whether a Mi’kmaw person required a status card to practice Aboriginal and Treaty Rights came into question. In the absence of any document created by Mi’kmaq, for Mi’kmaq, on how to determine whether someone was a Mi’kmaw, the court looked to the *Powley* test on Métis and the judge found it to be “equally applicable to the question of who is an Indian”.

In *Lavigne* Mr. Justice McIntyre stated:

“There is evidence, that the respondent has Indian Ancestry, he self-identified as a Mi’kmaq from an early age and even lived on a Mi’kmaq reservation for a while... with respect to community acceptance there was sufficient evidence before the trial judge to allow him to conclude that the Mi’kmaq community of Pabineau First Nations has accepted the respondent as one of their own.”

Of particular interest in this case was how the judge came to this conclusion and what evidence was weighed in satisfying the court as to whether Mr. Lavigne was a Mi’kmaq or not. J. Macintyre looked at a previously decided case of Aker (2006) where Mr. Acker was able to demonstrate Indian ancestry but wasn’t able to show he had self-identified as a Mi’kmaw or that he was accepted by a Mi’kmaq community.

The courts noted that Mr. Acker had only, at the age of 40, discovered his Mi’kmaq ancestry, he only attended a few meetings with the N.B. Aboriginal Peoples Council, he had no communication with a Mi’kmaq reserve despite one being only 20 miles away, and generally had no contact with other Mi’kmaq, nor did his lifestyle change after discovering his Mi’kmaq heritage.

In comparison, the evidence called by Mr. Lavigne showed an ancestral connection five generations removed from a recognized Indian; secondly, that he self-identified as Mi’kmaq and had lived on reserve at an early age; and, lastly, community acceptance that was supported by testimony of NB Aboriginal Peoples Council, a district representative of the Grand Council and an anthropologist. Weighing the evidence presented, (but without hearing testimony from any member of the Pabineau First Nations community), the judge ruled that Mr. Lavigne was accepted by that Mi’kmaq community. It is important to note that Mr. Lavigne’s fiancé/common-law wife at the time was a full status Mi’kmaw from the Pabineau reserve.

When reading the case of *Lavigne*, the evidence being offered to prove affiliation with Mi’kmaw people noted that Mr. Lavigne participated in National Aboriginal Day, danced at pow-wows, had an Indian name of “Lintuk” and also had built and had sufficient knowledge of the sweat lodge. The evidence accepted seem to weigh heavily on the romanticized version of what it means to be Indian, with the feathers, regalia, dancing, and ceremonies as the focus.

This reminded me of a recent feedback from Mi’kmaq Elders about Mi’kmaq values and responsibility where an Elder noted that “being Mi’kmaq isn’t about beads and feathers”, yet this seems to be at least some of the evidence a court looked to in determining who is a Mi’kmaq.
Most recently and perhaps most disturbingly, the Qalipu Band created in Newfoundland used the Powley test to determine who was a member of their band. By negotiating a settlement, the Federation of Newfoundland Indians relied on the three factors of ancestry for those who wished to be applicants. What resulted was nearly 100,000 applications from across Canada. This came as a great surprise to all involved in the negotiation, and even more of a surprise to many Mi'kmaq communities. After realizing their mistake, the Federal government along with the Newfoundland Mi'kmaq, have modified the Powley test and have added that applicants must prove “acceptance by the Mi'kmaq group of Indians of Newfoundland, based on a demonstrated and substantial cultural connection.” This modified test is now being put in place along with a Qalipu Act, which will prevent people from suing the government for revoking status as Indians, which many had recently received.

Looking at the case of Lavigne, Aker, and with the agreement and legislation involved in the Qalipu Mi'kmaq band it is clear that the Powley test is being used to determine whether one is Mi'kmaq. While the Indian Act continues to remove status from many of our community we see the Court and the government seem to be less reliant on the Indian Act with a preference for using the ancestral connection, self-identification, and acceptance factors test to determine if someone is a Mi'kmaw.

The question facing Mi'kmaq is, do we want the courts deciding who is and isn’t a Mi’kmaq or should we be deciding for ourselves? The United Nations Declaration on the Rights of Indigenous Peoples in Article 33 states that “Indigenous peoples have the right to determine their own identity or membership”. As Mi’kmaq, we have never relinquished this right. While the court has offered some guidance, Mi’kmaq must weigh for themselves what the important factors are to being a Mi’kmaw. We hope to hear from community youth, Elders, women, Grand Council members, and others as to what they think in the weeks and months to come. As always, I look forward to your thoughts and hope this brings some clarity to the case law.