

# The Mikinaks: Personal and Legal Indigenous Identity

On December 9, 2015, the Mikinak Communauté Autochtone de la Montérégie was founded in a Montreal suburb.<sup>[1]</sup> To join this group, one must prove some sort of Indigenous ancestry and pay 80 dollars.<sup>[2]</sup> The Mikinak leadership issues members “status” cards, which state that they are Aboriginals within the meaning of section 35 of the *Constitution*, and that they therefore have the right to hunt and fish throughout Canada<sup>[3]</sup> and are exempt from taxes.<sup>[4]</sup>

At first reading, the creation of this new Indigenous group sounds farcical, if not offensive. For the *Huffington Post*, Liam Massaubi writes that the Mikinaks “have all the makings of a story fit for *The Onion*,” (a satirical online publication) but also that they are “phony, self-centred, opportunistic, predatory people.”<sup>[5]</sup> He views the Mikinaks as fraudulently masquerading as Indigenous in order to obtain supposed financial and other benefits.

Underlying the Mikinak story however is a question of legal and personal identity. The Mikinaks comprise people of Indigenous descent who no longer have connections with existing Indigenous groups. Most are considered non-status Indians. If people of Indigenous descent who are alienated from any specific Indigenous community wish to re-identify as Indigenous, are they entitled to any Aboriginal rights under the *Indian Act* or section 35 of the *Constitution*?

## Eligibility for Status Under the *Indian Act*

The federal government administers “Indian Affairs” through the *Indian Act*.<sup>[6]</sup> This Act applies to “status Indians,” and has specific rules defining who these are.<sup>[7]</sup> The Act includes rules on Band membership and governance,<sup>[8]</sup> as well as eligibility for privileges such as access to special programs and reservation residence.<sup>[9]</sup> Many Canadians with Indigenous ancestry, whether or not they identify with that ancestry, are not “status Indians” under the *Indian Act*. This includes the Métis, and non-status Indians. Mikinak Chief Lise Brisebois and the other Mikinaks fall into this group.<sup>[10]</sup> Although the federal government retains some obligations towards these “non-status Indians,”<sup>[11]</sup> they do not receive any privileges under the *Indian Act*.

By joining the Mikinaks, members cannot become eligible for benefits as “status Indians” as defined by the *Indian Act*. Brisebois has been trying to gain recognition as a status Indian since 1979 to no avail.<sup>[12]</sup> Being a member of the Mikinaks will not assist with this. Status cards issued by the Mikinaks will not provide any of the tax benefits for example, that are available to “status Indians.”

## Eligibility for Communal Constitutional Aboriginal Rights -- Section 35

Regardless of whether they are “status Indians” under the *Indian Act*, many Indigenous

people are entitled to exercise Aboriginal rights under section 35 of the *Constitution*.<sup>[13]</sup> Section 35 protects Aboriginal rights established by treaty, as well as pre-existing Aboriginal rights that were historically “integral to the distinctive culture”<sup>[14]</sup> of a specific Indigenous community.<sup>[15]</sup> These pre-existing and treaty rights continue to be held by the modern version of the original community.<sup>[16]</sup> Members of the modern rights-holding community can exercise the claimed rights. Membership in such a community and the existence of these rights are not related to the *Indian Act*.

Aboriginal rights under section 35 are determined by examining the lifestyles of Indigenous communities that existed prior to European contact or control.<sup>[17]</sup> Indigenous communities that did not exist in some fashion at that time cannot hold rights now. Courts will not accept arguments for the existence of an historic community based only on ethnicity. “A community is a social and legal fiction maintained through generations by social institutions...Aboriginal rights are not inherited...as genetic traits according to racist notions.”<sup>[18]</sup> As the Mikinaks did not exist as an historic community, they are thus not able to hold communal Aboriginal rights under section 35.

The courts have been especially critical of groups like the Mikinaks that advance Aboriginal rights claims based on claims of Aboriginal race or ancestry. As the court in *R v Hopper* stated, “Membership in self-styled organizations does not make one aboriginal for purposes of constitutional exemptions...statements such as those located on...membership card[s]...do nothing to advance the legitimate constitutional rights and aspirations of Canada's aboriginal peoples.”<sup>[19]</sup>

Finally, Aboriginal rights can only be exercised in the area that they were historically exercised.<sup>[20]</sup> For example in the case of *R v Bernard*, a New Brunswick court denied a member of the Shubenacadie Mi'qmacs the right to hunt near St John, as his community was not historically present in the area.<sup>[21]</sup> A Mikinak claim to hunting rights throughout Canada thus seems impossible.

### **Eligibility for Membership in Recognized Indigenous Communities**

Some members of the Mikinak group may be able to exercise constitutionally-protected Aboriginal rights, but only if those individuals also become members of existing historic Indigenous communities. The rights are only possible by virtue of the existence of the communities.

Membership in a rights-bearing Indigenous community involves a three-step test.<sup>[22]</sup> A rights claimant must self-identify with the relevant group, she must have some ancestral connection to the historic group, and she must be accepted by the modern version of the group. Thus, people of Indigenous descent who newly identify as Indigenous may come to exercise Aboriginal rights. However, this will require sustained and meaningful involvement with the modern iteration of a community with which they have ancestral ties.

### **Conclusion**

No Canadian is entitled to additional privileges and rights simply by having Indigenous ancestry.<sup>[23]</sup> Some Indigenous Canadians are deemed “status Indians” by the rules of the *Indian Act*, and are thus granted certain legal benefits. Meanwhile, some Indigenous Canadians may exercise constitutionally protected Aboriginal rights, through membership in communities that occupied Canada before European contact. Members of these communities have the right to retain their historic culture and lifestyle in a modern setting. The community holds these rights, not the individual members.

The Mikinaks are individual Canadians intent on re-connecting with their Indigenous ancestry. They appear to be acting in good faith. However, claiming constitutionally protected Aboriginal rights based on ethnicity or by virtue of membership in a recently-established group is not in keeping with the law.

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[1] Eric Tremblay, “Une Communauté Autochtone s'Installe à Beauharnois” (11 January 2016) *Le Journal Saint-François*, online : <<http://www.journalsaint-francois.ca/actualites/2016/1/11/une-communaute-autochtone-s-in-stalle-a-beauharnois.html>> .

[2] Graeme Hamilton, “Mikinaks Call Themselves Quebec’s Newest Aboriginal Community, Others are Calling Them a Fraud” (7 July 2016) *The National Post*, online: <<http://news.nationalpost.com/news/canada/the-mikinaks-call-themselves-quebecs-newest-aboriginal-community-others-are-calling-them-a-fraud>>.

[3] *Ibid.*

[4] *Communauté Autochtone*, *supra* note 1.

[5] Liam Massaubi, “‘Tribe’ Created to Save Taxes Disrespects Indigenous Struggle” (11 July 2016) *Huffington Post*, online: <[http://www.huffingtonpost.ca/liam-massaubi-/mikinak-tribe\\_b\\_10915058.html](http://www.huffingtonpost.ca/liam-massaubi-/mikinak-tribe_b_10915058.html)>.

[6] *Indian Act*, RSC 1985, c I-5.

[7] *Ibid.*, s 2(1).

[8] *Ibid.*, s 4.1.

[9] *Ibid.*, s 20(1).

[10] *Communauté Autochtone*, *supra* note 1, Mikinak Communauté Mikinak de la Montérégie, “À Propos” (2013) *Communauté Mikinak*, online : <<http://www.communaudemikinak.com/about.html>>; the Métis people are also generally not status Indians.

- [11] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 53.
- [12] *Communauté Autochtone*, *supra* note 1.
- [13] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 s 35.
- [14] *R v Vanderpeet*, [1996] 2 SCR 507 at para 48 .
- [15] *Ibid* at para 60.
- [16] *R v Powley*, 2003 SCC 43 at para 23 .
- [17] *Vanderpeet*, *supra* note 14, paras 55-59.
- [18] John Giokas & Paul L A H Chartrand, “Who are the Métis? A Review of the Law and Policy?” in John Giokas & Paul L A H Chartrand, eds, *Who are Canada’s Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing Ltd., 2002) 83 at 111.
- [19] *R v Hopper*, 2008 NBCA 42 at para 18.
- [20] *R. v Marshall*, [1999] 3 SCR 533 at para 17.
- [21] *R v Bernard*, 2016 NBQB 21 at para 27.
- [22] *Powley*, *supra* note 16, paras 31-33.
- [23] Giokas, *supra* note 18.