

THE ORIGINAL INTENTIONS OF THE INDIAN ACT

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I. INTRODUCTION

For over a century the *Indian Act* has held great symbolic and practical importance. Both ambiguous and ubiquitous it has been reviled as a "symbol of discrimination, a piece of racist legislation" and at the same time been protected and depended upon to support special rights.¹ It is widely recognized for controlling everything that touches First Nations people and resources, for outliving generations of politicians, bureaucrats and activists, and for evading every attempt at meaningful reform.

The Royal Commission on Aboriginal Peoples referred to the *Indian Act* as "the single most prominent reflection of the distinctive place of Indian peoples within the Canadian federation."² Yet the distinctive place set out in the *Indian Act* is not "a privileged one" but is "marked by singular disparities in legal rights with Indian people subject to penalties and prohibitions that would have been ruled illegal and unconstitutional if they had been applied to anyone else in Canada."³

Similarly, the Penner Committee Report referred to the *Indian Act* as a paradox that confirms special status but also provides "a mechanism of social control and assimilation."⁴

Thus it is not surprising that the 1969 White Paper's proposal to abolish the *Indian Act* was firmly rejected by First Nations. Harold Cardinal explained the aboriginal leadership's reluctance to eliminate the *Indian Act* in his now famous passage:

We do not want the *Indian Act* retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. ... we would rather continue to live in bondage under the inequitable *Indian Act* than surrender our sacred rights.⁵

¹ Sally Weaver, *Making Canadian Indian Policy: A Hidden Agenda 1968-1970*. (Toronto: University of Toronto Press, 1981), p. 19.

² Canada. Royal Commission on Aboriginal Peoples, *Report of Royal Commission on Aboriginal Peoples. Looking forward, Looking Back*. (Ottawa: Canada Communication Group Publishing, 1996), Vol. 1 p. 256.

³ RCAP, *Report of Royal Commission*, Vol. 1 p. 257.

⁴ House of Commons, Special Committee on Indian Self-Government (Penner Committee), *Indian Self-Government in Canada: Report of the Special Committee*. (Ottawa: Supply and Services, 1983), p. 16.

⁵ Harold Cardinal, *The Unjust Society, The Tragedy of Canada's Indians*. (Edmonton: M. G. Hurtig Ltd., 1969), p. 140.

The First Nations' answer to the White Paper, the Red Paper, proposed that the *Indian Act* be revised according to a First Nations' agenda rather than abolished.⁶ However, no comprehensive overhaul has been made of the act since its redrafting in 1951 and despite numerous piecemeal amendments and endless study, the *Indian Act* remains fundamentally unchanged since its initial inception in the 19th century.

The *Indian Act* was drafted in 1876 as a legislative tool to implement the Dominion's jurisdiction over "Indians and Lands reserved for Indians"⁷ under Section 91(24) of the *Constitution Act, 1867* (formerly the *British North America Act*). Because the Dominion was considered to have exclusive⁸ authority over Indian affairs the *Indian Act* contained provisions governing many areas that normally fell under provincial legislation and thus was extremely comprehensive in its scope.

At the outset it is important to note that the *Indian Act* as it was conceived shortly after confederation was not new or original legislation. It was in fact a consolidation of pre-confederation legislation, policies and practices already being carried out through an existing Indian Department. Thus the new Dominion chose to fulfill its 91(24) jurisdiction by expanding existing legislation to be administered through an established departmental structure.

The purpose of this paper is to consider the original intentions or aims of the *Indian Act* and determine why and how it has failed. It is not possible to fully understand the original intention of the *Indian Act* without first looking at how the early relationship between First Nations and the British evolved into an institutionalized Indian Department that spawned the precursors of the *Indian Act*.

Indian Act legislation as it was conceived was not the only vehicle through which the Crown could fulfill its obligations to First Nations. Treaty relationships pre-dated the inception of the *Indian Act* and its predecessors – this included treaties that the Imperial

⁶ Weaver, pp. 183-4.

⁷ Historically the *Indian Act* has been applied only to those aboriginal people that the Crown recognizes as Indians in the meaning of the act. The *Indian Act's* restrictive definition excluded Métis and Inuit and also created a group of aboriginal people who are not entitled to official registration and Indian status. Those people are often referred to as non-status Indians.

⁸ Authors of the Hawthorn Report argued that there was no constitutional bar to the province assuming some responsibility for Indians.

government had negotiated over the previous century as well as those that the Crown was in the process of negotiating shortly after confederation. Before turning attention to a detailed discussion of the *Indian Act*, it is instructive to briefly consider the role and place of those treaties.

II. THE ROLE AND PLACE OF TREATIES

Treaties and treaty relations were as fundamental to relations between the Crown and First Nations as the *Constitution Act, 1867* is to the relationship between the federal and provincial governments.

Canada recognizes that about half of the First Nations in Canada have negotiated formal treaty agreements. These include treaties signed prior to or shortly after confederation – the Peace and Friendship treaties of the Atlantic Provinces (1725-1779), the Vancouver Island treaties (1850-1854), numerous pre-confederation treaties in Ontario (1764-1862), and Treaties 1 to 7 (1871-1877) in the prairies and old North West Territory, as well as five major treaties concluded in the period from 1899 to 1923, being Treaties 8 to 11 and the Williams Treaty.⁹ In addition, First Nations had other historic agreements with Europeans, whether it be trading companies such as the Hudson's Bay Company or local settlers, or complex traditional treaties such as the Covenant Chain and Two Row Wampum. Furthermore, all of the First Nations formed alliances and made treaties amongst themselves for the purposes of trade, peaceful co-existence and military aid. In recent years, modern treaties are being used to define new relationships between the First Nations and the Crown.

In sharp contrast to *Indian Act* legislation, historic treaties were based on mutual need and advantage, consultation and negotiation, honour, and at least some degree of information sharing. While First Nations argue that written treaties have been marred by uneven and incomplete recording, problems of interpretation and misunderstanding,¹⁰

⁹ Indian and Northern Affairs Canada, Information Circular. "Historic Indian Treaties." April 1997. In recent years the Crown has recognized other treaties such as the 1701 Beaver Hunting Ground Treaty, the 1760 Murray Treaty, and the 1760 Treaty of Swegatchy.

¹⁰ See for example: Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Sarah Carter and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7*. (Montreal & Toronto: McGill-Queen's University Press, 1996). Treaty Commissioner for Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future*. (Saskatoon: Office of the Treaty Commissioner, 1998), especially

they do reflect some fundamental principles such as the independent status of the participants, both First Nation and Crown, and the nation to nation nature of the agreement.

The terms and circumstances of the treaties vary, however, there are certain important consistencies. With the exception of some items that were to be distributed for a limited time period, the language of treaties speak of perpetual obligations and responsibilities. The First Nation signatories did not relinquish their authority or leadership, nor did they agree to abandon their traditional systems of political or social organization and self-determination. There is no record of them giving up the right to their spiritual and religious practices, nor did they agree to forfeit their freedom of movement. No First Nations agreed to submit to day to day management of their affairs by an outside government and none of the written accounts record any discussion of the *Indian Act* being applied to the signatory First Nations.¹¹

Historic treaties with First Nations in Canada did not result in specific legislation to implement their provisions. The Royal Commission on Aboriginal People recognized this as a fundamental problem:

In the absence of effective laws to implement treaties, the federal Indian administration fell back on the *Indian Act*. As time went on, basic treaty provisions such as annuities were provided for in the *Indian Act* to enable federal government to deliver them. Although it does not recognize, affirm or otherwise acknowledge treaties, the *Indian Act* continues to be the only federal statute administering to Indians generally, including those with historical treaty agreements.¹²

Thus by default the *Indian Act* has become the legislative framework for carrying out the terms of the treaties despite the fact that it was not written specifically in response to

pp. 10-27. James Morrison, "The Robinson Treaties of 1850: A Case Study", research study prepared for the Royal Commission on Aboriginal Peoples, 1993. For an oral history account of Treaty 6 see: Freda Ahenakew and H. C. Wolfart, *The Counselling Speeches of Jim Ka-Nipitehtew*. (Winnipeg: University of Manitoba Press, 1998), especially pp. 100-119.

¹¹ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They were Based*. (Saskatoon: Fifth House Publishing, 1991). This source should be used with caution as it underrepresents the perspective of the First Nations.

¹² RCAP, *Report of Royal Commission*, Vol. 1 pp. 177-8.

treaty obligations. This has created a serious disjuncture between the spirit and intent of the treaties and the administration of their terms. Historically, this has become all too apparent to Aboriginal leaders who persistently recalled their treaty relationship with the Crown and asserted the rights that flow from those treaties, only to hear that the Crown's actions are limited to those permitted and delineated by the *Indian Act*.

The failure to implement the spirit and intent of treaties through domestic legislation has led to the primacy of the *Indian Act* in Crown-First Nation relations, including treaty relations which the *Indian Act* was not designed to address. I will now turn to an examination of earlier Crown-First Nation relations, legislation and administration.

III. THE HISTORIC ROOTS OF THE *INDIAN ACT*

To really understand the complexities of intention of the *Indian Act* and to answer the question of why and how it has failed we need to return to the early 19th century roots of Indian legislation and the nascent Indian Department. This examination should be more than a mere history lesson – it should identify fundamental problems and lead to an understanding of why this legislation has persisted in the face of numerous efforts at reform. Most of the following discussion focuses on the growth of the Indian Department and legislation in colonial Quebec and Upper Canada as it was this system that was eventually applied across Canada.

A. THE EARLY RELATIONSHIP AND SETTLEMENT PLANS

Early relations between First Nations and the British were conducted on a nation to nation basis through trade and military alliances. Fiscal considerations, primarily presents of European goods, were given to aboriginal leaders to reward and bind allies and obtain favour in trade. Crown representatives did not purport to impinge on aboriginal internal affairs. Correspondence written in the critical years after the conquest of New France reflect the British policy of courting the good-will and co-operation of the First Nations and enacting laws and promoting practices that would avoid conflict and open rupture between the First Nations and colonists.¹³ The 1760 Articles of

¹³ O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York; Procured in Holland, England and France, by John Romeyn Brodhead, Esq., Agent* (Albany: Weed, Parsons and Company, 1856), Vol. VII, p. 473: "Order of the King in Council on a Report of the Lords of Trade", 23 November 1761, and pp. 478-479: Lords of Trade to the King, "Draft of an Instruction for the Governors of

Capitulation signed in Montreal made reference to non-interference with aboriginal lands,¹⁴ and the British Lords of Trade ordered an investigation into the state of "Indian Affairs" with the intention of regulating policy and trade.¹⁵ Most importantly the Royal Proclamation of 1763 recognized the importance of the relationship with First Nations and focussed on regulating relations and protecting aboriginal land rights with a view to minimizing conflict and safeguarding British interests.¹⁶

Relations with First Nations were typically carried out by Superintendents who had usually established relationships with aboriginal leaders through trade alliances and military exploits. Sir William Johnson was a prominent figure who established himself as a man of influence among the Six Nations, particularly the Mohawk. After the Seven Years' War he advocated the creation of an Indian Department through which to secure peace and promote British interests amongst the First Nations.¹⁷ Thus when the new Governor of Quebec, Sir James Murray, was instructed to appoint a suitable person to conduct relations with the First Nations,¹⁸ Sir William Johnson was an obvious choice.

Johnson appointed deputies to conduct affairs at various locations and he himself "conferred frequently with Indians, settling grievances and renewing covenants of

Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia, forbidding them to Grant Lands or make Settlements which may interfere with the Indians bordering on those Colonies", 2 December 1761.

¹⁴ NAC RG 10 Vol. 2030 File 8946 Pt. 3 pp. 86-87 Reel C-11,138: "Articles of Capitulation Between their Excellencies Major General Amherst, Commander in Chief of his Britannic Majesty's troops and forces in North America, on the one part, and the Marquis de Vaudreuil, &c., Governor and Lieutenant-General for the King in Canada, on the other," 8 September 1760. Article XL read: "[t]he Savages or Indians of his most Christian Majesty shall be maintained in the Lands they inhabit if they chuse to remain there; they shall not be molested on any pretense whatsoever." The First Nations allied with "his most Christian Majesty" (the French) included: Mohawks from Akwesasne, Oswegatchie, Kahnawake, and Kanesatake; Algonquins; and some Odawa, Chippewa, Potawatomi, Huron and Mississauga.

¹⁵ O'Callaghan, ed., *DRCHNY* Vol. VII, p. 535: Lords of Trade to Sir William Johnson, 5 August 1763.

¹⁶ Alexander Fraser, ed., *Fourth Report of the Bureau of Archives for the Province of Ontario, 1906* (Toronto: L. K. Cameron, 1907), pp. 2-7: Royal Proclamation, 7 October 1763.

¹⁷ O'Callaghan, ed., *DRCHNY* Vol. VII, p. 575: Johnson to the Lords of Trade, 13 November 1763.

¹⁸ Fraser, ed., *Fourth Report*, pp. 22-23: "Instructions to Governor Murray", 7 December 1763.

friendship with them on behalf of the crown."¹⁹ He represented the Crown at important conferences such as the treaties at Niagara in July 1764²⁰ and the treaty at Fort Stanwix in 1768.²¹ The military alliance of the Crown and First Nations was affirmed and cemented through the periodic renewal of treaties and covenants such as the Two Row Wampum and Silver Covenant Chain.²²

The first comprehensive scheme for an Indian Department was contained in the Plan for the Future Management of Indian Affairs which had "for its object the regulation of Indian Affairs both commercial; and political throughout all North America, upon one general system, under the direction of Officers appointed by the Crown so as to sett [sic] aside all local interfering of Particular Provinces."²³ The Indian Superintendent was to manage relations with First Nations as the direct representative of the King.²⁴ By the time he died in 1774 Sir William Johnson had organized a group of experienced and capable officers²⁵ who formed the core of the Indian Department, extending their influence throughout the Colony of Quebec.²⁶

Sir Guy Carleton (Lord Dorchester) returned to the colony for a second term as the Governor of Quebec, Nova Scotia and New Brunswick, and issued extensive

¹⁹ Julian Gwyn, "Sir William Johnson." *Dictionary of Canadian Biography*. Vol. IV pp. 396.

²⁰ Alexander C. Flick, ed., *The Papers of Sir William Johnson* Vol. IV (Albany: The University of the State of New York, 1925) pp. 466-481: "A Conference with Foreign Nations", Niagara, 9 to 14 July 1764. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government", *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch ed. (Vancouver: UBC Press, 1997), p. 163.

²¹ NAC MG 11 CO 5/69 pp. 316-319 Reel B-6112: Sir William Johnson to First Nations, Treaty of Fort Stanwix, 24 October to 5 November 1768.

²² Robert S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815*. (Toronto & Oxford: Dundurn Press, 1992), pp. 15-16.

²³ O'Callaghan, ed., *DRCHNY* Vol. VII, pp. 634-636: The Lords of Trade to Johnson, 10 July 1764 and pp. 624-626: Johnson to the Lords of Trade, 11 May 1764.

²⁴ NAC MG 11 CO 5/69 p. 115 Reel B-6112: Circular from the Earl of Hillsborough, Whitehall, to the Governors of Quebec, New York, Pennsylvania, Nova Scotia, Virginia, North Carolina, South Carolina, Georgia, East Florida and West Florida, 15 April 1768. The principles outlined in Future Plan and Royal Proclamation were included in instructions to Governor Carleton in 1775. Fraser, ed., *Fourth Report*, pp. 58-74: Instructions to Governor Carleton, 3 January 1775.

²⁵ Allen, *His Majesty's Indian Allies*, p. 38

²⁶ By the 1774 Quebec Act the colony included Labrador and the Indian country west and south to the Ohio and Mississippi.

"Instructions for the Good Management of the Indian Department" to Superintendent General Sir John Johnson.²⁷ Officials were instructed to treat First Nations respectfully in consideration of their free and independent status, to keep careful records of all council meetings and transactions and to issue proper instructions to Indian Agents. The Indian Department's independent and separate status is seen in the orders instructing Military officers to attend all conferences with First Nations but not to interfere in the management of the Indian Department.

When J. G. Simcoe became Lieutenant Governor in Upper Canada the inevitable struggle between the imperative to keep the Indian Department as an adjunct to the military agenda and the domestic government's settlement aspirations came to a head. This tension had been foreshadowed in the Future Plan's directives which intentionally kept Indian affairs out of the hands of local colonial governments. Simcoe wanted the Superintendent General to answer to the Lieutenant Governor as the head of the civil government in Upper Canada instead of reporting to the Commander in Chief of forces. The crux of the conflict was control of the land base as Simcoe wanted the authority to initiate land cessions. Simcoe did not get the control he lobbied for, however, in December 1796 instructions gave his successor the authority to issue orders to the Indian Department for purchasing land, requisitioning presents and appointing new Indian officers in Upper Canada.²⁸

The primary focus of British-First Nation relations centered on the aboriginal people as military allies and potential adversaries as long as there were actual hostilities or the intrigues and fears that attended colonial relations during the period of the French and Indian Wars (1755-1763), hostilities associated with American Independence (1774-1783), and conflict between the new American state and the British which culminated in the War of 1812.

²⁷ NAC RG 10 Vol. 789 pp. 6759-6765 Reel C-13,499: Lord Dorchester to Sir John Johnson, 27 March 1787.

²⁸ E. A. Cruikshank and A. F. Hunter, eds., *The Correspondence of the Honourable Peter Russell, With Allied Documents Relating To His Administration of the Government of Upper Canada During the Official Term of Lieut.-Governor J. G. Simcoe While on Leave of Absence* Vol. I, 1796-1797 (Toronto: Ontario Historical Society, 1932), p. 113: "Additional Instructions to the Lieutenant Governor of the Province of Upper Canada", 15 December 1796; p. 272: Russell to Prescott, 21 August 1797; and pp. 258-261: Russell to Prescott, 6 September 1797.

The post-War of 1812 period heralded a shift in British colonial policy. Colonial authorities ceased to regard the First Nations as military allies and turned their attention to obtaining their lands for settlement. Thus the emphasis was not on courting their friendship and alliance but on removing them to remote villages and reserves and freeing up their land for settlement.²⁹ Treaties now took the form of land cession. Furthermore, the Imperial treasury sought to limit the cost of providing annual presents and maintaining the Indian Department and transferred the cost of obtaining Indian lands to local government. Upper Canada began paying for land cessions with annual distributions of goods and cash as a more affordable alternative to the traditional one time payments.³⁰ These payments were made by Indian Department officers.

During this era the First Nations were suffering from the loss of their land base and traditional means of support along with other impacts associated with white settlement, including disease and alcohol. Pressure to obtain lands for settlement and the distressed condition of much of the aboriginal population brought about various schemes to "improve" their lives during the tenures of Lieutenant-Governors Sir Peregrine Maitland (1818-1828) and Sir John Colborne (1828-1836). These plans were influenced by the rise of philanthropic liberalism and evangelical Christian movements which advocated the "advancement and civilization" of Indians. The underlying ideology of these movements, which predominated from around 1828 to 1839, was that while aboriginal people deserved protection and basic rights, they were in an inferior stage of spiritual, mental and social development and needed to be raised up by the adoption of Christian values.³¹

One of the earlier schemes proposed under Maitland was the creation of self-sustaining communities modeled on white settlements under the watchful eye of resident missionaries:

²⁹ Robert S. Allen, "Claus, William" *Dictionary of Canadian Biography* Volume VI, 1821-1835, Frances Halpenny, ed. (Toronto: University of Toronto Press, 1987), pp. 151-153.

³⁰ Lillian F. Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968), pp. 158-159.

³¹ John F. Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department* (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Indian Affairs and Northern Development Canada, 1985), p. 39.

Despite its boldness this scheme appealed to many contemporaries as a reasonable solution to otherwise intractable problems. Although initially expensive, it promised an ultimate saving by helping the Indians towards self-sufficiency. It would also open Indian hunting grounds to white settlement, while actually benefiting the Indians, for it would fit them for a manner of life that offered greater economic rewards. ... ³²

As noted in the above quotation these schemes appealed to the Crown as having the long term advantage of addressing the problems of the aboriginal people and meeting the government's desire to reduce the fiscal responsibilities and free up land for settlement. Numerous plans of this nature were proposed, most of which were intended to turn the First Nations into white peasant farmers, end dependency on government and free land for settlement.³³

B. INVESTIGATIONS INTO INDIAN AFFAIRS AND THE INDIAN DEPARTMENT

The debate over an appropriate policy for Indian people led Governor Dalhousie to order what would be the first of many investigations into the state of Indian affairs and the fate of the Indian Department.³⁴ Major General H. C. Darling, Dalhousie's Military Secretary, undertook a tour of the settlements in Upper and Lower Canada and submitted a report in July 1828. Darling argued that the Indian Department could not be abolished as, without the intercession of the Department, the First Nations would need to be supported completely by government, would starve in the streets and fill the jails, or would "turn with vengeance in their hearts into the arms of the Americans".³⁵ The Department was considered by Darling to be indispensable for overseeing the affairs of the First Nations until they were eventually absorbed into the dominant society.

While Darling's recommendations for managing the tribes were not received favourably, a settlement system was further elaborated under Lieutenant Governor Sir John Colborne that evolved into a reserve system based on self-support through the sale and leasing of

³² John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534*. (Toronto: University of Toronto Press, 1984), p. 82.

³³ See for example: Archives of Ontario. Pamphlet 1824, No. 3. "Plan for the Melioration and Civilization of the British North American Indians", James Buchanan, King's Consul for State of New York, to Earl of Dalhousie, Governor General of Canada, 1 November 1824.

³⁴ The terms and findings of Darling's inquiry are discussed in detail in Leslie, *Commissions of Inquiry*, pp. 20-23.

³⁵ Leslie, *Commissions of Inquiry*, p. 21.

Indian lands, village settlement, peasant farming, supervision, and conversion to Christianity.³⁶ Armed with the blessing of the Imperial Government and a Parliamentary Grant a "civilization" program under the Indian Department was approved in November 1829. In his comprehensive study of Indian Commissions of Inquiry, John Leslie concluded:

Thus the old military partnership between British regular forces, Canadian militia, and Indian warriors was to be refashioned, and in its place, Imperial authorities, local officers of the British Indian department, and missionaries would work together to ensure the growth of Christian civilization among the "barbarous" and unsettled tribes of the Canadas.³⁷

As part of the restructuring the Indian Department was transferred from military to civil jurisdiction while remaining an Imperial responsibility. The old British Indian Department agents, whose backgrounds were mainly military, took on new settlement duties and the cost of running the department soared.³⁸

An alternate approach was taken by Colborne's successor, Lieutenant Governor Bond Head. Bond Head toured Upper Canada in 1836 and then, judging the Indians to be a dying race, took cessions of vast tracts of their land and promoted an isolated settlement

³⁶ NAC RG 10 Vol. 5 pp. 2110-2119: John Colborne, Lieutenant Governor of Upper Canada, to R. Hay, Colonial Secretary, 3 May 1829. Aborigines Protection Society, *Report of the Indians of Upper Canada, 1839* (Toronto: Canadiana House, 1968) pp. 8-9: James Kempt, Administrator of Upper Canada, to George Murray, Secretary of State, 16 May 1829. Governor Dalhousie had been replaced by an Administrator Sir James Kempt.

³⁷ Leslie, *Commissions of Inquiry*, p. 25.

³⁸ Throughout the 1830s, the Indian Department was highly centralized, with ultimate authority to change policy, appoint personnel and determine financing centered in Whitehall. This centralized decision-making effectively stifled innovation and initiative at headquarters and at the various posts. Virtually every administrative transaction and policy modification, whether emanating from field offices or headquarters, required referral to the Colonial Secretary, through the office of the Lieutenant Governor or Governor General. The process was cumbersome and resulted in delays and frustration for both First Nations and Department officials. Leslie, *Commissions of Inquiry*, pp. 37 and 80. For a more complete description see Marie W. LaForest, "Indian Land Administration and Policy in Ontario (Upper Canada), 1791-1867", prepared for the Office of Native Claims, Department of Indian Affairs and Northern Development, 1979, pp. 10-17.

on Manitoulin Island where they could live out their final days. The Report of the Royal Commission summarized the state of affairs by the end of the 1830s.

By the end of the decade, both experiments had failed. In the case of Darling's civilization program, Indians were not ready to abandon their traditional ways so quickly or completely. It also appears that the various church groups bickered among themselves, thereby hindering the effectiveness of the program. Bond Head's approach faltered because the Indians became increasingly wary of surrendering their rights to their traditional lands. The removal policy [of Bond Head] had also aroused the opposition of philanthropic and humanitarian elements in British and colonial society which were genuinely concerned about declining material and social conditions among Indian people.³⁹

The growth in costs and the apparent difficulties impressed upon government the complexity of the problem and led to further inquiries during the period of the late 1830s to the late 1850s. These inquiries are documented in detail in John Leslie's study. Several features of the inquiries are noteworthy.

There was only one consultation with First Nations; the balance of the inquiries gathered information from Indian Department officers and missionaries. The single aboriginal consultation was a survey of the tribes and villages in Upper and Lower Canada on the sole question of stopping the distribution of annual presents.⁴⁰ Although the First Nations asserted the necessity of continuing the issue of presents and claimed it as a mark of their alliance with the Imperial government, the distribution was first reduced and then stopped completely within a few years.

The investigations identified basic principles that had evolved and formed the foundation of Indian policy – the Crown had a "continuing responsibility to protect the rights and interests of Native peoples, as well as a duty to foster their social well-being and economic advancement."⁴¹ According to Leslie's findings:

³⁹ RCAP, *Report of Royal Commission*, Vol. 1 p. 266.

⁴⁰ RCAP, *Report of Royal Commission*, Vol. 1 p. 267. That inquiry is documented in the Pennefather Report. Province of Canada. Journals of the Legislative Assembly. *Sessional Papers*, Appendix 21, "Report of the Special Commissioners to investigate Indian Affairs in Canada," (Toronto, 1858).

⁴¹ Leslie, *Commissions of Inquiry*, p. 185.

That responsibility flowed from the Royal Proclamation of 1763, the previous military service of Indian people in colonial wars, the necessity of government to administer the benefits accruing from the treaties, and finally, from guilt feelings over the subsequent maladministration of Indian lands, and reserve resources.⁴²

The commissions reinforced the belief that the responsibility for Indians lay in the Crown and should be protected from the whims of the local legislatures. This principle was later incorporated in the British North America Act under Section 91(24).⁴³

The Victorian principles promoted by the humanitarian and Christian movements were reflected in the persisting belief in the social, moral and religious superiority of settler society and the need to convert and civilize the Indian nations. Western education and missionary supervision were seen as the road to improvement. A hallmark of their advancement would be the rejection of communal land holding and all vestiges of collective life in favour of individualism.⁴⁴ The success of Indian Department programs continued to be measured by the criteria of individualism, the assumption of Christian values and an agricultural lifestyle well into the 20th century.⁴⁵

The reserve system was judged to be central to Indian administration and the goals of civilization. While the reserves provided an anchor for these programs they were intended to be temporary, particularly in their collective form. The findings of these inquiries indicated a persistent belief that the Indian people would assimilate into the wider society and reserve lands would no longer be needed.⁴⁶

John Leslie concluded that the commissions to investigate Indian affairs in the pre-confederation period entrenched an administrative system that persists to the present:

Though not apparent at the time, the series of investigative reports created a corporate memory for the Indian department and established a policy framework for dealing with Native peoples and issues. The approach became entrenched, like the department itself, and remained virtually unchanged and

⁴² Leslie, *Commissions of Inquiry*, p. 185.

⁴³ Leslie, *Commissions of Inquiry*, p. 186.

⁴⁴ Leslie, *Commissions of Inquiry*, p. 186.

⁴⁵ This basis for assessing the health and achievement of aboriginal communities persisted throughout the twentieth century and is readily apparent in the Annual Reports of the Department of Indian Affairs.

⁴⁶ Leslie, *Commissions of Inquiry*, pp. 186-7.

unchallenged until 1969, when the federal government issued its white paper on Indian policy.⁴⁷

He further concluded that this policy framework was "impervious to substantive change."⁴⁸ In Leslie's assessment the "inertia and lack of an innovative approach to policy deliberations" reflected in the pre-confederation inquiries arose at least in part from the fact that the men conducting the inquiries were "close political associates" of the powers of the day and "consequently followed closely instructions and established principles and policy precedents."⁴⁹

Fiscal considerations proved another critical obstacle to innovative change. The reduction of costs was a recurring theme and in 1858 the Imperial government finally announced its decision to cease funding Indians in British North America, passing the responsibility to Canada in 1860.⁵⁰ By the time Canada assumed the fiscal responsibility the Indian Department was firmly entrenched both as a operating bureaucracy and a repository of archaic ideals and objectives.

C. PRE-CONFEDERATION LEGISLATION: MEMBERSHIP, LANDS AND GOVERNANCE MODELS

The fundamentals that evolved with the early 19th century administration of Indian affairs were reflected in legislation beginning in the middle of that century. The principles of assimilation and integration were expressed in the Crown's growing restriction of who it would recognize as Indians and provisions to encourage people to abandon their Indian status and communities. The land provisions were intended to protect Indian land while encouraging individualism and allowing for Indian land to be made available to the dominant society. The governance provisions placed limitations on the ability of First Nations to retain independence and self-sufficiency and reflected the Crown's attitude that they were minors incapable of managing their own affairs.

Upper Canada passed legislation in 1839 which gave the Lieutenant Governor authority to appoint commissioners to investigate complaints against squatters or anyone cutting

⁴⁷ Leslie, *Commissions of Inquiry*, p. 185.

⁴⁸ Leslie, *Commissions of Inquiry*, p. 2.

⁴⁹ Leslie, *Commissions of Inquiry*, p. 190. In the case of the six inquiries between 1828 and 1858 examined by Leslie the Imperial representatives, the Lieutenant Governor or Governor General were responsible for Indian affairs.

⁵⁰ Leslie, *Commissions of Inquiry*, p. 191.

timber without the proper consent on land appropriated for the residence of Indian tribes. Any fines levied under the act could, after deducting expenses, be appropriated for the use of the Indian tribes according to the discretion of the Lieutenant Governor and with the consent and advice of the Executive Council.⁵¹ This act was extended in 1849 to apply to all lands in Upper Canada, be they Crown Reserves, Clergy Lands, School Lands or Indian Lands.⁵²

The Legislative Assembly of the Province of Canada passed two pieces of legislation on 10 August 1850 regarding Indian lands in Upper and Lower Canada respectively. The contemporary attitude that aboriginal title had been extinguished by the French may account for the fact that there was no reference to the consent of the Crown being required for land cessions in Lower Canada while consent was required by the Upper Canada statute. Furthermore, the act for Lower Canada did not apply to non-aboriginal persons and entities who held land in trust for or for the benefit of Indians; that provision was written to protect third parties, such as religious institutions, that had received grants of land for the benefit of Indians.⁵³ There was no such reservation in the Upper Canada legislation.

In Lower Canada the 1850 *Act for the better protection of the Lands and Property of Indians in Lower Canada*⁵⁴ stated its purpose to "make better provision for preventing encroachments upon and injury to the lands appropriated to the use of the several Tribes and Bodies of Indians in Lower Canada."⁵⁵ Indian lands were vested in the Commissioner of Indian Lands who had the full power to lease land and collect rent without the consent of the band. The act also allowed for individuals (Indian or otherwise) to deal with individual parcels or lots within Indian lands as they saw fit.

⁵¹ *An Act for the protection of the Lands of the Crown in this Province, from trespass and injury*, Statutes of Upper Canada 1839 c. 15 (2 Vict.).

⁵² *An Act to explain and amend an Act of the Parliament of the late Province of Upper-Canada, passed in the second year of Her Majesty's Reign, intituled, An Act for the protection of the Lands of the Crown in this Province, from trespass and injury*, Statutes of Canada 1849 c. 9 (12 Vict.)

⁵³ There were several disputes raging between First Nations and religious bodies over title to tracts set aside for the use of Indians during the French regime.

⁵⁴ *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*. Statutes of Canada 1850, c. 42 (13-14 Vict.).

⁵⁵ S. C. 1850, c. 42 (13-14 Vict.).

Section V of the Lower Canada legislation contained the first legislative definition of Indian persons. They were defined as people of Indian blood who were reputed to belong to a particular body or group of Indians who were interested in certain lands. The definition included those who intermarried and resided amongst them and those who were adopted in infancy. Individuals could trace their Indian ancestry through either parent.⁵⁶

The 1850 legislation in Upper Canada *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied by them from trespass and injury*⁵⁷ stated that it was:

... expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation⁵⁸

In the spirit of the Royal Proclamation, this legislation stipulated that aboriginal lands could not be alienated without the Crown's consent. In addition, Indians were protected from taxation and seizure of property for debts and only Indians and those married to Indians were allowed to reside on reserve land. The Upper Canada statute did not define the term Indian but applied all the provisions of the act to "Indians and those intermarried with Indians."⁵⁹ The Commissioner was also empowered to prosecute and levy fines against anyone cutting timber without authority. Bands, chiefs and individuals had no authority to lease, rent or give permission to others to reside on their reserves.⁶⁰

The initial defining of Indian status in the 1850 Lower Canada statute would prove to be the most inclusive and least exclusive of all future legislative attempts at identifying and defining "Indians". One year after the Lower Canada legislation defined the term

⁵⁶ S. C. 1850, c. 42 (13-14 Vict.) Section V.

⁵⁷ *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*. Statutes of Canada 1850, c. 74 (13-14 Vict.)

⁵⁸ S. C. 1850, c. 74 (13-14 Vict.).

⁵⁹ S. C. 1850, c. 74 (13-14 Vict.).

⁶⁰ Other provisions prohibited pawning or exchanging goods derived from treaty annuities or annual presents, barred the sale of alcohol to Indians, and required statute labour on roads.

"Indian" the definition was amended to exclude non-Indian men married to Indian women; non-Indian women legally married to an Indian man were considered "Indians" in the meaning of the act.⁶¹ These definitions were used to decide who could live on Indian land and have their property protected from seizure, taxation and trespass.

These limitations were ostensibly legislated to protect Indian lands from being taken over by designing white men, however, their long-term effect was mostly to separate Indian women and children from their reserve communities. A more overt method was legislated to fulfill the assimilation agenda in 1857. The *Act for the Gradual Civilization of the Indian Tribes in the Canadas* demonstrated the intention of the Crown to erode First Nations communities, remove special status and integrate them into settler society. The intention was explicitly expressed in the preamble:

Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it ...⁶²

The preamble reveals the ideological basis of all the Indian affairs legislation that presumed Indian society and culture to be inferior to the settler society and assumed that individuals would seek to attain the status of Her Majesty's other subjects. The act also provided for the piecemeal dismantling of reserves by allowing enfranchised Indians to convert parcels of reserve land into fee simple lands.⁶³

The most comprehensive legislation to date was passed in 1860, largely in response to the recommendation of the 1858 Pennefather Commission that called for the consolidation of laws pertaining to Indian reserves.⁶⁴ Under the 1860 act, the Commissioner of Crown Lands was also appointed the Superintendent General of Indian

⁶¹ *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and Property of the Indians in Lower Canada.* Statutes of Canada 1851, c. 59 (14-15 Vict.)

⁶² *Act for the Gradual Civilization of the Indian Tribes in the Canadas.* Statutes of Canada 1857, c. 6 (20 Vict.).

⁶³ S. C. 1857, c. 6 (20 Vict.).

⁶⁴ John Leslie, *The Historical Development of the Indian Act* (Ottawa: Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs, 1978), pp. 30-31.

Affairs. The act specified that land could only be released to the Crown and that no other alienation of land was valid. For the first time the process required for formalizing a surrender was outlined; surrenders had to be assented to by the Chief or majority of Chiefs at a specially called meeting.⁶⁵

Shortly after confederation, legislation was passed placing the management of Indian lands in the Dominion under the Secretary of State.⁶⁶ This 1868 act "consolidated much of the legislation passed in the previous decade regarding protection and management of Indian interests."⁶⁷ The Governor-in-Council was authorized to make regulations for the protection and management of Indian lands and the surrender provisions outlined in the 1860 act⁶⁸ appeared as previously.

The stated objective of the 1857 *Enfranchisement Act* was extended in 1868-69 to apply to Indians throughout the newly formed Dominion.⁶⁹ Secretary of State Langevin⁷⁰ anticipated that "a large number of Indians would become enfranchised through the provisions of the 1869 Act"⁷¹ and the Deputy Superintendent General of Indian Affairs William Spragge indicated a few years later that the purpose of Indian legislation was to "lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life."⁷² In practice, while voluntary enfranchisement remained in the act for over one hundred years until it was removed in 1985, voluntary

⁶⁵ *An Act respecting the Management of the Indian Lands and Property*. Statutes of Canada 1860, c. 151 (23 Vict.).

⁶⁶ *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*. Statutes of Canada 1868, c. 42 (31 Vict.).

⁶⁷ Leslie, *Historical Development of the Indian Act*, p. 53.

⁶⁸ S. C. 1860, c. 151 (23 Vict.).

⁶⁹ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*. Statutes of Canada 1869 c. 6 (32-33 Vict.).

⁷⁰ Responsibility for Indian affairs fell under the Secretary of State from 1867 until 1873 when it passed to the Department of the Interior. Authority was granted under S.C. 1868 c. 42 (31 Vict.) The legislative regime that had been widely applied in the old provinces of Upper and Lower Canada replaced the Indian land provisions previously in force in New Brunswick and Nova Scotia.

⁷¹ Leslie, *Historical Development of the Indian Act*, p. 53 citing Canada, Parliament, House of Commons Debates, 2 Session, 1 Parliament, 1869.

⁷² C.P. *Sessional Papers* No. 23 (34 Vict. 1871) Annual Report for 1870 of the Indian Branch of the Department of the Secretary of State for the Provinces, p. 4: Report of the Deputy-Superintendent-General, William Spragge, 2 February 1871.

enfranchisement was never widely embraced by First Nations. For example, of all the people enfranchised between 1955 and 1985, less than 10% were adults enfranchised upon application.⁷³

The collective nature of Indian land was eroded by the extension of the *Enfranchisement Act* of 1869 which encouraged enfranchisement and individual land holding.⁷⁴ In addition, the 1869 act introduced an elective system. Deputy Superintendent of Indian Affairs William Spragge characterized the elective system as replacing an irresponsible system (i.e. traditional band and tribal government which were viewed as an impediment to advancement) with a responsible system which was "designed to pave the way to "the establishment of simple municipal institutions".⁷⁵ This three year elective system gave the Governor authority to require any tribe or band to elect a chief and council by the vote of the male members and reserved to the Governor the right to depose that chief for "dishonesty, intemperance or immorality." This imposed system allowed existing life chiefs to remain in place for their remaining years or until deposed by the Governor.⁷⁶ Furthermore, all rules and regulations passed by the elected council were approved or rejected by the Governor. Despite the fact that First Nations did not accept this legislation the provisions persisted.

Under the 1869 legislation, Indian women who married non-Indians were no longer considered Indian in the meaning of the act.⁷⁷ These excluded women and any children born from the marriage were no longer considered to be members of their bands, and could not collect annuities or other benefits. The General Council of Ontario and Quebec protested the enfranchisement of Indian women in 1872 calling for an amendment so that:

⁷³ Joan Holmes, *Bill C-31 Equality or Disparity? The Effects of the New Indian Act on Native Women*. (Ottawa: Canadian Advisory Council on the Status of Women, 1987), p. 9.

⁷⁴ Leslie, *Historical Development of the Indian Act*, p. 53.

⁷⁵ Canada. Department of Indian Affairs. *Annual Report*, 1870, p. 4: Deputy Superintendent William Spragge to Secretary of State Joseph Howe, 2 February 1871.

⁷⁶ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs and to extend the provisions of the Act 31st Victoria, Chapter 42*. Statutes of Canada 1869, Cap. 6 (32-33 Vict.) Section 10.

⁷⁷ S. C. 1869 c. 6 (32-33 Vict.) Section 6.

Indian women may have the privilege of marrying when and whom they please without subjecting themselves to exclusion or expulsion from the tribe.⁷⁸

Similarly, Simcoe Kerr, Head Chief of the Six Nations on the Grand River, proposed that any person with an Indian parent and who was said to have an interest in communal property of a band should be recognized as having Indian status.⁷⁹ This First Nations input was not acted upon.

In addition, women who married into another band became members of their husbands' bands and drew all benefits with that band. This act expanded on the earlier definition of "Indians" excluding more members of communities. Annuities, interest money and rents could not be paid to anyone with less than one-fourth "Indian-blood."⁸⁰ Annuities due under treaty and other payments could also be withheld from people convicted of offenses or deserting their families.⁸¹ These provisions placed conditions on the receipt of annuities, a benefit flowing directly from treaties.

Following the acquisition of Rupert's Land and the North-West Territories from the Hudson's Bay Company in 1870, Indian legislation was extended to the new territories by a series of Acts and Orders-in-Council dating from 1871 to 1874.⁸²

The 1876 *Indian Act* was a consolidation of existing Indian legislation that was to be applied in all of the provinces and the North West Territories.⁸³ When discussing the proposed legislation in the House of Commons the Minister, David Laird:

⁷⁸ Leslie, *Historical Development of the Indian Act*, p. 54 citing NAC RG 10 Vol. 1934, File 3541: Chairman, General Indian Council (Napanee) to the Minister of the Interior, 16 June 1872.

⁷⁹ NAC RG 10 Vol. 1925 File 3108: 1871 *Indian Act* drafted by Chief J. S. Kerr enclosed in a memorandum addressed to Deputy Superintendent General Vankoughnet, 1874.

⁸⁰ S. C. 1869 c. 6 (32-33 Vict.) Section 4.

⁸¹ S. C. 1869 c. 6 (32-33 Vict.) Sections 5 and 7.

⁸² For details see Leslie, *Historical Development of the Indian Act*, pp. 55-7.

⁸³ Canada acquired the North West Territories from the Hudson's Bay Company in 1870 and Manitoba was created as the fifth province. In 1873 British Columbia and Prince Edward Island joined confederation as the sixth and seventh provinces.

... cautioned the members of the House that "they should not attempt to act in any way contrary to the views of the Indians, at least as far as their rights to property were concerned" and "this was the policy of the Administration".⁸⁴

With regard to the status of Indians in Canada, shortly after the act was passed the Deputy Superintendent General asserted that "the legal status of the Indians of Canada is that of minors, with the Government as their guardians."⁸⁵ On introducing the Bill, Minister Laird made reference to enfranchisement and stated that "Indians must either be treated as minors or as white men".⁸⁶

In general the 1876 *Indian Act* reduced reliance on the Governor-in-Council and gave more discretionary power to the Superintendent General of Indian Affairs.⁸⁷ The election system remained intact under Section 62 with incompetence added as a reason for deposing a chief. The authority to depose chiefs was extended to the Governor-in-Council as distinct from the Governor alone. In addition under Section 61 eligible voters were defined (male, 21 years) and the required vote was specified as being a majority at a meeting or council of the band. While a meeting could be held according to the rules of the band it had to be conducted in the presence of the Superintendent General or his agent. Thus, the Crown assumed the right to monitor band elections.⁸⁸

The principle that land could only be surrendered to the Crown remained in the 1876 act and the procedure for taking a surrender was altered to require the consent of the majority of adult male members of the band rather than the consent of the Chief(s) alone.⁸⁹ Reserves could be divided into individual lots with location tickets being issued for individuals; the ultimate control of the location ticket system rested in the Superintendent General.⁹⁰

⁸⁴ Leslie, *Historical Development of the Indian Act*, p. 60.

⁸⁵ NAC RG 10 Vol. 1995, File 6886: L. Vankoughnet, Memorandum to the Indian Branch, Department of the Interior, relative to the Policy of the Government of the Dominion in their administration of Indian Affairs, 22 August 1876.

⁸⁶ Leslie, *Historical Development of the Indian Act*, p. 60.

⁸⁷ Leslie, *Historical Development of the Indian Act*, p. 69.

⁸⁸ *An Act to amend and consolidate the laws respecting Indians*. Statutes of Canada 1876, Chap. 18. (39 Vict.)

⁸⁹ S. C. 1876 c. 18 (39 Vict.) Sections 25 to 28.

⁹⁰ S. C. 1876 c. 18 (39 Vict.) Sections 6 to 10.

The definition of who was an Indian became more restrictive. Provisions were added that allowed the Superintendent General to exclude illegitimate children, those who were absent in a foreign country for more than five years without permission, and those who had taken scrip.⁹¹ The loss suffered by women excluded by marriage was only somewhat mitigated by a provision allowing for their annuities, interest payments and rents to be commuted by a ten-years purchase.⁹²

Since the inception of Indian legislation the Crown assumed legislative authority for determining who would be recognized as an Indian and thus be entitled to benefits conferred by treaty, by statute, and by departmental policy and practice. The way that membership provisions were written into the *Indian Act* reflected underlying assumptions that persisted from the early 19th century: the Indian population would and should disappear as a distinct group, family status was properly determined through the male line, and all rights and obligations flowing from treaties or legislated by the Crown could only be claimed by those meeting *Indian Act* membership criteria.

The combination of restricting membership and encouraging enfranchisement resulted in an aboriginal population in Canada that became divided in a way that was inconsistent with their own history and internal identity and that interfered with traditional patterns of social and political organization.

While the general framework of the 1876 *Indian Act* remained largely intact, various amendments tended to loosen the protection afforded to reserve lands. These changes give insight into the underlying belief that communal reserve lands should ultimately be divided into individually held property and that reserve land could not interfere with the priorities of the dominant society. For example, amendments gave the Superintendent General authority to lease lands under particular circumstances without band consent, and after the First World War the Superintendent General could issue location tickets to returning soldiers without band consent.⁹³

⁹¹ S. C. 1876 c. 18 (39 Vict.) Section 3(3).

⁹² S. C. 1876 c. 18 (39 Vict.) Section 3(3)(c).

⁹³ RCAP, *Report of Royal Commission*, Vol. 1 pp. 282-3. The 1894 and 1895 amendments gave the Superintendent General authority over lands held by disabled persons, widows and minors and location ticket holders who could not or would not cultivate their lands. In 1918 he was authorized to issue grazing leases without consent of the band. Also in 1894 the Superintendent General had sole authority to allow non-Indians to reside on reserve.

Similarly, the agenda of assimilation was furthered in changes to the governance provisions. Changes to the electoral system were made in 1880 which limited the number of representatives on council (perhaps to limit the number of officials with whom the Crown had to deal or to reduce the cost of higher payments to councillors). More significantly it forbade life-chiefs from exercising power in any form unless they had also been elected.⁹⁴ Subsequent changes introduced penalties for anyone involved in fraudulent or irregular elections,⁹⁵ and for chiefs and councillors deposed from office.⁹⁶

Another system of election – the one year elective system of the *Indian Advancement Act* – was initially proposed as a municipal style government.⁹⁷ Sir John A. Macdonald, who was Superintendent General of Indian Affairs at the time, described the intention of the legislation in 1880:

It is worthy of consideration whether legislative measures should not be adopted for the establishment of some kind of municipal system among such bands as are found sufficiently advanced to justify the experiment being tried. It is hoped that a system may be adopted which will have the effect of accustoming the Indians to the modes of government prevalent in the white communities surrounding them, and that it will thus tend to prepare them for earlier amalgamation with the general population of the country.⁹⁸

The persistent features are readily apparent in Macdonald's statement: the readiness of the government to impose systems on the First Nations and the intention to establish band councils as municipal style governments with assimilation as the final objective. Also apparent is the underlying premise that this white style of government was decidedly superior to any form of existing Indian government. Furthermore, the First Nations would have to be "sufficiently advanced" to take on the system and would become even more "advanced" by practicing it.

⁹⁴ *An Act to amend and consolidate the laws respecting Indians*. Statutes of Canada 1880, Chap. 28 (43 Vict.) Sections 72 and 73.

⁹⁵ *An Act respecting Indians*. Short title. *The Indian Act*. Revised Statutes of Canada 1886, Chap. 43 Section 75.

⁹⁶ *The Indian Act*. Statutes of Canada 1894, Chap. 32 (57-58 Vict.) Section 5.

⁹⁷ Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation, 1868-1951*. (Ottawa: Research Branch, Department of Indian and Northern Affairs, 1980), p. 10.

⁹⁸ Canada. Department of Indian Affairs. *Annual Report*, 1880, p. 8: Superintendent General Sir John A. Macdonald to Sir John Douglas Sutherland Campbell, Marquis of Lorne, Governor General of Canada.

The *Indian Advancement Act* was designed to give slightly more power to the council headed by a reeve or mayor. Like the election provisions of the *Indian Act*, an Order-in-Council was required to apply the provisions.⁹⁹ The eligible voters (males, 21 years and over) elected councillors who in turn elected a chief councillor. The Superintendent was empowered to admit or reject eligible voters and the agent regulated all business done at meetings. Again the response from First Nations was largely negative, as few chose to assume the proposed system and some of those who were interested in the act were judged incapable by their agents. It was applied to a few First Nations in British Columbia in 1886, 1889 and 1894.¹⁰⁰ Of interest was an 1886 amendment that allowed the agent to cast a deciding vote in the event of a deadlock.¹⁰¹

By 1895 the Department had placed a number of bands in the older provinces under the elective system.¹⁰² Despite 1897 reports that the First Nations had been reluctant to adopt the election system that had been in place for almost thirty years,¹⁰³ in 1899 a general Order-in-Council placed all bands in Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island under the election system.¹⁰⁴

The *Indian Advancement Act* was consolidated as part II of the *Indian Act* in 1906. A noted amendment was authorization of the Superintendent General to depose councillors for a variety of offenses.¹⁰⁵

⁹⁹ *An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers.* Statutes of Canada. 1884, Chap. 28 (47 Vict.)

¹⁰⁰ Daugherty and Madill, *Indian Government under Indian Act*, pp. 17-20.

¹⁰¹ *The Indian Advancement Act.* Revised Statutes of Canada. 1886, Chap. 44 (49 Vict.) Section 3.

¹⁰² NAC RG 10 Vol. 7920, File 32-1, Vol. 1 p. 1: "System of Election of Appointment of Chief and Councillors in the varying Provinces" by H. C. Ross, 4 February 1911. An Order-in-Council of 15 June 1895 placed 42 bands in Ontario, six in Quebec and seven in New Brunswick under the election provisions.

¹⁰³ Canada. Department of Indian Affairs. *Annual Report*, 1897, p. xxv: Deputy Superintendent Jas. A. Smart to Superintendent General Clifford Sifton, 31 December 1897.

¹⁰⁴ NAC RG 10 Vol. 7920, File 32-1, Vol. 1 p. 2. There were some exceptions including the Six Nations and Oneidas of the Thames who retained their hereditary systems. The bands in Treaty Three were also excepted.

¹⁰⁵ *An Act respecting Indians.* Revised Statutes of Canada. 1906, Chap. 81 Section 193.

The 1906 act also introduced significant changes regarding the protection of land. Under pressure to make lands in western Canada available for settlement, the *Indian Act* was amended to provide increased incentives to Bands to surrender reserve land. Previous to the 1906, only 10% of the proceeds of any sale of Indian land could be distributed to band members, while the balance had to be funded for the benefit of the First Nation. The 1906 amendments allowed for a distribution of up to 50% to encourage surrenders.¹⁰⁶

In addition, the act was amended several times to allow public bodies with expropriation powers to take reserve land upon agreement of the Governor-in-Council and without a surrender or consent of a band. The earliest legislation only provided for the Secretary of State to act for a band in obtaining compensation for damages suffered when a right-of-way passed through a reserve.¹⁰⁷ In 1887 an amendment required that the consent of the Governor-in-Council be obtained before any reserve land was taken for a road, railway or public work.¹⁰⁸ By 1911 the act had been further amended to allow any entity with expropriating powers to exercise those powers on reserve land with the consent of the Governor-in-Council.¹⁰⁹ While this legislation provided for compensation, First Nations have strongly opposed the taking of their land without their consent "because of its powerful invasive effect on the reserve land base. Even the threat of its use was often sufficient to force bands to comply by surrendering lands 'voluntarily'."¹¹⁰

Reflecting on the emphasis in the consolidated and revised 1906 act, Leslie observed that since the North West Rebellion of 1885 and the drafting of the 1886 act:

... the Government had increased its influence over Indian moral behaviour, means of livelihood, land resources and capital funds, and had effected little legislation which gave Indians more control over their own affairs.¹¹¹

¹⁰⁶ R. S. C. 1906, c. 81 (6 Edward VII).

¹⁰⁷ *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands.* Statutes of Canada. 1868, c. 42 (31 Vict.).

¹⁰⁸ *An Act to Amend the Indian Act.* Statutes of Canada. 1887, c. 33 (50-51 Vict.).

¹⁰⁹ *Indian Act.* Revised Statutes of Canada. 1927 c. 98.

¹¹⁰ RCAP, *Report of Royal Commission*, Vol. 1 p. 284.

¹¹¹ Leslie, *The Historical Development of the Indian Act*, p. 104.

Meaningful management of reserve lands remained within the jurisdiction of the Department of Indian Affairs and outside of the power of the First Nation. The RCAP report asserted:

By the time of the 1951 *Indian Act* revision, bands and band councils were no longer in a position to exercise any real control over their reserve lands beyond refusing to consent to land surrenders for sale or attaching conditions to such surrenders. This situation has continued almost unchanged to the present day. Many bands complain that the high degree of federal control over their land use decisions is preventing them from taking advantage of commercial and development opportunities in the modern Canadian economy.¹¹²

IV. HAS THE INDIAN ACT FAILED?

To assess success or failure one must have a stated goal or objective against which to measure performance. What goal shall we use? The precursors of the *Indian Act* were outspoken in their intentions. That legislation sought to prevent "encroachments upon and injury to [Indian] lands in Lower Canada,"¹¹³ protect their brethren in Upper Canada in the "unmolested possession and enjoyment"¹¹⁴ of their lands and property, and "encourage their gradual Civilization."¹¹⁵ Departmental officials repeatedly asserted that the *Indian Act* would assist the First Nations to become self-sufficient and assimilate or at least integrate into the dominant society.

It is well-known that almost all First Nations have lost substantial amounts of reserve land. Thus the act failed in its stated goals to protect Indian land but succeeded in its underlying goal to facilitate the freeing up of land to non-Native access and settlement. That being said it is difficult to imagine how well communally-held reserve land would have survived without the protection contained in the act, for one of the few areas where bands have been able to exercise control has been in refusing to surrender land.

¹¹² RCAP, *Report of Royal Commission*, Vol. 1 p. 285.

¹¹³ *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*. Statutes of Canada 1850, c. 42 (13-14 Vict.) Preamble.

¹¹⁴ *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*. Statutes of Canada 1850, c. 74 (13-14 Vict.) Preamble.

¹¹⁵ *Act for the Gradual Civilization of the Indian Tribes in the Canadas*. Statutes of Canada 1857, c. 6 (20 Vict.)

The provisions restricting membership and encouraging enfranchisement were intended to end the separate and distinct status of First Nations people. The persistence of a status population clearly shows that this goal was not achieved. In 1876 there were 95,280 registered Indians in the provinces and North-West Territories.¹¹⁶ This population more than tripled over the next one hundred years to reach 360,241 in 1985.¹¹⁷ As of the year 2000 the registered population reached 675,499.¹¹⁸ Most of this increase was because of amendments to the *Indian Act* which allow previously enfranchised individuals to regain Indian status and many of their descendants to register for the first time. Clearly the special status of First Nations people has persisted despite the restrictions in the act.

What is much more difficult to project is the potential size of the aboriginal population if the *Indian Act* membership and enfranchisement measures had not been in force. Had the reserve communities been free to practice their chosen form of government, how would that government have evolved? How would First Nations economies have developed under regimes of their own design?

Our examination of both the administration of Indian affairs and the particulars of the legislation indicate that "civilization" meant abandoning all traditional systems, beliefs and practices and becoming self-sufficient in a manner indistinguishable from the wider society. The provisions of the *Indian Act* and the policy framework established for the department attempted to destroy all traditional political systems and replace it with a municipal style of governance that allowed a very limited degree of internal control. The limits placed on the powers of Chief and Council historically have severely constrained the ability of First Nations to develop their communities. The *Indian Act* has failed to

¹¹⁶ C.P. Sessional Papers. *Annual Report of the Department of Indian Affairs for the year ending 30 June 1977*: Return G Census of Resident and Nomadic Indians in the Dominion of Canada, by Province, pp. 169-171; RCAP, *Report of Royal Commission*, Vol. 1 p. 1 gives the aboriginal population in 1876 as 102,358.

¹¹⁷ Canada. Lands Revenues and Trust (Operations), Department of Indian Affairs and Northern Development. *Indian Register Population by Sex and Residence for registry groups, responsibility centres, regions and Canada, December 31, 1985*. (Ottawa: Department of Indian Affairs and Northern Development, 1986) "Indian Register Population by Type of Residence for Regions and Canada, December 31, 1985" p. xv.

¹¹⁸ Canada. Information Management Branch, Department of Indian Affairs and Northern Development. *Registered Indian Population by Sex and Residence 2000*. (Ottawa: Department of Indian Affairs and Northern Development, 2001) "Registered Indian Population by Sex and Type of Residence by group, responsibility centre and region 2000" p. 1.

meet this objective as reserve communities are not self-sufficient and an astonishing proportion of First Nations people are suffering third world standards in a first world country.

The Crown's assumption of responsibility for First Nations appears throughout the *Indian Act* legislation but the scope falls far short of the relationship that First Nations claim to have achieved through the historic treaty process. However, to judge the *Indian Act* a failure for not upholding treaty promises is perhaps inappropriate. The fact that some treaty obligations were subsumed under the act was linked to the Crown's failure to pass distinct legislation to implement the treaties as well as the fact that the Indian Department mixed the administration and management of some treaty obligations, such as the distribution of annuities, with the operations of other duties and obligations.

Clearly no one believes the *Indian Act* has succeeded. This has been the conclusion of every study into Indian affairs from the 19th century commissions of inquiry to the most recent Royal Commission on Aboriginal Peoples.

V. CONCLUSION

The *Indian Act* is a seriously flawed piece of legislation that has persisted for over a century and become institutionalized and entrenched. Both the *Indian Act* and the Indian Department have evaded every attempt at substantial reform. As such the oppressive, restrictive and discriminatory principles of this 19th century legislation have been carried into the modern era. The act does not reflect the needs of the various and diverse First Nations and has never been responsive to their attempts to redraft it in the image of their own aspirations.

While First Nations are reluctant to abandon the *Indian Act* because it both symbolizes the duties owed the Crown and provides protection of community resources against alienation by individuals and outside interests, it does not allow for full development and self-determination. Nor is the *Indian Act* an appropriate vehicle for implementing historic treaty obligation and responsibilities.

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