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The Indian Act

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The Indian Act

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Introduction to the Indian Act

To be federally recognized as an Indian either in Canada or the United States, an individual must be able to comply with very distinct standards of government regulation... The *Indian Act* in Canada, in this respect, is much more than a body of laws that for over a century have controlled every aspect of Indian life. As a regulatory regime, the *Indian Act* provides ways of understanding Native identity, organizing a conceptual framework that has shaped contemporary Native life in ways that are now so familiar as to almost seem "natural."

--Bonita Lawrence[1]

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You can read the Indian Act online, at http://laws-lois.justice.gc.ca/eng/I-5/index.html

The Indian Act is a Canadian federal law that governs in matters pertaining to Indian status, bands, and Indian reserves. Throughout history it has been highly invasive and paternalistic, as it authorizes the Canadian federal government to regulate and administer in the affairs and day-to-day lives of registered Indians and reserve communities. This authority has ranged from overarching political control, such as imposing governing structures on Aboriginal communities in the form of band councils, to control over the rights of Indians to practice their culture and traditions. The Indian Act has also enabled the government to determine the land base of these groups in the form of reserves, and even to define who qualifies as Indian in the form of Indian status.

While the Indian Act has undergone numerous amendments since it was first passed in 1876, today it largely retains its original form.

The Indian Act is administered by Indian and Northern Affairs Canada (INAC), formerly the Department of Indian Affairs and Northern Development (DIAND). The Indian Act is a part of a long history of assimilation policies that intended to terminate the cultural, social, economic, and political distinctiveness of Aboriginal peoples by absorbing them into mainstream Canadian life and values.

The origins of the Indian Act: A history of oppression and resistance

The Indian Act came to be developed over time through separate pieces of colonial legislation regarding Aboriginal peoples across Canada such as the *Gradual Civilization Act* of 1857 and the *Gradual Enfranchisement Act* of 1869. In 1876, these acts were consolidated as *the Indian Act*.

"The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change."
- John A Macdonald, 1887

The Gradual Civilization Act, passed in 1857, sought to assimilate Indian people into Canadian settler society by encouraging enfranchisement. In this sense the act was a failure, as only one person voluntarily enfranchised.[2] By 1869, the federal government had created the Gradual Enfranchisement Act which established the elective band council system that remains in the Indian Act to this day. The Gradual Enfranchisement Act also granted the Superintendent General of Indian Affairs extreme control over status Indians. For example, the Superintendent had the power to determine who was of "good moral character" and therefore deserve certain benefits, such as deciding if the widow of an enfranchised Indian "lives respectably" and could therefore keep her children in the event of the father's death. The Act also severely restricted the governing powers of band councils, regulated alcohol consumption and determined who would be eligible for band and treaty benefits. It also marks the beginning of gender-based restrictions to status. For a closer look as to why this is, see our section on the marginalization of Aboriginal women. For a more specific look at the process of excluding women from their status rights in the Indian Act, read Chapter 9, "The Indian Act," in Volume I of the Royal Commission on Aboriginal Peoples.)

The confederation of Canada presented the federal government with the challenge of uniting distinct and separate Aboriginal groups under one law. Therefore, despite the diversity of experiences and relationships between Aboriginal peoples and settlers across the country, including strong military and economic alliances in certain regions, Confederation established a very different relationship between these two groups by disregarding the interests and treaty rights of Aboriginal peoples and uniformly making them legally wards of the state. Systems of control that had been established in prior legislation were now newly defined under one act, the Indian Act of 1867. This act effectively treated Aboriginal people as children—a homogenizing and paternalistic relationship.

Since the first pieces of legislation were passed, Aboriginal peoples have resisted oppression and sought active participation in defining and establishing their rights. Early on, Aboriginal leaders petitioned colonial leadership, including the Prime Minister and the British monarchy, against oppressive legislation and systemic denial of their rights. The legislation against Aboriginal peoples did not stop Aboriginal practices but in most cases drove them underground, or caused Aboriginal peoples to create new ways of continuing them without facing persecution.

Listen to an excerpt from CBC's RevisionQuest with Darrell Dennis, in which an all-singing, all-dancing

Indian Act explains what it really does. Keep up to date on new episodes of RevisionQuest by visiting its official site at http://www.cbc.ca/revisionquest/

The "Potlatch Law" & Section 141

One of the most famous examples of this oppression and subsequent resistance and adaptation is known as the "Potlatch Law." In 1884, the federal government banned potlatches under the Indian Act, with other ceremonies such as the sun dance to follow in the coming years. The potlatch was one of the most important ceremonies for coastal First Nations in the west, and marked important occasions as well as served a crucial role in distribution of wealth.

Non-native colonists and missionaries saw the sharing of wealth and food at potlatches as excessive and wasteful, but ultimately they knew how integral it was to sustaining First Nations cultures. Indian Agents and missionaries felt it interrupted assimilation tactics. They wanted Aboriginal people to shift from an economic system of redistribution to one of private property ownership—seemingly impossible as long as the potlatch existed. The outlawing of the potlatch severely disrupted these cultural traditions, although many groups continued to potlatch. One of the most famous displays of resistance was an underground potlatch hosted by 'Namgis Chief Dan Cranmer in Alert Bay. To celebrate a wedding, Cranmer hosted a six-day potlatch over Christmas, 1921. Indian Agents interrupted the potlatch and arrested approximately 50 people. The jail term was to be several months, but Indian Agents offered reduced sentences for anyone who would surrender their potlatch items, such as valuable masks, costumes, and coppers. 22 people went to jail for two months, and hundreds of potlatch items were confiscated, a devastating loss to the community. Judge Alfred Scow describes some of the impacts of the Potlatch Law:

This provision of the Indian Act was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to this country. We had a system that worked for us. We respected each other. We had ways of dealing with disputes.[3]

Judge Alfred Scow

Countless communities were similarly impacted by the restriction on ceremonies, facing legacies that continue to this day in the form of lost cultural practices, traditions, and oral history.

When Aboriginal political organizing became more extensive in the 1920s and groups began to pursue land claims, the federal government added Section 141 to the Indian Act. Section 141 outlawed the hiring of lawyers and legal counsel by Indians, effectively barring Aboriginal peoples from fighting for their rights through the legal system. Eventually, these laws expanded to such a point that virtually any gathering was strictly prohibited and would result in a jail term. These amendments presented a significant barrier to Aboriginal political organizing and many organizations had to disband. However, it did not entirely stop political organizing—Aboriginal organizations such as the Nisga'a Land Committee and the Native Brotherhood of British Columbia managed to continue to organize the fight for their rights underground.

1951 amendments

For an excellent resource to compare and contrast different versions of the Indian Act, look at Sharon Helen Venne's *The Indian Act and Amendments 1868-1975 – an indexed collection***. Saskatoon: Saskatoon Law Centre, 1981.**

After the Second World War, Canadian citizens shocked by the atrocities of the war became more aware of the concept of human rights. Many Canadians recognized that Aboriginal people in Canada were among the most disadvantaged in the country. This was particularly troubling for Canadians after the participation of First Nations soldiers in the war highlighted Aboriginal peoples' contribution to Canada as a nation. This recognition, along with Canada's commitment to the United Nations' Universal Declaration of Human Rights, led to the revision of the Indian Act in 1951. The more oppressive sections of the Indian Act were amended and taken out. It was no longer illegal for Indians to practice their customs and culture such as the potlatch. They were now allowed to enter pool halls and to gamble—although restrictions on alcohol were reinforced. Indians were also now allowed to appear off-reserve in ceremonial dress without permission

of the Indian Agent, to organize and hire legal counsel, and Indian women were now allowed to vote in band councils.
The federal government's general purpose for the amendments at that time was to move away from casting Indians as wards of the state and instead facilitate their becoming contributing citizens of Canada. The Royal Commission of Aboriginal Peoples (RCAP) points out, however, that by taking away some of the more oppressive, and ultimately unsuccessful, amendments, the government simply rendered the Indian Act more similar to the original act of 1876.[4]

The White Paper

In 1969, Prime Minister Trudeau proposed a "white paper" policy with the aim of achieving greater equality for Indians. To do this, he proposed to abolish the Indian Act and dismantle the Department of Indian Affairs. Indians would essentially become like other Canadian citizens. Although it was widely agreed that the Department of Indian Affairs and the Indian Act were hugely problematic, this "white paper" policy was overwhelmingly rejected by Aboriginal peoples across Canada who felt that assimilating into mainstream Canadian society was not the means to achieve equality. They wanted to maintain a legal distinction as Indian people. Due to this widespread resistance against the white paper, the policy was eventually abandoned by the federal government. In fact, scholar John Milloy pinpoints the proposed white paper policy of 1969 as the turning point when the federal government finally abandoned their policy of assimilation for a policy geared toward establishing constitutionally protected rights for First Nations.[5]

Bill C-31 and gender discrimination

The Indian Act has been highly criticized for its gender bias as another means of terminating ones' Indian status, thus excluding women from their Aboriginal rights. Legislation stated that a status Indian woman who married a non-Indian man would cease to be an Indian. She would lose her status, and with it, she would lose treaty benefits, health benefits, the right to live on her reserve, the right to inherit her family property, and even the right to be buried on the reserve with her ancestors. However, if an Indian man married a non-status woman, he would keep all his rights. Even if an Indian woman married another Indian man, she would cease to be a member of her own band, and become a member of his. If a woman was widowed, or abandoned by her husband, she would become enfranchised and lose status altogether. Alternatively, if a non-native woman married an Indian man, she would status.
In all these situations, a woman's status was entirely dependent on their husband. As is explicitly stated in Section 12 (1)(b) of the Indian Act, "a woman who married a person who is not an Indian... [is] not entitled to be registered."
In the 1970s, Aboriginal women began organizing to battle the discriminatory legislation. In 1979, Jeanette Corbière Lavalle and Yvonne Bedard took the Canadian government to court, claiming that Section 12 of The Indian Act violated the Canadian Bill of Rights. They lost their case at the Supreme Court of Canada. In 1981, Sandra Lovelace resumed the fight and took her case to the United Nations. The United Nations Human Rights Committee found Canada in breach of the Covenant on Civil and Political Rights.

In the 1980s, the United Nations Human Rights Committee and the Canadian Human Rights Commission identified Section 12 of the Indian Act as a human rights abuse, as it removed a woman's Indian status if she married a non-Indian man. This is in direct violation the International Covenant on Civil and Political rights that protects a minority's right to belong to their cultural group.[6]
The UN ruling in 1982 coincided with the repatriation of the Canadian constitution, which includes the Charter of Rights and Freedoms that guarantees gender equality. The government allowed itself three years to change any law that was not in line with the new constitution and Charter. After consultations and negotiations, the Indian Act was amended in 1985, and Bill C-31 passed so that those who had lost their status could once again regain it.
However, Bill C-31 is still seen by many as unconstitutional, as those who have

When the Canadian Human Rights Act was passed in 1977, Section 67 (originally subsection 63(2)) was created specifically to prohibit First Nations people from filing an official complaint that the Indian Act was a human rights violation.[7] This in itself was later described as a "serious disregard for human rights."[8] The exemption of the Indian Act from Canada's own Human Rights law is an implicit recognition by the Canadian government of how

their status reinstated can only pass it on for one generation. This was very recently put before the courts when Sharon McIvor challenged Canada that this was not in line with the Charter of Rights and Freedoms. In June 2009, the Supreme Court of British Columbia ruled that restricting inheritance of status to the children of women reinstated by Bill-C31 is in fact unconstitutional, and violates equality rights guaranteed in Section 15 of the Charter of Rights and Freedoms. The government is currently in the process of amending the Indian Act. For further information on this topic, please see Bill C-31 and the marginalization of Aboriginal women in Canada.

unreasonable the Indian Act truly is. In May of 2008, the House of Commons unanimously passed Bill C-21 to repeal this section of the Canadian Human Rights Act.

So why don't we just abolish the Indian Act?

The Indian Act is a very controversial piece of legislation. The Assembly of First Nations describes it as a form of apartheid.[9] Amnesty International, the United Nations, and the Canadian Human Rights Commission have continually criticized it as a human rights abuse. These groups claim that the Canadian government does not have the right to unilaterally extinguish Aboriginal rights—something the government could legally do to status Indians up until 1985 through the process of enfranchisement, and can still control through status.

Yet despite controversy, the Indian Act is historically and legally significant for Aboriginal peoples. It acknowledges and affirms the unique historical and constitutional relationship Aboriginal peoples have with Canada. For this reason, despite its problematic nature, efforts to outright abolish the Indian Act have been met with widespread resistance. (See, for example, the White Paper, 1969). As Harold Cardinal explained in 1969,

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. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than happy to help devise new Indian legislation.[10]

RCAP identifies this situation as a paradox that is key to understanding the Indian Act and the relationship between the Canadian state and status Indians. The Indian Act legally distinguishes between First Nations and other Canadians, and acknowledges that the federal government has a unique relationship with, and obligation to, First Nations. At the same time, any changes to the Indian Act through history have historically been proposed or established unilaterally by the government. Although there are many differing opinions on how to confront the issues presented by the Indian Act, Aboriginal leaders widely agree that if any alternative political relationship is to be worked out between First Nations and the government, First Nations will need to be active participants in establishing it.

By Erin Hanson

Recommended resources:

Milloy, John. "Indian Act Colonialism: A Century of Dishonour, 1869-1969." Research Paper for the National Centre for First Nations Governance, 2008. Available online at: http://www.fngovernance.org/research/milloy.pdf

Royal Commission on Aboriginal Peoples. "Chapter 9: The Indian Act," in *Report of the Royal Commission on Aboriginal Peoples*: *Looking Forward, Looking Back.* Volume 1. Ottawa: the Royal Commission on Aboriginal Peoples, 1996. 235-308.

Steckley, John L. and Bryan D. Cummins. "Chapter Twelve: The Royal Proclamation and the Indian Act." *Full Circle: Canada's First Nation*s. Second Ed. Toronto: Pearson Prentice Hall, 2008. 121-131.

Tobias, John. "Civilization, Protection, Assimilation: An Outline of Canada's Indian Policy." *The Western Canadian Journal of Anthropology*, 6:2 (1976): 13-17.

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Union of British Columbian Indian Chiefs, *The Indian Act and What it Means.* Vancouver: UBCIC, 1988. Available online, courtesy of UBCIC: http://www.ubcic.bc.ca/files/PDF/TheIndianAct_WhatItMeans.pdf

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Endnotes

1 Lawrence, Bonita. "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview." Hypatia. 18:2. 2003. 3.1

2 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples***:** *Looking Forward, Looking back.* **Volume 1. Ottawa: the Royal Commission on Aboriginal Peoples, 1996. 250.**

3 Scow, Alfred. Royal Commission of Aboriginal Peoples (RCAP), *Transcriptions of Public Hearings and Round Table Discussions, 1992-1993,* **Ottawa, Ontario. Thursday, November 26, 1992. 344-5. Available online courtesy of the University of Saskatchewan Archives: http://scaa.sk.ca/ourlegacy/permalink/30466.**

4 RCAP, Report on the Royal Commission of Aboriginal Peoples, *Volume 1: Looking Forward, Looking Back,* **1996. 310-1.**

5 Milloy, John. "Indian Act Colonialism: A Century of Dishonour. 1869-1969." National Centre for First Nations Governance, 2008. Available online at: http://www.fngovernance.org/research/milloy.pdf

6 Article 27, International Covenant on Civil and Political rights:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

7 Section 67 of the Canadian Human Rights Act states, "Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act."

8 Hurley, Mary C. "Bill C-21: An Act to amend the Canadian Human Rights Act." Parliamentary Information and Research Service, Law and Governance Division, 2008. Available online at: http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c21&source=library_prb&Parl=39&Ses=2#section67

9 "This apartheid law prohibited traditional First Nation government systems from existing in the native communities and in its place established the present day 'band council' system." Assembly of First Nations, "Assembly of First Nations- The Story." Available online at: http://www.afn.ca/article.asp?id=59

10 Cardinal, Harold. *The Unjust Society.* **2nd ed. Vancouver: Douglas & MacIntyre, 1999. 140.**

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