The Indian Act: An Historical Perspective

by John F. Leslie

In 2001 the Minister of Aboriginal Affairs, Robert Nault, announced that the government would be introducing legislation to overhaul the Indian Act. In anticipation of this legislation in February 2002, the House of Commons Standing Committee on Aboriginal Affairs began hearing from various witnesses on issues relating to the Act. For the sake of simplicity, this article uses the term "Indian" throughout. The Constitution states that Canada's Aboriginal Peoples are Indians, Métis and Inuit, but the Indian Act does not apply to Métis and the 1951 Indian Act specifically excludes Inuit from its operation.

The *Indian Act* is a complex piece of legislation that has evolved in scope, content, and sophistication since about the mid-19th century. The philosophical principles and practices of Indian policy are reflected in the legislation of the period. A couple of points should be kept in mind.

Historically, Indian policy and legislation was devised largely without Indian consent or participation. The 1951 Indian Act was an exception. A more recent example of lack of meaningful consultation was, of course, the 1969 white paper. Both Indian policy and *Indian Act* legislation were developed by members of the dominant society, and they reflected the views and values of that society in regard to the proper place and role of aboriginal people. There was this constant, lingering Indian question in Canada.

Historical Origins of Indian Policy and Administration

The key historical document in terms of gaining an understanding of the evolution of Canadian Indian policy and legislation was the *Royal Proclamation* of 1763. The *Royal Proclamation* set down a policy and procedure for the Crown to acquire, in an orderly fashion, Indian hunting grounds. The *Royal Proclamation* also affirmed the first major principle of British Indian policy: that Indian people on Indian lands were to be protected from unscrupulous land speculators and traders. Indeed, the land cession treaty system of present-day Ontario and western Canada can be traced back to the *Royal Proclamation*.

Officials of the Indian Department which was founded in 1755 were expected to be custodians of the imperial policy of Indian protection, and were instructed to oversee and manage the acquisition of Indian lands required for European settlement. This role was expanded after 1830.

The traditional roles of Indian people in early colonial society were to act as middlemen in the fur trade and to assist regular armed forces in times of war. These activities were carried out with distinction during both the French and British regimes. In these traditional functions, Indian people shared, to a degree, in decision-making, devising trade practices, and planning military operations.

However, following the end of the War of 1812, the traditional roles for Indian people in colonial society declined rapidly. British and Canadian policy-makers were faced with determining a new role and place for Indians

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in colonial society. Instead of abandoning Indian people to face the harsh, new political and economic realities, the first principle of Indian policy, that of Indian protection, was reasserted. The new approach was simple and direct: place Indian people temporarily on reserved lands – convert them to Christianity, dress them in European clothes, and teach them to become self-sustaining British citizens by becoming productive farmers.

Policy-makers of the day were optimistic that the process of Indian assimilation would be rapid. Indian people per se would disappear through intermarriage and other processes, as would their lands, the reserves. In the beginning, there was no obvious need for protective Indian legislation.

The Pre-Confederation Legacy

The Indian civilization program, which was launched in 1830, was based on three philosophical principles: Indian protection, based on the *Royal Proclamation*; improvement of Indian living conditions; and Indian assimilation into the dominant society. The new policy had three systemic cornerstones: a system of land cession treaties, which we see in Upper Canada, which is now Ontario and western Canada; a system of Indian reserves and supervisory Indian agents; and a system of schools to educate Indians, first at day and industrial schools, and later at residential schools.

Between 1830 and 1858, there were six government investigations of Indian policy and the new administrative arrangements. The cumulative investigations sanctioned the Indian civilization program and, in essence, created an institutional memory for Indian Affairs policy-makers that, in subsequent decades, informed their attitudes towards Indian people and Indian issues. Interestingly, as early as the 1840s, these government investigations recognized that Indian policy and administrative practices were too paternalistic, but no other arrangements were broached or deemed viable. Officials were satisfied with the *status quo*.

The first piece of legislation to protect Indian reserves was passed in Upper Canada in 1839, and what it did was basically include Indian lands in with crown lands. There was no separate distinction. But by mid-century, 1850, government officials realized that the transformation of Indian people into productive farmers was not proceeding as rapidly as expected. Rapid settlement and commercial development, particularly in Canada West – which would become Ontario – necessitated some more elaborate legislative protection for Indian people and their lands.

This protection came in 1850, when the Province of Canada, which at that time comprised Ontario and Quebec, passed two pieces of legislation to protect Indian reserve lands and property. The legislation that applied to Canada East – which became Quebec – is noteworthy because a four-point definition of who constituted an Indian in government eyes was provided for the first time. In the legislation for Canada West, section 4 of the act established the practice that no taxes would be levied on Indian people living on reserve lands.

By the late 1850s, Indian policy-makers were becoming impatient with the slow progress of Indian assimilation. As a consequence, in 1857, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, was proclaimed. This legislation set down a policy and procedure whereby all legal distinctions between Indian people and non-natives would be removed under certain conditions. This act was clarified further in 1859 and 1860. As well, in 1859, the 1850 legislation to protect Indian lands was strengthened, with numerous penalty clauses and additional authority for those officials enforcing the legislation.

In 1858, British officials notified their Canadian counterparts that they were no longer interested in financing Indian administration. As a result, responsibility for the evolving system of Indian legislation, a growing administrative apparatus, and increased expenditures, was formally turned over to the Province of Canada in 1860. In effect, Canada was now on its own.

Confederation

So what were the main features of Indian policy, administration, and legislation, at Confederation in 1867? First, as in colonial times, Indian administration was deemed too sensitive a policy field to be left to the various provinces. It was going to be a federal responsibility. Protection of Indian people and Indian lands became a federal responsibility under section 91, class 24, of the *British North America Act*.

Second, the new federal government, largely made up of officials from the Province of Canada, looked no further than the pre-Confederation Indian policy and administrative arrangements and applied the three systems of treaties, reserves, and Indian education across the Dominion, with regional variations to meet local circumstances and conditions.

Third, after 1873, Indian Affairs became a branch of the Department of the Interior and remained under the jurisdiction of the minister – who, in 1880, was Sir John A. Macdonald – until 1936, a period of some 63 years.

In the decades after Confederation – in fact, I would argue it was until 1940 – the policy, administrative, and legislative framework for dealing with Indian people and

Indian issues, as established in colonial times, became the basic model for a more elaborate and comprehensive federal approach. Remarkably, however, the philosophical assumptions behind Indian policy and Indian legislation were not questioned, nor was the viability of the land cession treaty systems, the reserves, and education.

In 1876, the Indian Affairs branch consolidated all the existing pre-Confederation legislation, with some modifications, into one consolidated *Indian Act*, meaning that the first consolidated Indian Act came in 1876. It is interesting to note that the *Indian Act* actually came after some of the treaties. The western treaties that were negotiated, Treaty No. 1 through Treaty No. 6, 1871 to 1876, preceded the *Indian Act*. Many Indian people in western Canada say the relationship is not with the *Indian Act*, it is with the treaties, because the act came after the treaties.

The first post-Confederation *Indian Act* was comprehensive. It contained a hundred sections, it touched on all aspects of Indian reserve life, and it directed government administration. For example, various sections dealt with who was an Indian; what constituted an Indian band; what was an Indian reserve; how Indian reserve lands could be subdivided via location tickets; what legal protections would be given to reserves; and how reserves could be surrendered. There were also rules for the management and sale of minerals and timber; procedures for the disposition of Indian moneys; enumerated powers for the chiefs and band councils; band election procedures; specific Indian privileges – for example, "no taxation" was repeated; disabilities and penalties; and procedures for Indian enfranchisement – that is, for loss of Indian status.

The 1876 *Indian Act* was modified and tightened in 1880. The major provisions of this act remained in place until 1927, despite some thirty amendments when the *Indian Act* was finally revised. In 1884, *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* – that is the actual title of it – was passed by Parliament. This legislation became know as the *Indian Advancement Act*, and its focus was mainly on the bands of eastern Canada. The measures were designed to promote municipal-style government for the more advanced Indian groups, such as the Six Nations at Brantford.

In spite of the official optimism, events were not progressing as politicians and officials had hoped, particularly in the west. Old Indian ways persisted. The policy of Indian assimilation was not showing tangible results. In the view of government officials, a relatively effortless way of dealing with the apparent lack of progress was to revise the *Indian Act* to give more powers to local Indian agents and to heavily penalize Indian people for persisting in the old ways. For example, in the 1880s, Indian agents acquired additional powers as justices of the peace in order to prosecute Indians. In April 1884, the *Indian Act* was amended by section 3, which placed a ban on dances and traditional ceremonies. In 1894, section 11 gave the Minister of Indian Affairs the power to direct industrial or residential schools, and made school attendance compulsory, with strict truancy penalties. And in 1927, a section 141 was inserted into the act, banning the pursuit of land claims.

To get some idea of the state of official thinking on Indian policy in the early decades of the 20th century, one need not go further than quoting Deputy Superintendent-General Duncan Campbell Scott in his remarks to the 1920 Special Committee of the House of Commons examining the *Indian Act* amendments of 1920, when he spoke about new legislative measures for compulsory enfranchisement of Indians:

> Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the object of this Bill.

Despite the intentions of policy-makers, Indian peoples did not disappear. Quite the contrary. By the 1930s, Indian agents and missionaries noted a significant increase in the native population. With government cutbacks during the Great Depression and with more Indians crowded on reserve lands, living conditions on reserves became increasingly unbearable. There seemed to be no ready solution to the long-standing Indian question. In fact, Indian branch officials did not know precisely how many Indians there were in Canada, because Indian band lists were maintained in a haphazard fashion by the local agents.

The plight of Canada's Indian peoples became a matter of national concern at the close of World War II, when the House of Commons Special Committee on Reconstruction and Re-establishment was struck. This committee was charged with looking into the nature of Canadian society after the war. In this period of national account-taking, Indian reserve conditions and Indian policy and administration came under sustained public scrutiny for the first time since before Confederation.

Between 1946 and 1948, a special joint committee of the Senate and House of Commons examined the operation of the *Indian Act* and Indian administration. Witnesses were called, including government officials, select native groups, and interested parties.

Three years of committee hearings produced significant policy and administrative recommendations. For example, the special joint committee came up with its own *Indian Act*, and this became known as the "Commit-

tee's Bill". The committee proposed that Indian people receive the federal vote, which they had once possessed in the 1880s but had lost on technical grounds. The committee suggested that an Indian claims commission be established to deal with long-standing grievances that were impeding Indian participation in Canadian society. The committee felt the minister had too many discretionary powers and that these should be reduced in a new act. The committee argued that Indian bands should be able to develop their own charters or constitutions for self-government – and that is the term they used back in the 1940s, "self-government" – and that the bands should be allowed to incorporate and hold title to reserve lands. Finally, the long-standing policy goal of Indian assimilation was modified by the committee hearings, to one supporting Indian integration.

From 1948 to 1950, government officials considered the special joint committee's proposals and rejected most of them: the federal vote, the claims commission, and the notion of Indian band constitutions and incorporation. In June 1950, revised *Indian Act* legislation was presented to the House of Commons. It was soon withdrawn because Indian people and their supporters claimed they had not been formally consulted. A revised bill was reintroduced in the fall of 1950 and was reviewed by select Indian leaders in a five-day session in Ottawa in the winter of 1951. A new *Indian Act*, the one currently in force, was proclaimed in September 1951.

The 1951 *Indian Act*

The revised *Indian Act* of 1951 was not a radical departure from earlier versions. It essentially tidied up and removed conflicting sections. In many ways, it was an exercise in legislative housekeeping. There were few significant departures. There was no claims commission, and there was no federal vote for the Indians. The ban on dances and ceremonies was lifted, as was the ban on the pursuit of land claims. The discretionary powers of the minister were reduced in number, as were the number of penalty clauses against Indians. Chiefs and band councils received more powers to act as municipal-style governments – in particular, greater freedom to spend band revenues as they saw fit. And perhaps the most significant features of the revised act were a new legal definition of who was entitled to be an Indian, and the establishment at Indian branch headquarters of a central Indian registry.

In many respects, the need to specifically identify who was an Indian – at least in government eyes – and was thus entitled to receive government benefits such as mothers' allowances and old age pensions, was prompted by the advent of the post-war welfare state. The passage of the revised *Indian Act* suggested to policy-makers that Indian administration had set out on a new and enlightened course for the 1950s.

The 1950s were relatively uneventful until the arrival of the John Diefenbaker Conservatives in 1957. Under the aegis of the Diefenbaker Government, there were several major initiatives. Between 1959 and 1961, a second joint committee of the Senate and the House of Commons reviewed Indian administration. A series of recommendations made in 1961 were actively pursued by the government, including establishing an Indian Claims Commission and carrying out *Indian Act* revisions.

In 1962, a bill to establish a claims commission was introduced in Parliament, but the measure died when the government was defeated in 1963. Similarly, the Diefenbaker cabinet was working on significant changes to the *Indian Act* in late 1962, including band incorporation and allowing women to keep their status even if they married non-Indians. However, these were not pursued due to the government's defeat.

Despite these failures, the Conservative government did introduce two significant legislative measures. In 1960, Indian people received the federal vote, and in 1961, section 112, concerning compulsory Indian enfranchisement provisions, was deleted from the *Indian Act*.

When Lester B. Pearson's Liberal Government came to power in 1963, Indian claims legislation was reintroduced in Parliament. The government also commissioned an in-depth study of Indian economic, educational, and political needs. This was the Hawthorn-Tremblay report, which presented a two-volume study to government in 1966-67. That report is noteworthy for introducing the notion of Indian people as "citizens plus'", and it called upon the Department of Indian Affairs, which had been established as a stand-alone in 1966, to assume an advocacy role for Indian people within the federal bureaucracy.

The 91 Hawthorn proposals were under consideration when the government decided to launch a series of Indian consultation meetings across Canada to revise the *Indian Act*. The round of Indian consultations began in 1968 and continued until the spring of 1969. The consultation process revealed that Indian people wanted greater self-government; more funds for economic and social development; settlement of land claims; protection of treaty rights; and constitutional recognition of aboriginal rights.

The government response was the June 1969 Statement of the Government of Canada on Indian Policy, the infamous white paper. Instead of buying into the notion of Indians as "citizens plus" and settling land claims, the discussion paper called for an end to Indian status, which was viewed as discriminatory. The white paper also

called for the termination of the operations of the Department of Indian Affairs, and revised legal status for Indian reserve lands. A commissioner of Indian claims was appointed to examine how Indian claims and treaty issues should be adjudicated.

In many ways, the 1969 white paper went right back to the 19th century. It was straight assimilation. The federal policy proposals caused a political uproar among Indian people and their supporters. The discussion paper was formally withdrawn in 1970, but it left a bitter legacy.

The Indian consultation process and the resulting white paper experience created a termination psychosis among Indian people and their political institutions. Did the federal government have a hidden Indian policy agenda? This unease has coloured Indian-government relations for many years, and has made both policy and legislative change difficult. Yet there were significant policy and legislative developments, many driven by Supreme Court decisions. Some are worth noting in a brief fashion.

For example, following the Calder decision in the 1970s, the federal government announced a set of specific and comprehensive land claims policies to deal with historic grievances. Later in the decade, the government thought it might be a good idea to get the National Indian Brotherhood and cabinet together in order to establish some sort of a joint committee that would look at policy issues . This started around 1974 and lasted two or three years, but it produced no tangible results.

The 1980s were productive. The *Charter of Rights and Freedoms*, proclaimed in the early 1980s, had a section providing constitutional protection for treaty and aboriginal rights. Indeed, the *Royal Proclamation* of 1763 was deemed to be one of Canada's constitutional documents. In November 1983, the Special Parliamentary Committee on Indian Self-Government presented its findings and urged expanded powers for first nations governments, which in some instances would go beyond the traditional municipal model. Of course, in 1985, we then had Bill C-31, which was passed by Parliament to reinstate Indian women who had lost their status under paragraph 12(1)(b) of the 1951 *Indian Act*.

In the 1990s, of course, Indian Affairs announced a policy on the inherent right to self-government. There was also a royal commission appointed between 1991 and 1996, to investigate the condition of Canada's aboriginal peoples. And more recently, we have had the *First Nations Land Management Act*.

These initiatives and events are, of course, only highlights of the continuing efforts by the federal government – with varying degrees of provincial assistance – to improve living conditions on Indian reserves, which are still comparable to the fourth world in some instances. But after 247 years of formal Indian administration, we are still grappling with an Indian question in Canada.