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THE INDIAN ACT OF CANADA

RICHARD H. BARTLETT*

INTRODUCTION

The Indian Act of Canada is the principal instrument through which federal jurisdiction over Indians and native people has been exercised during the last one hundred years. It indicates the manner in which Indian reserves and treaties are administered by the Indian Affairs Department and the limited control exercised by bands and band councils. The Act governs 295,000 (1971) Indian people in 565 bands. Insofar as statistics can reveal a style of life, they indicate that these people are by far the most economically impoverished and socially disadvantaged group in Canada.

First passed in 1876, the Indian Act was simply a consolidation of previous legislation. And, in order to understand its role in the law of Canada governing Indian and native people, it is essential to appreciate the surrounding legislation and jurisprudence. The Royal Proclamation of 1763 established the incidents of aboriginal title to land subsequently recognized in Canada. The Indian “personal and usufructuary right,” after the model outlined by the United States Supreme Court in Johnson v. McIntosh, was affirmed by the Privy Council in St. Catherines Milling and Lumber Co. v. The Queen. Imperial and federal government policy required that extinguishment of aboriginal title be purchased by treaty, and reserves be set apart for the aboriginal population. The Constitution of Canada, the British North America Act of 1867, sought to ensure the achievement of such objectives by providing that “Indians and lands reserved for Indians” were exclusively within federal jurisdiction.

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3. 21 U.S. (8 Wheat.) 543 (1823).
4. [1888] 14 App. Cas. 46 (P.C.) (Can.).
1. History

The most singular feature of Canadian legislation concerning Indians is that the governmental policy established therein, that of "civilizing the Indians," has shown almost no variation since the early 19th century when the government assumed responsibility for the society and welfare of the Indian population. In 1830, the British Indian Department ceased as a branch of the military and became, as a Department of Indian Affairs, a branch of the public service. Prior to that time the

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6. This uniformity is exhibited by the language and tone of various reports concerning the Indians:

[O]ur Indian legislation generally rests on the principle that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. The soundness of this principle I cannot admit. On the contrary, I am firmly persuaded that the true interests of the aborigines and of the State alike require that every effort should be made to aid the red man in lifting himself out of his condition of tutelage and dependence, and that it is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.


The use of the tent and wigwam should be discouraged as much as possible, and every effort should be made to induce them to abandon their old habits of life and to adopt those of the white man.


The military policy had looked upon the Indians as potential allies or foes, and, during the pioneer days, the feeling was balanced between hope and apprehension. They were kept quiet by presents of scarlet cloth, silver gorgets, brass kettles, and ammunition, with an occasional ration of rum. The fur-traders used the latter fluid as the most precious means of exchange and barter, and the restless, dejected people that were handed over to the province were indeed a problem. One Governor of Upper Canada, seeing them so wretched, resolved to send them back to nature for healing, and to remove them to hunting grounds where they might recuperate or die away unseen. But better counsels prevailed. The missionaries claimed them as material ready for evangelization, and protested that they were capable of lasting improvement. Upper and Lower Canada, not long after that, began a systematic endeavour to educate the Indians, supported by zealous missionary effort. This informal union between church and state still exists, and all Canadian Indian schools are conducted upon a joint agreement between the Government and the denominations as to finances and system. The method has proved successful, and the Indians of Ontario and Quebec, in the older regions of the provinces, are every day entering more and more into the general life of the country. They are farmers, clerks, artisans, teachers, and lumbermen. Some few have qualified as medical doctors, and surveyors; and increasing numbers are accepting enfranchisement and taking up the responsibilities of citizenship. Although there are reactionary elements among the best educated tribes, and stubborn paganism on the most progressive reserves, the irresistible movement is towards the goal of complete citizenship.


relationship between the government and the Indians was largely confined to contacts appropriate to a military alliance. In 1844, the direction of the Department was transferred from the Imperial authorities to the Province of Canada.

The nature of the responsibility assumed by the Department of Indian Affairs in the 19th century is clearly illustrated by the 1850 statutes entitled an "Act for the Better Protection of the Lands and Property of Indians in Lower Canada" and an "Act for the Better Protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury." The former statute established a Commissioner of Indian Lands who held the lands in trust for the Indians with full power to manage and dispose of the property. The latter statute barred dealings in Indian lands except with the approval of the Crown and sought to protect such lands from trespass or injury by non-Indians. It conferred an exemption upon Indians from judgment or taxation, and sought to prevent the provision of liquor to Indians. The legislation hints at the ultimate thrust of the government policy—"civilizing" the Indian population and achieving assimilation and integration as soon as possible. Protection of the Indians and their land from abuse and imposition was afforded until such time, as being "civilized," such protection was superfluous.

The ultimate goal of assimilation received explicit declaration in the Civilization of Indian Tribes Act of 1857. The Act provided for the enfranchisement of Indians of "sufficiently advanced" education or of Indians who were "capable of managing their own affairs." Enfranchisement removed the disabilities and distinctions imposed upon the Indian people for their protection.

In 1860, the Management of Indian Lands and Property Act declared the Commissioner of Crown Lands to be the Chief Superintendent of Indian Affairs. The Commissioner was empowered to dispose

8. Sir George Murray, Secretary of State for War and the Colonies, declared in 1830 that:
the course which had hitherto been taken in dealing with these people has had reference to the advantages which might be derived from their friendship in times of war, rather than to any settled purpose of gradually reclaiming them from a state of barbarism and of introducing amongst them the industrious and peaceful habits of civilized life.
Murray to Kempt (Jan. 25, 1830), reprinted in Public Archives of Canada, 116 Record Group 10.

of lands reserved for the Indians upon their release or surrender. The Commissioner administered Indian Affairs until 1867 when the Department of the Secretary of State Act appointed the Secretary of State the Superintendent of Indian Affairs and declared that the Secretary "shall as such have the control and management of the lands and property of the Indians in Canada." The statute did not confer any powers of management on the Indians, but merely sought to continue already established protections from abuse and imposition.

The form of the modern Indian Act can be traced to the Department of the Secretary of State Act and the amending statute passed the following year, the Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs. The latter statute conferred greater power upon the Superintendent General, including allocation of reserve land and control of reserve income, and yet at the same time sought to introduce local government to the reserve in a form that appears unchanged to the present day. The inconsistency of a policy conferring all control upon the Superintendent General and yet seeking to encourage self-government was established by 1869.

In 1873, the Minister of the Interior was declared the Superintendent General of Indian Affairs, and, in 1874, the governing Indian legislation was extended to Manitoba, the North-West Territories and British Columbia. The need for a consolidation of the legislation became apparent with the development of the settlement of the North-West Territories and the establishment of treaty relations with the Indians inhabiting the area. The Indian Act of 1876 provided such a

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14. Id. at 5.
18. The Report of the Department of Interior of 1876 observed:
   The necessity of a careful revision of the Indian Acts at present on the Statute book, and of new and comprehensive legislation on some Indian questions which have not yet been dealt with, has long been felt. It must be admitted by all who have any familiarity with the present Indian Acts that they are inconveniently numerous, that some of them are encumbered by extraneous matter, that many of their provisions are vague and indefinite, if not contradictory; and that they are in some respects entirely opposed to the well understood and reasonable wishes of the Indians themselves. Moreover, since Confederation, the incorporation of the Maritime Provinces, British Columbia, Manitoba and the North-West Territories, has brought into the Dominion upward of 60,000 Indians (nearly trebling the number of Indians previously existing in the old Province of Canada), whose circumstances and surroundings are in many respects entirely different from those of the Indians to whom the majority of the Indians Acts now in force were intended to apply.
   With a view therefore to meet this pressing necessity for Indian legisla-
consolidation. The Act does not contain any substantial changes from previously established legislative policy. That policy had, as already indicated, been established in the early 19th century—the first Indian Act did not mark any deviation.

During the next one hundred years legal authority over the management and control of Indian lands and property remained with the Superintendent General of Indian Affairs. While local government procedures on the reserve became more complicated, they in no way eroded the legal responsibilities of the Superintendent General. The Indian Advancement Act of 1884 markedly indicates an inconsistency in approach. The statute sought to confer wider powers upon the Band Council, including the raising of money, yet appointed the Indian Agent chairman of the Council.

The policy of “civilization” developed to effectuate cultural destruction at the time of the disturbance surrounding the Riel Rebellion. The 1884 amendments barred the incitement of riots among Indians and half-breeds, banned the sale of “ammunition or ball cartridge” to them, and proscribed the celebration of the Indian festival known as the “Potlach” and the Indian dance known as the “Tamanawas.” Further prohibition of traditional dance and customs were introduced in 1895, 1914, and 1933.

The Depression appears to have been the high water mark of government regulation and interference in the daily lives of the Indian population. Until that time amendments to the Indian Act were frequent and excessively detailed; thereafter, amendments were made only in 1936, 1938, 1941, 1951, and 1956. In the last twenty years there have been no amendments. The astonishing feature of the amendments up to 1950 is how little, despite their frequency, they sought to accomplish. They were always preoccupied with details and never contradicted the basic rationale of the Indian Act, which demanded “civilization” and responsibility from the Indian population while denying them control over the forces affecting their lives.

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21. Id. c. 27.
The 1946-48 Joint Committee of the Senate and House of Commons reported on the lack of success of the government policy of assimilation. The Committee found many anachronisms and contradictions in the Indian Act and recommended that nearly all sections of the Act be repealed or amended. The recommended "amendment or repeal" took place in 1951, though the provisions of the Indian Act of 1951 were dramatically similar to those adopted in 1868. The major features of the 1951 Act were the increased imposition of provincial laws and standards on Indians, particularly through the explicit declaration of their application subject to federal legislation in section 87, and the introduction of provincial standards into the liquor provisions. The 1951 Act removed the excesses of government control of local affairs on the reserves and of cultural prohibitions, but the policy of encouraging "citizenship"—assimilation—was

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25. Special Joint Committee of Senate and House of Commons on Indian Act, Minutes of Proceedings, Fourth Report (1948). The Committee declared:

All proposed revisions are designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance themselves.

In order to achieve these objectives, your Committee recommends, in addition to other recommendations hereinafter set out,

(a) That the revised Act contain provisions to protect from injustice and exploitation such Indians as are not sufficiently advanced to manage their own affairs;

(b) That Indian women of the full age of 21 years be granted the right to vote for the purpose of electing Band Councillors and at such other times as the members of the band are required to decide a matter by voting thereon;

(c) That greater responsibility and more progressive measures of self-government of Reserve and Band affairs be granted to Band Councils, to assume and carry out such responsibilities;

(d) That financial assistance be granted to Band Councils to enable them to undertake, under proper supervision, projects for the physical and economic betterment of the Band members;

(e) That such Reserves as become sufficiently advanced be then recommended for incorporation within the terms of the Municipal Acts of the province in which they are situate;

(f) That the offence and penalty sections of the Indian Act be made equitable and brought into conformity with similar sections in the Criminal Code or other statutes;

(g) That the Indians be accorded the same rights and be liable to the same penalties as others with regard to the consumption of intoxicating beverages on licensed premises, but there shall be no manufacture, sale or consumption, in or on a Reserve, of "intoxicants" within the meaning of the Indian Act;

(h) That it be the duty and responsibility of all officials dealing with Indians to assist them to attain the full rights and to assume the responsibilities of Canadian citizenship.

Id. at 186.

continued. The accomplishment of the 1951 statute was the removal of the most paternalistic of the excesses in governmental authority introduced in the first half of the 20th century. It in no way, however, conferred any power resembling self-determination or self-government upon the Indians.

A Second Joint Committee of the Senate and House of Commons reported in 1961, though its fine phrases did not result in recommendation of any major changes in the Indian Act. The recommendations were essentially concerned with fine-tuning the established policy of the Indian Act. Moreover, the report’s regard for the special status and the “cultural, historical and economic inheritance” of the Indian people must be regarded as insincere when viewed in conjunction with recommendations urging the transfer of education and social services to the provinces and the imposition of taxes off the reserve. Changes were not introduced into the Indian Act as a result of the report.

In 1966, the Hawthorne Committee reported following “a study

27. JOINT COMMITTEE OF SENATE AND HOUSE OF COMMONS, MINUTES OF PROCEEDINGS, SECOND (1961):

The time is now fast approaching when the Indian people can assume the responsibility and accept the benefits of full participation as Canadian citizens. Your Committee has kept this in mind in presenting its recommendations which are designed to provide sufficient flexibility to meet the varying stages of development of the Indians during the transition period.

It is the view of the Committee that the government should direct more authority and responsibility to Band Councils and individual Indians with a consequent limitation of ministerial authority and control, and that the Indians should be encouraged to accept and exercise such authority and responsibility. Your Committee believes that the advancement of the Indians towards full acceptance of the responsibilities and obligations of citizenship must be without prejudice to the retention of the cultural, historical, and other economic benefits which they have inherited.

28. INDIAN AFFAIRS BRANCH, HAWTHORNE COMM., SURVEY OF CONTEMPORARY INDIANS OF CANADA (Ottawa 1966). The Committee’s general recommendations included:

(1) Integration or assimilation are not objectives which anyone else can properly hold for the Indian. The effort of the Indian Affairs Branch should be concentrated on a series of specific middle range objectives, such as increasing their real income, and adding to their life expectancy.

(2) The economic development of Indians should be based on a comprehensive program on many fronts besides the purely economical.

(3) The main emphasis on economic development should be on education, vocational training and techniques of mobility to enable Indians to take employment in wage and salaried jobs. Development of locally available resources should be viewed as playing a secondary role for those who do not choose to seek outside employment.

(4) Special facilities will be needed to ease the process of social adjustment as the tempo of off-reserve movement increases. Where possible these should be provided by agencies other than the Indian Affairs Branch. However, if other agencies prove inadequate, either due to incapacity or unwillingness, the
of the social, educational and economic situation of the Indians of Canada." This report did not suggest any changes from the policy of assimilation declared in the Indian Act. It emphasized transferring the provision of services to the provinces, which, of course, is a major element in the attainment of the goal of assimilation. It did, however, coin the phrase "citizens plus" as a reference to Indians.

In 1969, the Federal Government finally acted on the series of reports and its understanding of the consultative process with the Indians. The Statement of Policy presented to Parliament declared that total assimilation must occur within a short period of time—the Indian Affairs Branch should be abolished in five years. All legislation specially pertaining to Indians was to be repealed, thereby denying special rights of Indians. Instead, all services were to be provided by the provinces; the statement rejected treaties and land-claims as insignificant in the debate on the future of the Indians. The Federal Government's goal of total assimilation would be accomplished, according to the Statement, by short-term economic aid. The 1969 Policy did not contain any major positive suggestions regarding the well-being of the Indians. Its essence was the severing of all ties between the Indians and the Federal Government.

The absurdity of the 1969 Policy was pointed up in the Red Paper prepared by the Indian Chiefs of Alberta in 1970, which declared that it described "[a] scheme whereby within a generation after the proposed Indian Lands Act expires our people would be left with no land and consequently the future generation would be condemned to the despair and ugly spectre of urban poverty in ghettos." The Indian Affairs Branch must step in itself regardless of whether the situations requiring special attention are on or off the reserve.

(7) Indians should be regarded as 'citizens plus'; in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community.

Id. at 13. The essence of the Committee's specific recommendations was as follows:

(1) Hundreds of millions of dollars should be spent in economic development to insure the provision of jobs emphasizing particularly industrial work off the reserve.

(2) The provinces should assume responsibility for Indians for as far as possible.

(3) Indian local government should be encouraged within the provincial municipal framework. Indians must increase their understanding of the local government procedures of their white neighbors.

Id. at 17.


30. Id. at 1.
Red Paper demanded the retention and entrenchment of the special legal status of the Indians. The Indian Chiefs stated that the Indian Act should be reviewed, not repealed, and that the treaties should be entrenched as part of the contribution of Canada. The Chiefs urged further that the Indian Affairs Branch, which they felt should serve rather than endure the Indian population, should supply social and development aid. Indeed, the Red Paper rejected the whole concept of assimilation: "The only way to maintain our culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights."\(^{31}\)

The Red Paper reflected the conflict between the Federal Government and the Indian organizations. This conflict led to extensive consultation concerning the future approach to the government's responsibility to the Indians. A dialogue was institutionalized in a special Federal Cabinet National Indian Brotherhood Joint Committee. However, the Committee collapsed when the National Indian Brotherhood withdrew because of demands made by the Federal Cabinet for amendments to the status or membership system of the Indian Act.

II. STATUS AND MEMBERSHIP—WHO IS AN INDIAN UNDER THE INDIAN ACT?

Determination of entitlement to be registered as an Indian under the Indian Act was historically important in order to ascertain who was interested in and entitled to be protected on the lands reserved for Indians. The first federal legislation on this issue, in 1868, declared that such persons were "all persons of Indian blood, reputed to belong to a particular tribe, band or body of Indians and their descendants."\(^{32}\) Wives of such persons were also considered to be Indians. In 1869, the patrilineal character of the status system was established when an enactment declared that Indian women and their children lost status upon marriage to a non-Indian.\(^{33}\) In an effort to settle disputes, the Act was amended in 1951 and provided for charter groups based on the previous statutory provisions. Entitlement to be registered as an Indian is now confined to members of the charter group, descendants in the male line, and wives of those persons.\(^{34}\) Illegitimate children of Indian

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31. Id. at 4.
women are entitled unless a protest is made that the father of the child was not an Indian.35

Two groups are specifically disentitled—the half-breeds, or meti, and those who are enfranchised. The Act specifically declares that those who "received or have been allotted half-breed lands or money scrip" and their descendants are not considered to be Indians. It appears that a Commissioner made the determination of who was meti and who was Indian in the late 19th century based on a complex of factors including reputation, blood and manner of living. At the time that treaties with the Indians were entered into in Western Canada individual allotments of land or money scrip were granted to the meti. These grants were manipulated for great profit by land and trading companies such that the meti were deprived of any land base. The Federal Government has always maintained that the grant of land and money scrip extinguished any claims to special status the meti might have preferred.

The Indian Act provides that if an Indian applies for enfranchisement and if the Minister of Indian Affairs is of the opinion that the Indian:

(a) is of the full age of 21 years,
(b) is capable of assuming the duties and responsibilities of citizenship, and
(c) when enfranchised, will be capable of supporting himself and his dependents,

the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.36

An enfranchised person is not entitled to be registered as an Indian.37 Enfranchisement has always been a central theme of federal Indian policy, albeit it is little used today. It represents the federal objective of assimilating or "civilizing" the Indian peoples. In the past, enfranchisement was used extensively. Indians who sought to avoid the disabilities then imposed with regard to franchise and liquor were particularly likely to seek enfranchisement. The Federal Government also employed involuntary enfranchisement for a short period of time. Upon enfranchisement an Indian receives a per capita share of the band funds and a capitalization of treaty annuities. Any interest in reserve land must be disposed of to the band or a member thereof, though

35. *Id.* §§ 11(1)(e), 12(12).
36. *Id.* § 109(1).
37. *Id.* § 12(1)(a)(iii).
the land itself may be "enfranchised"—cease to be reserve land—with the consent of the band council.\footnote{38} A band, upon a majority vote, may also enfranchise all its members.\footnote{39}

A registrar employed by the Department of Indian Affairs administers the status provisions of the Indian Act.\footnote{40} The power of the bands or band councils over the make-up of their membership is strictly limited; only actions of the Registrar that are not in accord with the Act may be protested. The band also must consent to the admission of new members.\footnote{41} Such controls are dramatically at variance with the aspirations of Indian groups such as the Federation of Saskatchewan Indians, which has declared:

Parliament has granted the Minister of Indian Affairs certain powers in determining the membership of Indian bands and in drawing up and maintaining a Band List. Such power was granted primarily for the purpose of dividing band funds held in the Canadian Treasury.

While the Minister does have certain powers and responsibilities, an Indian government's power to determine its membership cannot legally be impaired. As a general rule, an Indian government has complete authority in this area unless a specific law has taken away that power.

An Indian government may even prevent Canadian Intervention, if it exercises its sovereign power, and maintain membership requirements and rolls.\footnote{42}

In March of 1978, the joint National Indian Brotherhood–Federal Cabinet Committee on revising the Indian Act collapsed over federal demands that the Act's status system be amended to remove those elements that discriminated on the basis of sex. Sex discrimination had become a cause celebre among non-Indian groups, particularly in Eastern Canada.\footnote{43} On June 13, 1978, the Federal Government issued a "Dis-

\begin{itemize}
  \item \footnote{38}{\textit{Id.} § 111.}
  \item \footnote{39}{\textit{Id.} §§ 112, 113.}
  \item \footnote{40}{\textit{Id.} § 9.}
  \item \footnote{41}{\textit{Id.} § 13.}
  \item \footnote{42}{\textit{Indian Government}, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, Canada, June 1977.}
  \item \footnote{43}{H.C. Debates, June 15, 1978. On June 15th, 1978, the Minister of Indian Affairs declared in the House of Commons: Finally, in these areas of current concern is the pressing question deriving from the discriminatory aspects in the present Act in relation to Indian women. The government has decided that such discrimination is no longer tolerable in our society and we know that this view is broadly, if not unanimously, shared in both Houses of Parliament. Ministers have informed the Indian leaders, through the NIB-Cabinet committee, that the provisions disciminating against Indian women, and in particular section 12(1)(b), must be revised.}
\end{itemize}
discussion Paper on the Revision of the Indian Act." The paper suggested several choices but appeared to favour the approach that "all registered Indians retain their status on marriage to a non-Indian and non-Indian spouses do not gain status. This alternative is more in keeping with current federal human rights legislation."44 The Minister's preference regarding children's status is that all children of mixed marriages may choose status at the age of majority if they so desire and may become band members if accepted by the band. This alternative would require the establishment of fair and equitable criteria to be applied by all bands in accepting or rejecting those who opt for Indian membership.45

The federal initiatives represent a continued reluctance to extend any realistic form of self-government to band councils on reserves so as to enable them to determine their own membership, and also represent a preoccupation with an aspect of the status system that has not attracted the interest of a significant portion of the Indian population. The ensuing debate and amendments are unlikely to meet any major goals of the Indian people. Indeed, they may serve only to satisfy the political needs of the Federal Government.

III. THE DENIAL OF SOVEREIGNTY AND SELF-GOVERNMENT

Inherent Powers of Indian Governments

Indian governments traditionally exercised the powers of sovereign nations and the most fundamental right of a sovereign nation is the right to govern its people and territory under its own law and customs.

"Inherent" means that the right of self-government was not granted by Parliament or any other branch of any foreign government. Indians have always had that right and the Treaties re-enforce this position.

Indian tribes and subsequently Indian Bands are qualified to exercise powers of self-government because they are independent politi-

While there is undoubtedly widespread and grave concern among the Indian bands about this complex issue of discrimination, I believe that there is growing awareness on the Indian side that it is an issue that must be resolved satisfactorily and as soon as possible.

Id. at 6453.

45. Id. at 18. The Minister has indicated that he would like revisions to the Indian Act to be completed by 1980, in order to dovetail with the constitutional changes proposed by the Prime Minister in 1981.
cal groups. Among the inherent powers of Indian government is the power to:

a) determine the form of government;
b) define conditions for membership in the nation;
c) regulate the domestic relations of its members;
d) levy and collect taxes;
e) administer and enforce laws.46

The Indian Act historically and today totally rejects such claims.

A. The Form and Powers of Self-Government of the Band Council

A Report of Special Commissaries of the Legislative Assembly of Canada of 1858 did not encourage interference in Indian internal government. The Report suggested that the results of such interference had not been satisfactory.47

A decision not to seek immediate alteration of the structure of Indian government appears to have led to the conclusion that powers of management and control should not be conferred on the traditional government. Such was not, of course, a necessary conclusion from the Report. Indian government might readily have developed to adjust to changing conditions brought about by European settlement if it had retained its traditional powers. Instead, the Crown officers utilized the traditional government only for land surrenders and treaties, and otherwise deprived that traditional government of any powers of management or control. The astonishing failure of the subsequent developments in Indian administration is that the Indian Affairs Department hamstrung the development of elective forms of Indian government in exactly the same way.

47. JLAC, 1858, 21 Vict., app. 21 (Can.).

Another point of vital importance to be kept steadily in view, is the gradual destruction of the tribal organization. It has been proposed to substitute municipal institution at once for it.

The reasons against such a change however appear to us in the existing condition of the Indians to outweigh its advantages. A premature introduction of such an innovation produced for some time pernicious results among some of the bands in the State of New York, and though differences thence arising have been ultimately adjusted, it must be remembered that the social condition of the Indians there was in absence of that now obtaining among the generality of our tribes.

Id.
The introduction of municipal institutions in Indian internal government was provided for in the 1869 Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs.\(^4\) The provisions have been only slightly altered since that time. Section 10 of the Act provided for elections for office to be held for a three year term. The officers were subject to removal by the Governor "for dishonesty, intemperance or immorality." Especially in small communities, this "elective method" appears to have been less democratic than existing Indian customs and tradition. The three year term and the limited powers of removal vested in the Governor denied the immediate control of the Chiefs formerly possessed by the community. The justification for this interference in Indian internal government was explained in the Annual Report of the Indian Branch of the Department of the Secretary of State of 1871:

The Acts framed in the years 1868 and 1869, relating to Indian affairs, were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage, as a Council, local matters—that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of the mature years in each band, who should be fairly represented in the conduct of their internal affairs.

Thus establishing a responsible, for an irresponsible system, this provision, by law was designed to pave the way to the establishment of simple municipal institutions.\(^4\)

The introduction of the elective system was coupled with provisions for the "Chiefs of any tribe in Council" framing regulations in limited areas "subject to confirmation by the Governor in Council." The power so conferred was limited to matters of trivial importance compared to the powers of management and control over band prop-

\(^4\) Can. Stat. c. VI (1869). Section 10 of the Act provided:

The Governor may order that the Chiefs of any tribe, band or body of Indians shall be elected by the male members of each Indian settlement of the full age of twenty-one years at such time and place, and in such manner, as the Superintendent General of Indian Affairs may direct, and they shall in such case be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, or immorality, and they shall be in the proportion of one Chief and two Second Chiefs for every two hundred people; but any such band composed of thirty people may have one Chief; Provided always that all life Chiefs now living shall continue as such until death or resignation, or until their removal by the Governor for dishonesty, intemperance or immorality.

\(^4\) at §10.

\(^4\) (1871) Sessional Paper No. 3, at 4-7.
property conferred on the Secretary of State. The 1869 Act did not indicate how the Governor would order the introduction of the elective method. And, the Indian Branch did not seem prepared to ignore completely the wishes of the Indian community, which, in 1871, rejected the proposed new form of internal government. The Annual Report of 1871 noted the lack of success in introducing the elective method.\(^{50}\)

From 1871 to 1877 the Canadian government entered into seven treaties with the Indians of the Prairies to secure the surrender of aboriginal title, thus permitting European settlement. For the purpose of those treaties the Treaty Commissioners acknowledged the customarily selected Chiefs and Councillors as the Indians' representatives. The treaties provided for payment of special annuities, provision of a "suitable suit of clothing," and the presentation of a "suitable flag" to each Chief and Headman.

The Indian Act of 1876\(^{51}\) was directed at accommodating the ad-

\(^{50}\) Nevertheless, the new plan of appointment has found, as yet, little acceptance with the Indian people in general. With the exception of the Mohawks of the Bay of Quinte, they have evinced no desire to identify themselves with the proposed new order of things, or to give effect to it by applying for authority to hold elections.

There are, however, some bands who doubtless will avail themselves of the new mode of selecting chiefs, and are beginning to estimate its value. I had proposed to the Chippewas, Ottawas and Pottawatomies of Walpole Island, and the Chippewas and Munsees of the Thames, some six or eight years since, to elect a limited number of Councillors to manage their local business, as had previously been done by the Mohawks, and they carried out the proposition, and are satisfied with the improvement which it produced. The seeming apathy of others may be accounted for from the fact that the Indian mind is in general slow to accept improvements, until much time is consumed in discussion and reflection. And it would be premature to conclude that the bands are averse to the elective principle, because they are backward in perceiving the privileges which it confers.

As respects the largest and most influential Indian community in Canada, the Six Nations, their reluctance to accept the Act is attributable to the circumstance, that a council consisting of more than fifty chiefs, vacancies in whose ranks are filled up by descent, is the governing body, and although an outcry against arbitrary courses of procedure is occasionally raised, their numbers and the power they have long exercised uncontrolled, enable them to keep in subjection their people, who are rarely permitted to take part in discussions connected with the general welfare of the community.

The time must, however, arrive when the opinions and wishes of the majority will be consulted; and were the votes of the whole adult population polled, I have no doubt that a very large majority would be in favor of an elective Council. Under the statute the life chiefs would remain members of the Council. There are in all the bands young and intelligent men, who feel the injustice of being excluded from any voice in deliberations which materially affect their interests.

**Indian Affairs Branch, 1871 Annual Report.**

ministration of the Indians of the Prairies. It provided only minimal changes, however, to the provisions concerned with the form of self-government. The Act made a semantic change from “Second Chiefs” or “Headmen” to “Councillors,” and conferred upon the “band council” powers of consent in the administration of the reserve by the Department of the Interior.

In 1880, the Act was amended\(^\text{52}\) to bolster the introduction of the elective system. The transitional provisions governing customarily selected “life chiefs” were altered, and declared that such chiefs could not continue “until death”; their powers would cease upon the introduction of the elective system unless elected thereunder. The absolute nature of the discretion exercised by the Governor in Council in introducing the elective system was also more clearly described in the phrase “whenever the Governor in Council deems it advisable.” Finally, the power to make bylaws of the band council were extended to include provision for penalties of up to thirty days imprisonment for breach of bylaws. Proceedings were to be taken before a Justice of the Peace.

In 1884, the Indian Advancement Act\(^\text{53}\) was introduced. Its object was described in the House of Commons by Sir John A. McDonald:

[T]his Act is merely an experimental one, for the purpose of enabling the Indians to do by an elective council what the chiefs, by the Statute of 1880, have already the power to do. In some of the tribes or bands, those chiefs are elected now, in others the office is hereditary, and other bands there is a mixture of both systems. This Bill is to provide that in those larger reserves where the Indians are more advanced in education, and feel more self-confident, more willing to undertake power and self-government, they shall elect their councils much the same as the whites do in the neighbouring townships.\(^\text{54}\)

The Act provided in considerable detail for the introduction of an alternative system to any band declared “fit” by the Governor in Council. The extension of powers of the band in the alternative elective system was minimal, however. The power to make bylaws was extended, including the taxing of property on the reserve, but astonishingly section 9 provided that the Indian agent should call and preside at all band council meetings. The suggestion that the Chief Councillor might preside at such meetings was rejected as likely to be “attended

\(^{52}\) Can. Stat. c. 28 (1880).
\(^{53}\) Can. Stat. c. 28 (1884).
\(^{54}\) H.C. Debates, February 26, 1884.
with mischievous results." The Act also provided for the subdivision of a reserve into, and election from, constituencies. Elections were to be held annually.

The Advancement Act sought to establish a framework of municipal government for the more "advanced" reserves. It suffered in extremis from the misguided rationale of all the Canadian legislation concerning self-government. The Act did not recognize that the encouragement of municipal forms of self-government cannot succeed when the power of control and management is denied those sought to be encouraged. Under the Advancement Act not only was the Minister possessed of his established powers of control and management, but the local Indian agent controlled the band council. The pointlessness of such proceedings was manifest to the Indians. For example, the St. Regis Band's reaction was the subject of considerable discussion in Indian Affairs Annual Reports. The band members' sometimes violent reluctance to embrace the elective system appeared inexplicable to the Department. The explanations proffered included a lack of speed in effecting the Department's policy, an obstructive minority, and the


56. (1899) Sessional Paper No. 14. The Annual Report of Department of Indian Affairs in 1898 describes the response:

In dealing with the Indians the department has for long time past kept before it as an ultimate end, their transformation from the status of wards into that of citizens. In the earlier stages of reclamation from the untutored state, chiefs and councillors or headmen have as a rule proved of great assistance in dealing with bands, but the hereditary system tends to retard the inculcation of that spirit of individuality without which no substantial progress is possible.

The department's policy has, therefore, been gradually to do away with the hereditary and introduce an elective system, so making (as far as circumstances permit) these chiefs and councillors occupy the position in a band which a municipal council does in a white community.

With this end in view the "Advancement Act" was framed, and the 75th section of the "Indian Act" enacted to provide the introductory or intermediate stage. The provisions referred to have not been taken advantage of as speedily or extensively as could have been desired.

The "Advancement Act" has been applied to the Cowichan, Kincolith, Metlakatla, and Port Simpson Bands in British Columbia; to the Mississaugas of the Credit in Ontario; and to the Caughnawaga Band in Quebec; but only the two last mentioned have to any extent availed themselves of its provisions, and the Caughnawaga Band does not consider that having done so, has proved by any means an unmixed benefit.

Effort has been made during the past year to awaken greater interest in self-government among the Indians, and in Ontario the triennial elective system has been applied to forty-two bands; in Quebec to six bands; and in New Brunswick to seven bands. In Manitoba and the North-West Territories as vacancies occur among hereditary office-holders, the Indians are being educated to fill them by triennial elections.
Americans. No mention was made of the misconceived rationale underlying the policy.\textsuperscript{57}

From 1884 until 1951 the legislation concerning self-government on Indian reserves was subject to minimal amendment. The policy with all its defects and misconceptions was established by 1884. In 1946, it was observed that

\[a\]t the present time practically all the bands in Ontario, Quebec and the Maritime provinces are under the elective system. In the West, with a few exceptions, mostly in British Columbia, the Indians continue to follow their tribal methods. As settlement continues, however, and the Indians become more closely associated with the surrounding community the application of the elective system among them doubtless will become more general.\textsuperscript{58}

In 1951, the present provisions of the Indian Act concerning self-government were introduced. The sections represent an amalgamation of the triennial elective system first introduced in 1868 and the more detailed system introduced in the Advancement Act in 1884. There is, of course, minimal deviation from the policies established in the 19th century. The provisions were described in the 1952 Annual Report of the Indian Affairs Branch:

The election provisions have been revised to provide uniform procedures and term of office. The right to vote in band elections and

\textsuperscript{57}. An example of what is meant is furnished by the St. Regis Band, which after having received the benefits of self-government under the elective system of appointing chiefs and councillors, instead of proceeding to take advantage of the provisions of the Advancement Act, to which the elective system is intended to be introductory, has evinced an obstinate determination to revert to the old system of hereditary chiefs.


It may be remembered that when discussing the subject of self-government last year mention was made of the obstinate determination exercised by the St. Regis Band to revert to the old system of hereditary chiefs instead of proceeding to take advantage of the progressive system of government for which the Indian Act makes provision.

To make the matter intelligible it has to be remembered that the St. Regis Reserve is only separated from that of another portion of the tribe belonging to the United States by the theoretical boundary line between the two countries, which, of course, forms no barrier to constant intercourse.

The majority of the Canadian Indians had little if any sympathy with the obstructive views of the minority, and certainly none with violent resistance of the law but the latter with the assistance of the American Indians who fomented, if they did not instigate the trouble, managed to over-awe the majority, and actually resorted to violence in order to prevent them from exercising their franchise in the election of chiefs.

(1900) Sessional Paper No. 11.

other votes under the Act has been extended to all members of a band of the full age of twenty-one years. This, for the first time, extends the franchise in band affairs to women. Indian women are now exercising this right, and a number of them have already been elected to office. Secrecy of voting has been provided under election regulations. As formerly, those bands to which the election provisions have not been applied may choose their chiefs and councillors according to band custom. The powers of band councils to make by-laws were broadened to correspond in a general way with those exercised by councils in a rural municipality.  

The provision providing for the chairmanship of the band council by the Indian agent was also removed.

The conflict between traditional and elective modes of self-government has continued to the present day and it has been recently judicially considered in Logan v. Styres and Isaac v. Davey. In Logan, the hereditary chiefs challenged the application of the elective mode of government to the Six Nations Reserve at Bratford, Ontario. Justice King refused to deny the application of the elective mode although he suggested "it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs." The conclusions of Justice King were affirmed in 1977 in the Supreme Court of Canada in Isaac.

The powers of band councils to make by-laws have been virtually unchanged since 1886 and are confined to matters with which a rural municipality might normally be concerned. They are, however, expressly subject to regulations that the Governor in Council might make

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60. A description of the operation of the provisions is contained in Indian Affairs Branch, 1960 Report:
Three hundred and fifty-seven Indian bands select their councils under an elective system provided for in the Indian Act. Under this system band councils consist of one chief only, and one councillor for every one hundred members of the band. In choosing their chiefs and councillors the remaining 200 bands prefer to do so according to the custom of each band although the band custom often approximates the elective system. Ten bands officially adopted the elective system in the past fiscal year.

Band councils passed 27 by-laws during the year bringing the total number of by-laws recorded to 245. Five of the 27 by-laws dealt with the raising and expenditure of monies. Forty-one by-laws of this type were passed in previous years. Throughout the year 137 elections were held under the provisions of the Indian Act with several of the candidates being women. Sixty-six women councillors and 7 women chiefs hold office under the elective system while 8 women hold office under band custom.
63. 20 D.L.R.2d at 424.
consistently with the Indian Act and the power of disallowance of the Minister of Indian Affairs. The power to make money bylaws—the taxation of interests in reserve land and of band members—is confined to those bands declared to have "reached an advanced stage of development." In the Province of Saskatchewan there are sixty-seven bands with a population of approximately 45,000—none of the bands have been declared to have "reached an advanced stage of development."

The surprising feature of the history of the provisions concerning the forms of self-government on the reserves is their consistency. It appears that no analysis of the desirability of the government policy of introducing the form of municipal government was undertaken after its adoption. Such an analysis is clearly desirable in view of the comments in volume two of the Hawthorne Report:

One theme... is the lack of fit between the elective band council and procedure and traditional structures and procedure. Another is the evident desire for public consensus or unanimity and the perception of the elective system and majority rule as inimical to the achievement of this goal, because they bring out into the open divisions between factions and individuals....

Again and again one is reminded of the insignificance of official band councils as decision-making bodies and the location of whatever Indian leadership there is in the covert power structure.

B. Management of the Reserve and Band Reserves

Throughout Canada in the 19th century, reserves were set apart, with and without treaties, for the benefit of the Indian bands who traditionally had owned and occupied the land. These reserves represent the major asset and jurisdiction of Indian bands today. The administration of the reserves and monies arising therefrom is governed by the Indian Act.

Reserves are declared to be "held by Her Majesty for the use and benefit of the respective bands for which they were set apart." The band's form of ownership is derived from the Royal Proclamation of 1763.

For all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple. Neither the Crown nor any government official has any right or status to in-

65. 2 Hawthorne Committee, supra note 28, at 193.
The Indian Act has, however, interfered extensively with such possession; management of the reserve and monies arising therefrom is the prerogative of the Minister of Indian Affairs, albeit the consent of the band council is required in specified instances.

The Minister may direct the use of reserve lands for schools, administration burial grounds, health projects, and with the consent of the band council, for any other purpose for the general welfare of the band. He may survey and subdivide the land, and direct the construction of roads that the band must maintain in accordance with his instructions. If land is uncultivated on a reserve, the Minister may direct its cultivation by lease or otherwise with the consent of the band council—no such consent is necessary for the operation of farms on the reserve by the Minister.

Recognition of the management prerogative of the Minister is manifest in section 60 of the Indian Act, which provides:

(1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

(2) The Governor in Council may at any time withdraw from a band a right conferred upon the band under subsection (1).

The only significant power of the band council under the Act with respect to reserve land is the power to allot possession of that land to band members. Such allotments are, however, subject to the approval of the Minister. The Minister issues a Certificate of Possession when approval is given and a Certificate of Occupation when the approval given is conditional. Particulars of the Certificates are entered in a Reserve Land Register maintained by the Department of Indian Affairs. An Indian may also transfer a right to possession to another member of the band subject, of course, to the Minister's approval.

69. Id. §§ 19, 34.
70. Id. § 58.
71. Id. § 71.
72. Id. § 60.
73. Id. §§ 20(1), 81(i)
74. Id. §§ 20, 21.
75. Id. § 24.
1. Surrendered lands. Surrender is the mechanism by which Indian bands dispose of reserve lands to the remainder of Canadian society. A surrender must be made to the Crown and assented to by the majority of electors, or a majority of those voting at a second election if a majority of electors do not vote at the initial election. The Minister is empowered to "manage, sell, lease or otherwise dispose of surrendered lands" in accordance with the terms of surrender. Minerals on reserve lands must be surrendered in order to be disposed of by a band. Although the band may specify the terms of a surrender, the Minister administers the disposition of such terms.

The nature of surrenders is derived from the concept of aboriginal title recognized by Canadian jurisprudence—aboriginal title precludes alienation of the reserve land base of the band without the consent of the band members. The Indian Act has introduced deviations from this traditional principle, however, since the Minister may lease, upon request, an individual Indian's reserve land of which he is lawfully in possession or authorize by permit the use of reserve land by any person.

2. Indian moneys. Indian moneys refers to money held by the Crown for the use and benefit of Indians or bands. Such money includes revenue from the sale of surrendered lands, including minerals, and other capital assets of the band. Indian moneys are managed and expended by the Minister, usually with the consent of the band council. This consent may be dispensed with in an emergency, for example, in order to pay compensation, and to suppress unsanitary conditions, diseases or overcrowding. The Governor in Council may, however, under section 69, permit a band to "control, manage and expend in whole or in part its revenue moneys."

3. Estates. In order to ensure management and disposition of reserve lands in accord with federal objectives "all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister." Provincial

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76. Id. § 39. Logan describes the acceptance of a surrender where only 54 of 3600 electors voted. The remainder refused to recognize the procedure of the Indian Act.
78. Id. § 58(3).
79. Id. § 28(2).
80. Id. §§ 62-66.
81. Id. § 69.
82. Id. § 42.
courts may only exercise jurisdiction with the consent of the Minister. In *Attorney General of Canada v. Canard*, the appointment of an administrator by the Minister was upheld as valid notwithstanding that the widow had obtained letters of administration from the Provincial Surrogate Court. The exclusive jurisdiction of the Minister also extends to estates of mentally disordered and infant Indians. No band council or tribal court has any jurisdiction over estates governed by the Indian Act.

The provisions of the Indian Act clearly indicate the managerial prerogative of the Minister of Indian Affairs over reserves and band resources. The denial of self-government inflicted by such provisions is compounded by the denial of any legal remedy. Regarding reserves, section 18 (1) provides: "[S]ubject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band." A similar provision applies to Indian moneys. The provisions deny any action for breach of trust by the Minister. Thus the Indian Act classically seeks to confer on the Minister "power without responsibility" and necessarily imposes on band members responsibility for exercise of this power.

C. *Provincial Jurisdiction over Indians and Reserves*

Federal government policy has always looked forward to the day when Indian lands would become municipalities under the jurisdiction of the provinces. To this end the Federal Government has continually sought to transfer jurisdiction over Indians to the provinces.

Prior to 1951, the application of provincial legislation to Indians tended to depend on whether the incident concerned took place on or off a reserve. The courts assumed broad provincial power and a narrow notion of an occupied field (preemption) regarding Indians off the reserve. For example, in *Rex v. Martin*, provincial temperance legislation was applied to an Indian off the reserve despite the extensive liquor and temperance provisions in the Indian Act that were applicable on and off the reserve. Conversely, the courts tended to allow very

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83. *Id.* § 44.
86. *Id.* § 18(1).
87. *Id.* § 61(1).
limited provincial jurisdiction and a broad notion of an occupied field regarding Indians on the reserve. In *Rex v. Jim*\(^8^9\) the court observed:

The Dominion Parliament has enacted a lengthy Act known as the Indian Act. Many provisions are there to be found in connection with the management of Indians upon their reserve; in fact by section 51 it is expressly enacted "that all Indian lands . . . shall be managed, leased and sold as the Governor-in-Council directs." Now, I cannot conceive it possible how any wider term can be used than the word 'management' in connection with the Indians as to what shall or shall not be done upon an Indian reserve. I would say that the word 'management' would at all events include the question of regulation and prohibition in connection with fishing and hunting upon the reserves.\(^9^0\)

Both *Jim* and *Rex v. Rodgers*\(^9^1\) may be explained by the extensive coverage provided by the Indian Act, which effectively excluded the provincial legislation. Both, however, contain dicta asserting that an Indian reserve may be regarded as an "enclave" removed from provincial jurisdiction. In *Rodgers*, Justice Prendergast declared:

Provincial statutes, even of general application, do not, as a rule, express state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the Province. But everyone understands that they cannot apply to regions in the Province (if any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be excepted.\(^9^2\)

The dicta suggest that a province has no jurisdiction at all to legislate affecting Indian reserves. A reserve is regarded as a federal undertaking established to "ensure uniformity of administration" in the protection of the Indian homeland. A reserve, to use the phrase subsequently employed by Chief Justice Laskin, is an "enclave" removed from provincial jurisdiction.\(^9^3\)

The Supreme Court of Canada has considered the application of provincial legislation on Indian reserves in two recent cases. The reasoning, particularly in the dissenting opinion of Chief Justice Laskin, relies heavily on the earlier cases. In *Cardinal v. Attorney General of*
the Court considered the jurisprudence existing prior to the Natural Resources Agreement of 1930 in order to determine its intent. Justice Martland, writing for the majority, rejected the enclave approach and concluded that prior to the Agreement the province did not have power to control hunting and fishing by Indians on a reserve. Chief Justice Laskin dissented and provided the first articulate exposition of the enclave approach to provincial jurisdiction on Indian reserves. He would have denied the application of provincial legislation in a matter integral to Indians and "lands reserved for Indians" even in the absence of federal legislation. Chief Justice Laskin, again dissenting, in *Natural Parents v. Superintendent of Child Welfare*,

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95. A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. *Id.* at 559-60.
96. Where land in a Province is, as in the present case, an admitted Indian reserve, its administration and the law applicable thereto, so far at least as Indians thereon are concerned, depend on federal legislation. Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada. This is seen in the *Indian Act*, with which I will deal later in these reasons.

The significance of the allocation of exclusive legislative power to Parliament in relation to Indian reserves merits emphasis in terms of the kind of enclave that a reserve is. It is a social economic community unit, with its own political structure as well according to the prescriptions of the *Indian Act*. The underlying title (that is, upon surrender) may well be in the Province, but during its existence as such a reserve, in my opinion, is no more subject to provincial legislation than is federal Crown property; and it is no more subject to provincial regulatory authority than is any other enterprise falling within exclusive federal competence.

Nor need I in this case consider whether, in the absence of federal legislation, provincial legislation touching the personal status and relationships of persons on a reserve, as for example, respecting marriage or custody or adoption of children, is validly applicable; or, similarly, whether provincial commercial law would apply, absent federal legislation. The present case concerns the regulation and administration of the resources of land comprised in a reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s. 91(24) does not preclude the application of such provincial legislation to Indian reserves, the power will have lost the exclusiveness which is ordained by the Constitution.

*Id.* at 566-70.
97. *Id.* at 570.
98. [1976] 1 W.W.R. 699 (Can.). Justice Maitland wrote the majority opinion (Pidgeon and Grandpre, J.J., concurring, and Ritchie, J., agreeing), and Chief Justice Laskin wrote the dissent (Judson, Spence and Dickson, J.J. concurring).
expounded on the enclave approach regarding section 91(24) of the Indian Act in a case concerning the application of the British Columbia Adoption Act to an Indian child.99

In 1951, section 88 of the Indian Act was introduced, apparently directed at restating or codifying the application of traditional constitutional law principles to Indians.100 The effect of the section remains unclear. As a result of the controversy over the enclave approach, it has not been decided whether section 88 provides for referential incorporation of provincial law or merely a statement of accepted law. In Natural Parents, Chief Justice Laskin asserted that in enacting section 88 Parliament “cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, per se, would not apply to Indians under the Indian Act unless given force by federal reference.”101 Justice Maitland maintained that “the wording of section 88 does not purport to incorporate the laws of each province into the Indian Act so as to make them a matter of federal

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99. It [Adoption Act] could only embrace them if the operation of the Act did not deal with what was integral to that head of federal legislative power, there being no express federal legislation respecting adoption of Indians. It appears to me to be unquestionable that for the provincial Adoption Act to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch “Indianness,” to strike at a relationship integral to a matter outside of provincial competence.

Counsel for the respondents cited a number of cases holding Indians to be subject to provincial legislation. Among them was Rex v. Hill (1907), 15 O.L.R. 406 (C.A.), and Rex v. Martin (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635 (C.A.). These, and other like cases, are simply illustrative of the amenability of Indians off their reservations to provincial regulatory legislation, legislation which, like traffic legislation, does not touch their “Indianness.” Such provincial legislation is of a different class than adoption legislation which would, if applicable as provincial legislation simpliciter, constitute a serious intrusion into the Indian family relationship. It is difficult to conceive what would be left of exclusive federal power in relation to Indians if such provincial legislation was held to apply to Indians. Certainly, if it was applicable because of its so-called general application, it would be equally applicable by expressly embracing Indians. Exclusive federal authority would then be limited to a registration system and to regulation of life on a reserve.

Id.

100. CAN. REV. STAT. c. I-6 (1970).

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Id. § 88.

101. Id.
legislation. The section is a statement of the extent to which provincial laws apply to Indians."

Section 88 specifically provides for a narrow notion of occupation of field and thus renders much of the debate as to the applicability of the enclave approach or a broad notion of occupation of the field on a reserve academic. Provincial "laws of general application" will apply except to the extent that they are inconsistent with the Indian Act and its regulations. Section 88 does not, however, provide for non-Indians and it is therefore necessary to examine the pre-existing case law in that regard. But more significantly, section 88 represents a massive intrusion of provincial jurisdiction into the powers of government to which bands and band councils aspire. The amendment of section 88 of the Indian Act is essential to any revision of the Act that purports to confer significant powers of self-government upon Indian bands.

D. Federal proposals

The June 1978 federal discussion paper suggests that the Act be amended to provide for a three-fold classification of power:

(1) exclusive federal powers. These would be powers which because of treaty, legal, or policy constraints would be within the sole jurisdiction of the Federal Government. This class of powers would probably be limited to matters, such as the land registry system, in relation to which it is necessary to maintain a uniform system across the country.

(2) shared powers. These would be powers which because of their national implications the Federal Government would want to retain some control over, e.g., housing standards.

(3) transferred powers. These would be powers which could, depending on the desires and capabilities of a band, be transferred to the sole jurisdiction of the band. The exercise of these powers would not require federal approval. However, the Federal Government might have some power to review band decisions. An example of this type of responsibility could be local planning and zoning. This type of responsibility would have little or no impact on other bands on a national basis. Another example could be the responsibility of administering educational services to the band. These powers would have to be sufficient to ensure that the band government was able to function effectively as a unit of local self-government.

102. Id.
The powers to be enumerated under the three classifications would be a matter of consultation with the Indian people.103

The suggested division of powers appears in keeping with the federal model of a municipality under provincial jurisdiction but every far removed from Indian aspirations. The only reference to provincial jurisdiction contained in the paper is the observation that "another complicating factor which may affect band government concerns the application of provincial powers and responsibilities in relation to Indians living on and off reserves."104

IV. THE TREATIES

The Royal Proclamation of 1763 established the Canadian policy of entering into treaties with the Indians in order to extinguish their title to the land. This policy has been, or is, intended to be implemented everywhere in Canada except in Southern Quebec, the Maritime Provinces and British Columbia. In Southern Quebec and in the Maritimes, settlement preceded the establishment of the policy. In British Columbia a distinct colonial history and government resisted such dealings with the Indians.

The "numbered" treaties were the most influential treaties in the determination of federal Indian policy. Most of these treaties were signed between 1871 and 1905 and provided the terms under which the Canadian plains were settled. The terms do not vary significantly among the "numbered" treaties and approximately one half of the Canadian Indians are considered to be subject to such terms. For example, the Plain and Wood Cree ceded title to Central Alberta and Saskatchewan to the Crown pursuant to Treaty No. 6. The Crown agreed to: lay aside reserves for farming land on the basis of one square mile for each family of five; maintain schools upon the reserves; prohibit introduction of liquor; guarantee traditional hunting and fishing rights; pay an annuity of $5 per head; provide $1,500 per annum for ammunition and twine; provide farming implements; pay each Chief an annual salary of $25; grant relief from famine and pestilence; pro-

104. Id. at 5. The paper also refers to a "Charter Band Option" that would allow bands to opt for one of "2-5 categories of charter to afford flexibility and a range of options for bands at various stages of evolution and faced with various circumstance." The Minister has intimated that under the charter option system wider power might be conferred upon the band councils. Hon. James Faulkner, Minister of Indian Affairs, H.C. Debates, June 15, 1978, at 6453.
vide a medicine chest. The Indians have asserted that many other promises were made that were not incorporated into the text of the treaties, though the courts have been reluctant to look beyond the text. In Regina v. Johnstone, the Saskatchewan Court of Appeal confined its examination of the treaty obligations of the Crown to such text and held that the Indians of Treaty No. 6 were not entitled to all medical services including hospital care.

The nature of the obligations imposed by the treaties with the Indians is not wholly settled, but it is suggested that the clear preponderance of authority indicates that they are of a private contractual character. In Attorney General of Canada v. Attorney General of Ontario (Robinson Annuities) the Dominion Government sought to impose liability upon the Ontario government for the payment of annuities to the Indians under the Robinson Treaties. The Privy Council rejected the claim and declared the Dominion government solely liable upon the treaty promises. In delivering the judgment of the Privy Council, Lord Watson described the treaty as a "promise and agreement" made on behalf of the Crown for the right of the old province of Canada by its governor.

The nature of the obligations imposed by the treaties with the Indians is not wholly settled, but it is suggested that the clear preponderance of authority indicates that they are of a private contractual character. In Attorney General of Canada v. Attorney General of Ontario (Robinson Annuities) the Dominion Government sought to impose liability upon the Ontario government for the payment of annuities to the Indians under the Robinson Treaties. The Privy Council rejected the claim and declared the Dominion government solely liable upon the treaty promises. In delivering the judgment of the Privy Council, Lord Watson described the treaty as a "promise and agreement" made on behalf of the Crown for the right of the old province of Canada by its governor.

The language of the Privy Council has been quoted with approval in Rex v. Wesley and Regina v. Sikyea. Judicial authority thus appears to recognize the treaty as a "promise or agreement" in the

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105. Treaty No. 6, Treaties of Forts Carlton and Pitt, Aug. 23 & 28, 1876 (Carlton), Sept 9, 1876 (Pitt) (Queen's Printer, Ottawa, 1966). Treaties Nos. 1-6 are reprinted in A. Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (repl. ed. 1971).
108. Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due.

Id. at 213 (emphasis added). He gave a clearer expression of the nature of the liability imposed by such "promise and agreement" in apportioning the costs of the suit between the parties:

Seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here. The appellants must, therefore, pay to the respondent his costs of these appeals.

Id. (emphasis added).
nature of a contract. Actions on the treaties are discouraged by problems of procedure and jurisdiction, but effect was given to the contractual analysis in *Henry v. Rex.* The Mississaugas of the Credit sought by petition of right an order declaring their entitlement to an annuity under a treaty of 1818 surrendering certain lands. The Exchequer Court acknowledged jurisdiction "so far as the claim set up is supported by the agreement or treaty" as a case "in which the claim arises out of a contract entered into by or on behalf of the Crown." Canadian jurisprudence has determined that treaty rights may be abrogated by legislation of a competent jurisdiction like any other private arrangement. In *Sikyea,* the Supreme Court of Canada upheld the conviction of an Indian hunting for food on lands surrendered by his band contrary to the Federal Migratory Bird Conservation Act. The conviction was upheld despite the terms of the treaty, which had guaranteed the right to hunt in such manner. Only the federal legislature is competent to abrogate Indian treaty obligations, however. Under the British North America Act it is doubtful whether the provincial legislature could validly enact such legislation, and in any event section 88 of the Indian Act clearly declares their incompetence: "subject to the terms of any treaty ... all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province." In *Regina v. White and Bob,* the British Columbia Court of Appeal applied section 88 and dismissed an appeal from an acquittal of Indians on a charge of hunting contrary to the Provincial Game Act. The court held that the Indians were entitled to hunt as they did under the language of their treaty, which guaranteed the "liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."

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111. 9 Can. Exch. 417 (1905).
112. Id. at 442. The Court concluded:
What the Mississaugas are entitled to in that respect is an annual payment, or credit in current account of the sum of two thousand and ninety dollars—neither more nor less. And as their right thereto rests upon the treaty or contract between the Crown and them ... there will be judgment for the suppliants, and a declaration that the Mississaugas of the Credit have been and are entitled to be paid or credited each year with the full amount of the annuity of two thousand and ninety dollars, payable under the agreement of treaty No. 19 dated the 28th day of October, 1818, and that they are in that respect and to that extent entitled to relief.

Id. at 446-47.
116. 50 D.L.R.2d at 615.
The denial of self-government inflicted by the terms of the Indian Act is asserted by Indian groups to be the grossest violation of treaty rights; however, a more manifest violation is evident in the area of education. Treaty No. 6 provided for educational instruction at the Indians' desire so long as the government deemed education advisable. Section 114 of the Indian Act indicates the emphasis of the policy of the Department of Indian Affairs and its reluctance to establish schools especially for Indian children on reserves. It contains no authority for band-operated schools. Indeed, ministerial control extends to the ages to which schooling is required and the school that must be attended. Draconian truancy provisions seek to enforce attendance; section 120 declares that an "Indian child who fails to attend school regularly shall be deemed to be a juvenile delinquent."

The June 1978 Discussion Paper suggests substantial changes in furtherance of the policy of Indian control of Indian education. In particular the paper suggests that "a new subsection (f) could be added to section 114(1) which would specify that Indian bands are a recognized authority with whom the Minister may enter into an agree-

117. "And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made, as to Her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it." Treaty No. 6.

The earlier treaties did not reserve such discretion to the Crown. Treaty No. 4 (Southern Saskatchewan) provided: "Further, Her Majesty agrees to maintain a school in the reserve, allotted to each band as soon as they settle on said reserve and are prepared for a teacher." Treaty No. 4, The Qu'Appelle Treaty, Sept. 15, 1874 (Queen's Printer, Ottawa, 1966). Section 114 Indian Act provides:

(1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with
(a) the government of a province,
(b) the Commissioner of the Northwest Territories,
(c) the Commissioner of the Yukon Territory,
(d) a public or separate school board, and
(e) a religious or charitable organization.

(2) The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.

119. Id. § 120.
120. Id. § 120.

a. The need to cater for the rapid development in the local control of Indian education by Band Councils.

b. The need to reflect present-day concerns in the area of child and parental rights, the invasion of privacy, etc., in matters of school attendance, truancy, etc.

c. The need to improve and clarify the administration, quality and scope of education for Indians.
ment for the provision of services." The use and place of Indian languages would also be circumscribed and controlled. The Discussion Paper does not suggest, however, that, insofar as possible, schools should be provided for Indian children in their own community, the reserve.

An area where the Indian Act has sought to respect the promises made in the treaties is that of liquor. For example, Treaty No. 6 provides:

Her Majesty further agrees with Her said Indians that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve Her Indian subjects inhabiting the reserves or living elsewhere within Her North-West Territories from the evil influence of the use of intoxicating liquors shall be strictly enforced.

Until 1951, absolute prohibition was imposed upon reserves and Indians. In 1951, the Indian Act was amended to provide that the provincial lieutenant governor in council might legitimize sale to, or possession of, liquor by an Indian off a reserve provided such was "in accordance with the law of the province where the sale takes place or the possession is had." Prohibition on the reserves was relaxed by the allowance of "possession by any person in accordance with the law of the province where the possession is had" provided a band referendum had favoured the establishment of a "wet" reserve and the provincial lieutenant governor in council had not objected. Sale, supply and manufacture of liquor and intoxication on a reserve by any person is still prohibited under the Indian Act. In the only case in which the Canadian Bill of Rights has been applied to override the provisions of the Indian Act, the liquor provisions governing Indians off a reserve were struck down on the ground that they inflicted a denial of racial equality.

In the one instance where the Indian Act looks beyond the written

122. Id.
123. Treaty No. 6, Treaties of Forts Carlton and Pitt, Aug. 23 & 28, 1876 (Carleton), Sept. 9, 1876 (Pitt) (Queen's Printer, Ottawa, 1966).
124. CAN. REV. STAT. c. 98, §§ 126, 128 (1927).
125. CAN. REV. STAT. c. 1-6, § 96 (1970).
126. Id. § 98.
127. Id. §§ 94, 97.
text of the treaties, sections 87,129 89130 and 90131 extend a substantial exemption from taxation and seizure to Indian property on a reserve. In essence, these sections exempt real and personal property of an Indian or band situated on a reserve from taxation or seizure. They have been largely unchanged since their introduction in 1876,132 and derive from assurances pledged at the time of the treaties such as that of the Treaty No. 8 Commissioner: "We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax . . ."133

Federal income tax was not introduced in Canada until 1917, and accordingly it was not referred to in the language of the exemption conferred by the Indian Act. The Department of National Revenue has declared, however, that Indian income earned on the reserve will

129.
Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
(a) the interest of an Indian or a band in reserve or surrendered lands; and
(b) the personal property of an Indian or band situated on a reserve; and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian . . ., nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, on or in respect of other property passing to an Indian.


130.
(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.
(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller, may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Id. § 89.

131.
(1) For the purposes of sections 87 and 89, personal property that was
(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

Id. § 90.


133. Treaty No. 8, June 21, 1899 (Queen's Printer, Ottawa, 1966), at 7.
Such conclusions are in accord with the decision in *Peterson v. Cree and Canadian Pacific Express Co.*,\(^{135}\) where income earned off a reserve by an Indian was declared to constitute personal property situated off the reserve and accordingly subject to garnishment. However, recent decisions of the Tax Review Board have cast some doubt on the Department of National Revenue's approach. In *Snow v. Minister of National Revenue*,\(^{136}\) the Board seemed to consider that the Indian Act conferred no exemption from income tax; in *National Indian Brotherhood v. Minister of National Revenue*,\(^{137}\) the Board extended the exemption to employees of the Brotherhood employed in the capital because "in no way do I consider these people as having left the reserve to seek their fortune and earn a living in the non-Indian society."\(^{138}\)

Examining the imposition of customs duty, the Supreme Court of Canada offered a narrow construction of the section 87 exemption in *Francis v. The Queen*.\(^{139}\) The Court held the tax payable on appliances imported into Canada from the United States by an Indian who proposed to install them in his home on a reserve, "because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada."\(^{140}\)

Provincial revenue authorities recognize the exemption of section 87 in varying degrees. In Saskatchewan, Nova Scotia and New Brunswick, goods purchased by Indians on or off the reserve are exempt from sales tax; in British Columbia, only sales made on reserves are exempt. All provinces, however, except Ontario, impose gasoline tax on all sales to Indians on the somewhat doubtful ground that the fuels are used almost exclusively outside the reserves. All provinces also re-

\(^{134}\) Interpretation Bulletin IT-62, August 18, 1972. The Federal Department of National Revenue collects income for all the provinces except Quebec. While the exemption in the Indian Act refers to 'property' and the tax imposed under the Income Tax Act is a tax calculated on the income of a person rather than a tax in respect of his property, it is considered that the intention of the Indian Act is not to tax Indians on income earned on a reserve. Income earned by an Indian off a reserve, however, does not come within this exemption, and is therefore subject to tax under the Income Tax Act.

\(^{135}\) Id. at 1.

\(^{136}\) [1941] 79 Que. O.S. 1 (1940).


\(^{138}\) Id.

\(^{139}\) 3 D.L.R.2d 641 (Can. 1956).

\(^{140}\) Id. at 643.
quire the payment of tax on sales of liquor and tobacco to Indians irrespective of the place of consumption.

**CONCLUSION**

Federal policy and its instrument, the Indian Act, has failed to keep faith with the treaties made with the Indians or confer any meaningful powers of self-government on the Indian people. The Federal Government hopes to complete revisions to the Indian Act by 1980. It does not presently appear that any substantial change from the policies of the last one hundred years is contemplated. It is a shame that the government does not pay heed to the words of Alexander Morris, Lieutenant Governor of Manitoba, the North-West Territories, and kee-wa-tin, writing in 1880:

> [L]et us have a wise and paternal Government faithfully carrying out the provisions of our treaties, and doing its utmost to help and elevate the Indian population . . . and we will have peace, progress and concord among them in the North-West . . . we will see our Indian population, loyal subjects of the Crown, happy, prosperous and self-sustaining . . . .

In 1974, George Manuel, former President of the National Indian Brotherhood and founder of the World Council of Indigenous peoples, remarked that "[t]he fastest way to bring about change among an oppressed people is to put the decision-making authority, and the economic resources that go with it, into their own hands." The Federal Government appears reluctant to accept such counsel.
