

ANOTHER LOOK AT CANADIAN HISTORY....

From A Medicine Wheel on the Indian Act

Over the centuries it was assumed by various governments that the “Indian problem” would solve itself as Aboriginal peoples *died off from diseases or wars*. The survivors would be absorbed into the larger society.

Between 1876 and 1960, the “*Indian Act*” served as the primary legal framework for federal policy-making. The Canadian government’s policy of *forced assimilation* explains, in part, the extraordinary pressures placed on Aboriginal peoples over the past century. The *Indian Act* was used to cancel collective and individual rights to traditional forms of governance, languages, economies and land use.

Canada’s first Prime Minister, John A. Macdonald, described the aim of the *Indian Act* as a statute intended to liquidate tribal existence and make all Indians ‘white-men in the eyes of the law’ His words in Parliament: “*The great aim of our legislation is to do away with the tribal system and assimilate the Indian in all respects with the inhabitants of the Dominion.*”

These same expectations were also later stated clearly by Indian Affairs deputy superintendent (1913-1932) Duncan Campbell Scott who wrote that his goal was “*to continue until there is not a single Indian in Canada that has not been absorbed into the body politic.*” Since the BNA Act, it has been the policy of the government of Canada to *terminate the rights* of Aboriginal Peoples. through a process called ‘extinguishment.’

Between 1876-1921, 11 Treaties were signed negotiating “land surrender” with First Nations across the continent.

In **1884**, Canada’s Parliament passed an “*Indian Advancement Act*” to target communities for schooling. Establishing residential schools was part of an *enfranchisement policy* applied to individuals and whole communities as a way of keeping on-reserve populations small, and even reducing them to nothing. First Nations children were expected to become divorced from their culture and families and move into mainstream society.

In 1960, a Parliamentary Committee concluded that it was an embarrassment to deny First Nations voting rights and citizenship in Canada. At the same time as declaring First Nations citizens, the real order of the day was to get rid of the *Indian Act* which in fact prevented people from being citizens. To dismantle the *Indian Act*, the federal government’s approach was basically to suggest making reserves into municipalities under provincial jurisdiction...

An alternative exit out of the *Indian Act* required that the spirit and intent of treaties be recognised and implemented. This is the avenue most First Nations wanted to travel. The government kept this exit firmly closed.

In 1969, Jean Chrétien, then Minister of Indian and Northern Affairs under Prime Minister Trudeau introduced his blueprint for assimilation, the “*White Paper*”.

The declared aim, in its lead paragraph, was “*full, free and non-discriminatory participation in Canadian society.*” Section 91(24) of the BNA Act would be cancelled. The Government would no longer be responsible for Indians and lands reserved for Indians. In Jean Chrétien’s view, treaties didn’t amount to much anyway. The government only had to fulfill a few “lawful obligations”.

Thus the intent to terminate/extinguish inherent Aboriginal rights was revealed. The implementation of the White Paper met with a huge backlash from First Nations and went underground.

In the **1982 Constitution Act (section 35)**, there are 15 little words affirming (but not defining) inherent Aboriginal rights.

In 1993, Jean Chrétien became Prime Minister, still with *White Paper* thinking, the only policy he knew. So the legislative initiatives and gradual strategies to get out of the Indian Act have varied. The ‘divide and conquer’ approach: negotiate band by band and region by region negotiating funding strategies with bands prepared to revisit the principles of the “*White Paper*”. The assimilative approaches: governance initiatives, treaty renewal proposals, treaty inducements, a Lands, Revenue and Trusts exercise, Bill 79, were all intended to gut the *Indian Act*.

When the federal government negotiates with Aboriginal communities that have not ceded their traditional lands, it requires that Aboriginal Peoples give up their rights, or title, to the large majority of their traditional territory as a condition of settlement. In return, Aboriginal Peoples receive a specified set of rights.

Linked to this is something the federal government called a “federal productivity covenant”. A federal policy aimed to help government stay out of a deficit position by redirecting spending by all departments- including Indian Affairs- to selected national priorities. These priority sectors are those which strengthen Canada’s economy and increase federal tax revenues.

Indian Affairs Minister, Mr.Nault declared: “*First Nation leaders must put aside their rights agenda and focus instead on creating jobs and building wealth in their communities.*” The message clearly is that First Nations are not pulling their weight in economic terms and are an unproductive drain on a federal budget which is dedicated to reducing the deficit.

According to reports prepared by Canada’s spy agency, the disproportionate numbers of First Nations youth on reserves are unemployed, untrained and restless and a ‘threat to Canada’s stability’. The government’s solution, in collaboration with the provinces, is to get young people off reserves and into training programs.

In 1930, the *Natural Resources Transfer Act (section 12)* which transferred resources to the three Prairie Provinces, suggested that a First Nation equity in resource wealth is a federal

constitutional obligation. Still today, there are countless unresolved issues of resource development on First Nations traditional lands. (Oil, Uranium, minerals, forests, hydro, natural gas etc...). The federal government has had no interest in addressing its trust obligations insofar as sharing Canada's resource wealth. Lobbies from industry have more power. A letter from the 'Canadian Association of Petroleum Producers' to Mr. Nault, reads more like a threat to settle claims with finality or the industry will shut down and pull out \$20 billion investments!

In **1986**, *Bill C-110* introduced compensation settlements to eliminate claims. There are more than 1200 specific claims of Aboriginal title that have been filed to date.

In **1997**, the Supreme Court of Canada *Delgamuukw Decision* legally recognised the existence of Aboriginal Title in Canada.

According to a report dated November **2002**, lawsuits now under way pose a potential liability to the federal treasury of \$44 billion dollars.

In November **2003**, Chrétien introduced the passage of a series of legislation, amendments and regulations intended to finish the job he started .

Bill C-6 Specific Claims Resolution Act is to legislatively entrench the federal conflict of interest by creating two national institutions (a Commission and a Tribunal appointed by the Prime Minister's Office) designed to limit and cap the 'lawful obligations' of the Crown owed to First Nations. It imposes limits on the kinds of claims that can be accepted: no claims for language or cultural loss, no personal claims, no claims related to aboriginal title or the spirit and intent of treaties. This act remains stuck in a Senate Committee.

Bill C-19 First Nations Fiscal and Statistical Management Act: An act to provide for real property taxation powers of First Nations, to create a First Nations Tax Commission, Financial Management Board, Finance Authority and Statistical Institute ... all to prove that First Nations who do not have the 'capacity' or 'fitness' to manage can be legally governed by an outside authority, all without the consent of the community! This bill was being fast-tracked through a Parliamentary Committee. Has yet to get third reading in House of Commons.

The *Governance Act* introduced at the same time was meant to change the definition of local governments and legal persons. The basic intent of all this legislation was to ignore inherent Aboriginal rights and to turn Aboriginal territories into municipalities that collect taxes for government coffers. The Bill died at third reading because of procedural debates.

And in **2004** with Prime Minister Paul Martin

David Anderson, the ***Environment*** Minister was leading the charge to remove any clause in federal agreements with First Nations or in legislation that incorporates the non-abrogation and non-derogation clause in Section 25 of the *Charter of Rights and Freedoms*. Section 25 is supposed to acknowledge the *collective* nature of Aboriginal and treaty rights and protect them from other clauses, which deal with personal rights.

The ***Justice Department*** is engaged in an operation called “Legal Risk Management”

“*including contingency planning which focuses on identifying policies that may be at risk*”.

These strategies can then be applied to evade and delay any court judgements that threaten the direction of federal policy. So, all federal officials who are responsible for getting any kind of agreement with First Nations arrive with detailed instructions from the Justice Department on how such accords should be worded!

Royal Proclamation 1763

The Indian Provisions

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanours, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed, of which they stand accused, in order to take their Trial for the same.

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign. GOD SAVE THE KING

MORE BACKGROUND INFO...

Reserve Lands

There are nearly 2300 Indian reserves in Canada, governed by over 600 First Nations or Bands. The largest reserve in area is the Blood Reserve in southern Alberta. The largest in population is the Six Nations Reserve near Brantford, Ontario. They are all governed by the [Indian Act](#) and, especially by its land provisions, although only about half of the communities actually apply those provisions in allotting reserve lands to members. Generally speaking, non-Indians cannot live on, or otherwise use or occupy, Indian reserve land unless:

...the community has "surrendered" it to the Crown for sale and the non- Indian has an agreement with the Crown to purchase the land

... the community has "designated" it for leasing and the individual has entered into a proper lease

... the Minister has leased it for the benefit of an individual Indian or granted a permit for more limited use

All other occupation by non-Indians is a trespass. Agreements with individual Indians or Bands to use and occupy reserve land are void, preserving the exclusive right of the Crown to deal with Indians in respect of their lands as originally set out in the [Royal Proclamation](#). Except as noted below, reserve lands cannot be mortgaged, pledged or otherwise used as security for financing.

Reserve lands are not subject to seizure under legal process. They are subject to taxation by the First Nation itself, and to regulation, zoning and other competent laws made by Chief and Council. All of the above is governed by the [Indian Act](#).

Taxation

Contrary to popular belief, Aboriginal peoples are not generally exempt from taxation. The exemptions which do exist extend only to Indians, and then only in relation to reserve lands and to personal property of Indians situated on reserve. The relevant statutory exemptions are found in the [Indian Act](#). If a provincial law would have the effect of imposing a tax where the federal act would provide an exemption, the provincial law is invalid. The general rule is that provincial taxing laws can broaden exemptions for Indians but not limit exemptions prescribed by federal law.

Employment income earned on reserve, for example, is not subject to income taxation if the employee is a status Indian. This exemption is based on an interpretation of section 89 of the [Indian Act](#) which generally exempts all "personal property of an Indian situated on a reserve". Income has been held -- not without dispute -- to be personal property. So has electricity supplied by a utility.

It is an understatement to say that this is a highly charged political issue. In 1995, Revenue Canada offices in Toronto were being occupied by Aboriginal people protesting the introduction of new taxation guidelines that would expand the number of Indian employees subject to income tax. The common sentiment among First Nations is that such taxation is a breach of Treaty and Aboriginal rights as well as an erosion of exemptions historically acknowledged

Personal property on reserve is also exempt from provincial sales tax and G.S.T. Governments will frequently challenge, however, off-reserve purchases. The general rule is that goods purchased off-reserve to be consumed on reserve (e.g., take-out meals, furniture, etc.) are exempt. The fact that a reserve resident might use a car, for example, largely off-reserve does not make its purchase a taxable transaction. Similarly, services -- including professional services -- provided to a First Nation are considered to be provided on reserve and are not subject to G.S.T. These exemptions do not extend to Indians who live off-reserve if they do not consume the goods or services on reserve. Law and practice can, however, be very different.

There are additional exemptions for various commodities purchased by Indians. In Ontario, for example, provincial gasoline taxes and (notoriously) tobacco taxes are not imposed when these are purchased by Indians on reserve. Indian businesses traditionally object to collecting taxes in respect of purchases by non-Indians and these frequently, but not necessarily legally, go unrecorded. Most provinces have implemented quota systems to shorten the supply of tax-free cigarettes in First Nations communities, a clear effort to stem what is seen as widespread bootlegging of them off-reserve. It is fair to say that the high level of tax on tobacco products makes the distribution of untaxed tobacco a lucrative business.

Questions regularly arise in connection with importation of goods. Indians base their right to bring goods across the border duty-free on the 1792 Jay Treaty. In 1956, the Supreme Court of Canada ruled that this Treaty (and the confirming 1815 Treaty of Ghent) did not avail since neither had been implemented by domestic legislation: *Francis v. The Queen*. This too is a contentious and perennially current issue. Aboriginal peoples argue that their rights know no borders and regular border-crossings are held to assert these rights.

Business Problems

Financing for business and other purposes has long proved difficult because real and personal property of Indians or Bands located on reserve cannot be used as security or collateral: it is exempt from seizure by anyone other than an Indian or a Band. The same is true of Band bank accounts and other property that is notionally "on reserve". While this fact, and the tax exemptions noted above, make it attractive for Indians to deal with banks and trust companies with branches on reserve land, it has made it almost impossible to get large amounts of venture capital without government, a corporation or a joint venturer guaranteeing loans. Only in recent years have banks actively sought out this business.

- * Personal property purchased under a conditional sales contract can be seized since ownership remains with the vendor until payment is completed
- * Indians or Bands can execute against property and may act as assignees for value, or as trustees, for a non-Indian financier
- * Indian borrowers may be required by financing groups to incorporate since a corporation is not an "Indian" and corporate property is not exempt from seizure (the corporation, however, is also taxable)

Even making creative use of these exceptions, Indians and Bands have traditionally had little access to capital markets. Historically, the sale or lease of land has proved to be the

only real source of capital funding for communities. For this reason, there is serious concern about creating more exceptions because of the limited land base on most reserves and the unwillingness to put what land remains at risk. There are a fortunate few First Nations who derive significant income from oil and gas deposits on reserve: a half dozen such communities have vastly more money in their trust accounts than all of the other First Nations combined. Others, like Squamish and Musqueam in B.C. and Sarcee in Alberta, are close to or within urban settings which greatly enhances their leasing and other commercial opportunities. Location, then, can be a significant advantage but the basic law of Aboriginal business is the same and financing is always a problem.

Timing is also problematic. A community designation of land for leasing or business purposes involves a referendum process that may take two years to complete. The [*Indian Act*](#) strikes an unhealthy balance between protectionism and enterprise that is increasingly unworkable in the modern world. That Act, it should be noted again, does not affect Inuit or Métis or their lands.

Aboriginal Claims

Governments have been dealing with Aboriginal claims for about 20 years. There are two broad classifications under which claims can be negotiated with the federal government:

- * Comprehensive Claims, which are those based on Inuit or Indian Aboriginal title which has not been extinguished, meaning generally large claims in respect of traditional lands which are not subject to treaties. There have been major settlements of this kind in the north, but British Columbia remains a major and unresolved source of comprehensive claims.

- * Specific Claims, which are those involving breaches of Treaty promises, improper alienation of reserve or surrendered lands, loss of Band funds and other breaches of fiduciary duty to Indians. Government has settled 100 of the 6-700 claims that fall into this category.

There are published policies outlining how government deals with these two categories of claims. Government has also acknowledged "claims of a third kind": a catchall category for claims which do not fit into either of the above policies. There is no policy defining what types of claims these might be or how they are dealt with.

Because alienated lands and resources, once relieved of the Indian title, fall under provincial jurisdiction, provincial governments must also become involved in settlements which involve a return of lands or resources to Indians. This fact has frustrated many negotiations although there seems to be a greater provincial willingness to participate in recent years. Here again, the return of Crown resources to First Nations has provoked reaction in the non-Aboriginal community.

The land entitlement claim settlement with the Mississauga No. 8 community near Blind River is an example of a solution hotly contested by other residents of the area. This gives rise to concern that provinces may be more reluctant to engage in such unpopular processes in future. Many feel that the governments will slowly withdraw from all claims negotiations.

There are also many claims which are not negotiable under government guidelines. Loss

of traditional resources such as wild rice, fisheries, etc. is a prime example of a non-negotiable claim. Other historic grievances such as the wide-spread abuse of native children in residential schools are also not claims which government is prepared to negotiate. This is another common criticism of the existing claims processes. The court alternative has not proved to be attractive either, the [Guerin](#) case being one of the few court judgments which have held government liable for significant damages in respect of an Indian claim.

There has been a tendency, in recent years, to create commissions -- such as the Indian Specific Claims Commission or the [B.C. Treaty Commission](#) -- to deal with some of these issues, but there is no early indication that these commissions are part of the solution. It is certain that Aboriginal claims, including Métis claims which have not been dealt with at all, will be with us for many years to come.

Self-Government

The many initiatives that fall generally under the rubric of self-government are commonly seen as a fair and reasonable transition from government limitations imposed on Aboriginal communities and individuals to a modern, community-based self-actualizing form of government. This has many legal implications in terms of constitutional, legislative and jurisdictional issues: all complicated by an almost theological reliance upon a theory of "inherent rights" of self-government. Recognition of the inherent right of Aboriginal communities to govern themselves was a feature of the rejected Charlottetown Accord . If we cannot successfully address the comparatively simple public issues of hunting and fishing rights, it is difficult to see how we can advance very far with more difficult concepts such as the inherent right of self-government.

The Royal Commission on Aboriginal Peoples, has issued an interim report arguing that the right of self-government is constitutionally protected by section 35. There is scant judicial authority for that proposition. A much-diminished concept of self-government was set out in the federal government's 1995 Inherent Rights Policy which offers greater provincial intrusion into First Nations affairs, limitations on the range of powers that can be negotiated and no new funding for implementation. Many First Nations observers have seen this as the stalking horse for a new White Paper approach. While this may be an exaggeration, there is little in the new policy to make it attractive to First Nations.

The Inherent Rights Policy underscores the proposition that fiscal restraint will prevent major resources being available , even on an interim basis, to support expanded self-determination for Aboriginal communities. When one considers, however, the range of decision-making for Indian reserve communities, for example, which is partly or wholly subject to the discretion of the Minister or Governor in Council, perpetuation of the existing legislative scheme is simple injustice.

Aboriginal self-government replace a largely non-Aboriginal bureaucracy with an Aboriginal one.

In the far north, claims settlements such as the [Nunavut Agreement](#) create de facto self-government since the quasi-municipal local structures are well funded and subject to majority Inuit political control. The situation of Métis, who have no land base and no claims settlements, is quite different and there is no real process in place to deal with it. Another group which will be

seeking a measure of self-determination is the urban Aboriginal population which lacks political recognition in the urban setting. This group, which may consist of more than half of the Aboriginal population of Canada, also brings forward the issue of self-government in the absence of a land or tax base.