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**The Indian Act and the Future of  
Aboriginal Governance in Canada**

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## **The Indian Act and the Future of Aboriginal Governance in Canada**

The Indian Act is no longer an uncontestable part of the Aboriginal landscape in Canada. For decades, this controversial and intrusive piece of federal legislation governed almost all aspects of Aboriginal life, from the nature of band governance and land tenure systems to restrictions on Aboriginal cultural practices. Most critically, the Indian Act defines the qualifications for being a “status Indian,” and as such has been the centre-piece of Aboriginal anger over federal attempts to control Aboriginal identity and membership. The importance of this historic legislation is now being steadily eroded. At the political level, Aboriginal and non-Aboriginal critics of the Indian Act offer biting critiques of the limits of Indian Act governance and argue for the elimination of this outdated and no longer relevant administrative device. At the same time, recently concluded modern land claims settlements have eliminated the authority of the Indian Act over specific Indigenous groups, replacing the federal law with complex agreements on governance, taxation and government to government relations.

Since being passed by Parliament in 1876, the Indian Act has been the touchstone for Aboriginal affairs in Canada. Few documents in Canadian history have generated as much debate, anger and sorrow as the Indian Act. Yet the legislation persists as a central element in the management of Aboriginal affairs in the country. While Aboriginal anger with historic and current terms of the Indian Act is deep and powerful, Indigenous politicians and governments remain strongly divided as to the value and purpose of the legislation. This is hardly surprising, given that the political structures and political cultures of Aboriginal communities across the country have, for generations, been created and distorted by the imposition of Indian Act government systems.<sup>1</sup>

It is important to understand both the origins and impact of the Indian Act. The Indian Act reflected the core assumptions held about Indigenous peoples by the dominant Euro-

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<sup>1</sup> Wayne Dougherty and Dennis Madill, *Indian Government under Indian Act Legislation, 1868-1951* (Ottawa; Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1980).

Canadian society in the mid to late 19<sup>th</sup> century. Its basic premises, summarized as providing for “civilization, protection and assimilation,” were that the Government of Canada viewed Aboriginal people as wards, that Indigenous communities and governments were incapable of managing their affairs, that the nation sought eventually to integrate Indigenous cultures into the Canadian mainstream, and that the First Peoples had to be separated from the rest of Canadian society until they were ready for the transition. The Indian Act was, and is, a powerful tool in the hands of the federal government, giving federal civil servants the authority to manage band affairs, supervise Indigenous lands and trust funds, direct the personal and family lives of individual Aboriginal people, and deny basic Canadian civil and personal rights to hundreds of thousands of “wards” of the federal state.<sup>2</sup>

Through the Indian Act, the Government of Canada granted itself wide-ranging authority over the lives of Aboriginal peoples and communities. The Act defined a “status Indian,”<sup>3</sup> thereby setting membership for the Indian bands recognized and created under

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<sup>2</sup> John Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy,” in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991).

<sup>3</sup> The definition of a status Indian under the Indian Act is a matter of considerable legal debate and interpretation. A flavour of the complexity can be found in the section of the Indian Act entitled “Persons entitled to be registered (see below). The text of the Indian Act can be found at [http://laws.justice.gc.ca/en/showdoc/cs/I-5/bo-ga:s\\_5/en#anchorbo-ga:s\\_5](http://laws.justice.gc.ca/en/showdoc/cs/I-5/bo-ga:s_5/en#anchorbo-ga:s_5). From the Indian Act, Section (6):

(1) Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

the terms of the Act.<sup>4</sup> Indian Agents, appointed by the Government of Canada, had considerable power over elected Aboriginal officials, who held their offices under the terms and conditions set out in the Act. Indigenous people had significantly fewer rights than most other Canadians. At a time when the voting rights of other Canadians were being expanded, status Indians were denied the opportunity to vote. The government established the process of enfranchisement, which involved the removal of an individual from the list of status Indians. There were provisions for voluntary enfranchisement, started by an individual, and involuntary enfranchisement, which occurred when a status Indian entered university, became a doctor or lawyer, or was otherwise deemed by government officials to be ready for entry into the Canadian mainstream.<sup>5</sup> The Indian Act gave the Department of Indian Affairs and its officials control over reserve lands and resources and authorized them to regulate commerce and trade with Aboriginal people. The Act became the primary means of adapting federal policy to changing expectations and concerns about Aboriginal people. Amendments to the Indian Act banned crucial cultural ceremonies, such as the Sun Dance and the Potlatch, barred Aboriginal communities from hiring lawyers to pursue claims against the government, made illegal public meetings to discuss Indigenous affairs, and established pass systems which allowed Indian Agents to regulate the movement of people on and off reserves. Major

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(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

<sup>4</sup> For a useful overview of this topic, see Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues* (Ottawa: Parliament of Canada, revised 2003). Available at <http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm>. See also Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).

<sup>5</sup> See, for example, the statement by Aboriginal Legal Services of Toronto, <http://aboriginallegal.ca/docs/sauve.factum.final.htm>, specifically Section 13.

amendments to the Indian Act in 1951 removed some of the more offensive elements of Indian Act, but prohibitions on voting and alcohol consumption remained until the 1960s.

As the final report of the Royal Commission on Aboriginal Peoples observed:

The Indian Act of 1876 created an Indian legislative framework that has endured to the present day in essentially the terms in which it was originally drafted. Control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors. Indian policy was now clear and was expressed in the alternative by the minister of the interior, David Laird, when the draft act was introduced in Parliament: “[t]he Indians must either be treated as minors or as white men.” There was to be no middle ground.<sup>6</sup>

A list of powers and a description of governmental authority does not do justice to the impact of the Indian Act on Aboriginal people in Canada. The Indian Act, by itself, was simply a tool used by the Government of Canada to exercise near-total control over First Nations people. Unlike almost all other Canadians,<sup>7</sup> First Nations people had significantly fewer rights and political privileges. The government exercised comprehensive control over Aboriginal life, determining where and when they went to school, the management of their land and economic resources, prohibiting them from entering key professions, attempting to shape Indigenous cultures, and dominating daily affairs through the often aggressive hand of federally-appointed Indian Agents.<sup>8</sup> It is difficult to categorize and describe the social and cultural consequences of this wide-ranging government intervention. Dependency, cultural loss, dispiritedness, and a

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<sup>6</sup> *The Report of the Royal Commission on Aboriginal Peoples*, vol. 1, Looking Forward, Looking Back, Part Two: False Assumptions, Failed Relationship, Section 9, “The Indian Act.” This report can be found at [http://www.ainc-ina/gc.ca/ch/rcap/sg/sgm9\\_e.html](http://www.ainc-ina/gc.ca/ch/rcap/sg/sgm9_e.html).

<sup>7</sup> Several immigrant groups, most notably those from Asia, and selected religious sects had restrictions placed on many of their basic civil rights. Conversely, other groups, Christian sects from Europe including the Hutterites and Mennonites, received special legal protection for group, religious and political rights.

<sup>8</sup> Somewhat surprisingly, the work of Indian Agents has not attracted a great deal of historical attention. See, for a good example of the point made here, the work of Sarah Carter *Aboriginal People and Colonizers of Western Canada* (Toronto : University of Toronto Press, 1999) and Laurie Barron, “Indian agents and the North-West Rebellion,” in L. Barron and James Waldrum, eds, *1885 and after: native society in transition* (Regina: Canadian Plains Research Centre, . 1986), 139-54.

profound sense of disengagement from the national political system are all logical outgrowths from a system that provided little room for individualism, collective action or a positive Indigenous agenda.

The existence and authority of the Indian Act did not mean that Indigenous communities simply accepted all of its rules and restrictions. Nor does it mean that they abandoned long-standing cultural and political practices simply because federal legislation imposed other models. In numerous instances – the rejection of the anti-potlatch proscriptions by West Coast First Nations is the best example<sup>9</sup> – Aboriginal communities found many ways to resist, ignore or overcome restrictions imposed by the federal government. Government-created Indian Act governments, with elected band chiefs and councils, often lacked legitimacy in the eyes of their people, which continued to respect and follow the directions set by hereditary chiefs and traditional political systems, even when all of the official authority and government program funding flowed through the band councils created and managed under the Indian Act.

Resistance to the Indian Act was, importantly, a central theme of late 19<sup>th</sup> and 20<sup>th</sup> century Aboriginal political life. In fact, Aboriginal challenges of the legitimacy of the federal government's controlling hand resulted in wide-ranging political and legal protests, including petitions to the Government of Canada and the British Crown, legal challenges in defense of Aboriginal land and resource rights, and a careful flaunting of Indian Act regulations. The federal government's response often included harsh legislative measures and amendments to the Indian Act, such as the provision to outlaw the potlatch (and subsequent arrests of those who publicly persisted in their cultural practices) and the prohibition on the hiring of lawyers to pursue Aboriginal rights through the courts. The passage of such laws did not stop Indigenous groups, for they continued to meet and organize, maintained cultural traditions in the face of concerted efforts by government to stop them, and retained their respect for hereditary leaders. But they

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<sup>9</sup> Douglas Cole and Ira Chaikin (1990) *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990). See also Tina Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884-1890," in Tina Loo and Lorna McLean, eds., *Historical Perspectives on Law and Society in Canada* (1994), pp 219-253;

functioned on a daily basis in an oppressive and unrelenting system that denied both control over their lives and the opportunity to participate in broader Canadian society.

With the expansion of Aboriginal political organizations and protests in the 1960s, the Indian Act came under intense scrutiny. Aboriginal politicians and supporters devoted considerable energy to exposing the colonial and paternalistic imperatives of the Indian Act to a somewhat disbelieving nation.<sup>10</sup> To the degree that non-Aboriginal Canadians paid much attention to Indigenous affairs in the 1960s – and few did – most assumed that the hand of government was gentle and benign, not authoritarian and controlling. Indigenous leaders documented the fundamental injustices entrenched in the Indian Act, found support for their insistence on voting and other rights, and gradually convinced the Government of Canada to back off from the most contentious and intrusive elements of the legislation.

The Indian Act became a matter of intense political debate, and some measure of innovation. Government of Canada, led at the time by Prime Minister Pierre Trudeau and with Aboriginal matters managed by Jean Chrétien, Minister of Indian Affairs and Northern Development, reviewed the Indian Act. Following considerable review, and rejecting the recommendations of the much touted Hawthorne Report,<sup>11</sup> commissioned to identify the underlying causes of Aboriginal disengagement from Canadian society, of only a few years earlier, the Government of Canada released the White Paper on Indian Affairs in 1969. Trudeau had a well-established distaste for nationalism in Canadian affairs, and likewise opposed special rights for any group of Canadians. The White Paper offered to change that. It proposed the elimination of Indian reserves, the end of the unique legal position of status Indians, the shift of services for Indians from the federal to provincial governments. In sum, the White Paper advocated the replacement of the collective rights of status Indians with greater integration with the individualistic Canadian mainstream.

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<sup>10</sup> Harold Cardinal's highly influential *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969) is the best example of this public denunciation of the Indian Act.

<sup>11</sup> *A Survey of the Contemporary Indians of Canada* (Ottawa: Queen's Printer, 1967).

The Government, which had consulted with Aboriginal politicians and communities and which had received contradictory advice on how best to proceed, was ill-prepared for the backlash that followed. Indigenous political leaders, most notably Harold Cardinal, President of the Indian Association of Alberta, responded with outrage. They saw the White Paper as an extreme act of colonialism, challenging the very roots of Indigenous identity and social organization. The Aboriginal leadership made it clear that they desired greater participation with the rest of the country<sup>12</sup> – there were powerful declarations of the need to transform the welfare-based economies of many reserves – but that their identity as distinct communities remained of fundamental importance. Where Chrétien anticipated widespread acceptance of the White Paper ideas, he experienced instead a fire-storm of protest and dismay. The Government of Canada backed down, although they moved very slowly away from the underlying belief that the Indian Act and the reserves created under the legislation contributed to the separation of Indigenous and other Canadians and thereby slowed their economic and social integration.

The decades following the debate over the 1969 White Paper saw dramatic changes in the legal and political status of Aboriginal peoples in Canada. The Government of Canada reluctantly agreed to negotiate Aboriginal specific and comprehensive claims. Dozens of negotiations commenced in the 1970s, moving slowly and often painfully toward eventual resolution.<sup>13</sup> Aboriginal politicians organized more effectively on the national level, and assumed a prominent, if uncertain, place in the country's political and constitutional life. They managed to get the attention of the Canadian electorate and, for a time, experienced a sharp positive spike in public support for Indigenous aspirations. Many communities, frustrated with the delays in the political process, took the federal and provincial governments to court, seeking redress for longstanding grievances, securing in the process important recognition of a wide array of land, resource and political rights. In the early 1960s, few Canadians paid more than passing attention to

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<sup>12</sup> The best review of the Aboriginal response to the White Paper is found in Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (Toronto: University of Toronto, 1981).

<sup>13</sup> While progress on land claims negotiations proved to be very slow, agreements were signed in northern Quebec, Labrador, the Eastern Arctic, most of the Mackenzie River valley, Western Arctic, most of the Yukon, and with several First Nations groups in British Columbia.



Aboriginal affairs; by the end of the century, the political and legal battles of Indigenous people and communities often dominated provincial and national political debates.

**Indigenous Views of the Indian Act:** Defining the Indigenous response to the Indian Act is far from easy. For many, the Indian Act is the embodiment of Canadian colonialism and paternalism. It is the prime example of the intrusiveness of the Canadian state into the lives of Aboriginal people in this country and is generally held to be responsible for the serious social and cultural disruptions experienced by Indigenous peoples over the past century and a half. The Indian Act provided the Government of Canada with extraordinary powers over Aboriginal peoples, denied those some Indigenous peoples basic rights other Canadians took for granted, and imposed political and administrative structures that conflicted with Indigenous governance systems and values. For reasons too many to enumerate briefly, many Aboriginal Canadians revile the Indian Act and all that it represents, and wish only for its prompt removal from their lives. Leading Aboriginal intellectuals have found much fault with the Indian Act, explaining its colonial, paternalistic and patriarchal roots and its manipulative aspects.<sup>14</sup>

Why, then, do many Aboriginal leaders argue that the Indian Act should be maintained, as a substantial number do? The explanation is complex. The over-riding consideration is that Indigenous people and communities fear the withdrawal of federal commitments, as was proposed in the 1969 White Paper and as had been touted widely by the Reform Party and such non-Aboriginal thinkers as Thomas Flanagan. Knowing that there is considerable sentiment in favour of eliminating all specific Indigenous rights, Aboriginal people opt to protect the rights and structures that are already in place, including the Indian Act. At least, they argue, the Indian Act makes the federal government's legal and fiduciary responsibilities quite clear and re-enforces historical commitments to the Indigenous peoples in Canada. Harold Cardinal captured these sentiments when he wrote in 1969:

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<sup>14</sup> See the summary in Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver; UBC Press, 2000), pp. 178-180.

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 level 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 ready to help devise new Indian legislation.<sup>15</sup>

At the same time, the structure and power of current Aboriginal governments in Canada arise out of the Indian Act. Band governments, chiefs and councilors operate on the basis of the authority granted in the Act; those who favour traditional means of community leadership often refer to these people as "Indian Act chiefs," suggesting that the political power is based on the colonial system and not traditional values. (There are, of course, communities like Six Nations where two systems operate alongside each other, one funded by the Government of Canada and the other by their communities.) For many First Nations people, elections are equated with Indian Act governance systems. Customary governance, in contrast, provides to recognition of traditional social organization and means of selecting leaders and for broad community input into decision-making. It is wrong, however, to assume that Aboriginal communities face an either-or choice on governance, as many governance systems, like the Nisga'a Lisims Government, blends a variety of cultural and administrative concepts.<sup>16</sup> Those who favour, or who benefit from, the Indian Act political system support its continuation unless, as many argue, wholesale changes with appropriate legislative and constitutional guarantees are in place to ensure the continuity and authority of the replacement system.

The Congress of Aboriginal Peoples has emerged as the foremost public critical voice on the issue of the Indian Act. Given that the Congress represents off-reserve Indians and Métis across the country, the criticism of the Indian Act is not surprising. The Congress membership is generally excluded from the voting and administrative activities of Indian Act governments and have long been upset about the control exerted by what are often

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<sup>15</sup> Cardinal, *The Unjust Society*, p. 140.

<sup>16</sup> <http://www.nisgaalisims.ca/> provides details on the structure and operations of the Nisga'a system of government.

described as “Indian Act Chiefs.” These political leaders, the Congress argues, gain their authority and prestige from a piece of colonial legislation that is the opposite of Indigenous cultural values. Patrick Brazeau, National Chief of the Congress of Aboriginal Peoples, has been particularly critical of the reserve system, Indian Act governments and Chiefs, and the emphasis on the empowerment of reserve governments. He proposed the adoption of a new Aboriginal Peoples Act, which recognized the rights and responsibilities of off-reserve status Indians, non-status Indians, and Metis. Brazeau argues that, as a consequence of the Indian Act, Aboriginal politicians defend a system that actually undermines the independence and autonomy of Indigenous peoples in Canada. As he noted in November 2006, “This re-nation-building must go on. I know this may be seen as a little bit forceful on the chiefs, or many sound anti-chief – which it is – but at the same time, it makes sense. We have to get away from this reserve system.”<sup>17</sup> Critics of Indian Act governments, and there are many across the country, suggest that the corruption and political difficulties encountered on some reserves as a direct consequence of the Indian Act. Only the removal of the Act and the establishment of truly Indigenous governments, they suggest, will result in proper management and governance of Aboriginal communities.

The internal critique of Aboriginal governments, of course, deflects attention away from the historical roots of contemporary governance and administrative challenges. Métis communities have long sought formal recognition of Indigenous rights and self-government authority. Non-status Aboriginals, caught outside the Indian Act-constituted governments by the regulations of the Indian Acts, have long fought for recognition by the Government of Canada. The long history of legal and political dispossession has, therefore, created a contemporary situation that recognizes the self-government rights of some Aboriginal peoples while steadfastly ignoring those of other people and communities which see themselves as equally Aboriginal. The debate among Aboriginal peoples and often within Indigenous has been used by opponents of Aboriginal rights as a justification for rejecting Aboriginal arguments in favour of greater autonomy.

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<sup>17</sup> ““Too many chiefs,” Aboriginal leader says,” [Toronto Globe and Mail](#), 7 November 2006.

On balance, most Aboriginal people in Canada would be pleased to see the Indian Act disappear – but only after an appropriate Aboriginally-controlled system, with firm and ongoing financial and legal commitments by the federal government, is in place. Given the current difficult state of affairs in most Indigenous communities, there is little enthusiasm for experimentation and even less confidence that the Government of Canada will take steps in the best interests of the Aboriginal peoples in the country. The Indian Act serves, by default, as the only viable means of governance and the management of Indigenous affairs, save for modern treaties. Only when Aboriginal peoples have had the opportunity to negotiate a substantially new and constitutionally protected system of governance and administration are they prepared to consider stepping away from the Indian Act. This has now happened in several parts of the country, providing an opportunity to contemplate Aboriginal life without the historical domination and constraints contained within the Indian Act.

**Federal and Non-Aboriginal Views of the Indian Act:** The Indian Act has survived for a surprisingly long time. Amended substantially on several occasions, its core principles remain substantially intact more than 100 years after its passage. That the legislation has been preserved for a very long time indicates the degree to which the basic assumptions of the Indian Act remained part of the Canadian mainstream. The Indian Act, after all, assumed that status Indian people were not capable of making major decisions for themselves, either as individuals or as political communities. The legislation codified the authority of the federal government, through the Department of Indian Affairs, and asserted government dominance over Indigenous peoples. The central commitments of 19<sup>th</sup> century Indian policy – assimilation, civilization and protection – were imbedded in the Indian Act and remained as the foundation of non-Aboriginal assumptions and policy into the 1960s and 1970s.

The Hawthorne report, issued in 1967 under the title *A Survey of the Contemporary Indians of Canada*, provided the first systematic non-Aboriginal critique of the Indian Act. After reviewing the manner in which the federal government applied the Indian Act

and the degree to which provincial authorities had opted out of legislating on Aboriginal matters, the report observed,

What the federal government does or does not do is largely the result of its own discretionary determination of the ambit of its responsibilities...[T]he federal government has displayed a consistent tendency to limit its policies to reserve-based Indians. The prevailing assumption has been that an Indian who established himself off the reserve in accordance with provincial residence requirements shall then become generally subject to the operation of normal provincial laws applied to non-Indians.

Interestingly, in a document penned in the mid-1960s but echoing intentions still dominant forty years later, “There is a noticeable trend to reduce the amount of ministerial and Governor-in-Council discretion in the Indian Act. The corollary of this is, of course, increased attention to self-government and Indian participation in decision-making.”<sup>18</sup>

In the aftermath of the Aboriginal response to the 1969 White Paper on Indian Affairs, the federal government was at a loss to decide what to do with Aboriginal policy in Canada. Prime Minister Pierre Eliot Trudeau wanted to eliminate all of the special arrangements for status Indians and wished to have them absorbed into the broader Canadian political community. There was real astonishment in Ottawa when Aboriginal people rallied to oppose the White Paper and sought to preserve the Indian Act. The federal government did not really have a fall-back provision, for they also recognized that the assumptions and mindset imbedded in the Indian Act had to change, even if the commitments to federal responsibility and status Indian rights was to remain. From the 1970s through to the present, the Government of Canada has sought an alternative strategy, one that recognized and accepted Indigenous demands for a continuing federal-Aboriginal relationship, removed the offensive elements of the Indian Act, properly empowered Aboriginal governments and communities and provided an appropriate measure of political and administrative accountability.

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<sup>18</sup> *A Survey of the Contemporary Indians of Canada* (Ottawa: Queen’s Printer, 1967), Chapter 12, “The Legal Status of Indians.”

High profile scandals in band governance and complaints about Indian Act governments led the federal government to contemplate major changes in the Act and in general policy. Robert Nault, Minister of Indian Affairs and Northern Development, attempted to change the Indian Act arrangements in the early 2000s. At this stage, the Government of Canada recognized that First Nations governments needed greater authority, more effective administrative procedures, and by ensuring local control over the daily management of Aboriginal affairs. Legislation was drafted which, the government believed, would shift the emphasis from Government of Canada-First Nations relations to the relationships between First Nations governments and First Nations people. Speaking to journalists in June 2002, Nault outlined the principal contributions of the proposed First Nations Governance Act:

This legislation as you know is a giant step away from the Indian Act, a piece of legislation that's 126 years old [and] that does not meet the modern needs of First Nations governance. The replacement on the governance side and the tools necessary to build a society and an economy and improve in the lives in the community I think are in this bill. It's a process, a piece of legislation that turns control over by-law making powers, local governance laws to the community, removes the role of the Minister in the day to day lives of the government and the community members. It gives more powers obviously back and far back to the people themselves and that's what this legislation was always intended to do.<sup>19</sup>

The First Nations Governance Act encountered both support and resistance across the country, with the Assembly of First Nations and chiefs and councilors leading the opposition and with others calling for its quick passage. They felt, in particular, that the demands for government accountability and oversight was a direct assault on Aboriginal autonomy and represented a lack of respect for Indigenous institutions.

Nault's plan was not implemented before the 2004 election. Minister Nault was not included in the cabinet of new Prime Minister Paul Martin. The new administration dropped the emphasis on institutional accountability and administrative reform. Through extended negotiations with Aboriginal representatives, the Martin government reverted to the previous approach of funding Aboriginal governments. The resulting Kelowna

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<sup>19</sup> Transcription, Conference Call Re: New First Nations Governance Act, 19 June 2002, 1 pm.

Accord signed by Indigenous, federal and provincial leaders late in 2005 promised an investment of \$5 billion in Indigenous communities and programs and seemed to signal an end to efforts to reform Aboriginal governance and change the Indian Act. Following Martin's defeat in the January 2006 federal election, the Conservative Party of Canada in 2006 shelved the Kelowna Accord. Further reforms have been delayed, although the Conservatives have made clear that they support greater accountability, a stronger emphasis on democratic processes, and more efforts to improve individual property rights and economic development on reserves.

Thomas Flanagan, a long-time academic critic of Aboriginal rights and Indigenous self-government, is now a key advisor to Prime Minister Stephen Harper. He continues to speak out on Aboriginal issues, including the relevance and role of the Indian Act. In a November 2006 commentary, Flanagan observed:

Aboriginal self-government is one of those rare ideas that can draw support across the entire political spectrum. Those on the left welcome it as the emancipation of oppressed people, while those on the right see it as an opportunity to dismantle an expensive system of bureaucratic socialism. Potentially, self-government can be a winner for everyone — left, right, and, most importantly, aboriginal people themselves — but only if we get beyond some basic difficulties of implementation.

The fundamental problem is the Indian Act, first passed in 1876 but based on even older legislative models. Its purpose was the exact opposite of self-government. In the name of civilizing native people and preparing them for assimilation into Canadian society, it created a paternalistic regime in which Indians were not self-governing citizens but objects of administration. The minister of Indian Affairs, acting through appointed Indian agents, had control over property, contracts, education, employment, housing and other aspects of daily life that other Canadians manage for themselves in civil society.

When the demand for aboriginal self-government became irresistible, Canada responded, not by replacing the Indian Act with more appropriate legislation, but by abolishing the position of Indian agent and delegating departmental powers to local governments on Indian reserves. As a result, band governments now possess the same comprehensive control over their people's property, jobs, and housing that Indian agents used to exercise. In too many cases, local factionalism replaces distant administration as an oppressive force in people's lives.

It is not good enough simply to transfer such power from one level of government to another. The Indian Act urgently needs to be replaced, or at least amended, to create a modern framework for responsible self-government.

Flanagan's critique mirrors many of the comments offered by Aboriginal leaders and commentators over the years. He differs, often profoundly, in his preferred solutions. Flanagan argued for increased emphasis on the following elements:

- Increased democracy among First Nations communities and governments, including a reduced role for traditional and culture-based governments;
- Much greater accountability for Aboriginal governments, both in terms of electoral processes and financial management;
- Self-funding of Aboriginal governments through local taxation, principally as a means of ensuring that communities pay close attention to the actions of their political leadership.
- Expansion of individual property rights, and limitations on the rights of First Nations governments to control privately-held property.

Flanagan's comments fit with, and likely shaped, the Conservative Government's agenda, which called for an expansion of self-government while requiring greater accountability and oversight of First Nations governments. His strong views, widely shared in his controversial book, *First Nations, Second Thoughts*,<sup>20</sup> remain influential across the country. Importantly, Flanagan supports the elimination of the Indian Act, but shares a very different view of the desired outcome than most First Nations leaders. As he observed,

Aboriginal leaders would be better advised to get out in front, to co-operate with the federal government in developing a modern legislative framework for self-government to replace the Indian Act. Better that than the imposed solution that will be the eventual response to obstruction.<sup>21</sup>

For the past twenty years, the Government of Canada has generally realized that a single national system for federal government-Indigenous relations would not work – as the

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<sup>20</sup> Thomas Flanagan, *First Nations, Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).

<sup>21</sup> Thomas Flanagan, "Bring Democracy to Indian Reserves," *Toronto Globe and Mail*, 20 December 2006.



experience with the Indian Act had shown over the generations. Emphasis shifted to negotiating with specific Aboriginal groups, initially through comprehensive land claims agreements and, more recently, through self-government accords with individual First Nations. The Indian Act, once the focal point for Indigenous-government relations in Canada, has been declining steadily in importance. New approaches have come to the fore, driven as much by Indigenous desires for change as government imperatives, providing Aboriginal communities and organizations with greater flexibility in considering the best means of governing their communities.

**Changing the Indian Act:** Few Canadians understand that the power and authority of the Indian Act is being steadily eroded in Canada. While the legislation remains in force – attracting a full measure of criticism and complaint from all sides in the Aboriginal rights debate – significant steps have been taken to change the scope and application of the Indian Act. Recently concluded comprehensive agreements have included significant provisions relating to the Indian Act and have, in the process, removed the Act as the most influential element in the governance and administration of the lives of Indigenous peoples. Under Robert Nault, Minister of Indian and Northern Affairs, the Liberal government attempted in the first years of the 21<sup>st</sup> century to remake Indigenous governance in Canada through the First Nations Governance Act. The intention of the legislation, from the government’s point of view, was to strengthen accountability requirements and to make Aboriginal governments more responsive to their communities. Aboriginal response to the proposal was harsh and critical. As one journalist wrote of the proposed legislation:

Still today, with all-embracing and oppressive oversight, Canada's Indian Act comprehensively shapes, directs and determines the basic "local governance" powers and cost accounting functions of those 600-plus band councils. It has never really been seen by tribal leadership as a desired framework, but its replacement or modification at this stage must meet the highest standards and expectations of an educated and increasingly astute Aboriginal leadership seeking its restored sovereignty. And the First Nations Governance Act leaves much to be desired.<sup>22</sup>

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<sup>22</sup> “Canada’s First Nations Governance Act is Nothing of the Sort,” Indian Country, 28 June 2002 (available on-line at <http://www.indiancountry.com/content.cfm?id=1025272931>)

The Indian Act is now being replaced, not in the dramatic fashion envisaged by Jean Chrétien and Pierre Trudeau in 1969 or even Robert Nault's more transitional changes outlined in the First Nations Governance Act. Rather, a series of small, transitional stages, primarily through modern treaties, are transforming the reach and authority of the Indian Act and foretelling a time in the near future when the Indian Act will no longer figure as prominently in Aboriginal affairs. The net impact of these changes – hidden by the fact that few Canadians know that they are underway – will be to accelerate the reconsideration of the role of the Indian Act, generate new approaches to band and tribal council government, and generally encourage group-specific approaches to Aboriginal governance across the country.

**The Indian Act in Modern Land Claim Settlements:** Negotiation of comprehensive land claims agreements in Canada commenced in 1973, when the federal government commenced talks with the Yukon Native Brotherhood (later the Council for Yukon First Nations). Twenty-two years later and two years after the major agreement had been signed, in February 1995, the Umbrella Final Agreement and the Final and Self-Government Agreements for four Yukon First Nations (Champagne and Aishihik, Teslin Tlingit, Vuntut Gwitchin and Nacho Nyak Dun) became law. Other Yukon First Nations subsequently signed final agreements, with self-government accords, bringing most of the Yukon's First Nations into a radically different relationship with the Government of Canada.

The crux of this new relationship is that the authority of the Indian Act has been significantly diminished in the Yukon. Reserves, the geographic cornerstone of federal Indian policy for a century and a quarter, have been replaced by settlement lands. The long-standing and often contentious exemptions from taxation were to be phased out. Yukon First Nations had to create new governance structures and administrative arrangements, utilizing in part the territory-wide presence of the Council for Yukon First Nations. First Nations governments operating under settlement agreements, with much wider scope than those regulated by the Indian Act, had to design and implement

financial management regimes, establish accountability systems acceptable to their communities, draft and pass appropriate legislation, and continue negotiations with federal and territorial authorities on financial/tax arrangements, and transfers of programs and services. The enabling federal legislation for the Yukon agreement, the Yukon First Nations Land Claims Settlement Act (1994), included only one direct reference to the Indian Act. In section 12, the legislation noted, “When a final agreement is given effect, the *Indian Act* ceases to apply in respect of any reserve, within the meaning of that Act, that is identified in the agreement as settlement land.”<sup>23</sup> Furthermore, the self-government agreements negotiated and implemented alongside the land claims settlement clearly identified the reduced role of the Indian Act for Yukon First Nations. (“Subject to subsections (2) and (3) and section 22, the *Indian Act* does not apply to a first nation named in Schedule II or to its citizens.”<sup>24</sup>)

The settlement agreements were not designed to sever all ties between Yukon First Nations and the Government of Canada. The final accord speaks specifically (2.2.7) to the ongoing responsibilities of the federal government as citizens of Canada and as First Nations people, and to the continuing applicability of the Indian Act: “Except as provided in Chapter 4 - Reserves and Lands Set Aside and Chapter 20 - Taxation, nothing in Settlement Agreements shall affect any rights or benefits Yukon First Nations or Yukon Indian People may have or be entitled to under the Indian Act, R.S. 1985, c.I-5.”<sup>25</sup>

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<sup>23</sup> For the text of the enabling legislation, see <http://lois.justice.gc.ca/en/Y-2.3/text.html>.

<sup>24</sup> Yukon First Nations Self-Government Act, Laws of General Application, 17 (1). <http://www.canlii.org/ca/sta/y-2.6/>.

<sup>25</sup> For the text of the final agreement, see [http://www.ainc-inac.gc.ca/pr/agr/umb/index\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/umb/index_e.html). Two earlier clauses spoke to the broader rights of Yukon First Nations adherents to settlement agreements: **2.2.5** Settlement Agreements shall not affect the rights of Yukon Indian People as Canadian citizens and their entitlement to all of the rights, benefits and protection of other citizens applicable from time to time. **2.2.6** Nothing in Settlement Agreements shall affect the ability of Yukon First Nations or Yukon Indian People to participate in and benefit from, Government programs for status Indians, non-status Indians or native people, as the case may be. Benefits under such programs shall be determined by the general criteria for such programs established from time to time. Programs which apply to Yukon Indian People residing on a Reserve or on Land Set Aside shall not cease only by reason of the fact the land becomes Settlement Land pursuant to a Yukon First Nation Final Agreement.

The involvement of Yukon First Nations with the Indian Act continued in other ways. On issues of membership, becoming a beneficiary under the settlement agreements (where membership was left within First Nations authority) did not automatically make an individual a status Indian under the Indian Act. Conversely, having status under the Indian Act did not automatically confer the right to become a beneficiary under the Indian Act. The chapter dealing with reserves and (the new designation of First Nations lands under the settlement) lands set aside indicated that existing reserves could, at the request of First Nations, remain as reserves and therefore under the authority of the Indian Act or could be converted to settlement lands. Furthermore, the establishment of Aboriginal self-government is a process, not a single event or piece of legislation, meaning that each First Nation is moving at its own pace to assume responsibilities currently managed by the Government of Canada through Indian and Northern Affairs Canada. In sum, the changes in the Yukon were clearly transformative, albeit with lingering reminders of the long-term role of the Indian Act.

The most controversial and widely debated of the modern settlements, involving the Nisga'a of the Nass River valley in northwestern British Columbia, provides another illustration of the changing role of the Indian Act in Aboriginal communities. The Nisga'a often say that they have been negotiating their land claims settlement in the late 19<sup>th</sup> century, when they first made representations to the Government of Canada for recognition of their ownership of their traditional territories. Ottawa paid scant attention to them at that time, particularly with the Government of British Columbia argued that the terms of their entry into Confederation eliminated any provincial obligation to support treaty processes. The Nisga'a continued to agitate for recognition. The famous Calder case argued before the Supreme Court of Canada was the spark that convinced the Government of Canada that land claims negotiations were inevitable for areas not yet covered by treaties. But still the Government of British Columbia balked at the prospect of negotiations, halting any meaningful effort to resolve the outstanding Nisga'a claims. Only in the late 1980s, in the last years of the Social Credit administration of Bill Vander Zalm, did British Columbia relent and come to the table. Although the federal government and the Nisga'a had been discussing land claims matters for years, it took

time to bring the province on board. A final agreement with the Nisga'a and the Governments of Canada and British Columbia was not reached until 2000. The controversial accord touched off extensive debate, eventually leading to a British Columbia referendum on treaty process in the province. For the Nisga'a, the agreement ended decades of uncertainty and more than a generation of negotiation. The settlement also changed, profoundly, the role of the Indian Act in Nisga'a territory.

The Nisga'a approach to self-government is markedly different from that laid out in the Yukon, where each of the 14 First Nations has a First Nations government operating under the Umbrella Final Agreement. The old Indian Act administration has been removed, and replaced with the Lisims Government. Wilp Si'ayuukhl is the principle law-making authority for the Nisga'a, established along traditional lines, with a Council of Elders providing crucial cultural leadership. The Council of Elders is made up of Hereditary Chiefs (Simgigat), Hereditary Matriarchs (Sigidimhaanak) and other key Nisga'a elders. The actions and decisions of the Wilp Si'ayuukhl are implemented by a Government Executive. Local matters are administered by the Village Governments established for the four main Nisga'a communities (New Aiyansh, Gitwinksihlkw, Laxgaltzap, Gingolx). In addition, the Nisga'a made permanent provision for Nisga'a living off the settlement lands, establishing Urban Locals in Terrace, Prince Rupert and Vancouver. The Urban Locals provide local information and services (on a contract basis) from the Nisga'a government.

The Nisga'a moved quickly to convert their settlement into an active and productive Nisga'a-led government. Between 2000 and 2006, the Wilp Si'ayuukhl passed 28 different legislative initiatives, exercising the right to self-government as outlined in the agreement. The regulations and acts of the Wilp Si'ayuukhl ranged widely, establishing the formal foundations for Nisga'a government, outlining the human resource regulations for the First Nation, defining the contours of fisheries regulation, creating and amending electoral procedures, and otherwise handling the business of government and administration for the Nisga'a First Nation. Standard administrative systems were implemented, including the establishment of offices for Finance and Administration,

Economic Development, Capital Projects, Land Title, and Communications. The Nisga'a government quickly expanded its a range of self-administered service departments, including Youth Organizing Youth, Children and Family, Ayuukhl Nisga'a (Nisga'a law, culture and history), Social Development, Eligibility and Enrolment, Access to Justice and Housing. The Land and Resources directorate assumed responsibility for the management of settlement lands and forestry resources, and fisheries and wildlife.

The Nisga'a frame their understanding of the new agreement in the context of the Indian Act. As Kevin McKay, Nisga'a Lisims Government Chairperson commented,

The Indian Act was in our lives for approximately 131 years. Compare that to the history of the Nisga'a Nation: our oral stories tell us that we've been here since the beginning of time. The Indian Act was here for 131 years and it did a lot of damage. The demand of our people, especially our hereditary chiefs, matriarchs and respected elders, was that we achieve recognition of the land question in a just and honourable way. To us, we interpreted that to mean on our own terms and conditions, not another prescription.<sup>26</sup>

The agreement, by removing the authority of the Indian Act (save for the role it plays in defining whether an individual is an Indian under the terms of the Act), represented a major shift away from the long-standing system of external control. The impact of living under the Indian Act, said Chairperson McKay, reflecting on the first half decade of self-government, was more pervasive and difficult to overcome than many Nisga'a had anticipated:

Our experience has taught us that we were a bit ambitious in thinking that change would happen more quickly in this area. Indeed, a little more than six years into our experience and we still encounter the frustration of having to remind the federal and provincial governments of the new rules of the game under the Nisga'a final agreement, that we are no longer an Indian Act band council, that we are no longer a Societies Act tribal council, that we are a legal entity, both through Nisga'a Lisims Government on behalf of the nation and in each of the four Nisga'a villages. We have our own legal identity and all of those other key hallmarks of a selfgoverning people.

The transformation of governance in the Yukon, among the Nisga'a and for the other First Nations people who have signed modern treaties is more extensive than this outline

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<sup>26</sup> B.C. Treaty Commission, "Nisga'a Nation," [http://www.bctreaty.net/files\\_3/perspectives\\_nisgaa.html](http://www.bctreaty.net/files_3/perspectives_nisgaa.html).

describes. Power has shifted dramatically and, because the modern treaties are constitutionally protected, permanently to local First Nations governments and away from the Government of Canada. Many of these Aboriginal governments have reconstituted themselves along traditional lines, re-establishing the control of clans, recognizing the authority of elders and hereditary leaders, and/or permitting the exercise of Aboriginal customary law. Land is now controlled locally, under the terms of the settlement agreements, and Aboriginal people have secured extensive and ongoing participation in the management of resources. The Indian Agent of the past has long since gone, replaced for several decades by a complex bureaucracy that continued to exert control over Indigenous lives and now superseded in large measure by Aboriginal authority.

The Indian Act has not disappeared from the lives of First Nations people in the Yukon, the Nisga'a, or other Aboriginal Canadians. Indeed, considerable administrative and political complexity remains in the all jurisdictions covered by modern treaties. The agreements themselves ensure that the protections and benefits of the Indian Act – and there are some – are not eliminated by the signing of a land claims settlement. The federal government's fiduciary responsibility<sup>27</sup> remains in place. In the Yukon and in the Nisga'a territories, there are First Nations people who have status under the Indian Act but who are not beneficiaries under the terms of the modern settlement and its membership provisions. In these instances, the Government of Canada, through Indian and Northern Affairs Canada, maintains full responsibility for the non-settlement First Nations people. The federal government continues to debate issues of government accountability – to both First Nations constituents and the Canadian public – and there will likely be significant changes in the accountability requirements for Aboriginal governments. First Nations political leaders resent the intrusion into Aboriginal affairs – and see the demands for greater accountability as yet another example of Indian Act-type paternalism and colonial meddling.

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<sup>27</sup> Fiduciary responsibility means that the federal government has a continuing obligation to act in the interest of the people or community they represent, in this case the First Nations of Canada. .

**Living outside the Indian Act:** Little time has passed since the initial First Nations agreements to move outside the Indian Act. It is far too soon to declare the process a tremendous success or, alternately, to claim that the establishment of self-governing Aboriginal communities has failed to meet expectations. Conversations with federal government officials, territorial civil servants in the Yukon, and Aboriginal leaders, administrators and observers permits a series of tentative observations about the impact of modern settlements and the changing role of the Indian Act in the lives of Canadian First Nations. These are tentative observations. The coming years will reveal the degree to which the early experience with self-government provides a useful roadmap for other First Nations considering similar moves.

- The move away from the Indian Act has attracted virtually no national or regional attention, among both Aboriginal and non-Aboriginal people. After all of the discussions and lengthy negotiations, the removal of the Indian Act from the lives of thousands of First Nations people in Canada has drawn surprisingly little comment or debate. Given the historic importance of the Indian Act and the long-standing criticism of the legislation, it is surprising that the successful movement of Aboriginal people away from the Act has not drawn more comment.
- For all of the symbolism associated with the Indian Act, correctly identified as being the source of many of the crises and problems facing First Nations people in Canada, there has been little off-setting celebration of First Nations emerging from out of the shadow of federal legislation. The First Nations involved have generally downplayed the significance of the transition in their public documents and political pronouncements, perhaps to reduce the expectations for an immediate and dramatic change in the lives of local Aboriginal people.
- There has been some community backlash against the leaders who negotiated the agreements to remove the Indian Act, most notably because fast results and greater changes were anticipated. In the main, however, the extensive consultation processes ensured that community members understood what was at stake in the shift away from the Indian Act.



- The long-standing tax exemption for First Nations people earning income on an Indian Act reserve generated enormous anger among non-Aboriginal people. Given this situation, it has been surprising that little attention has been given to the gradual reduction and eventual elimination of the First Nations tax exemption. First Nations have not publicized the issue, and have been anxious to emphasize the more positive and constructive elements in the settlement agreements. Governments, for their part, have long shied away from commenting on the contentious provisions governing Aboriginal taxation for fear of sparking non-Aboriginal protests. The result has been that a highly symbolic element in the transition from the Indian Act to Aboriginal self-government has largely been ignored.
- The assertions of numerous critics of the land claims settlements and self-government processes that ending the supervisory role of the Government of Canada would bring chaos, poor administration and corruption have not been borne out. There have been minor controversies in the Yukon, among the Nisga'a, and with other self-governing First Nations, but they have been inconsequential compared to the dramatic visions of administrative doom painted by opponents of the settlements.
- The transition from total federal control under the Indian Act to truly self-governing First Nations has proceeded more slowly than many people anticipated. It took longer than expected to put the administrative and political apparatus in place and to educate the community about the transitions that are underway. Most First Nations moved cautiously in accepting administrative responsibilities from the Government of Canada, testing themselves and their administrative officers and avoiding the temptation to take large and potentially risky steps toward local administration. There is widespread sentiment that the transition process has been more difficult and more time-consuming than assumed.
- The claims by advocates of self-government, modern settlements and the removal of the Indian Act that changes in the administrative system would bring about dramatic and radical change in First Nations communities have not been proven in the short-term. Initial enthusiasm for the settlements was soon replaced by the

- details and difficulties of implementation. Negotiations with federal and regional governments, instead of ending, have shifted to other forums and topics, focusing mostly on the translation of legislation and negotiated agreements into practical management systems.
- The work of self-government and operating outside the Indian Act is dramatically different from the challenges associated with negotiating agreements with the federal and territorial/provincial governments. Many of the key land claims negotiators have left First Nations government, often feeling the personal effects of many long and difficult years at the negotiating table. Since the skill set required for the implementation and administration of the agreements is radically different than those needed for successful negotiations, First Nations have struggled to find leaders willing and able to take on the new assignments of the post-Indian Act world.
  - For more than forty years, Canadian First Nations have been engaged in a difficult, occasionally angry, series of negotiations with the Government of Canada and regional governments. These negotiations produced a frustration with government and agents of authority that has become a part of First Nations culture. Anger that was once directed at federal and provincial/territorial officials did not evaporate immediately and required a new outlet. In some instances, the frustrations have been re-focused on Aboriginal officials and governments, adding to the considerable difficulties of administering the settlements and self-government agreements.
  - First Nations underestimated the legal, political and administrative work associated with converting land claims agreements and self-government accords into practical, appropriate and sustainable First Nations legislation and political structures. For many years, First Nations leaders negotiated for the right of communities to determine their future. Having gained that right, these same leaders now faced the very difficult challenges of drafting legislation, securing community support (particularly for tradition and culture-based governance systems and laws), developing administrative systems, and recruiting suitable personnel. This community-based work, coming at the end of an exhausting,

- externally-oriented political process, has been time-consuming, controversial, and extremely difficult for leaders who had assumed that the post-settlement processes would unfold more smoothly and with greater First Nations support.
- A major issue, and one Aboriginal leaders raise with caution, has to do with the administrative capacity to manage the transition from the Indian Act to self-government. It is not that First Nations community lack talented and dedicated leaders; perhaps the only thing that has sustained Aboriginal governments over the past three decades has been the intense devotion and determination of its core leadership group. Rather, the challenge is that assuming responsibility for a wide range of government responsibilities requires more trained and experienced administrators than most First Nations have available. Even the Nisga'a, who have long supported education and training for their young people, have had difficulty attracting and retaining skilled administrators for the many and growing tasks associated with self-management.
  - First Nations communities emerging from out from under the Indian Act discovered that there were few tested or viable models for administration and governance. Given that most communities were searching for solutions which reflected Aboriginal traditions and customary law, most did not look externally for field-tested models of administrative and political operations. Most groups have not examined the experience of other communities in great detail and have instead emphasized the need to develop local solutions to local problems. Of course, so little time has passed since the signing of the major accords that it is not yet known which systems work the best. Furthermore, and perhaps most importantly, self-government arrangements and post-Indian Act circumstances are so community and culture-specific that finding transferable models and examples will prove difficult into the future.
  - The Yukon process, involving 10 individual First Nations agreements and one umbrella agreement that covers the whole territory, has produced very uneven results, reflecting the condition, interests and priorities of the various communities and governments. The result has been an administrative patchwork that, because it is First Nations-focused, has seen relatively little region-wide or coordinated

- activities. Some observers worry that the Yukon First Nations have lost important opportunities for economies of scale and administrative efficiency. Many predict that, over time, smaller First Nations will realize that joint administration or certain programs and responsibilities will provide better results than community-specific administrative structures. The settlement structure established through the Nisga'a settlement draws the Nisga'a people together in a system that recognizes shared language and culture. As a consequence, the balance struck between the Lisims government and the Village Governments appears more sustainable than the Yukon arrangements (which, it must be emphasized, reflect the cultural and linguistic diversity in the territory).
- There has been no significant talk of wanting to go back or regretting the transition away from the Indian Act. Although First Nations governments recognize that they face formidable challenges, there is widespread acceptance of the reality that the Indian Act is gone and that First Nations have assumed responsibility for managing their affairs. There is rarely even a murmur of favourable comment on the old Indian Act regime or even a hint that the shift to self-administration was the wrong way to go (although some do comment that their political leaders did not secure enough in the way of a settlement). For those First Nations who have made the change, a new path has been set, one filled with hard work and uncertainty but with solid reasons for optimism about the future.
  - The current situation in the Yukon, for the Nisga'a and in other former Indian Act communities is not a full and proper test of life outside the Indian Act. For a variety of complex reasons – dealing with membership, the rights of off-reserve status Indians and other Indigenous peoples, partial self-government arrangements and the like – First Nations who have opted out from under the Indian Act nonetheless have extensive engagement with the Government of Canada and Indian and Northern Affairs Canada. Indian Affairs is far from removed from the lives of self-governing First Nations, and will remain an active player for many years to come. As a consequence, even communities that have opted out of the Indian continue to feel the frustrations associated with external control and federal government involvement in their lives.

- All First Nations leaders involved with moving away from the Indian Act understand that the process of regaining control will take a very long time. Several spoke of the process requiring two or three generations before the intrusive aspects of the Indian Act – and the effects of living under a totally controlling institution – are purged from the lives of First Nations people. Those expecting a rapid transition and quick improvements in civic life, economic activity and the like are destined to be disappointed.
- Most importantly, perhaps, Aboriginal people familiar with the process of moving outside the Indian Act point to one critical transition: the shift in community focus away from negotiations and relations with the Government of Canada to a much greater emphasis on local issues and concerns. Leaders now confront community problems more than reluctant civil servants in Ottawa. The resulting debates have been difficult on occasion – struggles over local improvements, job creation, health and education are challenging at the best of times – but communities have more time, personnel and resources to devote to solving the very real problems at home. This is the most promising outcome to date from the process of moving away from the Indian Act, for it means that the communities and their leaders can devote their energy and resources to local priorities and not to complex negotiations with distant governments.

**The Future of the Indian Act in Canada:** The foundations of Aboriginal community life, governance, and relations with the rest of the country are changing rapidly. For generations, the Indian Act defined federal government management of Indigenous affairs and set the legal and administrative structures within which Aboriginal people lived, worked and attempted to control their lives. Much attention has focused on the more serious manipulations of First Nations people, such as the pass regulations governing movements off reserves, attempts to control the potlatch, the Sun Dance and other crucial cultural practices, and restrictions on Aboriginal voting and the right to own property. It is crucial to understand the comprehensive impact of the Indian Act on Aboriginal life. The Indian Act effectively guided Aboriginal communities and ensured

that status Indians operated within the confines of the legislation, as interpreted and implemented by the Department of Indian Affairs.

To be a status Indian in Canada was to be immersed in a “total institution,” which enveloped those caught under its authority and which rendered them largely without power to determine their destiny. It is this all-inclusive power – the reality of being under the effective daily control of a distant political authority – that stripped away First Nations autonomy, undercut their confidence and restricted their ability to compete effectively with other Canadians. Total institutions remove dignity, self-respect and a sense of independence; they are, in return, the foundation of dependency, demoralization and cultural loss. Attempts to understand the full impact of the Indian Act must move well beyond the details of specific clauses, amendments or regulations and must reflect more broadly on how this critical and long-standing piece of government legislation sent a clear message to status Indians across the country that they were lesser citizens within Canada and therefore lacked the most basic rights, freedoms and opportunities available to other Canadians. The Indian Act is both a symbol of cultural and political domination but, in a very real and pervasive sense, the cause of much Aboriginal suffering, discouragement and cultural loss.

If it is hardly surprising that Indigenous peoples often refer to the Indian Act with contempt and derision, it is less easy to explain why many status Indians continue to support the continuation of the legislation, albeit with amendments and greater Aboriginal control. Most of the Aboriginal governments currently operating within Canada derive their power from the Indian Act. The Chiefs and Councilors elected under its provisions, operate under its authority, and increasingly assume responsibilities hitherto delegated to the Department of Indian Affairs. Many communities, particularly those in the more densely settled southern areas, have operated under the Indian Act for generations and are familiar with the provisions and administrative and political structures. The Indian Act, while the source of much First Nations pain, is also the legal and administrative focus of Aboriginal distinctiveness. The Act also makes clear that the

Government of Canada has an ongoing and comprehensive set of responsibilities to First Nations people in the country, ensuring status Indians of special and distinctive status.

The debate about the Indian Act over the past 40 years has understandably been shaped by the sweeping intent of the White Paper of 1969. The effort in the late 1960s to eliminate the Indian Act, which many Aboriginal leaders supported, was linked to the federal government's plan to eliminate all special provisions and rights for status Indians. In other words, the Trudeau government connected a desirable end – eliminating the Indian Act – with an undesirable outcome – stripping status Indians of significant legal and political rights and government obligations. Not surprisingly, therefore, subsequent debates about changing the Indian Act have occurred against an historic backdrop of the elimination of federal obligations to First Nations people. Thanks to the White Paper, Indigenous peoples are understandably very wary about the federal government's ultimate intentions in changing the Indian Act. However imperfect – and it is that – the Indian Act at least commits the Government of Canada to the recognition of the special legal status of Aboriginal people.

Canada is, however, now moving fairly quickly away from its emphasis on the Indian Act as the focal point for federal-government-Indigenous relations. The dominance of the Department of Indian Affairs in the lives of First Nations communities recedes further each year. Already more than 80% of the funds spent on status Indians are managed by band or tribal governments. This will expand in the coming years. Recent northern land claims agreements and agreements in principle signed in British Columbia in 2006 have revolutionized Aboriginal governments and removed most of the authority and relevance of the Indian Act, as the Nisga'a and Yukon First Nations have experienced. The agreements in principle signed by the Lheidli T'eeneh Band, the Maa-nulth First Nations, and the Tsawwassen First Nation all include provisions comparable to those in the Nisga'a and Yukon settlements.<sup>28</sup> The creation of Nunavut, an Inuit-controlled jurisdiction with the same range of powers as the other two territories, has raised even

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<sup>28</sup> For the text of the British Columbia agreements, see <http://www.gov.bc.ca/arr/firstnation/lheidli/default.html>.

further the bar on Aboriginal governance. Self-government agreements, like that negotiated by the Westbank First Nation, similarly eliminate much of the authority of the Indian Act within the lives of specific First Nations.<sup>29</sup>

The current push to finalize modern treaties in British Columbia and treaty negotiations in the Maritimes will, over time, result in even more status Indian communities agreeing to come out from under the Indian Act. They will instead operate under the terms and conditions of agreements that recognize the centrality of Aboriginal governments and accept Indigenous law-making authority. Equally, the Government of Canada has been moving in other ways beyond the limits of the Indian Act in recent years. Ottawa has been working more closely with Métis communities and with urban Aboriginal populations, groups who argued their needs were not being met under the Indian Act, with its emphasis on status Indians and reserve governments.<sup>30</sup> These efforts have challenged the central role of reserve-based band governments created under the Indian Act and have broadened the federal government's programming for Indigenous people in Canada. Put simply, the Indian Act no longer dominates Aboriginal-government relations and no longer provides a singular focus for the management of status Indian affairs.

Despite all of these changes, the Indian Act remains a touch-stone for Aboriginal politics in Canada. Many Indigenous politicians still lobby for its retention. Others attack it as the classic illustration of Canadian paternalism and colonialism and demand its abolition. Slowly, this pivotal piece of legislation is being replaced by agreements that Aboriginal governments and communities feel more appropriately represent their needs and interests. The modern treaties signed in northern districts have become models for future accords

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<sup>29</sup> See the Westbank First Nation Self-Government Act, <http://lois.justice.gc.ca/en/2004/17/text.html>.

<sup>30</sup> The conflict over the political representation of off-reserve status Indians was capped by the Corbiere decision by the Supreme Court of Canada in 1999, which recognized the right of off-reserve status Indians to have "reasonable representation" in band governments. For a discussion of this decision, see "Corbiere Decision Making Waves," Windspeaker, July 1999. <http://www.ammsa.com/windspeaker/WINDNEWSJULY99.html#anchor844596> For the perspective of the Indian and Northern Affairs Canada on Corbiere, see [http://www.ainc-inac.gc.ca/nr/prs/s-d2000/00168bk\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/s-d2000/00168bk_e.html).



and represent important signs of the declining role of the Indian Act in the lives of status Indians in Canada. Non-Aboriginal Canadians generally know very little about this important transition, just as they long knew very little about the power and constraints associated with the Indian Act. Long-standing critiques of the “special status” of Aboriginal people and communities – such as the exemption from taxation that has long been so strongly criticized by non-Indigenous Canadians – become meaningless as modern treaties change the financial relationships between First Nations and the Government of Canada.

The Indian Act appears to be losing its position of prominence within the Canadian political and administrative scene. Surprisingly little attention followed the removal of Indian Act controls in the modern treaties. There is little appreciation across the country of the important and continuing changes underway. The crucial element – and a major improvement from the long-standing reliance on the Indian Act – is that the new arrangements have been negotiated with Aboriginal governments and ratified by Aboriginal communities. The most intrusive element in the Indian Act was always the fact that it was imposed by the Government of Canada, without consultation with the people whose lives were, for generations, controlled and shaped by the legislation. Under the terms of modern treaties, self-government agreements and other accords, the basic model of Aboriginal government has changed in Canada. The old way, symbolized by the Indian Act, is on its way out. The new way – demonstrated in the Council for Yukon First Nations and Nisga’a settlements and by agreements in principle in British Columbia – has taken over. Political and administrative life in Indigenous communities will certainly never be the same again.