9

The *Indian Act*

MOST CANADIANS KNOW that in 1982 our written constitution was amended as part of the process of completing the evolution of Canada as a self-governing nation. As recounted in Chapter 7, one of the 1982 amendments addressed the special constitutional status of the Aboriginal peoples of Canada — which includes the Indian, Inuit and Métis peoples — by recognizing and affirming their Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. Since then there have been several first ministers conferences with the goal of completing the constitutional renewal process by explicitly entrenching the right of Aboriginal self-government within the Canadian constitution.

In 1993 we published *Partners in Confederation*, in which we asserted that there are good reasons to believe that the Aboriginal rights referred to in section 35 include the inherent right of self-government.[1] Our conclusion was based on, among other things, the wording of the *Royal Proclamation of 1763*. As our earlier discussion showed, through that authoritative statement, the Crown offered its protection to the Aboriginal peoples as self-governing nations whose relative political autonomy and land rights it recognized.

In our view, by referring to these rights, section 35 has already entrenched them in the constitution. They need now to be implemented in an orderly and appropriate way. Many Canadians appear to agree with us. Efforts are continuing to implement the inherent right of self-government and thereby to reaffirm the special status of Aboriginal peoples within the Canadian federation.

In this context it is important to realize that the unique constitutional position of Aboriginal peoples did not originate with the 1982 constitutional amendments, important as they were. There are references throughout Canadian history to the singular place of Indian peoples, Inuit and Métis people in the collective enterprise now known as Canada. Many constitutional documents attest to this, including, of course, the *Constitution Act, 1867* with its familiar reference to federal jurisdiction over "Indians, and Lands reserved for the Indians" in section 91(24). In 1939 the Supreme Court of Canada recognized that the term 'Indian' as used in section 91(24) also includes Inuit.[2] We are of the view that it includes the Métis people as well.[3]

The distinctive rights accorded Indian tribal nations (or First Nations, as we refer to them today) are mentioned in official documents as early as the eighteenth century. One of the most significant references occurs in the *Royal Proclamation of 1763*. Issued by King George III to confirm the special relationship between the Crown and First Nations, the

Proclamation has been described by one Canadian Supreme Court judge as "the Indian Bill of Rights"[4] and by another as having legal force "analogous to the status of Magna Carta".[5] In addition to its constitutional status, this document has a powerful symbolic importance and is often cited by Aboriginal peoples in their quest to regain their relative autonomy within the Canadian federation. We discussed the nature and significance of this document in Chapter 5 of this volume and will say more about it here in the context of the *Indian Act*.

Many other constitutional documents refer to the rights of First Nations. For example, the statutes confirming the entry of Manitoba and British Columbia into Canada, the order by which Canada acquired the Hudson's Bay Company territories, federal legislation granting Ontario and Quebec additional lands in the North, and legislation giving the prairie provinces control over their resources all refer in one way or another to Indians, treaties, Indian lands and other related rights.[6] Treaties are also constitutional documents reflecting the special status of the tribal nations that signed them with the Crown. There are so many references to Indian people and Indian rights in documented Canadian history that the Pepin-Robarts Task Force on Canadian Unity acknowledged in 1979 that "native people *as a people* have enjoyed a special legal status from the time of Confederation, and, indeed, since well before Confederation."[7]

The *Indian Act* is yet another manifestation of this status. Passed originally in 1876 under Parliament's constitutional responsibility for Indians and Indian lands, it is based on Indian policies developed in the nineteenth century and has come down through the years in roughly the same form in which it was first passed. Until the 1982 amendments to the constitution, it was the single most prominent reflection of the distinctive place of Indian peoples within the Canadian federation. It too has powerful symbolic importance. In fact, when the federal government recommended in 1969 that it be repealed as part of a proposed new approach to Indian policy,[8] Indian people across Canada protested. A young Cree leader, Harold Cardinal, wrote a book that became the Indian alternative to the federal proposals:

We do not want the Indian Act retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to help devise new Indian legislation.[9]

Thus, and despite its symbolic importance, the distinctive place accorded Indian people by the *Indian Act* was not a privileged one. It was marked by singular disparities in legal rights, with Indian people subject to penalties and prohibitions that would have been ruled illegal and unconstitutional if they had been applied to anyone else in Canada. Moreover, and despite their direct relationship with the federal government, the majority of Indian people living on reserves could not vote in federal elections until 1960. Indian people could not manage their own reserve lands or money and were under the

supervision of federally appointed Indian agents whose job it was to ensure that policies developed in Ottawa were carried out on the various reserves across Canada.

Indian people chafed within the confines of this legislative straitjacket. It regulated almost every important aspect of their daily lives, from how one acquires Indian status to how to dispose of the property of an Indian at death and much else. Many attempts have been made through the years to free Indian people from the *Indian Act* legal regime. Although usually well-intentioned, many of these efforts have been ill-conceived and badly carried out. Rarely were Indian peoples consulted on what to do to alleviate the problems posed by the *Indian Act*, and almost never were their proposals for reform taken seriously.

In many ways the history of the evolution of the *Indian Act* has been a dialogue of the deaf, marked by the often vast differences in philosophy, perspective and aspirations between Canadian policy makers and Indian people. Indian people have been consistent in calling for respect for their special constitutional status, especially in the context of the *Indian Act* and its colonial predecessors. However, Canadian officials have generally interpreted Indian proposals for reform of Indian policy as yet another indication of their need for further guidance, for even sterner measures to help them adapt to the culture and political ways of the settler society that has grown up around them.

For example, when the elective band council system was first introduced in 1869 as a way of undermining traditional governance structures, Indian nations were not easily persuaded to adopt it. Two years after passage of the legislation implementing the band council system, Deputy Superintendent Spragge is reported to have observed that Indian opposition to adopting what was clearly an alien system owed less to its cultural inappropriateness than to the fact that "the Indian mind is in general slow to accept improvements", but that "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."[10]

Indian people have refused consistently, however, to renounce the constitutional special status that their unique place in Canadian history assures them and have resisted efforts to force them to abandon their cultures and forms of social organization to become Canadians like all others. The *Indian Act* has thus become the battleground for the differing views of Canadian officials and Indian people about their rightful place within the Canadian federation. But the battles have not been straightforward, nor have they always been overt. Much has occurred in the shadows of Canadian history, in the meeting rooms of commissions of inquiry[11] and in the halls of Parliament and the offices of federal public servants.[12] Decisions taken by bureaucrats and politicians behind closed doors, although little known in the broader Canadian society, have had a profound impact on Indian people. This impact has been experienced more often than not as oppressive and has engendered deep suspicions on the part of Indian people about the ultimate intentions of Canadian policy makers toward them.

Today the *Indian Act* is the repository of the struggle between Indian peoples and colonial and later Canadian policy makers for control of Indian peoples' destiny within Canada. The marks of that struggle can be seen in almost every one of its provisions. By examining the act, how it came about and how it continues to influence the daily experience of Indian people in Canada, much can be learned about why reform is so difficult to achieve at present. By the same token, an examination of the *Indian Act* will also show why reform or complete repeal is needed so vitally now.

It is clear that many mistakes have been made in the past. A new or renewed relationship of partnership between Aboriginal peoples and other Canadians can be achieved only through awareness of these mistakes and avoidance of the false and unwarranted assumptions that led to them. That is the purpose of this chapter.

1. The Paradox of *INDIAN ACT* Reform

In the 1960s the Hawthorn report on Indian conditions in Canada observed that until the Second World War, "Indian reserves existed in lonely splendour as isolated federal islands surrounded by provincial territory."[13] In a real as well as a metaphorical sense, Indian communities were not part of Canada. The lonely splendour of their isolation was at once geographic, economic, political and cultural and was enforced by the special legal regime contained in the *Indian Act*. It set Indian people apart from other Canadians and, although protective of their rights, was the source of much criticism by Indian leaders and concerned Canadians alike.

In 1969, the recently elected federal government — like many other Canadians at the time — wished to eliminate the barriers that were seen increasingly as preventing Indian people from participating fully in Canada's prosperity. The government issued a white paper on Indian policy that, if implemented, would have seen the global elimination of all Indian special status, the gradual phasing out of federal responsibility for Indians and protection of reserve lands, the repeal of the *Indian Act,* and the ending of treaties. The government watchword was equality, its apparent goal "the full, free and non-discriminatory participation of the Indian people in Canadian society" on the basis "that the Indian people's role of dependence be replaced by a role of equal status".[14] Surprised by the massive and fervent opposition to this measure, the government was forced to withdraw its proposal in 1970. The *Indian Act*, largely unchanged, is still with us.[15]

Nonetheless, most still agree that progress in self-government, in economic development and in eradicating the social ills afflicting many Indian communities cannot be accomplished within the confines of the *Indian Act*. Despite being its harshest critics, however, Indian people are often extremely reluctant to see it repealed or even amended. Many refer to the rights and protections it contains as being almost sacred, even though they are accompanied by other paternalistic and constraining provisions that prevent Indian peoples assuming control of their own fortunes. This is the first and most important paradox that needs to be understood if the partnership between First Nations and other Canadians is to be renewed.

Seen in this light, the profound ambivalence of First Nations toward the *Indian Act* begins to make more sense. To shed additional light on the origins of Canada's Indian policies we must go further back into Canadian history, however. It is there that the tangled roots of the *Indian Act* and the many paradoxes it discloses can be found. The major and underlying paradox, and the key to unravelling the others, lies in the unique way Indian sovereignty has been conceptualized in Canadian legal and constitutional thinking.

2. Indian Sovereignty and the *ROYAL PROCLAMATION OF 1763*

Until recently, North American history has been presented as the story of the arrival of discoverers, explorers, soldiers and settlers from Europe to a new world of forest, lake and wilderness. Indian peoples have been portrayed as scattered bands of nomadic hunters and few in number. Their lands have been depicted as virtually empty — *terra nullius*, a wilderness to be settled and turned to more productive pursuits by the superior civilization of the new arrivals. In the same way, Indian people have been depicted as savage and untutored, wretched creatures in need of the civilizing influences of the new arrivals from Europe. This unflattering, self-serving and ultimately racist view coincided with the desire of British and colonial officials to acquire Indian lands for settlement with the minimum of legal or diplomatic formalities. The view prevailed throughout the nineteenth century when the foundations for the *Indian Act* were being laid. Many Canadians may still maintain such beliefs.

We now know that this picture is simplistic and one-sided. As described in earlier chapters, Indian nations were organized into societies of varying degrees of sophistication. Many practised and taught agricultural techniques to the new arrivals and had established intricate systems of political and commercial alliances among themselves. The forests were not trackless; they were traversed by well-known trails created for trade and other social purposes well before the arrival of Europeans. Rivers and lakes served as highways and as natural boundaries between tribal nations. Many tribes were relatively large in population and had spawned smaller off-shoot tribes precisely because of population pressures. In short, there is an increasing body of evidence that Indian nations were far more subtle, sophisticated and numerous than the self-consciously 'civilized' Europeans were prepared to acknowledge.[16]

Europeans did not arrive, therefore, to an empty and untamed land. In many ways their arrival was more like an invasion and displacement of resident peoples of varying but evident cultural attainments. The arrival of the newcomers was accompanied by European diseases to which Indian people were vulnerable and that drastically reduced their populations, destroying some nations completely and weakening others immeasurably. In the face of these pressures many tribal nations broke up and were gradually absorbed by the new settler societies around them. Fearing this fate, others were forced to leave their historical homelands and to move away from the settled colonies farther into the interior, abandoning vast territories to the emerging settler society. Later, during the nineteenth and even into the twentieth century, many Canadian policy makers clung to the notion that, if Indian people were prevented from removing

themselves from the cultural influences of the surrounding non-Indian society, they would eventually be absorbed piecemeal and simply disappear as distinct peoples.

As our historical review of the relationship between Aboriginal and non-Aboriginal peoples showed, from the moment of their arrival, the political and commercial manoeuvring of the various European powers drew Aboriginal nations into their conflicts, further reducing Aboriginal numbers and increasing their dependence on European trade goods and arms. Finally, after more than 200 years of trade, warfare and social interaction, the victorious British Crown attempted to stabilize relations between Indian nations and colonists. The method chosen was a public proclamation confirming the nature, extent and purpose of the unique relationship that had developed in North America between the British Empire and Indian nations.

The *Royal Proclamation of 1763* accomplished purposes already reviewed in some detail in our historical outline. Two of them are of particular significance here. First, the Proclamation drew a line separating Indian tribal lands from those forming part of the colonies. These lands were reserved for Indian peoples' exclusive use and possession. In that way the Crown hoped to remove the constant colonial pressure for lands that had pushed many tribal nations into the interior and that threatened to lead to new wars between Indian peoples and colonists.

By guaranteeing Indian lands, the Crown established itself as their protector, thereby undertaking a role that continues today. It is reflected in the reserve system, whereby separate tracts of land — whether set aside originally by the imperial Crown, colonial governments, the federal government or provincial governments[17] — continue to be reserved as Indian lands under a special legal regime that differentiates them from other lands within provincial or territorial boundaries.

A second thing the Royal Proclamation did was initiate an orderly process whereby Indian land could be purchased for settlement or development. Before that process, private individuals — land speculators and colonial officials — had often perpetrated frauds on Indian sellers and non-Indian purchasers alike. This had greatly damaged relations between Indian nations and the Crown and produced instability in commercial relations that was harmful to both Indian and colonial economic interests. In future, lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction.

The present *Indian Act* continues to reflect the land surrender procedure first set out in the Royal Proclamation. It must be noted, however, that the federal government has failed, for reasons that will become evident later, to recognize the original "Nations and Tribes" to which the Proclamation refers and has instead substituted for them the artificial legal entities known as bands. Despite this, the land surrender provisions are the centrepiece of the entire act and the provisions most ardently defended by First Nations today.

By clearly recognizing a right to land and by mandating a formal nation-to-nation land surrender process, the Royal Proclamation did more than recognize a particular method of setting aside and purchasing land. It also recognized the autonomy of tribal nations as self-governing actors within the British imperial system in North America. Indian peoples were not mere collections of private individuals like other Crown subjects; they were distinct peoples — political units within the larger political unit that was eventually to become Canada. The early British imperial system was tripartite: it included the imperial Crown, the colonies and the Indian nations. Today, Canada is an independent state, again represented by a tripartite system in the form of the federal government, provincial and territorial governments and Aboriginal peoples.

In 1763 it was not considered necessary to specify the precise nature of the relationship between Indian nations and the Crown. It was self-evidently one of mutual respect and mutual recognition. The Supreme Court of Canada has reviewed the nature of relations between the Crown and Indian nations during this period in Canadian history, concluding that for the British it was "good policy to maintain relations with them very close to those maintained between sovereign nations."[18]

The *Royal Proclamation of 1763* provides the first model of that early imperial tripartite relationship. It was not quite one of complete equality between sovereign nations, because by then many tribal nations had been greatly weakened and were no longer fully autonomous. By the same token, however, it was not one of subjugation, since relations in the most important areas were conducted on a nation-to-nation basis. In short, it was and remains a unique relationship that is well captured in the following passage from the Proclamation:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds... ...if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively...[19]

The paradoxical aspect of this model of relations revolves around the relationship of the Crown and tribal nations to Indian lands. The reference is to nations and tribes connected to and living under Crown protection on lands within its dominions and territories. But at the same time, the Crown cannot simply appropriate these lands; it must purchase them from the nation or tribe on a nation-to-nation basis.

This original paradox raises the dilemma of the Crown and Indian nations simultaneously having sovereign rights to the same land. Through sharing the land, they shared sovereignty in a way that was unique to the situation in North America. There were no precedents for this singular relationship. In retrospect we now recognize it as the

prototype for the later federal model that emerged first in the United States and then in Canada: governments sharing the same territory, but with different or shared powers in relation to that territory.

In this relationship, Indian nations agreed to share the land with the Crown. The Crown agreed that a portion of those lands would be set aside for exclusive Indian occupation and to protect the overall relationship. In a sense, this was the original confederal bargain between them as partners. In the United States the bargain would be recast by the new republic in slightly different terms. Indian nations were not part of the United States, yet at the same time they were in a political relationship with the United States. This is the familiar 'domestic dependent nations' formula — itself a paradoxical statement — that has permitted American Indian tribes to continue, in the face of enormous centrifugal pressures, to assert their nation status up to present times.[20] In Canada, however, Crown/Indian relations took a somewhat different course.

For several generations the nation status of tribes in the British possessions was respected by imperial authorities and by the colonies. At a certain point, however, this carefully constructed and maintained model of imperial federalism began to come apart. Through a series of culturally based misunderstandings and the emergence of a radically different interpretation of the protective relationship among British and Canadian policy makers, a fundamental shift occurred that has altered the balance between the original partners in Confederation. Ethnocentric notions based on the claimed cultural superiority of the settler society prodded imperial and colonial officials to reinterpret the original bargain between the Crown and tribal nations.

More than a century of official measures aimed first at civilizing and then assimilating Indian people caused the original partnership to become completely unbalanced. This led to cultural confrontation between Canadian officials and Indian people that has evolved into political confrontation and legal challenges by Indian representatives to the assumption of political, social and cultural jurisdiction over Indian communities in Canada. The *Indian Act* reflects the imbalance in the relationship. Putting the relationship back into balance is one of the major goals of this Commission.

3. Indian Policy: Protection, Civilization and Assimilation

The early history of tripartite relations between Indian nations and the Crown in British North America during the stage of displacement can be described in terms of three phases in which first protection, then civilization, and finally assimilation were the transcendant policy goals. Although they may appear distinct from each other, in fact, these policy goals merge easily. They evolved slowly and almost imperceptibly from each other through the nineteenth century when the philosophical foundations of the *Indian Act* were being laid.

For example, the measured separation between tribal nations and the settler society implied by Crown protection of tribal lands and Indian autonomy merged almost effortlessly for non-Indian officials into the related goal of 'civilizing' the Indians. The

transition was aided by the fact that Indian people often requested or consented to official assistance in acquiring tools to adapt to the growing presence of non-Indian settlements around them.

Mission schools, training in farming and trades, and instruction in Christianity were the hallmarks of this stage in the relationship. More ominously, however, new civilian Indian department officials often came to the job with attitudes marked by emerging notions of European racial and cultural superiority. They lacked the inherent respect for Indian social and political culture that had been a feature of the eighteenth century, when there was greater equality in the overall relationship between the Crown and First Nations.

For these officials, the transition to a policy of encouraging and even forcing Indian people to assimilate into colonial and later Canadian society was a short step from the civilizing policy. Often the churches and humanitarian societies — both of which called for measures to alleviate the often desperately poor conditions of Indian people and communities — assisted this transition, seeing in it the only way to save Indian peoples from what appeared at the time to be their eventual and inevitable destruction as separate entities by the social and economic forces of mainstream colonial society.

In all three phases, humanitarians, church and government officials saw themselves as supporting the original and primary policy of protection. The goal remained; only the means had changed. The measured separation desired and called for by Indian people themselves eventually came to be seen by government officials as ultimately harmful to Indian interests. To them, it simply preserved Indian people in a state of social inferiority. Indian protests against assimilative policies were interpreted as proof of their racial and cultural inferiority: they simply did not know what was good for them. The relative strength of colonial society in comparison to the increasing weakness of Indian communities was sufficient proof to Indian department officials of the inherent rightness of their perspective and ample justification for the paternalistic approach they had taken over the years.

Thus, in the years following the *Royal Proclamation of 1763*, the Crown undertaking to protect Indians and their lands from settler encroachment was an evident and paramount characteristic of the relationship between them in Upper and Lower Canada. It was somewhat different in the Maritimes, where the Mi'kmaq and Maliseet nations, former enemies of the British Crown, were not treated with the same respect by British authorities after 1763. Nonetheless, in the Maritimes, as in Upper and Lower Canada, reserves were created to further the Crown goal of protection. Indian people and their non-Aboriginal supporters were forced to petition the authorities to return to them small tracts of their own lands in the Maritimes, whereas reserves were freely offered by the British authorities elsewhere.[21]

Reserves were not new. They had been a feature of relations between the French and their Indian allies, and the practice of creating them was carried over by the British in what is now southern Ontario.[22] In this respect, the goal of maintaining a line between Indian and colonial lands was upheld. Overall responsibility for relations with Indians was lodged in

the imperial Indian department, first created in 1755 as a branch of the military. But whether reserves were established or not, in all cases the clear and underlying goal of Crown/Indian relations was to secure and maintain the commercial and military alliances with tribal nations upon which the welfare of British North America still depended.

With the massive influx of settlers in the late eighteenth and early nineteenth century and the need to find additional land for settlement, the reserve policy assumed new importance. At the same time, with the establishment of peace between the United States and the British colonies, the need for Indian peoples as military allies waned. Tribal nations also became more and more impoverished as the game and furbearing animals on which they depended for sustenance and commerce disappeared. Traditional lifeways became more difficult to maintain. Many tribes and bands came to rely on the symbolic payments and gifts that accompanied formal commemorations of treaty signings and on treaty annuity payments. The result was a weakening of their relative bargaining position with the British authorities and a growing dependence upon them.

At the same time, new ideas were sweeping the British Empire. Missionaries and humanitarians, appalled at the deterioration in living conditions in areas where settlements were devastating traditional Aboriginal cultures and economies, called for action to save them. But imperial and colonial officials, imbued with notions of racial superiority, preferred new policies to assist Indian people to evolve on a European model and to become 'civilized' farmers and tradesmen. Financial pressures coincided with these trends as the colonial office in London questioned the expense of continuing to maintain Indian nations as military allies.

In the face of these pressures, the first formal inquiry into Indian conditions in Canada was undertaken by Major General H.C. Darling, military secretary to the governor general. His 1828 report became the foundation of the civilization program, outlining a formal policy based on establishing Indians in fixed locations where they could be educated, converted to Christianity and transformed into farmers.[23] The goal of this policy was to enable Indian communities to become more economically self-sufficient. This approach was influenced by an experiment by the Methodist Church with the Mississauga of the Credit River in southern Ontario. The latter had written to the lieutenant governor of Upper Canada in 1827, thanking him for his support and expressing their happiness that "flows from a settled life, industry and a steady adherence to the great commands of the great Spirit" and their hope to "arise out of the ruins of our great fall, and become a people...like our neighbours the white people".[24]

Thus, the civilizing policy began to go forward with the establishment of additional reserves in southern Ontario, in the hope that the early success being achieved among the Mississauga would be repeated elsewhere. There was no question, however, of imposing this policy on Indian communities. Indian self-government was to be fully respected by seeking the consent of chiefs before introducing any of the proposed civilization measures. As the letter from the Mississauga indicates, at first these measures were often welcomed by Indian nations as they prepared for the future.

While this experiment was going on, another entirely different approach was being taken by the lieutenant governor of Upper Canada, Sir Francis Bond Head. After visiting every Indian community where civilizing efforts were being conducted, he concluded that Indians could not be civilized and were doomed as a race to die out over time. He proposed to relocate Indians to Manitoulin Island, where they could be protected in a traditional lifestyle until their inevitable disappearance as separate peoples. To this end he persuaded some bands to surrender their Aboriginal title to large areas of reserved lands in southern Ontario in exchange for lands on Manitoulin Island. Church groups working to convert and civilize Indians at that time were angered by his approach, since it ran counter to the liberal and philanthropic ideas then coming into vogue in Great Britain and the colonies.

Thus, in the 1830s the overlap between these policy approaches saw two distinct initiatives in operation at the same time, each favouring a different approach to protecting Indians. Darling's was to help them adjust to the demands of mainstream colonial society through measures designed to augment and eventually supplant their traditional cultures. Bond Head's was the opposite: to isolate them so they could preserve their traditional lifeways a little longer. Each one seemed to assume that, left to their own devices, Indians were inherently unable to respond to the new economic and social climate of British North America.

By the end of the decade, both experiments had failed. In the case of Darling's civilization program, Indians were not ready to abandon their traditional ways so quickly or completely. It also appears that the various church groups bickered among themselves, thereby hindering the effectiveness of the program. Bond Head's approach faltered because Indians became increasingly wary of surrendering their rights to their traditional lands. The removal policy had also aroused the opposition of philanthropic and humanitarian elements in British and colonial society, which were genuinely concerned about declining material and social conditions among Indian people.

During this period several other official inquiries were commissioned to investigate what was increasingly becoming known as the 'Indian problem'. Each one repudiated the approach taken by Bond Head and supported the civilization policy. Only one is known to have consulted extensively with Indians regarding their views, and then only on the issue of discontinuing the system of 'presents', designed to reinforce the treaty relationship.[25] In fact, it was not until after the Second World War that any systematic effort was made to seek the views of Indian people on policy issues that affected them.

In support of the policy of protection, legislation was passed in 1839 in Upper Canada expressly declaring Indian reserves to be Crown lands and therefore off-limits to settlers.[26] By the 1840s imperial and colonial officials were impatient with what they saw as slow progress in civilizing Indians. Although imperial financial concerns were present, an element of cultural superiority and intolerance was colouring official attitudes more and more. Something similar was occurring in the United States. Alexis de Tocqueville, a French writer travelling in the United States, described the generally negative feelings

and attitudes of the settlers toward Indians in terms that applied to the British colonies as well:

With their resources and their knowledge, the Europeans have made no delay in appropriating most of the advantages the natives derived from their possession of the soil; they have settled among them, having taken over the land or bought it cheaply, and have ruined the Indians by a competition which the latter were in no position to face. Isolated within their own country, the Indians have come to form a little colony of unwelcome foreigners in the midst of a numerous and dominating people.[27]

In the United States the Indian policy was similar to that advocated by Bond Head: removal of entire tribes to more isolated locations west of the Mississippi River where they could pursue their own cultures and develop their own political institutions according to their aspirations and capacities. In Canada, yet another commission was established to study the problem. Its report would set Canadian Indian policy on an entirely different path from that taken in the United States. In most important respects, official Indian policy in Canada is still on the path set by that commission.

4. Civilization to Assimilation: Indian Policy Formulated

Established by Governor General Sir Charles Bagot, the commission reported in 1844.[28] Generally, the commissioners found that there were serious problems with squatters on Indian lands, poor records of land sales or leases, and inept official administration of band funds; that the wildlife necessary for subsistence was fast disappearing from settled areas; and that Indians generally were suffering from alcohol abuse.

To bring order to the development of Indian policy and to end the varying practices in the different colonies, centralization of control over all Indian matters was recommended. This recommendation later bore fruit, first in 1860 with the passage of the *Indian Lands Act*. It transferred authority for Indians and Indian lands to a single official of the united Province of Canada, making him chief superintendent of Indian affairs.[29] When the Province of Canada united with Nova Scotia and New Brunswick in 1867 to form the Dominion of Canada, section 91(24) of the *Constitution Act, 1867* gave legislative authority over Indians and lands reserved for the Indians to Parliament and removed it from the provincial legislatures.

To combat settler encroachments and trespassing, the Bagot Commission recommended that reserves be properly surveyed and illegal timber cutting eliminated by a timber licensing system. Indians were to be encouraged to take up farming and other trades and were to be given the training and tools required for this purpose in lieu of treaty gifts and payments. Education was considered key to the entire enterprise; thus boarding schools were recommended as a way of countering the effects on young Indians of exposure to the more traditional Indian values of their parents. Christianity was to be fostered.

The commissioners were concerned that Crown protection of Indian land was contrary to the goal of full citizenship in mainstream society. In their view, maintaining a line

between Indian and colonial lands kept Indians sheltered from various aspects of colonial life such as voting (only landowners could vote at that time), property taxation, and liability to have one's property seized in the event of non-payment of debt. The Bagot Commission therefore recommended that Indians be encouraged to adopt individual ownership of plots of land under a special Indian land registry system. They were to be encouraged to buy and sell their plots of land among themselves as a way of learning more about the non-Indian land tenure system and to promote a spirit of free enterprise. However, the reserve system was not to be eliminated all at once — the transition was to be gradual, and in the meantime, no sales of Indian land to non-Indians were to be permitted.

Crown financial obligations were to be reduced by taking a census of all Indians living in Upper Canada. This would enable officials to prepare band lists. No Indian could be added to a band list without official approval, and only persons listed as band members would be entitled to treaty payments. It was recommended that the following classes of persons be ineligible to receive these payments: all persons of mixed Indian and non-Indian blood who had not been adopted by the band; all Indian women who married non-Indian men and their children; and all Indian children who had been educated in industrial schools. These recommendations were adopted in one form or another in the years after the Bagot Commission issued its report and formed the heart of the Indian status, band membership and enfranchisement provisions of the *Indian Act.*

The commissioners were also opposed in principle to the idea of a separate imperial Indian department, believing that it tended to breed dependency. However, until it could be dispensed with, it was recommended that the two branches of the existing Indian department be reunited under an official who would be located in the seat of government where broader social policy was made. This recommendation ultimately led to the creation of a more or less permanent department of government to deal exclusively with Indians and Indian lands. Today it is called the Department of Indian Affairs and Northern Development and is still located in the seat of government in the Ottawa-Hull region.

Initially, Indians were generally in favour of the Bagot Commission's proposals on education, since they still wished to co-exist with the new settler society and knew that education was the key to their children's futures. However, once the assimilationist flavour of the program became evident, opposition quickly increased. They also opposed the restrictions on eligibility to receive treaty payments. This was viewed as interference with internal band matters and as a way of ultimately reducing all payments. There was, in addition, strong resistance to the notion of individual allotment of reserve lands, as many feared — rightly — that this would lead to the loss of these lands and to the gradual destruction of the reserve land base.

Although it stopped short of endorsing forced assimilation, which would come later, there can be no question that the Bagot Commission recommended a far-reaching and ambitious program that is still in operation today. Many of the current provisions in the *Indian Act* can trace their origins to these early recommendations.

In any event, land legislation was passed shortly after, in 1850, in Upper and Lower Canada to put some of these recommendations into effect by dealing with the threat to Indian lands posed by settler encroachments.[30] It became an offence to deal directly with Indians for their lands, trespass on Indian lands was formally forbidden, and Indian lands were made exempt from taxation and seizure for debts. Similar provisions continue in the current *Indian Act* and are generally valued by Indian people, who see them as a bulwark against erosion of the reserve land base.

However, in that early legislation appears the first clear indication of the marked differences in the philosophy and perspectives of Indians and non-Indian officials. This pattern, which would be repeated throughout Canadian history right up to the present, has involved building on Indian concerns and carrying remedial measures much further than desired by Indians themselves. For example, by 1850 the presence of substantial numbers of non-Aboriginal men on Indian reserves had apparently begun to alarm some tribal and band governments. Although married to Indian women and hence part of the reserve community, these men brought with them ideas and perspectives that appeared to threaten traditional Indian culture, particularly as it affected land use. Both 1850 land protection acts defined the term 'Indian', for purposes of residency on the protected reserve land base, for the first time in Canadian history, introducing the notion of race as the determining factor. Only a person of Indian blood or someone married to a person of Indian blood would be considered an Indian.

In response to Indian concerns, that definition was narrowed in amendments to the Lower Canada legislation one year later, specifically to exclude from the definition all non-Aboriginal men married to Indian women.[31] However, non-Aboriginal women married to Indian men were still considered Indian in law. Thus, for the first time Indian status and residency rights began to be associated with the male line. Subsequent versions of the definition of 'Indian' went back and forth on the question of whether non-Indian men could acquire Indian status through marriage. By the time the first comprehensive *Indian Act* was enacted in 1876, it had become accepted policy that non-Indian men could not acquire Indian status through marriage.[32]

The next important official inquiry into the conditions of Indians in the colonies was that of the Pennefather Commission in 1858.[33] Established in response to the continuing emphasis on financial retrenchment by imperial authorities, its mandate was to report upon "the best means of securing the future progress and civilization of the Indian tribes" and "the best mode of so managing the Indian property as to secure its full benefit to the Indians, without impeding the settlement of the country."[34]

Commissioners found generally that the relationship between the Crown and Indian nations had changed a great deal over the past few years as a result of the civilization policy, with Indians slowly being weaned from dependence on the Crown. Although commissioners were optimistic about the possibility that Indians might be "reclaimed from their savage state" over time, they felt themselves forced to "confess that any hopes of raising the Indians as a body to the social or political level of their white neighbours, is yet but a glimmer and distant spark."[35] Slow progress in the civilizing program was

attributed to the "apathy" and "unsettled habits" of Indians rather than to any shortcomings in the civilization policy or its administration.[36]

Ultimately, the Pennefather Commission recommended moves toward a policy of complete assimilation of Indians into colonial society. It called, for example, for direct allotment of lands to individual Indians instead of creating communally held reserves. This policy was carried out later in Manitoba in the case of the Métis people, where individual plots of land were awarded instead of collective Métis lands.[37] The commission also proposed collecting smaller bands in a single reserve, consolidating the various pieces of Indian legislation, legislating the dismantling of tribal structures, and eventually abolishing the Indian department once the civilizing efforts had borne fruit. As we will see, these recommendations were acted upon in one way or another over the years.

5. The *GRADUAL CIVILIZATION ACT:* Assimilating Civilized Indians

Before the final report of the Pennefather Commission was published, the *Gradual Civilization Act* was passed in 1857.[38] It applied to both Canadas and was one of the most significant events in the evolution of Canadian Indian policy. Its premise was that by eventually removing all legal distinctions between Indians and non-Indians through the process of enfranchisement, it would be possible in time to absorb Indian people fully into colonial society.

Enfranchisement, which meant freedom from the protected status associated with being an Indian, was seen as a privilege. There was thus a penalty of six months' imprisonment for any Indian falsely representing himself as enfranchised. Only Indian men could seek enfranchisement. They had to be over 21, able to read and write either English or French, be reasonably well educated, free of debt, and of good moral character as determined by a commission of non-Indian examiners. For those unable to meet these criteria, a three-year qualifying period was allowed to permit them to acquire these attributes. As an encouragement to abandon Indian status, an enfranchised Indian would receive individual possession of up to 50 acres of land within the reserve and his per capita share in the principal of the treaty annuities and other band moneys.

An enfranchised man did not own the 50 acres of land allotted to him, however. He would hold the land as a life estate only and it would pass to his children in fee simple ownership upon his death. This meant that it was inalienable by him, but could be disposed of by his children once they had received it following his death. If he died without children, his wife would have a life estate in the land but upon her death it would revert to the Crown — not to the band. Thus, it would no longer be reserve land, thereby reducing the overall amount of protected land for the exclusive use and occupation of the reserve community. Where an enfranchised man died leaving children, his wife did not inherit the land. She would have a life estate like his and it would pass to the children of the marriage once she died.

Enfranchisement was to be fully voluntary for the man seeking it. However, an enfranchised man's wife and children would automatically be enfranchised with him

regardless of their wishes, and would equally receive their shares of band annuities and moneys. They could not receive a share of reserve lands.

The provisions for voluntary enfranchisement remained virtually unchanged through successive acts and amendments, although some elements were modified over the years. Other developments in enfranchisement policy in subsequent legislation, such as making enfranchisement involuntary, will be described later in the discussion of the *Indian Act*.

The voluntary enfranchisement policy was a failure. Only one Indian, Elias Hill, was enfranchised between 1857 and the passage of the *Indian Act* in 1876. His story was told in Chapter 6. Indians protested the provisions of the *Gradual Civilization Act* and petitioned for its repeal. In addition, Indian bands individually refused to fund schools whose goals were assimilative, refused to participate in the annual band census conducted by colonial officials, and even refused to permit their reserves to be surveyed for purposes of the 50-acre allotment that was to be the incentive for enfranchisement.

The passage of the *Gradual Civilization Act* marked a watershed in the long history of Indian policy making in Canada. In many ways, the act and the response it generated were precursors of the 1969 white paper termination policy in terms of souring Indian/government relations and engendering mutual suspicion. The impact of this legislation was profoundly negative in many ways.

The new policy created an immediate political crisis in colonial/Indian relations in Canada. The formerly progressive and co-operative relationship between band councils and missionaries and humanitarian Indian agents broke down in acrimony and political action by Indians to see the act repealed. Indian people's refusal to comply and the government's refusal to rescind the policy showed that the nation-to-nation approach had been abandoned almost completely on the Crown side. Although it was reflected in subsequently negotiated treaties and land claims agreements, the Crown would not formally acknowledge the nation-to-nation relationship as an explicit policy goal again until the 1980s.

By virtually abandoning the Crown promise, implied by the *Royal Proclamation of 1763* and the treaty process, to respect tribal political autonomy, the *Gradual Civilization Act* marked a clear change in Indian policy, since civilization in this context really meant the piecemeal eradication of Indian communities through enfranchisement. In the same way, it departed from the related principle of Crown protection of the reserve land base. Reserve lands could be reduced in size gradually without a public and formal surrender to which the band as a whole had to agree. No longer would reserve land be controlled exclusively by tribal governments.

The *Gradual Civilization Act* was also a further step in the direction of government control of the process of deciding who was or was not an Indian. While the 1850 Lower Canada land act had begun this process by defining 'Indians' for reserve residency purposes, this new legislation set in motion the enfranchisement mechanism, through which additional persons of Indian descent and culture could be removed from Indian

status and band membership. In these two laws, therefore, can be seen the beginning of the process of replacing the natural, community-based and self-identification approach to determining group membership with a purely legal approach controlled by non-Aboriginal government officials.

Moreover, the *Gradual Civilization Act* continued and reinforced the sexism of the definition of Indian in the Lower Canada land act, since enfranchisement of a man automatically enfranchised his wife and children. The consequences for the wife could be devastating, since she not only lost her connection to her community, but also lost the right to regain it except by marrying another man with Indian status.

Finally, the tone and goals of the *Gradual Civilization Act*, especially the enfranchisement provisions, which asserted the superiority of colonial culture and values, also set in motion a process of devaluing and undermining Indian cultural identity. Only Indians who renounced their communities, cultures and languages could gain the respect of colonial and later Canadian society. In this respect it was the beginning of a psychological assault on Indian identity that would be escalated by the later *Indian Act* prohibitions on other cultural practices such as traditional dances and costumes and by the residential school policy.

6. End of the Tripartite Imperial System

Between the passage of the *Gradual Civilization Act* and Confederation several events and legislative measures cemented the change in imperial Indian policy. They included the ending of treaty presents to bands (the symbols of the alliance between the Crown and Indian nations) in 1858 and the passage of the *Indian Lands Act* in 1860. Although this legislation formalized the procedure for surrendering Indian land in terms reflective of the procedure set out in the *Royal Proclamation of 1763*, it also transferred authority for Indians and Indian lands to an official responsible to the colonial legislature, thus breaking the direct tie between Indian nations and the British Crown upon which the nation-to-nation relationship rested.

This was a clear departure from the Crown/colony/Aboriginal tripartite system described earlier. The *Indian Lands Act* legislation replaced it with another model of direct colonial/Aboriginal relations. The withdrawal of the British Crown as the impartial arbiter and mediator between the weakened tribal nations and the ascendant and land-hungry colonies was a step that would have important consequences for Indians in the future. Indians in the Canadas who were aware of the transfer of responsibility for Indian affairs from the imperial Crown to the Province of Canada generally opposed it, preferring to manage their own affairs than to be managed by the colonial government, which they distrusted and feared:

The Imperial Govt. is unwilling to find us officers as Formerly and withdraw wholly its protection we deem that there is a sufficient intelligence in our midst to manage our own affairs.[39]

The British parliamentary select committee looking into Aboriginal issues had warned in its 1837 report against entrusting the management of Aboriginal relations to the local legislatures in the British colonies, fearing a conflict of interest between the duty of protection and that of responding to the desires of their electors:

The protection of the Aborigines...is not a trust which could conveniently be confined to the local Legislatures. In proportion as those bodies are qualified for the right discharge of their functions, they will be unfit for the performance of this office, for a local legislature, if properly constituted, should partake largely in the interest, and represent the feelings of settled opinions of the great mass of people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with the native Tribes, or claims to urge against them, the Representative body is virtually a party, and, therefore, ought not to be the judge in such controversies; ...we therefore advise, that, as far as possible, the Aborigines be withdrawn from its control.[40]

The government ignored this advice. From that point on, the authorities entrusted with managing relations with Indian nations in Canada could no longer necessarily be described as disinterested. They were 'local' in a political as well as a geographic sense.

At Confederation, Parliament was given law-making powers over "Indians, and Lands reserved for the Indians" in section 91(24) of what was then referred to as the *British North America Act*. Indian nations as such were not recognized in this new tripartite Crown/dominion/provincial scheme.

From a certain perspective, Indian nations were outside and inside Confederation at the same time. They were outside in the sense that they were still self-governing, but inside to the extent individual Indians cared to renounce their collective identity and be absorbed into the mainstream body politic. They could in this sense emigrate to Canada without having to leave their own country.

At Confederation, the secretary of state became the superintendent general of Indian affairs and, in 1868, acquired control over Indian lands and funds through federal legislation consolidating much of the previous decade's land protection measures. The definition of 'Indian' was finalized on a patrilineal model, excluding non-Indian men who married Indian women, but including non-Indian women who married Indian men. Thus the Lower Canada rule of 1851 became national policy.[41]

7. The *GRADUAL ENFRANCHISEMENT ACT:* Responsible Band Government

Two years after Confederation the *Gradual Enfranchisement Act* marked the formal adoption by Parliament of the goal of assimilation.[42] It repeated the earlier voluntary enfranchisement provisions and introduced stronger measures that would psychologically prepare Indians for the eventual replacement of their traditional cultures and their absorption into Canadian society.

With these provisions Parliament entered a new and definitive phase regarding Indian policy, apparently determined to recast Indians in a mould that would hasten the assimilation process. The earlier *Gradual Civilization Act* had interfered only with tribal land holding patterns. The *Gradual Enfranchisement Act*, on the other hand, permitted interference with tribal self-government itself. These measures were taken in response to the impatience of government officials with slow progress in civilization and enfranchisement efforts. Officials were united in pointing to the opposition of traditional Indian governments as the key impediment to achieving their policy goals. This new act, it was hoped, would allow those traditional governments to be undermined and eventually eliminated.

The primary means of doing this was through the power of the superintendent general of Indian affairs to force bands to adopt a municipal-style 'responsible' government in place of what the deputy superintendent general of Indian affairs referred to as their "irresponsible" traditional governance systems.[43] This new system required that all chiefs and councillors be elected for three-year terms, with election terms and conditions to be determined by the superintendent general as he saw fit. Elected chiefs could be deposed by federal authorities for "dishonesty, intemperance or immorality." None of the terms was defined, and the application of these criteria for dismissal was left to the discretion of the Indian affairs officials upon receiving a report from the local Indian agent.

Only Indian men were to be allowed to vote in band elections, thereby effectively removing Indian women from band political life. Indian women were not given the right to vote in band elections until the 1951 *Indian Act*.[44]

The authority accorded the elective band councils was over relatively minor matters: public health; order and decorum at public assemblies; repression of "intemperance and profligacy"; preventing trespass by cattle; maintaining roads, bridges, ditches and fences; constructing and repairing schools and other public buildings; and establishing pounds and appointing pound keepers. There was no power to enforce this authority. Thus, under this governance regime Indian governments were to be left with mere shadows of their former self-governing powers. Moreover, even in these limited areas their laws would be ineffective if they were not confirmed by the governor in council (the cabinet). This restricted list of powers later became the basis for the powers accorded band councils under the later *Indian Act*.

Although referred to in the legislation as the "Tribe in Council", it is clear that the elective council system was not at all tribal in the larger sense of the nations or tribes referred to in the *Royal Proclamation of 1763*. It was restricted to individual reserves and to the inhabitants of individual reserves — a group that would be described in the later *Indian Act* of 1876 as a band. There was simply no provision for traditional groupings going beyond the individual band level. In fact, the goal of the measures was specifically to undermine nation-level governance systems and the broader nation-level associations of Indians more generally.[45]

Traditional Indian patterns of land tenure were also affected. On reserves that had already been sub-divided into lots, a system of individual property holding could be instituted by requiring that residents obtain a 'location ticket' from the superintendent general. Otherwise, reserve residents would not be considered to be lawfully holding their individual plots of land. The intention was to establish a bond between Indians and their individual allotments of property in order to break down communal property systems and to inculcate attitudes similar to those prevailing in mainstream Canadian society. This policy may have been inspired by similar efforts in the United States, where individual allotments had always been used as a method of terminating tribal existence, particularly in the period between 1887 and the early part of the twentieth century.[46] Individual land allotments were also used when lands were set aside for the Métis people of Manitoba in 1871.[47]

The *Gradual Enfranchisement Act* also provided for the first time that an Indian woman who married a non-Indian would lose Indian status and band membership, as would any children of that marriage. In a similar way, any Indian woman who married an Indian from another band and any children from that marriage would become members of the husband's band. As discussed in Volume 4, Chapter 2, which examines Aboriginal women's perspectives, the sexism that had been bubbling beneath the surface of Indian policy was now apparent and would become an element of the *Indian Act* when it was passed a few years later.

The manifest unfairness of these provisions led to Indian complaints. For example, the Grand Council of Ontario and Quebec Indians wanted the provision concerning marrying out amended so that "Indian women may have the privilege of marrying when and whom they please without subjecting themselves to exclusion or expulsion from the tribe."[48]

Originally designed for the more 'advanced' Indians of Ontario and Quebec, this legislation was later extended to Manitoba and British Columbia and eventually to all of Canada. The band and band council system of the *Gradual Enfranchisement Act* and later the *Indian Act* and all it entailed were thus made uniform throughout Canada.

8. The *INDIAN ACT* and Indians: Children of the State

In the 1870s, Canada grew by the addition of Manitoba, British Columbia and Prince Edward Island as provinces, and by the conclusion of Treaties 1 to 7 with the Indian nations and tribes of western Canada. Treaties 8 to 11 would be concluded in the west and north between 1899 and 1921. These important events in our national history were discussed in more detail in Chapter 6 of this volume.

In 1874 new federal legislation extended the existing Indian laws to Manitoba and British Columbia.[49] That legislation also widened earlier prohibitions on selling alcohol to Indians, making it an offence punishable by imprisonment for an Indian to be found "in a state of intoxication" and with further punishment possible for refusal by the Indian accused of drunkenness to name the supplier of the alcohol. Earlier anti-alcohol provisions had been passed expressly to protect Indians from what was then the scourge

of their communities; they had been directed only at the sellers, however. The 1874 prohibition was the beginning of the creation of special offences applicable only to Indians.

In the midst of the treaty-making process going on in western Canada, the first *Indian Act* as such was passed in 1876 as a consolidation of previous Indian legislation.[50] Indian policy was now firmly fixed on a national foundation based unashamedly on the notion that Indian cultures and societies were clearly inferior to settler society. The annual report of the department of the interior for the year 1876 expressed the prevailing philosophy that Indians were children of the state:

Our 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 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 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.[51]

The transition from tribal nation in the tripartite imperial system to legal incompetent in the bilateral federal/provincial system was now complete. While protection remained a policy goal, it was no longer collective Indian tribal autonomy that was protected: it was the individual Indian recast as a dependent ward — in effect, the child of the state. Moreover, protection no longer meant maintaining a more or less permanent line between Indian lands and the settler society; it meant the very opposite. By reducing the cultural distance through civilizing and assimilating measures that would culminate in enfranchisement of Indians and reduction of the reserve land base in 50-acre chunks, it was hoped Indian lands would in this piecemeal fashion soon lose their protected status and become part of the provincial land regime.

In keeping with the clear policy of assimilation, the *Indian Act* made no reference to the treaties already in existence or to those being negotiated at the time it was passed. The absence of any significant mention of the treaty relationship continues in the current version of the *Indian Act*.[52] It is almost as if Canada deliberately allowed itself to forget the principal constitutional mechanism by which the nation status of Indian communities is recognized in domestic law. The omission is curious and speaks volumes about official intentions with regard to Indian autonomy after 1876. In short, it may give rise to an inference that Canadian officials did not attach great importance to the nation-to-nation nature of the treaty relationship.

The *Indian Act* of 1876 created an Indian legislative framework that has endured to the present day in essentially the terms in which it was originally drafted. Control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors. Indian policy was now clear and was expressed in the alternative by the minister of the interior, David Laird, when the draft act was introduced

in Parliament: "[t]he Indians must either be treated as minors or as white men."[53] There was to be no middle road.

In general terms the 1876 act offered little that was different from what had gone before. It was much more complex and detailed, however, covering almost every important aspect of the daily lives of Indians on reserve. To facilitate the job of separating Indians from those who were not to enjoy the protection of Indian status and band membership, new definitions were provided to cover terms such as 'band' and 'reserve' in terms reflective of the policies already described.

The responsible cabinet minister was referred to in the legislation as the superintendent general of Indian affairs — a title first applied in the earlier legislation by which the new Province of Canada acquired control of Indian matters from the imperial Crown in 1860. In practice, this minister always had another, more politically significant portfolio. Thus, effective management of Indian affairs was left to the deputy superintendent general, an official who would be described today as a deputy minister.

As with earlier acts in relation to Indians, in the new *Indian Act* an Indian had to be someone "of Indian blood" or, in the case of mixed marriages, a non-Indian woman married to an Indian man. Indian women who married non-Indian men were not recognized as Indian. Thus, the exclusionary and sexist provisions described earlier found themselves incorporated into this first *Indian Act* in one form or another. In this same vein, Indian women were excluded from taking part in band land surrender decisions, since the new act restricted the procedure to "male members of the band of the full age of twenty-one years".[54] Not until 1951 would Indian women be permitted to participate in this most important band process.

Most of the protective features of earlier legislation were brought forward and made clear: no one other than an "Indian of the band" could live on or use reserve lands without licence from the superintendent general; no federal or provincial taxation on real and personal property was permitted on a reserve; no liens under provincial law could be placed on Indian property and no Indian property could be seized for debt. All these features of the original act are still present in the current version and are credited by most Indian people with preserving the reserve land base from gradual erosion. Former president of the National Indian Brotherhood, George Manuel, supported this assessment, referring to this aspect of the *Indian Act* as follows:

The main value of the Act from our point of view was that it was the one legal protection of our lands, and spelled out the basic rights and privileges of living on a reserve. But it also included a price tag.[55]

That price tag is discussed in more detail in the context of the many measures subsequently passed to increase federal government control and reduce the political and cultural autonomy of Indians under the *Indian Act* regime in the years between 1876 and 1951.

The 1876 *Indian Act* also carried the three-year elective band council system over from the *Gradual Enfranchisement Act* almost unchanged. Eventually, the term of office would be shortened to its current length of two years. The 1876 act repeated the list of band council by-law making powers in the earlier *Gradual Enfranchisement Act* (with one new power, that of allocating reserve land[56]), but they were still subject to governor in council confirmation. As with that earlier act, there was no power for a band to enforce these laws.

To foster individualism, the superintendent general of Indian affairs could now order that a reserve be surveyed and divided into lots and then require that band members obtain location tickets for individual plots of land. The voluntary enfranchisement provisions continued as described earlier, with two significant changes. First, an enfranchised man would receive his 50 acres in fee simple ownership at the end of the probationary period, thus making the land freely alienable right away. This provision was later changed so that no alienation could take place without the approval of the governor in council. In addition, Indians who earned a university degree or who became doctors, lawyers or clergymen were enfranchised automatically whether or not they wished to be enfranchised.

Although the *Indian Act* of 1876 applied throughout Canada, the bands of the west were excluded from many provisions (such as the elective band council system) because they were seen as insufficiently 'advanced' for these measures. They were also in the process of entering into Treaties 1 to 7 and still had sufficient military strength that it might have been unwise to attempt to subject them to federal legislation of this nature.

Thus, where a western tribe was not officially under the *Indian Act* (or the later *Indian Advancement Act* of 1884[57]) and where a treaty had been entered into, the Indian affairs department allowed Indians to hold elections under the close supervision of the local Indian agent. In British Columbia the department often followed customary or traditional practice, while in the prairies the election practices were akin to appointments by the agent, since it was he who would usually initiate and control the entire procedure. In such cases, the agents would attempt to follow the *Indian Act* model, limiting terms to three years and otherwise ensuring that procedures similar to those followed in eastern Canada were adopted.

Indians in those parts of Canada subject to the *Indian Act* band council system refused to adopt it unless it was imposed on them. They were aware if they did adopt the system, the superintendent general of Indian affairs would have full supervisory and veto power over governance decisions made by the band. They would also be forced to concern themselves with the minor matters set out in the restrictive list of powers. Only one band is known to have adopted the *Indian Act* elective system voluntarily at the time.[58]

The 1880 consolidated version of the act created a new department of Indian affairs to replace the Indian branch of the department of the interior to manage Indian administration and to see to the appointment of local Indian agents. The new department remained under the direction and control of the department of the interior, however, with

the minister of the interior being superintendent general of Indian affairs. The 1880 act also introduced a new provision denying band governments the power to decide how moneys from the surrender and sale of their lands or other resources would be spent. The governor in council thereby took the power to decide how to manage Indian moneys and retains it to this day.[59]

The 1880 consolidation also attacked the traditional band governments. Thus, where the superintendent general imposed the elective system on a particular reserve, traditional tribal leaders would no longer be permitted to exercise any powers at all. They would have to stand for election under the new *Indian Act* procedures, despite tribal or band traditions to the contrary. The new department of Indian affairs, concerned with implementing the assimilation policy, in this way showed its determination to foreclose the possibility of opposition from traditional elements on reserves by using the elective system.

Although band councils had by now been given the power to enforce their limited law-making powers, the 1880 version of the *Indian Act* required that proceedings be taken before a justice of the peace in the ordinary way before punishment was imposed. This meant that all proceedings regarding reserve events had to be taken off-reserve to a location where a justice of the peace could be found. Enforcement was all but impossible under these conditions.[60]

Aside from these few changes, the 1880 act reflected its 1876 predecessor and was the model on which all succeeding versions were erected. Although incremental amendments continued to be made to increase the power of the superintendent general and local Indian agents at the expense of bands and band councils, there was no real change in substance or approach for the next 70 years. The only major legislative addition was the passage of the *Indian Advancement Act* in 1884, which was designed for the more 'advanced' Indians in eastern Canada and modelled on town councils.

The *Indian Advancement Act* gave the governor in council power to force bands to adopt its provisions regarding one-year elective band councils. There was to be no chief elected by the adult male electorate. Instead the elected band councillors would select one among them to be a chief councillor. For these purposes, the reserve was to be divided into electoral districts with a relatively equal number of voters. These provisions went further than those in the *Indian Act* by extending the powers of band councils into areas such as public health and by enabling band councils to tax the real property of all band members, whether held by location ticket or by an enfranchised former Indian who had received his 50 acres of reserve land.

However, and somewhat paradoxically, if the goal was to educate Indians in mainstream self-government matters, the superintendent general (typically through the local Indian agent) acquired vastly enlarged powers to direct all aspects of elections and to call, participate in and adjourn band council meetings. Although a few bands came under this act voluntarily,[61] most bands across Canada refused to adopt its provisions. The

provisions of this act were later incorporated into the *Indian Act* and remained part of it until 1951.

9. The *INDIAN ACT*: Oppressive Measures

From the passage of the first version of the *Indian Act* in 1876, amendments were brought forward almost every year in response to unanticipated problems being experienced by federal officials in implementing the civilization and assimilation policies to which they were committed. Many of these amendments eroded the protected status of reserve lands. Others enabled band governments to be brought under almost complete supervision and control. Yet others allowed almost every area of the daily life of Indians on reserves to be regulated or controlled in one way or another.

Many of the provisions, such as the prohibition on alcohol consumption, were often supported by large segments of the reserve population. However, the overall effect was ultimately to subject reserves to the almost unfettered rule of federal bureaucrats. The Indian agent became an increasingly powerful influence on band social and political matters and on most reserves came to dominate all important aspects of daily band life.

Most of these provisions and practices arose during the period between 1880 and the 1930s, when the assimilative thrust of Indian policy was at its peak. In many cases these measures were inspired by larger concerns about reducing federal government expenditures or supporting broader federal policies. For example, much of the push for Indians to adopt farming in western Canada was prompted by a more general concern that they become more self-sufficient, so as to reduce the drain on federal expenditures. Similarly, much of the impetus for leasing 'unused' portions of reserves to non-Indian farmers and compelling surrenders of what were referred to as 'surplus' reserve lands came from broader economic policies in support of the war effort between 1914 and 1918.[62]

Many *Indian Act* provisions and practices associated with them were known at the time to be arbitrary and unfair. Others have come to be seen in that light with the benefit of hindsight. Some of these provisions and practices merit examination here to impart the flavour of the *Indian Act* regime that has coloured so profoundly the experiences of several generations of Indian people and their leaders. Thus, what follows is a review of some of the most oppressive amendments and practices in the *Indian Act* and its administration in the period up to and beyond the 1951 revision.

9.1 Protection of the Reserve Land Base

The *Gradual Civilization Act* first set the Crown on a course contrary to the procedures set out in the *Royal Proclamation of 1763* by allowing protected reserve land to be converted to provincial lands upon the enfranchisement of an Indian. The various versions of the *Indian Act* over the years continued in the same vein, permitting the piecemeal undermining and erosion of the reserve land base in many ways.

In 1894, for example, the superintendent general was given the power to lease reserve land held by physically disabled Indians, widows, orphans or others who could not cultivate their lands. Neither surrender nor band approval was required. In 1918 the superintendent general's power to lease reserve lands without a surrender was widened to include any uncultivated lands if the purpose of the lease was cultivation or grazing. This was intended to permit him to deal with the relatively large areas of western reserves that were not being cultivated intensively to support the war effort and was part of a broader national policy of encouraging Indian farmers to increase production and make reserve land available to non-Indian farmers, who had more machinery at their disposal and were therefore more efficient. When Arthur Meighen, the minister of the interior, was questioned in the House of Commons about the effect on Indians of having their best lands taken from them this way, he did not give a direct answer, replying instead that "we need [not] waste any time in sympathy for the Indian, for I am pretty sure his interests will be looked after by the Commissioner."[63]

Other reserve land use decisions were also removed from band council control. Thus, in 1894 bands lost the power to decide whether non-Indians could reside on or use reserve lands — the sole authority to do this was henceforth the superintendent general's. The next year further amendments permitted the superintendent general to lease reserve land held by location ticket if the individual locatee wished to do so. There was no requirement that the band consent, even where the superintendent general intended to lease the land to non-Indians.

In 1919 the deputy superintendent general was given the power to grant location tickets to returning Indian war veterans, without band council consent, as part of the *Soldier Settlement Act*; the tickets were in lieu of the 160 acres of land promised veterans by the legislation. Although an intrusion into band autonomy and local self-government, this was less extreme than the scheme originally proposed — requiring Indian veterans to enfranchise if they wished to receive land under the *Soldier Settlement Act*. In the view of Deputy Superintendent Duncan Campbell Scott, this would have been a "fitting recognition of their services and...an object lesson to the other Indians".[64] The issues surrounding implementation of that act with respect to Indian veterans are discussed in more detail in Chapter 12 of this volume.

During this same period, great pressure was put on many bands to surrender portions of their reserves, usually so that the lands could then be sold to settlers or incorporated into adjacent municipalities. In response to an opposition question in 1906 regarding the 'unused' reserve lands in the west, interior minister Frank Oliver replied that the Indian affairs department was making efforts to acquire surrenders of 'surplus' Indian lands, noting in this regard that "if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for."[65] To induce such surrenders, an amendment to the *Indian Act* was passed that same year allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members.[66]

The new provision was put to immediate use in the case of the St. Peter's reserve in Manitoba. A long and tangled history of dealings regarding reserve lands had led to

serious controversy and to a subsequent recommendation by an investigating judge that the Indians be encouraged to surrender the entire reserve in order to clear up the legal problems that had arisen over the years. Accordingly, a surrender was arranged with much difficulty in 1907, upon which the judge noted that the government had "readily and cheaply got out of a nasty tangle."[67] The surrender was repudiated the next year, however, by a substantial number of band members on the basis of irregularities in the surrender process; they also asserted that they had been promised a sum of money by federal officials and had never received it.[68]

The inducements and other pressures for surrender were insufficient to satisfy the demand for additional Indian lands. Thus, public authorities were given the power to expropriate reserve land, without a surrender, in 1911. Any company, municipality or other authority with statutory expropriation power was enabled to expropriate reserve lands without governor in council authorization so long as it was for the purpose of public works. This power continues in the current act, but now governor in council authorization is required. It has been used in the past and is strongly opposed by Indians because of its powerful invasive effect on the reserve land base. Even the threat of its use was often sufficient to force bands to comply by surrendering lands 'voluntarily'.

A good example of this provision's use and the threat of its use is provided by the relatively recent *Kruger* case in the Federal Court of Appeal. The case involved an action for breach of fiduciary obligation in the taking of two large tracts of land from the Penticton reserve in British Columbia for purposes of an airport. The first tract was expropriated in 1940 by the federal transport department, which had refused to follow the advice of Indian affairs officials who had helped negotiate a leasing arrangement instead. The second tract of land was lost through a surrender imposed by the threat of transport officials to expropriate reserve land, once again after a lengthy period of negotiation. In the second case, Mr. Justice Heald noted that transport officials "made little effort to seriously negotiate a settlement" and that "[t]heir only answer was to expropriate first and then negotiate thereafter."[69] Despite these facts, two other members of the court could not find a breach of the Crown's fiduciary obligation. Ultimately all three judges agreed, for different reasons, that the case ought to be dismissed.[70]

In 1911, another amendment to the *Indian Act* allowed a judge to issue a court order to move a reserve within or adjoining a municipality of a certain size if it was 'expedient' to do so. There was no need for band consent or surrender before the entire reserve was moved. This provision, along with the expropriation power, was subsequently referred to as the 'Oliver Act'. It was passed despite Parliament's knowledge that its implementation could lead to a breach of treaty rights. It arose in the context of a general desire among federal officials to reduce the size of many Indian reserves in order to promote development. The minister of the interior, Frank Oliver, dealt with the issue as follows:

For while we believe that the Indian, having a certain treaty right, is entitled ordinarily to stand upon that right and get the benefit of it, yet we believe also that there are certain circumstances and conditions in which the Indian by standing on his treaty rights does

himself an ultimate injury as well as does an injury to the white people, whose interests are brought into immediate conjunction with the interests of the Indians.[71]

The provision was considered necessary so that Parliament would not have to pass special legislation every time it wished to expropriate reserves adjoining towns. This had been done in the case of the Songhees reserve in British Columbia that same year (see Chapter 11 on relocations), and federal officials were seeking a more expeditious way of proceeding in such cases. The Songhees reserve had been moved from Victoria to a location outside the city in order to free up prime urban land for development.

Indians protested this provision, seeing in it an outright attack on the integrity of their reserve land base. In 1912, for instance, the Grand General Indian Council of Ontario passed a resolution condemning it.[72] Nonetheless, it was not repealed until 1951. Federal officials were able to apply this new provision almost immediately, seeking in 1915 to move a Mi'kmaq reserve in Sydney, Nova Scotia, to another location outside the city. The judge to whom the inquiry was directed granted the application, finding that it was in the public interest because "removal would make the property in that neighbourhood more valuable for assessment", since the "racial inequalities of the Indians, as compared with the white man, check to a great extent any move towards social development".[73] Similarly, the growing population of the band and the relatively small size of the reserve made it possible for the judge to conclude that it would be in the best interests of the Indians that the reserve be moved, despite the fact that they had previously indicated strong resistance to surrendering the reserve or moving to another location.

In other ways, too, Indians' control of their already small reserve land base was undermined through additional powers given to federal officials. In 1919, for example, the governor in council was authorized to make regulations allowing leases to be issued for surface rights on Indian reserves in connection with otherwise valid mining operations. This would allow such operations to make use of adjoining reserve lands where necessary in the event the band refused to surrender them. There was provision for compensating the occupant of the land over which a lease might be granted. In 1936, responsibility for Indian affairs was transferred from the department of the interior to the department of mines and resources. Two years later, further amendments clarified the leasing authority originally granted in 1919, dropping the statutory requirement for compensation.

By the time of the 1951 *Indian Act* revision, bands and band councils were no longer in a position to exercise any real control over their reserve lands beyond refusing to consent to land surrenders for sale or attaching conditions to such surrenders. This situation has continued almost unchanged to the present day. Many bands complain that the high degree of federal control over their land use decisions is preventing them from taking advantage of commercial and development opportunities in the modern Canadian economy. This issue is discussed in more detail in Volume 2 of this report.

9.2 Band Government and Law-Making Powers

In many cases amendments to the *Indian Act* gave the superintendent general further powers to control band councils. For example, in 1884 he was given the power to override a band council's refusal to consent to the enfranchisement of a band member who otherwise met the qualifications. He could also annul the election of any chief found guilty of "fraud or gross irregularity" in a band council election and recommend to the governor in council that such a chief be prohibited from standing for election for six years. This provision was passed to counter the practice of many bands of holding sham elections and simply electing their traditional or hereditary leaders.

In 1914 the superintendent general received authority to make health regulations that would prevail over competing band council by-laws. This regulation-making power was enhanced to cover many more areas in 1936. Since these areas coincided with many of the band council law-making powers, this effectively allowed federal authorities to second-guess band councils.

In 1933 the authority of Indian agents was reinforced by an administrative directive requiring that all Indian complaints and inquiries be directed to the Indian affairs branch through the local agent. This produced the paradoxical situation of band complaints about their agents having to be directed to headquarters in Ottawa by the very agents complained about. Three years later other *Indian Act* amendments authorized Indian agents to cast the deciding vote in band council elections in the event of a tie and to preside at and direct band council meetings.

Although Indian agents began to be phased out in the 1960s, band councils still operate under the restrictive and limiting by-law making framework first developed in 1869. In the modern era, most band council by-laws are subject to either a ministerial power of disallowance or a requirement that the minister confirm them. In addition, the regulation-making authority of the governor in council may render band council by-laws irrelevant if they cover the same area as the regulation.

Moreover, subject to certain limits, recent judicial decisions have confirmed that general provincial laws may apply to Indians living on federally protected reserve lands.[74] In many situations both the provincial law and the band council by-law cover the same area. Traffic laws are a good example. So long as they do not actually conflict in a narrow constitutional sense, both sets of laws stand. This effectively undercuts band council authority and impedes the establishment of a band legal regime appropriate to the circumstances of the reserve concerned.

The limited and supervised law-making powers of bands under the *Indian Act* are a constant object of criticism by Indian people and appear to be more and more glaringly at odds with current trends toward enhanced autonomy for First Nations communities and general trends toward decentralization within the Canadian federation.

9.3 Enfranchisement

The concept of voluntary enfranchisement was given its first legislative expression in the *Gradual Civilization Act* of 1857 and remained virtually unchanged through successive versions of the *Indian Act* until relatively recently. It was not a realistic or popular policy among Indians, most of whom had no intention of renouncing their personal and group identity by assimilating into non-Aboriginal society. Since only one Indian, Elias Hill, had been enfranchised voluntarily (see Chapter 6), federal officials decided to make it compulsory in some situations.

Thus, to the 'privilege' of voluntary enfranchisement, officials added compulsory enfranchisement in 1876 for those who obtained higher education. However, that first *Indian Act* also allowed unmarried Indian women to seek enfranchisement — ironically, one of the few examples of sexual equality in the early versions of the *Indian Act*. Given the stipulation that such a woman be unmarried, there was little possibility that her decision would affect others — unlike the case of men, whose enfranchisement would automatically enfranchise their wives and children.

In addition, the new *Indian Act* permitted entire bands to be enfranchised, a provision that the Wyandotte (Wendat) band of Anderdon, Ontario took advantage of in 1881, finally receiving letters patent enfranchising them in 1884. This move greatly encouraged subsequent generations of Indian affairs officials in their civilizing and assimilating endeavour.[75] Bands could still apply for voluntary enfranchisement until 1985. Only one other band was enfranchised voluntarily during the period when the *Indian Act* contained band enfranchisement provisions.[76]

With respect to compulsory individual enfranchisement, an 1880 amendment removed the involuntary element, thereby allowing university-educated Indians and those who had entered one of the professions to retain their Indian status if they wished. However, to prevent Indian communities from impeding worthy candidates from taking advantage of the provisions, in 1884 another amendment removed the right of the band to refuse to consent to enfranchisement or to refuse to allot the required land to the individual who had applied for enfranchisement during the probationary period. Further amendments in 1918 made it possible for Indians living off-reserve to enfranchise. This included widows and women over the age of
21. Passage of this amendment produced immediate results. The department of Indian affairs noted, for example, that in the period before 1918, only 102 persons had enfranchised, whereas between 1918 and 1920, a further 258 Indians abandoned their Indian status through enfranchisement.[77]

The most drastic change occurred in 1920, however, when the act was amended to allow compulsory enfranchisement once again. A board of examiners could be appointed by the superintendent general of Indian affairs to report on the "fitness of any Indian or Indians to be enfranchised" and, following the board's report, the superintendent general could recommend to the governor in council that "any Indian, male or female, over the age of twenty-one [who] is fit for enfranchisement" be enfranchised two years after the order.[78] This provision was repealed two years later, but reintroduced in slightly modified form in 1933 and retained until the major revision of the act in 1951. A further modification,

made in 1951 and retained until 1985, allowed the compulsory enfranchisement of Indian women who married out. These matters are discussed in more detail in Volume 4, in Chapter 2 and are touched on only generally in this chapter.

A particularly compelling example of how enfranchisement was used by federal officials — the case of F.O. (Fred) Loft — is described later in this volume (see Chapter 12). A returning veteran of the First World War, Loft was a Mohawk from the Six Nations reserve at Brantford. After the war he became an effective leader and national spokesman for the fledgling League of Indians of Canada, a political organization designed to lobby on behalf of Indian concerns in Canada. His organizational activities alarmed Indian affairs officials, who were instructed not to co-operate with him in any way. After the passage of the 1920 amendment allowing compulsory enfranchisement, the deputy superintendent general of the day, Duncan Campbell Scott, threatened to use it to enfranchise Loft and thereby deprive him of credibility among status Indians in the country. Loft protested strongly and wrote directly to the superintendent general. In the interim, the involuntary element was repealed in 1922, so the threat was never carried out.[79]

Compulsory enfranchisement of Indian women who married non-Aboriginal, Métis, Inuit or unregistered Indian men was introduced in 1951 and retained until repealed in 1985 by Bill C-31. As explained in the chapter on the perspectives of Aboriginal women (Volume 4, Chapter 2), from 1951 on, enfranchisement measures under the notorious subsection 12(1)(b) of the act were directed primarily against Indian women who married men who did not have Indian status. The effects on enfranchised women and their children could be devastating. They, along with their children, would lose Indian status, the right to live in the reserve community, and even the right to treaty benefits or to inherit reserve land from family members. Compulsory enfranchisement of women led to an enormous increase in the number of enfranchised persons after the figures had remained relatively low for decades.[80]

9.4 Reserve Justice Administration

In 1881, the administration of non-Aboriginal justice was brought formally to Indian reserves by making officers of the Indian department, including Indian agents, *ex officio* justices of the peace and by extending to the reserves the jurisdiction of magistrates in towns and cities. Importantly, the department of Indian affairs now had authority to enforce its own civilizing regulations. The next year local Indian agents were given the same powers accorded magistrates. Evidently, this was a considerable extension of the powers of administrators with no previous legal training.

In 1884, yet another set of amendments allowed Indian agents, in their role as justices of the peace, to conduct trials wherever they thought necessary. Presumably, this would allow them to conduct trials off-reserve as well. The same amendments extended the authority of Indian agents acting as justices of the peace beyond *Indian Act* matters to "any other matter affecting Indians." Given that the *Criminal Code* had not yet been enacted, this presumably included all civil and criminal matters generally — a

considerable amount of jurisdiction for a civil servant. This was corrected two years later, however, to limit their jurisdiction to *Indian Act* matters.

Also in 1884, a new offence was created under the *Indian Act*, that of inciting "three or more Indians, non-treaty Indians, or halfbreeds" to breach the peace or to make "riotous" or "threatening demands" on a civil servant. In addition, the superintendent general was given authority to prohibit the sale to any Indian in the west of "fixed ammunition or ball cartridge." These measures were adopted for purely political motives — to foil the Métis and Cree peoples, who were increasingly discontented with government policy toward them.

Ultimately, of course, the other stern measures being taken against them, such as the restriction of rations to the Cree, for example, would cause them to rebel against the imposition of Canadian political authority over them in what became known as the second Riel Rebellion. Thus, the federal government criminalized Indian and Métis political protest and prevented Indians from receiving ammunition needed for hunting at a time when they were already suffering from the effects of Deputy Superintendent Vankoughnet's cost-saving policy of restricting rations to them following the drastic decline of the buffalo herds.[81] Both new offences, inciting and providing ammunition, were within the jurisdiction of the Indian agent.

Amendments to the *Indian Act* in 1890 brought Indian persons accused of certain sexual offences within the jurisdiction of Indian agents.[82] Following enactment of a comprehensive *Criminal Code* in 1892, Indian agents lost this aspect of their criminal law authority over Indians, but it was restored to them in 1894 along with jurisdiction over two additional offences, Indian prostitution and Indian vagrancy.

In describing the evolution of the powers of Indian agents, the two judges who conducted the Aboriginal Justice Inquiry of Manitoba compared the relatively more oppressive Canadian approach to bringing non-Aboriginal justice to Indians with that used on reservations in the United States:

The Americans also sought from the outset to use the court system as a "civilizing" tool to foster their values and beliefs in substitution for traditional law and governmental structures. It was felt that this was accomplished best through the hand-picking of individual tribal members to be appointed as judges under the supervision of the Bureau of Indian affairs Indian agents. The Canadian approach was much more oppressive. All Indian agents automatically were granted judicial authority to buttress their other powers, with the result that they could not only lodge a complaint with the police, but they could direct that a prosecution be conducted and then sit in judgment of it. Except as accused, Aboriginal persons were excluded totally from the process.[83]

It seems clear that the justice administration powers of the agents served more to augment their already impressive array of administrative powers than to deliver Canadian justice to Indians. It is hardly surprising, then, that even today, many Indians still harbour a deep-seated resentment toward mainstream justice officials — something pointed out by

most of the many recent Aboriginal justice inquiries. We dealt with these issues in some detail in our special report, *Bridging the Cultural Divide*.[84]

Today, there are no longer any Indian agents exercising judicial functions. A few Indians have now been appointed to the position of justice of the peace under the *Indian Act*, but only on three reserves.[85] Except for those reserves that have appointed by-law enforcement officers and band constables under delegated federal authority, most bands have no internal means of enforcing their by-laws or prosecuting those who contravene them. They must rely for the most part on provincial police and provincial Crown attorneys to prosecute by-law offenders in the provincial court system. Unfortunately, police and prosecutors have a heavy workload and usually intervene only in the case of criminal and serious statutory offences. As a result, bands themselves must often initiate proceedings where their by-laws have been violated, sometimes by engaging counsel to pursue such matters. This is expensive and time-consuming, unless the band is a large one with the financial resources and political will to pursue such actions.

With regard to criminal matters, the remoteness and isolation of many communities means that access to the judicial system is often limited to sporadic and hurried visits by circuit courts enforcing Canadian criminal law. Thus, the police and courts are usually unable to accommodate Indian values and concepts of justice. The results include inappropriate charging practices and convictions and sentences that do not reflect Indian views or needs. These matters have been reviewed extensively in federal and provincial Aboriginal justice inquiries over the years. Many bands see the existing justice system as a foreign one, less a protector than an enforcer of an alien and inappropriate system of law.

Effective enforcement of *Indian Act* by-laws and the most common criminal offences involves not only laying charges against offenders, but also prosecution, adjudication and sentencing. The current situation with outside police forces refusing to enforce by-laws, the limited criminal jurisdiction of *Indian Act* justices of the peace, the forced reliance on provincially and territorially administered courts, and the absence of any authority for bands to correct these anomalies means jurisdictional gaps, confusion over procedures and policies, and the continuing inability of bands to provide effectively for the safety and security of their own members.

Paradoxically, most bands have moved from a position of extremely heavy judicial control of reserve law and order matters to a situation of almost no control, except by outside forces on a sporadic basis. From a position of too much enforcement, they have arrived at one of not enough. This is just one of the legacies of the past, but it is one that has profoundly serious consequences for daily life in most reserve communities.

9.5 Attacks on Traditional Culture

In 1884 official policy turned from protecting Indian lands from non-Indians to protecting Indians from their own cultures. That year amendments to the *Indian Act* prohibited the potlatch and the Tamanawas dance. The potlatch was a complex ceremony among the

west coast tribes that involved giving away possessions, feasting and dancing, all to mark important events, confirm social status and confer names and for other social and political purposes. Tamanawas dances were equally complex west coast ceremonies involving supernatural forces and initiation rituals of various kinds, many of which were repugnant to Christian missionaries.[86] A jail term of two to six months could result from conviction of any Indian who engaged or assisted in Tamanawas dances.

This was a significant development in Indian policy because it went further than merely imposing non-Indian forms on traditional Indian governance or land holding practices — it was a direct attack on Indian culture. The goal was, of course, to assist the civilization and assimilation goals of Indian policy by abolishing what a British Columbia official referred to at the time as the evil that lay "like a huge incubus upon all philanthropic, administrative or missionary effort for the improvement of the Indians."[87]

The 1884 prohibition on potlatching and the Tamanawas dance was not pursued as vigorously as its sponsors had hoped, although the arrests and harassment of potlatchers apparently had the desired effect of reducing the incidence of potlatching and Tamanawas dances or at least forcing adherents to conduct these activities in secret. The failure to pursue the ban more actively was partly because of the reluctance of the Indian agents to enforce it — not all were opposed to traditional practices such as these. Partly it was the result of an early decision by British Columbia Chief Justice Begbie that was unsympathetic to such prosecutions.[88] In British Columbia, it seems as if most of the anti-potlatching impetus came from missionaries and Christian converts among the west coast tribes rather than from government officials.[89] Thus, no one was jailed for potlatching until 1920, during a period of intense official enforcement of prohibitions on traditional cultural practices in British Columbia and on the prairies.

However, official disapproval and the pressure generated by it, harassment from the Indian agents, use of the *Indian Act* trespass provisions to evict Indians from other reserves, and mass arrests and trials did have the desired effect of eliminating or at least undermining the potlatch and other traditional ceremonies in many cases. This was particularly so under the leadership of Deputy Superintendent Duncan Campbell Scott, who led a virtual crusade against traditional Indian cultural practices and who sponsored an amendment to the *Indian Act* in 1918 that gave Indian agents the additional power when acting as justices of the peace to prosecute the anti-dancing and anti-potlatching provisions.

Speaking at our round table on justice, British Columbia Provincial Court Judge Alfred Scow supported the conclusion that official harassment of the potlatch and other traditional ceremonies was harmful to the traditions of his people, the Kwakiutl of Vancouver Island:

The *Indian Act* did a very destructive thing in outlawing the ceremonials. This provision of the *Indian Act* was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have

forms of government be they oral and not in writing before any of the Europeans came to this country. We had a system that worked for us. We respected each other. We had ways of dealing with disputes. We did not have institutions like the courts that we are talking about now. We did not have the massive bureaucracies that are in place today that we have to go through in order to get some kind of recognition and some kind of resolution.[90]

Following the initial ban of the potlatch and the Tamanawas, further amendments prohibiting traditional dances and customs followed in 1895. Thus, later practices associated with traditional dances, including the Blackfoot sundance and the Cree and Saulteaux thirst dance, were singled out for an outright ban. However, since the ban applied only to the giving away of property and to the wounds and other injuries that were customary for some of the participants, the dances themselves were immune from the prohibition.

Indian agents nonetheless attempted to suppress the actual dances. This led to tensions between agents and the RCMP, who were charged with enforcement, because the police were unwilling to go beyond the law to enforce departmental policy. Arrests and imprisonments did take place, however, including one in 1904 that led to a sentence of two months' imprisonment at hard labour for a 90-year-old, nearly blind man named Taytapasahsung.[91]

Because of the scandal associated with such cases and the growing popularity of stampedes and agricultural exhibitions at which Indians were increasingly invited to dance, an amendment was passed in 1914 barring western Indians under penalty of law from participating without official permission in "Aboriginal costume" in any "dance, show, exhibition, stampede or pageant." Arrests and prosecutions immediately went up, but because the offences were indictable ones, they were beyond the jurisdiction of Indian agents acting as justices of the peace. In such cases they could merely lay charges in another court. In 1918 this was corrected by bringing these offences within the agent's jurisdiction and removing them from courts outside the reserve.

In 1921, the deputy superintendent general wrote to one of his western officials, urging him in the following terms to find alternatives to what he clearly misunderstood to be a mere recreational activity:

It has always been clear to me that the Indians must have some sort of recreation, and if our agents would endeavour to substitute reasonable amusements for this senseless drumming and dancing, it would be a great assistance.[92]

In 1933 the requirement that the participants be in Aboriginal costume was deleted from the prohibition; to attract the penalty it was sufficient that an Indian participate in the event, no matter how he or she was dressed. The apparent intent was to prevent Indians from attending fairs and stampedes without the permission of Indian affairs officials. Since the first prohibition was enacted in 1895, various means had been found by Indians and their supporters to get around the ban on dancing. This new offence seems in

retrospect to have been the last desperate attempt of Indian affairs officials to enforce their anti-dancing policy.

These provisions have now been removed from the *Indian Act*. Nonetheless, and as illustrated by the comments of Judge Scow concerning the ban on potlatching, their legacy continues. Indian traditional ways have been subverted and have sometimes disappeared. This has left many Indian communities trapped between what remains of traditional ways of doing things and the fear of importing too much more of mainstream Canadian cultural values into reserve life.

9.6 Liquor Offences

The control of sales of alcohol to Indians had been a feature of colonial legislation long before the *Indian Act* and had been ardently requested by many Indian nations because of the destructive social consequences of drunkenness in Indian communities. Both before and after Confederation penal sanctions were imposed on the sellers of alcohol.

However, legislation was passed in 1874 making it an offence punishable by one month in jail for an Indian to be intoxicated on- or off-reserve. Failure to name the seller of the alcohol in question could lead to an additional 14 days' imprisonment. These provisions became part of the 1876 *Indian Act*, supplemented by the prohibition on simple possession of alcohol by an Indian on-reserve.

The later 1951 *Indian Act* revision made one exception to the provisions by allowing an Indian to be in possession of alcohol if in a public place and in accordance with provincial law. It was still an offence to be drunk, however. No non-Indian could have been convicted of a similar offence. In the *Drybones* case the Supreme Court of Canada finally struck down the off-reserve intoxication offence for contravening the equality provision of the *Canadian Bill of Rights*.[93]

These provisions have been eliminated from the contemporary version of the *Indian Act*, and control over intoxicants on-reserve has been transferred entirely to the band and band council.

9.7 Pool Room Prohibition

In 1927 the superintendent general of Indian affairs was given the unusual power of regulating the operation of pool rooms, dance halls and other places of amusement on reserves across Canada. This was apparently to ensure that Indians would learn industriousness and would not spend too much time in leisure pursuits that were available to non-Indians. Where Indians were tempted to leave the reserve to play pool, further amendments in 1930 made it an offence for a pool room owner or operator to allow an Indian into the pool room who "by inordinate frequenting of a pool room either on or off an Indian reserve misspends or wastes his time or means to the detriment of himself, his family or household". The penalty for the pool room operator in such a case was a fine or a jail term of up to one month. These provisions are no longer in the *Indian Act.*

9.8 Sale of Agricultural Products

Amendments to the *Indian Act* in 1881 aimed to protect western Indians by prohibiting the sale of their agricultural produce except in conformity with official regulations. Anyone who purchased Indian agricultural produce without the appropriate permit was subject to summary conviction and a fine or imprisonment for up to three months. The official rationale was that this was necessary to prevent Indians from being swindled by non-Indians and to prevent the exchange or barter of agricultural products for things the agents did not consider worthwhile, especially alcohol.

However, another motive may have been the desire to reduce competition between Indian and non-Indian farmers. There are indications that in the 1880s non-Indian farmers were complaining to local Indian agents about the competition they were facing from Indian farmers, claiming it was unfair because of the government assistance to reserves.[94]

At this time, official federal policy on the prairies was explicitly to convert Indians to peasant farmers on the model of peasants of Europe. This addled policy was the brainchild of Hayter Reed, then deputy superintendent general of Indian affairs. He was imbued with a philosophy of strict social Darwinism, convinced that social evolution could proceed only in defined stages, from savagery to barbarism to civilization. Convinced that Indian attempts to 'advance' themselves too quickly would be 'unnatural', he stated as follows:

The fact is often overlooked, that these Indians who, a few years ago, were roaming savages, have been suddenly brought into contact with a civilization which has been the growth of centuries. An ambition has thus been created to emulate in a day what white men have become fitted for through the slow progress of generations.[95]

The requirement for a permit was also used by certain agents as more than a means to oversee transactions in Indians' interests. It was equally available as yet another tool for enforcing compliance with official policies. In this respect, the daughter of a prominent prairie Cree leader reports that her father saw the permit system as a loaded gun in the hands of the agent:

As time went on the permit system began to evolve into a disciplinary device. If the agent did not like a certain Indian, or if an Indian did something to displease him the agent could refuse or delay indefinitely a permit enabling him to sell any of his produce or to buy needed stock, equipment or implements. Favoured Indians would get all kinds of lands and help, totally contrary to the intent of the treaties, others got nothing. With no money coming in, unable to pay his debts, properly work his land or even to feed his stock the helpless farmer had to give away his cattle and try to find work from outside farmers, which usually consisted of clearing bush or picking rocks. This was enervating, debilitating work which the farmers themselves detested. And even such work was seasonal and not always available. White people, seeing only that the Indian had stopped working and had not paid his debts, concluded that Indians were useless, lazy and unreliable. There were too many men like this on the reserves.[96]

Whatever may have been the underlying reasons for this prohibition or the uses to which it was put, one effect was to hinder Indian farmers and to make them appear less efficient or even to drive them from farming. Nonetheless, the provision was retained and expanded in successive versions of the *Indian Act* and was extended in 1941 to all Indians in Canada regarding the sale of furs and wild animals. Despite the 1951 revision and the advent of the *Canadian Charter of Rights and Freedoms* and other human rights instruments, the present version of the *Indian Act* still contains a provision prohibiting the sale of agricultural products by western Indians without official permission, although it is apparently no longer enforced.

9.9 Indian Legal Claims

In a 1927 amendment, the superintendent general acquired a powerful new weapon in his arsenal — the right to require that anyone soliciting funds for Indian legal claims obtain a licence from him beforehand. Conviction could lead to a fine or imprisonment for up to two months. Official explanations once again focused on the need to protect Indians, this time from unscrupulous lawyers and other "agitators".[97]

The true reason probably had more to do with the desire of federal officials to reduce the effectiveness of Indian leaders such as Fred Loft and of organizations such as the Allied Tribes of British Columbia and the Six Nations Council. These groups had already proven troublesome to Indian affairs officials because of their insistence that their unresolved land claims be dealt with. In fact, Indian affairs officials were actively working to have charges laid against long-time British Columbia activist Arthur E. O'Meara when he died in 1928 and were on the verge of charging Loft when, elderly and tired, he finally withdrew from the struggle for Indian rights in the early 1930s.[98]

The effect of this provision was not only to harass and intimidate national Indian leaders, but also to impede Indians all across Canada from acquiring legal assistance in prosecuting claims until this clause was repealed in 1951. The claims of most British Columbia Indians as well as those of the Six Nations are still outstanding — as are hundreds of others.

9.10 The Pass System

The notorious pass system was never part of the formal *Indian Act* regime. It began as a result of informal discussions among government officials in the early 1880s in response to the threat that prairie Indians might forge a pan-Indian alliance against Canadian authorities. Designed to prevent Indians on the prairies from leaving their reserves, its immediate goal was to inhibit their mobility. Under the system, Indians were permitted to leave their reserves only if they had a written pass from the local Indian agent. The agent would often act on the advice of the reserve farm instructor.

The pass system should be read against the backdrop of other attempts to interfere with Indian cultural life, as it was intended not only to prevent Indian leaders and potential militants from conspiring with each other, but also to discourage parents from visiting

their children in off-reserve residential schools and to give agents greater authority to prevent Indians from participating in banned ceremonies and dances on distant reserves.

Although the pass system was official policy on the prairies, there was never any legislative basis for it. It was therefore nothing more than an expedient policy that arose apparently from a suggestion by the deputy superintendent general of Indian affairs to Prime Minister Macdonald in 1885.[99] It was maintained through the 1880s but had fallen into general disuse by the 1890s, although it was used occasionally in various parts of the prairies into the twentieth century. The RCMP disliked enforcing the pass system because of their fear that, if challenged, it would be found illegal by the courts and would bring their other law enforcement efforts into disrepute.

In practice the pass system was only partly effective in restricting Indian movement and was often ignored by Indians and by the agents themselves. Because it could not be legally enforced, many Indian agents simply issued passes to those who were going to leave the reserve in any event, or else they attempted to enforce the system by other means. Thus, rations and other matters within the control of the Indian agent were sometimes withheld from those who refused to comply. Another alternative was to prosecute Indians found off the reserve without passes for trespass under the *Indian Act* or for vagrancy under the *Criminal Code*,[100] both of which were within the jurisdiction of the agent.

9.11 Indian Agents

The role of the Indian agent has never been fully documented in Canadian history. This is largely because the work of these local reserve representatives of the superintendent general of Indian affairs was usually conducted in geographically remote areas, far from the scrutiny of most Canadians. Moreover, Indian affairs were, until relatively recently, well down on the list of the preoccupations of most Canadians.

Most accounts of how Indian agents conducted themselves have therefore been written from the vantage point of Indians and in the context of the many civilizing and assimilating measures that were imposed on them through official federal policy. Some of those measures and the role played by Indian agents have already been described.

Over the years the superintendent general acquired an increasingly vast array of powers to intervene in almost all areas of daily reserve life. Most of these powers were available to the agents. With their control of local administrative, financial and judicial matters, it is easy to understand how they came to be regarded as all-powerful and as persons of enormous influence in community life on most reserves. For example, in a 1958 study of Indian conditions in British Columbia, the duties of superintendents (agents) were described as follows:

[T]he superintendent deals with property and with records, or with the recording of property. He registers births, deaths and marriages. He administers the band's funds. He supervises business dealings with regard to band property. He holds band elections and

records the results. He interviews people who want irrigation systems, who complain about land encroachments, who are applicants for loans. He suggests to others that, if they are in a common-law relationship, they should get married, for, among other reasons, this simplifies the records. He obtains information about persons applying for enfranchisement. He adjusts the property of bands when members transfer. He deals with the estates of deceased Indians. He obtains the advice of the engineering officers on irrigation systems, and the building of schools. He negotiates the surrender of lands for highways and other public purposes. He applies for funds to re-house the needy and provide relief for the indigent. He draws the attention of magistrates to factors which bear upon Indians standing trial on criminal charges.[101]

To that list, of course, must be added the justice of the peace duties and powers described earlier: the power of inspecting schools and health conditions on reserves, presiding over band council meetings and, later, voting to break a tie. In addition, and as outlined in Chapter 12, the agents were also responsible for encouraging Indians to enlist in the armed forces during the wars and for keeping lists of those enlisted for purposes of administering veterans' benefits after the wars. It is clear that their powers and influence were formidable.

In many cases, Indian agents were persons of intelligence and integrity. For example, the anti-potlatch provisions in the *Indian Act* after 1884 were often thwarted by the agents themselves, as many regarded the prohibition as misguided and harmful. In the same way, Indian agents, along with the farm instructors, were from the beginning the most vociferous in calling for an end to certain aspects of Hayter Reed's absurd agriculture policy of transforming Indians into simple peasant farmers by forcing them to use hand implements instead of machinery. Many were courageous in allowing Indians to use machinery to harvest their crops, despite the career risks this entailed.[102]

By the same token, however, some Indian agents were petty despots who seemed to enjoy wielding enormous power over the remnants of once powerful Aboriginal nations. While much of their apparent disrespect can be attributed to the profound cultural differences between them and the Indian nations they were supervising, it is nonetheless clear that the Indian affairs branch often seemed to attract persons particularly imbued with the zeal associated with the strict morality and social Darwinism exhibited by deputy superintendents general Hayter Reed and Duncan Campbell Scott.

The condescending attitudes of many agents seemed to be accurately reflected in the following observation by William Graham, a long-time prairie agent and one who was much feared and complained about:

However, I must say, taking everything into consideration, the Indians were not bad, generally speaking. They did not thoroughly understand everything that was being done for them and were more or less suspicious by nature. The wonder is that there was not more trouble than there was.[103]

Following the return of veterans after the Second World War, Indian agents and other Indian affairs officials found themselves confronted increasingly by challenges to their authority and influence from activists. Many of the additional powers given to agents following the war were precisely to enable them to maintain their local authority. Beginning in the 1960s and at the initial insistence of the Walpole Island Band in Ontario, Indian agents began to be removed from reserves across Canada. The position no longer exists in the department of Indian affairs.

9.12 Indian Voting Rights

After Confederation, provincial voter eligibility requirements determined who could vote in federal elections and generally involved property ownership provisions that reserve-based Indians could not meet unless they enfranchised. In 1885, however, the right to vote in federal elections was extended to Indians in eastern Canada; eligibility included male Indians who met the qualification of occupying real property worth at least $50. For these purposes, reserve land held individually through location tickets would qualify.

Indians in western Canada were not allowed to vote, however, because, in the words of the minister of Indian affairs of the day, David Mills, that would have allowed them to go "from a scalping party to the polls".[104] The legislation granting the vote to eastern Indians was eventually repealed in 1898, thereby making all Indians ineligible to vote federally, since provincial laws once again governed the issue.

The First World War and the large number of Indians who enlisted altered the situation, however. Thus, in 1917 Indians on active military service were permitted to vote in federal elections, and in 1920 the federal vote was restored to two classes of Indians: those who lived off-reserve; and those (on- or off-reserve) who had served in the Canadian army, navy or air force in the First World War.

In 1944, during the Second World War, the federal government extended the federal franchise once again to Indians (on- or off-reserve) who had served in the war and to their spouses. In 1950, the federal franchise was extended further to on-reserve Indians, but only to those who waived their *Indian Act* tax-exempt status regarding personal property (which would have made them liable for income tax). In 1960, the federal franchise was finally extended without qualification to all Indians.

When the provinces dropped the property qualification and adopted universal male suffrage in the late nineteenth and early twentieth century, many provinces passed legislation explicitly to exclude Indians.[105] The provincial franchise was then re-extended to Indians at different times: British Columbia in 1949; Manitoba in 1952; Ontario in 1954; Saskatchewan in 1960; Prince Edward Island and New Brunswick in 1963; Alberta in 1965; and Quebec in 1969. Indian people in Nova Scotia were apparently never prevented from voting in provincial elections after the adoption of universal male suffrage. Newfoundland did not enter Confederation until 1949 and when it did, agreement was reached with the federal government that neither government would recognize Aboriginal people as status Indians under the *Indian Act*. Indeed, until the

federal government recognized the Miawpukek Band of Conne River in 1984, there were no status Indians in the province, so the question of Indian people voting in provincial elections never arose.

Inuit were excluded from the federal franchise in 1934 but had the vote restored to them without qualification in 1950. Except for those who had identified themselves as Indians and lived on reserves as part of an Indian community, Métis people had always been considered citizens and were eligible to vote in both provincial and federal elections (so long as they met the other criteria, such as possession of property).

9.13 Indian Women

If Indian people generally can be said to have been disadvantaged by the unfair and discriminatory provisions of the *Indian Act*, Indian women have been doubly disadvantaged.

This is particularly so, for example, with regard to discriminatory provisions on land surrender, wills, band elections, Indian status, band membership and enfranchisement. The Indian status and band membership system is discussed in the next section. The lingering effects of this early and sustained assault on the ability of Indian women to be recognized as 'Indian' and to live in recognized Indian communities continue to be experienced by many Indian women and their children today.

As described earlier, the first enfranchisement legislation, the *Gradual Civilization Act*, enabled any male Indian who met the qualifications to be enfranchised. His wife and children were automatically enfranchised with him, irrespective of their wishes in the matter. Unlike the husband, the wife received no allotment of reserve land upon being enfranchised. When an enfranchised man died, the land passed to the children in fee simple. The widow could regain Indian status and band membership only by marrying another Indian man.

In 1869, the *Gradual Enfranchisement Act* continued these enfranchisement provisions and added to them by providing that an enfranchised man could draw up a will leaving his land to his children — but not to his wife. By this legislation, Indian women were also denied the right to vote in band council elections. This prohibition on participation in band political matters continued through successive versions of the *Indian Act* until 1951, well after non-Indian women in Canada had acquired the right to vote in Canadian elections.

The *Gradual Enfranchisement Act* was the first federal legislation to impose serious consequences on an Indian woman who married a non-Indian. Unlike the case of an Indian man marrying out — whose non-Indian wife and children would acquire Indian status — she would lose Indian status, and any children of the marriage would never have it. These provisions were carried forward into the first *Indian Act* in 1876 and were maintained until 1985. In the same vein, the 1876 *Indian Act* carried the Victorian

emphasis on male superiority to new extremes, providing that only Indian men could vote in reserve land surrender decisions.

Amendments to the *Indian Act* in 1884 permitted any male Indian holding reserve land by location ticket to draw up a will. He could bequeath his property to anyone in his family, including his wife. However, in order for her to receive anything she had to have been living with him at his death and be "of good moral character" as determined by federal authorities. No Indian man inheriting property by will needed to meet any such criteria.

Further amendments in 1920 removed an important band council power and gave it to the superintendent general. Before that, band councils had been able to decide whether an Indian woman who had lost Indian status through marrying out could continue to receive treaty annuity payments or whether she would be given a lump sum settlement. Often a band would continue to allow women who had married out to receive treaty payments and in this way retain a link to their home communities.

Thus, while such women would no longer have Indian status as such, through band council permission they could retain informal band membership. The band and federal authorities would thus overlook their lack of status.[106] The 1951 revision of the *Indian Act*, discussed later in this chapter, went further than previous legislation in attempting to sever completely the connection between Indian women who married out and their reserve communities. A solution had to be found to the situation of Indian women who had married out but had then been deserted or widowed by their non-Indian husbands. These women did not have legal status as Indians, nor were they considered non-Indian in the same way as enfranchised women were. Rather than allow them to regain Indian status and formal band membership and with them an Indian community to go back to, federal authorities decided to provide for their involuntary enfranchisement upon marriage. They would thus lose any claim to Indian status or to formal or informal band membership.

Until then, these women had usually managed to continue to receive their treaty annuities and, in many cases, even to continue to reside in their reserve community. Before the 1951 revision it had even been the practice in some Indian agencies to issue informal identity cards, referred to as 'red tickets', to these women to identify them as entitled to share in treaty moneys. The director of the Indian registration and band list directorate at DIAND describes the system as follows:

It would have been a card that would have been issued to a woman who had married a non-Indian and lost her Indian status and band membership, and originally it would have been red [the colour] to indicate that she was no longer a member of the band but was entitled to collect treaty at the time the treaty payment was made.[107]

With the 1951 enfranchisement provisions, all that changed. Henceforth, an Indian woman would not only lose status but would also be enfranchised as of the date of her marriage to the non-Indian man.

Enfranchisement had immediate and serious consequences. Not only did it mean automatic loss of status and band membership, and with it the forced sale or disposal of any reserve lands she might have held; it also meant she would be paid out immediately for her share of any treaty moneys to which her band might have been entitled as well as a share of the capital and revenue moneys held by the federal government for the band. These provisions were later upheld against an equality challenge under the *Canadian Bill of Rights*, despite their characterization by Mr. Justice Laskin in the *Lavell* and *Bedard* cases as "statutory excommunication" and "statutory banishment".[108]

Red ticket women who had lost status before 1951 were dealt with in a later amendment to the *Indian Act*. They were paid a lump sum and put in the same position as Indian women who married out after 1951.

The children of these mixed marriages were not mentioned in the 1951 *Indian Act*. For a few years such children were erroneously enfranchised along with their mothers. Because there had been no legal basis for their enfranchisement, in 1956 further *Indian Act* amendments restored their Indian status. However, the same amendments authorized the issuing of orders that all or any of the children of an enfranchised woman also be enfranchised with her. This language was inserted to correct the earlier problem and to make it possible to enfranchise such children in the future. In practice, the off-reserve children of a woman enfranchised under these provisions would usually also be enfranchised, while her children living on-reserve would generally be permitted to retain their Indian status.

Thus, the discriminatory features of the *Indian Act* regarding Indian women who married out were actually strengthened following the Second World War, despite trends toward greater egalitarianism in the rest of Canadian society. It is clear in retrospect that a double standard was at work, since Indian men could not be enfranchised involuntarily after 1951 except through a stringent judicial inquiry procedure in the revised *Indian Act*. The figures for enfranchisement between 1955 and 1975 (when compulsory enfranchisements of women were ended administratively) demonstrate this, with nearly five times as many persons enfranchised compulsorily as enfranchised voluntarily.[109] Thus, the number of enfranchisements, which had been relatively small in the century following passage of the *Gradual Civilization Act*, jumped markedly after 1951.

Today many of those women and their children have been returned to status and to band membership by the 1985 amendments to the *Indian Act* contained in Bill C-31. However, there are still large numbers of non-status Indians, the victims of earlier loss of status or of the enfranchisement provisions, who have not been able to meet the new criteria set out in the current version of the act.

At the same time, many women and their children who have recovered Indian status as a result of the 1985 amendments have been unable to secure band membership. This is because those amendments gave bands the power to control their own membership. Some bands that control their membership have refused to allow these 'Bill C-31 Indians' to rejoin the band. In other cases, people who have managed to acquire band membership

have been refused residency rights on the reserve by the band council. Thus, they may now have status and band membership but be unable to return to the community or to vote in band council elections.

Moreover, the children of Indian women restored to status under the new rules in Bill C-31 generally fall into the section 6(2) category of status Indian. As discussed in the next section, this means they are inherently disadvantaged in terms of their ability to transmit Indian status through marriage.

In these and other ways, many Indian women and their descendants continue to experience the lingering effects of the history of discriminatory provisions in the *Indian Act*.

9.14 Indian Status and Band Membership

The *Gradual Enfranchisement Act* of 1869 was the first law denying Indian status to an Indian woman who married out and preventing her children from acquiring status. Carried forward into the first *Indian Act* in 1876, these provisions were maintained until 1985.

Recognition as 'Indian' in Canadian law often had nothing to do with whether a person was actually of Indian ancestry. Many anomalies and injustices occurred over the years in this regard. For example, a woman of non-Indian ancestry would be recognized as Indian and granted Indian status upon marriage to an Indian man, but an Indian woman who married a man without Indian status would lose legal recognition as Indian. Moreover, for historical reasons, many persons of Indian ancestry were not recognized as being Indians in law and were, accordingly, denied Indian status.

The status and band membership provisions, although heavily slanted against Indian women, nonetheless worked a hardship on Indians of both sexes over the years. For example, in 1887 the superintendent general was given the power to determine who was or was not a member of a band, with his decision on the matter appealable only to the governor in council. This power would ensure that those deemed ineligible for band membership could be removed more easily from a reserve community by federal authorities.[110] This provision was retained through to the 1951 amendments, when the power passed to an official known under the *Indian Act* as the registrar. Although *Indian Act* bands have had delegated authority since 1985 to determine their own membership, they do not have the authority to grant Indian status in law — that remains with federal authorities.

The federal government, which normally funds bands through a formula based on the number of status Indian band members, does not generally provide funds to bands for persons who are not status Indians. Bands that allow people without Indian status to become band members are therefore penalized financially, since they then have to provide housing and other services to these new band members without offsetting federal payments. This is a strong disincentive to many bands, since most are poor and utterly

dependent on the federal government for their funding. This means that large numbers of people of Indian ancestry who may have a connection to a band are unable to acquire either band membership or reserve residency.

In 1920 the superintendent general was given the authority to decide whether an Indian woman who lost status upon marrying out would receive her annuity or a lump sum settlement. This led to many problems, including that of Indian women who lost status but were then widowed or deserted; these women were left in a precarious and doubtful situation — neither Indian nor non-Indian in Canadian law.

During the 1946-48 parliamentary hearings on revising the *Indian Act* (discussed in more detail later), federal officials were unable to explain whether or to what extent they planned remedial action. As it turned out, the response of federal officials dealt with the situation of these women, but also served to confirm the continuing assimilative thrust of federal Indian policy. In a letter to the joint committee examining the issues, Indian affairs officials were candid regarding their motivations in the case of Indian women who married non-Indian men:

...by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been federal responsibility for all time.[111]

The 1951 version of the *Indian Act* allowed such women to be enfranchised involuntarily upon marrying out. Thus, their status was left in no doubt: under no circumstances would they be considered 'Indian' unless they subsequently remarried a status Indian man.

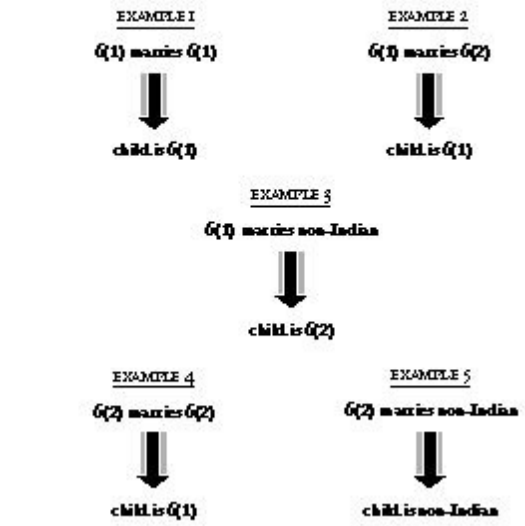
Although the current *Indian Act* contains no enfranchisement provisions, the status rules, as modified in 1985 by Bill C-31, are still highly problematic. Not only are they extremely complex, but like their historical predecessors, they appear to continue the policy of assimilation in disguised but strengthened form. This is because of the distinctions drawn between two classes of Indians under the post-1985 rules. We discuss this issue in more detail in Volume 4, Chapter 2.

Subsection 6(1) of the *Indian Act* accords status to persons whose parents are or were (if they are no longer alive) defined as 'Indian' under section 6 of the act. Subsection 6(2) accords status to persons with one parent who is or was an Indian under section 6. All those who were status Indians when the new rules came into effect in 1985 are referred to as 6(1) status Indians. This includes non-Indian women who were married to Indian men at that time.

The difficulties arise for the children and grandchildren of today's 6(1) and 6(2) status Indians. For the grandchildren of the present generation of 6(1) and 6(2) Indians, the manner in which their parents and grandparents acquired status is an important determinant of whether the grandchildren have Indian status themselves. The net result of the new rules is that by the third generation, the effects of the 6(1)/6(2) distinction will be

felt most clearly. Figure 9.1 shows how transmission of status works under the new rules.[112]

FIGURE 9.1



Thus, comparing examples 3 and 5, it is clear that the children of a 6(2) parent are penalized immediately if the 6(2) parent marries out, while the children of 6(1) parents are not. Figure 9.2 extends the effects of the 6(1)/6(2) difference in examples 3 and 5 to illustrate this.

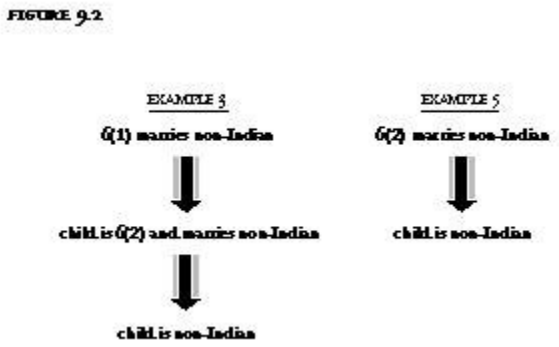
It is clear that the 6(1) parent has an advantage in terms of time if he or she marries out, since the child will still be a status Indian and will have the chance to marry another status Indian, 6(1) or 6(2), in order to retain Indian status for the children of that marriage. The 6(2) parent is not so fortunate, and may by marrying out cause status to be lost within the first generation. Thus, who the children marry is crucial in determining whether status is passed on to future generations, since there is a definite disadvantage to being in the 6(2) category. Nor should it be forgotten that this has very little to do with actual Indian ancestry, since the new rules are arbitrary and are built on the arbitrary distinctions that have come down through the history of the *Indian Act* and its predecessors.

An example using siblings shows the unfairness of the new rules clearly. A status Indian brother and his status Indian sister both married non-Indians before the new rules came into effect in 1985. The children of the sister would fall into the 6(2) category at the outset, because they would only have one parent (the mother) who is a status Indian under section 6 of the current act. The children of the brother who married out before the 1985 amendments would fall into the 6(1) category, however, since both parents would

be status Indians under section 6 (the non-Indian mother having acquired status under the pre-1985 rules). The brother's children would therefore start off with an advantage over their 6(2) cousins in terms of status transmission.

This has nothing to do with Indian ancestry, since the 6(1) and 6(2) children discussed in this example have exactly the same degree of Indian ancestry. Each has one parent of Indian ancestry and one of non-Indian ancestry. The fact that the children of the status Indian man who married out acquired status, while the children of the status Indian woman who married out did not, is at the root of this 6(1)/6(2) distinction. Thus, the post-1985 status rules continue to discriminate as the pre-1985 rules did, except that the discriminatory effects are postponed until the subsequent generations.

Moreover, the increase in the number of persons with Indian status through Bill C-31 was



Moreover, the increase in the number of persons with Indian status through Bill C-31 was a one-time event. Demographic trends show that this increase will begin to reverse itself within a few generations and that the number of status Indians will likely decline drastically. Thus, given the present rate at which status Indians marry outside the 6(1) or 6(2) category, it is predicted that, in time, many Indian communities will no longer be populated by people who fall within either the 6(1) or the 6(2) category. Material circulated by the Whispering Pines Indian Band of British Columbia in 1989 confirms this observation in more graphic terms:

The Whispering Pines Indian Band is located about 25 miles outside Kamloops. Since this is where the reserve is situated, our members associate the majority of time with non-status people.... [M]arriages are 90 per cent (approx.) to non-status people. For two generations already, marriages have been this way, so the chances of children from these marriages, in turn, marrying status Indians are very slim....

Actually the whole section in Bill C-31 on status has affected all Bands in Canada. The Bill was written to eliminate discrimination in the Indian Act. What it has really done is found a way to eliminate status Indians all together.[113]

Thus, it can be predicted that in future there may be bands on reserves with no status Indian members.[114] They will have effectively have been assimilated for legal purposes into provincial populations. Historical assimilation goals will have been reached, and the federal government will have been relieved of its constitutional obligation of protection, since there will no longer be any legal 'Indians' left to protect.

10. Post-War Indian Policy Reform: Everything Old Is New Again

To return to the evolution of Indian policy and the *Indian Act*, by the early twentieth century policy development had entered a new phase, as Canada attempted to come to terms with the impact of massive immigration and the effects of the First World War. Although the possibility of assimilating Indians quickly into the mainstream of a changing and growing Canadian population seemed more remote than ever, the government nevertheless introduced many oppressive measures designed to promote assimilation and enhance the authority of Indian affairs officials in daily reserve life.

It soon became evident, however, that past policies of civilization and assimilation had failed to eliminate the collective identity of Indians. This sense of failure was compounded by the diversion of official attention from Indian policy during the depression and the war years. Far from vanishing through enfranchisement and assimilation, Indians were increasing in number, and existing reserves, with their limited resources, were less and less able to support this growth. The Indian affairs bureaucracy had no policies other than civilization and assimilation with which to cope with the continuing presence of Indian communities and their burgeoning populations. By the 1940s it had become abundantly clear that Indian affairs were in disarray.

The end of the Second World War and the creation of the United Nations unleashed a national mood of egalitarianism and a growing interest in individual human rights. This national mood coincided with public awareness of the strong contribution of Indian servicemen to the Canadian war effort, and public interest in Indian issues grew. Many called for a royal commission to review and revise the *Indian Act* and put an end to what was seen increasingly as discriminatory legislation.

In response, the federal government established a joint committee of the Senate and the House of Commons to examine the general administration of Indian affairs. Its mandate included an examination of treaty rights and obligations; band membership issues; taxation of Indians; enfranchisement; Indian voting rights; encroachment on Indian reserve lands; Indian day and residential schools; and any other matter having to do with Indian social and economic issues that ought to find a place in a new *Indian Act*. The failure of the mandate to refer to issues of importance to Indians, such as self-government and the limited power of band councils, reveals the committee's egalitarian thrust. Committee members came to the proceedings with a decided bent in this direction. The co-chairman, for example, commented as follows early in the first year of hearings:

And I believe that it is a purpose of this committee to recommend eventually some means whereby Indians have rights and obligations equal to those of all other Canadians. There

should be no difference in my mind, or anybody else's mind, as to what we are, because we are all Canadians.[115]

The challenge for the Joint Committee would be to recommend equality without forcing Indians to abandon their heritage and collective and constitutional rights.

At the outset, committee members decided as a matter of policy to hear first and foremost from government officials and experts, particularly Indian branch officials. Early on, however, they made an exception by hearing Andrew Paull, then president of the newly formed North American Indian Brotherhood and a long-time Indian rights activist in British Columbia. His testimony was dramatic, for rarely had articulate Indian leaders been given a chance to be heard on the national stage before. Noting that the Joint Committee was not the independent royal commission that Indians and others had been calling for, Paull also emphasized the absence of Indian representatives on the committee and the fact that its mandate did not include the issues of greatest concern to Indians.

Moreover, with respect to the guiding philosophy for Indian policy, Paull challenged the Joint Committee to decide from which perspective it would deal with Indians: as wards or citizens. He also focused on Canada's abandonment of the nation-to-nation relationship of equality embodied by the treaties and on the lack of meaningful self-government on reserves. In Paull's view, the answers to these questions would determine the committee's ultimate response to other issues surrounding the overall relationship between Indians and the federal government. In short, he challenged committee members to abandon the historical assumptions underlying Canadian Indian policy in favour of a model more in harmony with Indian aspirations.

Paull's brief included several recommendations that have since become familiar: ending the Indian branch's power to determine band membership; continuing the taxation exemption; abolishing denominational schools on-reserve; decentralizing the Indian branch and generally hiring more Indians in administrative capacities; empowering band councils to act as local governments, including the power to police reserves; and granting Indians the right to vote in federal elections, with the possibility of electing their own Indian members to the House of Commons. The most important thing in Paull's view, however, was to give Indians a greater degree of control over their own lives, free of government interference.

Following Paull's testimony, a motion to permit five Indian observers drawn from across Canada to monitor committee sessions was defeated, although Indian witnesses and briefs were welcomed. This was the first time in Canadian history that the federal government made any systematic effort to consult with Indians. Indians attempted to make themselves heard. Sometimes this was with great difficulty, as it appears that on some reserves the Indian branch refused access to band funds for this purpose. As a result, most Indian evidence was in the form of letters to the committee, although several Indian bands and associations did manage to send representatives to testify on their behalf.

Indian submissions were varied, covering a broad range of issues and expressing a variety of political philosophies. Many focused on the nation-to-nation relationship and on the sanctity of treaties, criticizing the *Indian Act* regime. Others seemed to accept the general legitimacy of the *Indian Act* but called for increased band council powers. Still others appeared to accept the act to a greater extent and focused on incremental changes to particular provisions. The range of views expressed makes it impossible to speak of a single Indian position. There was a consistent focus, however, on the political relationship between Indians and the federal government as reflected in issues such as respect for treaties and Aboriginal rights and an end to the domination of reserve life by government bureaucrats. On one issue there was virtual unanimity: the need for a greater degree of local autonomy and self-government.

Diamond Jenness, an anthropologist and senior federal civil servant, took an entirely different approach, however, and one that was more in keeping with historical assimilation policy. In retrospect, it is clear that he and like-minded non-Indian witnesses carried the day. His testimony focused on the reserve system as the aspect of Indian policy that was the greatest impediment to Indians attaining equality with non-Indians in Canadian society. Jenness proposed a 25-year plan "to abolish, gradually but rapidly, the separate political and social status of Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on an equal footing".[116] The plan called for placing Indian children in provincial schools; delivering social services to Indians in the ordinary way, primarily by the provinces; having a committee study reserves across Canada with a view to abolishing them and enfranchising the inhabitants; and improving education for Indians in the North.

In 1948, giving little indication that it had heard or comprehended the views expressed before it by Indian people and their organizations, and in language reminiscent of the assumptions of an earlier era, the Joint Committee declared with respect to its proposals for reform of the *Indian Act* that "All proposed revisions are designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance themselves."[117]

The gulf between the perspectives and philosophies of most of the Indian testimony and those of committee members is startling. It is nothing less than the difference between greater Indian self-government and the revitalized goal of assimilation. It appears that the Joint Committee simply adopted and strengthened certain aspects of historical policies, clothing them in new rhetorical garments.

11. The 1951 *INDIAN ACT* Revision

The present-day *Indian Act* is the result of the major revision that occurred in 1951, following the Joint Committee process. It has been bolstered by a number of incremental amendments since then. Ironically, but in keeping with the tone of the non-Indian testimony to the Joint Committee, it is generally accepted that the net effect of the 1951 revision was to return Canadian Indian legislation to its original form, that of the 1876 *Indian Act*. The 1876 and 1951 versions are very similar in essential respects.

For example, although the number of powers that can be exercised by the minister of Indian affairs and the governor in council was reduced in 1951, their authority nonetheless remained formidable, with administration of more than half the act being at their discretion. In the current version of the act, nearly 90 provisions give the minister of Indian affairs a range of law-making, quasi-judicial and administrative powers in all-important areas. In addition, another 25 provisions give the governor in council wide powers, including that of making regulations in areas otherwise covered by band council by-law authority.

Expropriation powers were significantly reduced, although where a federal or provincial law authorizes a province, municipality or local authority to expropriate land, the governor in council can still permit reserve lands to be expropriated without band consent. The *Kruger* case, described earlier, offers graphic evidence of the high-handed way this power has sometimes been used. This power is strongly criticized by Indians as a derogation from the Crown duty of protection of their land base and political autonomy.

The 1951 revision also removed the prohibition on traditional dances and appearing in exhibitions and stampedes. Somewhat paradoxically, however, Indians in western Canada still needed official permission to sell their livestock and produce, and this provision remains in the act, although it is no longer applied.

Importantly, the definition of Indian status and control of band membership remained in non-Indian hands, and the definitions were actually tightened up for financial reasons by introducing an Indian register as a centralized record of those entitled to registration as an Indian (and to the receipt of federal benefits). This enabled federal officials to keep track of reserve populations and to remove non-status Indians and others. Before this, federal officials had kept various records, such as treaty and interest distribution lists, estates administration, band membership and 'half-breed' scrip records, but had attempted no comprehensive listing of Indians.

The mention of "Indian blood", which had been a feature of the act's definition section since 1876, was replaced by the notion of registration, with a strong bias in favour of descent through the male line. At the time the new registration system was introduced, the practice according to the provisions of the 1951 *Indian Act* was to use the existing band lists as the new "Indian Register" called for by the act. These lists may have been band fund entitlement lists, treaty pay lists or similar records. Given the relative informality and lack of comprehensive documentation at the time, they were not by any means complete lists of status Indians or of those entitled to legal status as Indians.

The lists were to be posted "in a conspicuous place in the superintendent's office that serves the band", and six months were given for additions, deletions and protests before the band list was finalized as the basis for the Indian register. In addition, a general list of Indians without band affiliations was kept in Ottawa. The registrar could add to or delete names from that list, under his own authority, or from band lists through application of the status rules in the new act.[118]

The names of many people who ought to have been on the band lists or the general list were never added. They may, for example, have been away from the reserve when band lists were posted. In remote places, especially where people still practised a subsistence lifestyle, people could have been away on hunting parties, fishing or on their traplines. Such people were also the least likely to have been able to read in the first place. Some people were opposed to any form of registration, seeing it as a derogation from the historical status of Indian nations. Sometimes, it has been argued, the "conspicuous place" called for in the *Indian Act* was less conspicuous than it ought to have been. In any event, and for whatever reason, many people claim that they or their parents or grandparents were never included on these lists when they should have been and that they were prevented later from obtaining Indian status.[119]

Under the new status rules the definition of Indian was made even more restrictive as far as women were concerned. A good example is the so-called 'double mother' rule in subsection 12(1)(a)(iv), whereby a child lost Indian status at age 21 if his or her mother and grandmother had obtained their own status only through marriage. In short, someone born and raised on a reserve, whose father and grandfather were status Indians, would automatically lose Indian status at the age of 21. Upon loss of status, band membership too would be forfeited, as well as the right to continue to live on the reserve.

The double mother rule applied to all women without Indian status. Thus it included women who might have been enfranchised involuntarily or left off band lists through inadvertence or otherwise, or who were simply unable to qualify under the *Indian Act*, despite being of Indian descent. A good example of the latter situation would obtain at the Mohawk reserve at Akwesasne if the mother and grandmother in question were both from the U.S. side of the reserve. The 21-year-old grandchild would lose Indian status in Canada automatically, even though he or she might be Mohawk by ancestry, language and culture. The legal fiction involved in registration and Indian status becomes evident in such cases.

Voluntary and compulsory enfranchisement were kept in the 1951 revisions, although the compulsory element was weakened: the minister could enfranchise an Indian or a band only upon the advice of a special committee established for that purpose. If the committee found that the Indian or band was qualified and that enfranchisement was desirable, the person or band in question would be deemed to have applied for enfranchisement. According to Indian affairs officials, no band was ever forced to enfranchise through this provision, although the threat was present until enfranchisement was dropped from the *Indian Act* after 1985.

One band, however, did choose to enfranchise as a group using the voluntary enfranchisement procedures in the 1951 *Indian Act.* In 1958 the members of the Michel Band of Alberta voluntarily renounced their Indian status in law, taking most of their reserve land in individual lots along with the proceeds of the sale of the remaining lands. The enfranchisement of this band solved one set of problems for Indian affairs officials, since it meant that there would no longer be an entity to pursue land claims based on some doubtful reserve land transactions from the past. However, it caused problems for

the descendants of the enfranchised band members, many of whom regained status through the 1985 amendments. These people have Indian status but no band and no reserve to return to as a result of a decision taken nearly 40 years ago. They have no standing to pursue land claims, since the government's specific claims policy states that only the chief and council of a band can apply to enter the negotiation process.[120]

Returning to the 1951 *Indian Act*, Indian women on-reserve could now vote and, in that limited way, participate in band political life. In addition, the provision that had prohibited Indian women from voting on land surrenders was amended to permit women to participate on equal terms with men. However, the discriminatory features of the old acts regarding Indian women who married out were actually strengthened in aid of the overall assimilation policy.

The administration of Indian estates was simplified in the 1951 act to bring it more in line with provincial law. However, where Indian women who married out were enfranchised involuntarily, they also lost the right not only to possess reserve land but to inherit it. In such cases, the land would be sold to an 'Indian' and the proceeds forwarded to the enfranchised woman, even if she had divorced the non-Indian man or had been widowed before inheriting the land.

The part of the *Indian Act* incorporating the former *Indian Advancement Act* was dropped, with some elements incorporated into the provisions on band council powers. As before, the minister could impose the elective system on a band (now with two-year terms for chief and council). Band council authority was still limited, but bands that had reached "an advanced stage of development" could acquire additional powers, such as authority to tax local reserve property. The current version continues the limited band council powers but has dropped the requirement that a band be "advanced" before it is permitted to pass local property taxation and business licensing by-laws to generate revenue for band purposes.

The 1951 revision also reinforced the prohibition on Indian intoxication, making it an offence for an Indian to be in possession of intoxicants or to be intoxicated, whether on- or off-reserve. Obviously, this was far more draconian than the alcohol laws applicable to non-Indians. Ultimately, of course, these provisions were struck down by the Supreme Court. They were replaced in 1985 by band council authority to regulate alcohol questions.

One of the most significant changes concerned the new section 87 (now section 88), which incorporated provincial laws of a general nature and made them part of the *Indian Act* legal regime. Thus, whenever a provincial law dealt with a subject not covered by the *Indian Act*, such as child welfare matters, Parliament would allow the provincial law to apply to Indians on-reserve. Through this route, the provinces made inroads into what was previously a federally protected area. Provincial laws could be prevented from applying only if they were not "laws of general application" in a constitutional sense, if there existed contrary treaty provisions, or if the *Indian Act* or its regulations or by-laws

dealt with the same area and conflict arose between the provincial law and the *Indian Act* provision, regulation or by-law.

Section 88 continues in today's version of the act, giving the provinces law-making powers in areas that they would not normally be able to deal with in regard to Indians. This provision is the source of much criticism from Indians and of accusations that the federal government has almost completely abandoned its role of protecting Indian autonomy from the provinces.

12. The Modern Era: Contrasting Assumptions and Models of Self-Government

From the 1950s on, Aboriginal policy development in Canada entered a confusing stage as the continuing policies of civilization and assimilation came into increasing conflict with the desire of Indian nations to resume control over social and political processes in their own communities and with newer ideas derived from the evolution of the international indigenous movement. Thus, until 1969, assimilation was still the dominant federal policy, although by then the federal government was using terms such as 'equality' and 'citizenship' instead of the more brutal language of the earlier era. After 1969 and the disastrous white paper, described earlier in this chapter, Canada seems to have adopted a new approach and is moving toward a policy based on true nation-to-nation negotiations. However, as discussed in this section, it is less clear that the old ideas of assimilation are dead.

Following the 1951 revision of the *Indian Act*, a number of the other recommendations of the 1946-48 Joint Committee were implemented during the 1950s. For example, a co-operative effort was undertaken with the provinces to extend provincial services to Indians. Since then, of course, it has become accepted that Indians are provincial residents for purposes of service delivery. However, it also appears that the federal government has continued to accept the desirability and inevitability of Indians becoming full-fledged provincial residents.

In 1959 the federal government struck another joint parliamentary committee to examine the *Indian Act*. Indian affairs officials prepared a report, *A Review of Activities, 1948-1958*, and submitted it to the Joint Committee. It outlined progress since the last joint committee report of the 1940s. After noting the various initiatives in progress with the provinces on sharing or transferring programs, the document indicated that, by 1959, 344 bands were using the elective system under the *Indian Act*, and 22 bands had been given authority to raise and spend band funds. More interestingly, enfranchisement figures were given that showed a vastly increased number of forced enfranchisements since 1951. For example, in the entire period between 1876 and 1948 there were 4,102 enfranchisements, while an additional 6,301 occurred after the restrictive provisions of the new act were introduced in 1951.[121] The figure for involuntary enfranchisements would continue to rise until 1975, when the practice was suspended. Although taken as a sign of progress, these figures reflect for the most part the effect of the marriage provisions, whereby Indian

women who married out and their descendants lost status through automatic enfranchisement.

The 1959 Joint Committee hearings repeated to a considerable extent those of the previous decade. Thus, virtually all Indian submissions, whether from Indian associations or individual band councils, reiterated Indian concerns about reserve conditions, administrative red tape, land claims, violation of treaties, and unsettled Aboriginal land title issues. For Indians, the solutions also remained as they had been presented to the earlier committee. In particular, Indian submissions stressed the continuing need for enhanced powers of self-government and less Indian branch interference in local reserve life.

Nonetheless, as with the earlier committee, that of 1959-61 came down firmly in favour of continuing on the path of preparing Indians for full participation in Canadian society, without distinction based on their Indian descent and their special constitutional status. In short, Indians were not seen as members of more or less permanent and distinct political units within the Canadian federation. Rather, they were considered members of a disadvantaged racial minority, to be encouraged and helped to leave their inferior status behind through social and economic evolution. Reserves and Indian status were transitional devices on the road to absorption within mainstream society. Assimilation was still the goal, although it was now solidly recast in the more felicitous language of citizenship and equality:

The time is now fast approaching when the Indian people can assume the responsibility and accept the benefit 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.[122]

The Joint Committee reported in 1961, recommending, among other things, greater equality of opportunity and access to services for Indians, the transfer of education and social services to the provinces, the imposition of taxes on reserve, more social research, more community planning and development studies, a formal federal-provincial conference to begin the transfer of social services to the provinces, the establishment of a claims commission, Indian advisory boards at all levels, and the striking of another parliamentary committee to investigate Indian conditions in seven years' time. Only one significant *Indian Act* amendment came out of this exercise: in 1961 compulsory enfranchisement for men and for bands was finally eliminated.

If this represented one model — a continuing emphasis on assimilation — the vision contained in the comprehensive Hawthorn report on Indian conditions in Canada represented what was for non-Indian reformers a radical new vision.[123] This 1966 report confirmed what had by then become obvious: Indians and their reserve communities had not been assimilated, although their "lonely splendour as isolated federal islands surrounded by provincial territory" had begun by then to be overtaken by the provincially administered welfare state emerging in Canada. Indian communities were actually

increasing in population, so much so that many Indians were forced to leave the reserves for the cities. Both trends have continued. In 1967, nearly 80 per cent of status Indians lived on their reserves; today less than 60 per cent do.

The solution to the Indian problem proposed by the Hawthorn report was to abandon assimilation as a formal goal of Indian policy. Instead, and in keeping with its view that Indian communities were already part of the provinces in a jurisdictional as well as a physical sense, it proposed building on the band council system to prepare reserve communities to become provincial municipalities. The authors were sceptical about a wide-ranging Indian right of self-government, concluding that the "best Indians can hope for is the limited control and autonomy available to small communities within a larger society, plus sympathetic consideration of their common and special needs by higher levels of government."[124]

The Hawthorn report did not accept the inevitability or desirability of individual assimilation and proposed instead the concept of "citizens plus" whereby, in addition to the ordinary rights and benefits to which all Canadians have access, the special rights of Indians as "charter members of the Canadian community" would be respected. The "charter rights" of Indians were traced back to the bargain made by the historical tribal nations: in exchange for allowing non-Indian settlement of the lands, Indians would be guaranteed Crown protection and special status within the imperial system. Earlier in this chapter we described this view in terms of the imperial tripartite system, developed on the basis of the Crown undertaking in the *Royal Proclamation of 1763*.

Thus, the view of the Hawthorn report appears in retrospect to be one of collective absorption of Indians into provincial municipal structures. Indians would retain certain federal protections over their lands and would remain Indians. Nonetheless, Indians were expected to develop new and permanent links with the provinces as the historical link to the federal Crown was gradually severed in favour of what the authors believed was the inevitability of greater provincial involvement in reserve matters through program and service delivery.

Indians did not see this process as inevitable, however, and they made this clear to the next important parliamentary committee struck to examine Indian issues — the 1983 Special Committee on Indian Self-Government, chaired by Keith Penner, MP.[125] In between the Hawthorn report and the Penner report, Canada patriated its constitution from Great Britain, adding the *Constitution Act, 1982* and its recognition and affirmation of existing Aboriginal and treaty rights in section 35.

This was the context in which Indian nations formulated their views to the Penner committee. What they wanted, and what the Penner committee recommended, was the immediate recognition of Indian First Nations as a distinct, constitutionally protected order of government within Canada and with a full range of government powers. In short, their vision was a return to that of the imperial tripartite system: a status equal to that of the colonies (now provinces), with the federal Crown in the role of protector originally assumed by imperial authorities.

Thus, the Penner report proposed an active and protective federal role to recreate the original partnership that Indians have never ceased to call for. As the protector and guarantor of Indian self-government, the federal Crown would pass legislation that under normal constitutional paramountcy rules would oust the provinces from regulating anything to do with "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. Having secured a space in which to legislate exclusively for Indians, Parliament would withdraw its laws to allow the laws of federally recognized self-governing Indian First Nations to regulate matters occurring on Indian reserves.

Ultimately, the Penner committee saw Indian First Nations as equivalent to provinces. Thus, in the same way that provinces are immune from each other's law-making powers, Indian First Nations laws and provincial laws would have had no effect on each other. In the event of conflict, federal laws in the same areas would be paramount over Indian First Nations laws, as is the case with provincial laws. The federal government would support Indian First Nations programs, services and operations through a system of grants like those available to the provinces under the rules of fiscal federalism. Eventually, the whole arrangement would be entrenched in the constitution.

Neither the federal government nor the provincial governments endorsed the approach of the Penner report. Instead, in recent years they have supported legislation like the *Cree-Naskapi (of Quebec) Act*, passed by Parliament in 1984, conferring a form of delegated self-government on the Cree and Naskapi peoples of Quebec.[126] These powers, like those conferred subsequently on the Sechelt Band by the 1986 *Sechelt Indian Band Self-Government Act*,[127] resemble the municipal-style powers that the Hawthorn report saw Indian reserve communities exercising. They are most definitely not the wider powers that Indians have been seeking, which would restore them to the self-governing status they enjoyed before the *Gradual Enfranchisement Act* of 1869.

In this vein, the federal government formally adopted a Hawthorn-style municipal approach in the Community-Based Self-Government Policy of 1986. With the exception of the Yukon self-government agreements, this policy has not been a successful one. While the 1992 Charlottetown Accord, had it been adopted, would have seen constitutional recognition of Aboriginal governments as a third order within the Canadian federation, it is less clear that the powers that would have been available to Aboriginal governments would have embraced the same range of law-making authority available to the provinces. Thus, it seems clear that there is a certain continuing reluctance on the part of federal and provincial governments to embrace fully the vision of Indian nations as a true third order as envisaged by the Penner report.

13. Conclusion

In the twentieth century as in the nineteenth, it is apparent that Indian and non-Indian perspectives on the fundamental issue of the place of Indians within the Canadian federation remain to be reconciled. Although massive attempts have been made in past decades to carve out a space within which Indian self-governing powers might operate in many ways in a renewed Canadian federation, and to repeat our earlier observations

about the formulation of Indian policy more generally, it has all too often been a dialogue of the deaf — neither side has heard or fully comprehended the other. Aboriginal and non-Aboriginal people, operating from the different cultural perspectives highlighted in the first seven chapters of this volume, often do not appear to be speaking the same language when they sit around the negotiating table to discuss self-government and constitutional issues.

In many ways, this difference in perspectives is captured by the way fundamental issues are typically formulated in the self-government context. For Indians the most common formulation goes as follows: "Show us in terms of international or domestic Canadian constitutional law why your assumption of jurisdiction over Indian tribal nations is justified." For the federal and provincial governments the formulation would more typically be as follows: "Show us precisely how you think your powers — inherent or delegated — will operate in the context of the current division of powers, lands and resources in the Canadian federation."

It is clear that each side starts from fundamentally different assumptions. For Indians, the original assumption that they are partners in the exercise of sharing the land of Canada and in building a society based on areas of exclusive and shared sovereignty has continued almost unabated since the time of the *Royal Proclamation of 1763*. For the federal and provincial governments, which have benefitted from the use and exploitation of the lands and resources of this continent, the assumption seems to be that Indians must make a case for themselves as entities fit to participate as governments in their own right in the joint enterprise now known as Canada.

It is true, as Tom Siddon, a former minister of Indian affairs, has observed, that there can be no real change within the confines of the *Indian Act*.[128] However, it is equally true that even if the *Indian Act* were repealed, there could be no real change without repeal of the attitudes and assumptions that have made legislation like the *Indian Act* and its precursors possible. A royal commission cannot make laws. It can inform and recommend, however. In that role, we can call attention to the factors, attitudes and continuing assumptions that brought about the *Indian Act* and that continue to prevent progress in moving away from the restrictive *Indian Act* vision.

Those factors are to be found in past assumptions and the shadows they have cast on present attitudes. They must be recognized for what they are and cast away as the useless legacy of destructive doctrines that are as inappropriate now as they were when first conceived. If this review of the foundations of the *Indian Act* has shown these assumptions for what they are, it will have succeeded as the first step in entering a new era of partnership between governments and Indians. Paradoxically, this new partnership is also a very old partnership, indeed, older than the *Indian Act* and what it represents.

In subsequent volumes of our report we outline how we believe the renewed partnership we have called for can be implemented. In Volume 2, Chapter 3 in particular, we return to a discussion of the *Indian Act* and its future in the context of Aboriginal self-government. Before doing so, however, the full range of factors that have led to the

present impasse in the relationship have to be addressed. One of the most important of these is the destructive experience for Aboriginal people of the industrial and residential schools that were so prominent a part of the civilizing and assimilation programs described in general terms in this chapter. It is to these schools and to their legacy that we now turn.

Notes:

1 Royal Commission on Aboriginal Peoples [RCAP], *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).

2 *In the matter of a reference as to whether the term "Indians" in head 24 of section 91 of the British North America Act, 1867, includes Eskimo inhabitants of the province of Quebec*, [1939] S.C.R. 104, commonly referred to as *Re Eskimos*. The federal government, however, has explicitly excluded Inuit from the *Indian Act* since the 1951 revisions (S.C. 1951, chapter 29, section 4) and instead delivers federal programs and services to them through the Department of Indian Affairs and Northern Development under its mandate for northern development.

3 See, to this effect, Bradford W. Morse and John Giokas, "Do the Métis fall within section 91(24) of the *Constitution Act, 1867* and, if so, what are the ramifications in 1993?", research study prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1993) and published in *Aboriginal Self-Government: Legal and Constitutional Issues* (RCAP: 1995). For information about RCAP publications and research studies, see *A Note About Sources* at the beginning of this volume.

4 *St. Catharines Milling and Lumber Company* v. *The Queen*, [1887] 13 S.C.R. 577 at 652 per Gwynne J.

5 *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313 at 395 per Hall J.

6 These constitutional documents are the *Manitoba Act, 1870*, R.S.C. 1985, Appendix II, No. 8; the *Rupert's Land and North-Western Territory Order* (1870), R.S.C. 1985, Appendix II, No. 9; the *British Columbia Terms of Union* (1871), R.S.C. 1985, Appendix II, No. 10; *The Ontario Boundaries Extension Act* (1912), S.C. 1912, chapter 40; *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, chapter 45; and the *Constitution Act, 1930*, R.S.C. 1985, Appendix II, No.
26.

7 The Task Force on Canadian Unity, *A Future Together, Observations and Recommendations* (Ottawa: Supply and Services, 1979), p. 56 [emphasis in original].

8 Department of Indian Affairs and Northern Development [DIAND], *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) [hereafter, the white paper].

9 Harold Cardinal, *The Unjust Society, The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969), p. 140.

10 Department of Indian Affairs, *Annual Report*, 1870, p. 4, quoted in Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation 1868-1951* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980), p. 2.

11 The commissions of inquiry that laid the foundation for Indian policy before Confederation are reviewed and assessed in John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department* (Ottawa: Indian Affairs and Northern Development, 1985). There were six commissions of inquiry into Indian policy between 1828 and 1858, all conducted in response to what was becoming known as the ' Indian problem '. The first report was somewhat rushed and rudimentary and was prepared in 1828 by Major General Darling, military secretary to the governor general, Lord Dalhousie. It covered both Upper and Lower Canada and led to the establishment of the reserve system as official policy. The second was prepared by a committee of the Lower Canada Executive Council in 1837 and essentially followed the recommendations of the earlier Darling report. In 1839, the third report was prepared by Justice James Macauley and dealt with conditions in Upper Canada. It too generally supported the reserve and civilization policies of the time. A committee of the Upper Canada Legislative Assembly prepared the fourth report in response to Lord Durham's report on conditions in the two Canadas, arriving at conclusions similar to those of the preceding report by Justice Macauley. The fifth, and by far the most important, was the 1844 report of Governor General Sir Charles Bagot, which covered both Upper and Lower Canada. Its recommendations gave a direction to Canadian Indian policy that has endured in many respects right up to the present. A sixth report was prepared in 1858 by Richard Pennefather, civil secretary to the governor general. It too covered both Canadas and was the most thorough report on Indian conditions to that point.

12 The 1969 white paper (cited in note 8) was devised in secret by federal public servants and politicians. Its proposals went completely against recommendations flowing from contemporaneous and wide-ranging consultations with Indian people across Canada, leading to feelings of betrayal. For a detailed examination of the secrecy and apparent duplicity of federal policy making with respect to this initiative, see Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto: University of Toronto Press, 1981).

13 *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies in Two Volumes*, ed. H.B. Hawthorn (Ottawa: Indian Affairs Branch, 1966), volume 1, p. 344.

14 White paper (cited in note 8), p. 5.

15 In Bill C-31 (1985), the status and band membership provisions were amended to eliminate sex discrimination and to allow bands to control their membership if they wished. However, the basic philosophical premise of that section of the *Indian Act* remained unchanged from when the act was passed originally in 1876. The issue of who is recognized as an 'Indian' and which groups of Indian people are recognized as 'bands' is still under exclusive federal government control. See sections 5-14.3 of the *Indian Act*, R.S.C. 1985, chapter I-5, as amended.

16 Recent years have seen a spate of scholarly revisions of the simplistic and largely contrived story of the clash of 'civilization' and 'savagery' that was put forward by generations of narrow-minded clergymen, politically oriented propagandists and romantic frontier novelists. Two particularly powerful debunkings of these conventional histories are Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, N.C.: University of North Carolina Press, 1975); and Robert A. Williams, Jr., *The American Indian in Western Legal Thought, The Discourses of Conquest* (New York: Oxford University Press, 1990).

17 There has been no uniform pattern in Canada for the creation of Indian reserves. Some were set aside by religious orders for converted Indians, some were created as refuges by imperial or colonial authorities for Indians fleeing other areas of Canada, some were created by treaty with the Crown, some were purchased from private individuals or from a colonial or provincial government, others were created by provincial governments after Confederation, while still others were simply recognized as such by the Crown.

The *Indian Act* itself has no mechanism for the creation of reserves. Rather, new reserves are created or, if already in existence, legally affirmed under the Crown prerogative power. After Confederation, the federal Crown was unable to use its jurisdiction over Indian lands in the *Constitution Act, 1867* to create reserves unilaterally, since after 1867 the land was vested in the provincial Crown under section 109. Joint federal-provincial action was required. The nature and conditions of that joint action are reflected in various federal-provincial agreements and vary somewhat from province to province. For a fuller discussion of the reserve system, see Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990); and Jack Woodward, Native *Law* (Toronto: Carswell, 1994). See also Chapter 4 in this volume.

18 *R*. v. *Sioui*, [1990] 1 S.C.R. 1025 at 1053.

19 The most accurate text of the Proclamation is provided in Clarence S. Brigham, ed., *British Royal Proclamations Relating to*

America, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: American Antiquarian Society, 1911), volume 12, pp. 212-218. A less accurate version is reproduced in R.S.C. 1985, Appendix II, No. 1. The original text, entered on

the Patent Roll for the regnal year 4 George III, is found in the United Kingdom Public Record Office, c. 66/3693 (back of roll). The complete text of the Royal Proclamation is provided in Appendix D at the end of this volume.

20 This formulation first appeared in the seminal case *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Peters) 1 (1831), and has been elaborated and refined ever since by a long and still growing line of court decisions in the United States. Academic commentators are divided on whether the courts have done justice to Indian aspirations through this verbal formula. A relatively positive appraisal is given in Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987). A more negative conclusion has been reached by Russell Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980).

21 No reserve was established in Newfoundland until 1984, since neither the federal nor the provincial government recognized the existence of a status Indian community until the Miawpukek Band of Conne River was declared to be a band by the federal government that year. The Mi'kmaq themselves claim that from 1870 a colonial 'reserve' had existed at Conne River, thereby indicating that they were a recognized Indian community. See Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, "Aboriginal Peoples and Governance in Newfoundland and Labrador", research study prepared for RCAP (1994).

22 Regarding the creation of Indian reserves under the French regime, see G.F.G. Stanley, "The First Indian 'Reserves ' in Canada", *Revue d'histoire de l'Amérique française* 4/2 (September 1950), pp. 168-185. See also note 17.

23 National Archives of Canada [NAC], Record Group 10 [RG10], volume 5, described in Leslie, *Commissions of Inquiry* (cited in note 11), p. 20 and following.

24 NAC RG10, "An address to our Great Father, Sir Peregrine Maitland from the Mississauga Nation residing on the River Credit", 2 January 1827, quoted in Leslie, *Commissions of Inquiry*, p. 16.

25 The Lower Canada Executive Committee; see note 11.

26 *AN ACT for the protection of the Lands of the Crown in this Province, from trespass and injury*, The Statutes of Upper Canada to the Time of the Union, volume 1 — Public Acts (1839), chapter15.

27 Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: Harper & Row, 1969), p. 334.

28 Province of Canada, *Journals of the Legislative Assembly of Canada*, 1844-1845, Appendix EEE, "Report on the Affairs of the Indians in Canada", 20 March 1845, quoted in Leslie, *Commissions of Inquiry* (cited in note), pp. 81-96. See also John Leslie, "The

Bagot Commission: Developing a Corporate Memory for the Indian Department", in *Historical Papers 1982*, A Selection from the Papers Presented at the Annual Meeting Held at Ottawa, 1982 (Ottawa: Canadian Historical Association, 1983), pp. 31-52.

29 *An Act respecting the Management of the Indian Lands and Property*, Statutes of the Province of Canada 1860, chapter 151, section 1.

30 *An Act for the better protection of the Lands and Property of the Indians in Lower Canada,* Statutes of the Province of Canada 1850, chapter 42; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, Statutes of the Province of Canada 1850, chapter 74.

31 *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada*, Statutes of the Province of Canada 1851, chapter 59, section II.

32 *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, chapter 18, section 3: 3. The term "Indian" means

First. Any male person of Indian blood reputed to belong to a particular band; *Secondly.* Any child of such person;
Thirdly. Any woman who is or was lawfully married to such person---

33 Province of Canada, *Journals of the Legislative Assembly of Canada*, Sessional Papers, Appendix 21, "Report of the Special Commissioners---" (Toronto: 1858), quoted in Leslie, *Commissions of Inquiry* (cited in note 11), pp. 129-172.

34 United Kingdom, House of Commons, *Parliamentary Papers*, volume XLIV, no. 595, "Copies or Extracts of Correspondence between the Secretary of State for the Colonies and the Governor General of Canada respecting Alterations in the Organization of the Indian Department of Canada" (London: 1860), p. 1, quoted in Leslie, *Commissions of Inquiry*, p. 138.

35 Quoted in Leslie, *Commissions of Inquiry*, pp. 143, 144.

36 Interim Report, Richard Pennefather to Governor General Sir Edmund Head, *Parliamentary Papers* (cited in note 34), quoted in Leslie, *Commissions of Inquiry*, p. 138.

37 The net result of these measures in Manitoba was the elimination of any system of communally held Métis land. For a more detailed discussion of Métis issues, see Volume 4, Chapter 5. See also Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan, Native Law Centre, 1991).

38 *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S.C. 1857, chapter 26.

39 NAC RG10, volume 245, part 1, Resident Agent and Secretary of Indian Affairs Letterbooks, statements of Indian leaders contained in communication from D. Thorburn to R. Pennefather, 13 October 1858, quoted in John S. Milloy, "A Historical Overview of Indian-Government Relations 1755-1940", discussion paper prepared for the Department of Indian Affairs and Northern Development, 7 December 1992, p. 61.

40 United Kingdom, *Parliamentary Papers*, Aborigines, volume 2, "Report of the Select Committee of the House of Commons on the Aborigines of the British Settlement" (1837), p. 77. See also Richard Bartlett, *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986), p. 27. Very similar language was used 50 years later in *United States* v. *Kagama*, 118 U.S. 375 (1886), the leading U.S. Supreme Court decision justifying congressional plenary power over Indians as a way of protecting them from the local settler populations (p. 384):

They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.

41 *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, chapter 42, section 15.

42 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, chapter 6.

43 Department of Indian Affairs, *Annual Report*, 1870, per William Spragge. See Daugherty and Madill, *Indian Government* (cited in note 10), p. 1.

44 Even today many assert that political matters internal to bands are firmly in the control of a dominant male hierarchy that has had more than a century to consolidate its power.

45 Ultimately, this limiting focus on band-level government would be adopted by Indian peoples themselves. Thus the modern Assembly of First Nations, for example, is made up of the chiefs of the individual band governments first established in 1869 and carried forward into the *Indian Act* a few years later.

46 In *Felix Cohen's Handbook of Federal Indian Law*, 1982 edition, ed. R. Strickland et al. (Charlottesville, Virginia: The Michie Company Law Publishers, 1982), allotment is described (pp. 129-130, footnote omitted) as follows: The allotment concept was not new; Indian lands had been allotted as early as 1633--- Later, allotments were used as a method of terminating tribal existence. Allottees surrendered their interest in the tribal estate and became citizens subject to state and federal jurisdiction. During the 1850s this break-up of tribal lands and tribal existence assumed a standard pattern. Such experiments in allotment served as models for later legislation. The major attempt to

destroy the basis of separate tribal existence in the United States occurred in 1887 with the passage of the *General Allotment Act* (25 U.S.C. ss. 331-34, 339, 341, 342, 349, 354, 381), known as the Dawes Act. It provided for compulsory allotment of communally held tribal lands. The allotment policy and process are described in Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934* (Bloomington: Indiana University Press, 1991).

47 Location tickets have been replaced on Indian reserves by certificates of possession and occupation in the modern version of the *Indian Act*, but otherwise the concept is the same.

Section 31 of the *Manitoba Act, 1870*, R.S.C. 1985, Appendix 2, No. 8, provides for the allotment of individual tracts of land to "the children of the half-breed heads of families" as follows: 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

For a discussion of this provision see Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis", *Osgoode Hall Law Journal* 29 (1991), p. 457, where he states that the section of the *Manitoba Act* granting land to Métis children "was a 'fast-track' version of the Indian enfranchisement legislation applied in eastern Canada" (p. 470).

48 NAC RG10, Red Series, volume 1934, file 3541, Chairman, General Indian Council (Napanee) to the Minister of the Interior, 16 June 1872, quoted in John Leslie and Ron Maguire, *The Historical Development of the Indian Act*, second edition (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1978), p. 54.

49 *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia* S.C. 1874, chapter 21.

50 *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, chapter 18.

51 Department of the Interior, *Annual Report for the year ended 30th June, 1876* (Parliament, Sessional Papers, No. 11, 1877), p. xiv.

52 Its sole provision in this respect is to allow treaty moneys to be paid to Indians out of the Consolidated Revenue Fund. *Indian Act*, R.S.C. 1985, chapter I-5, as amended, section 72.

53 House of Commons, *Debates*, Third Session — Third Parliament, 30 March 1876, p. 933. See also Leslie and Maguire, *Historical Development* (cited in note 48), p. 60.

The approach of treating Indians as minors was, of course, also official policy in the United States, the basis of which can be found in the leading Supreme Court case, *Worcester* v. *Georgia*, 31 U.S. (8 Peters) 515 (1832), where the relation of the tribes to the United States is described as resembling "that of a ward to his guardian". That phrase was enlarged upon and used as justification for the imposition of unrestricted federal power over the internal affairs of the tribes in *United States* v. *Kagama*, 118 U.S. 375 (1886) at 383-384:

These Indian Tribes *are* the wards of the nation. They are communities *dependent* on the United States... . From their very weakness and helplessness... there arises the duty of protection, and with it the power.

54 S.C. 1876, chapter 18, section 26.1.

55 George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills: Collier-Macmillan Canada, Ltd., 1974), p. 123.

56 S.C. 1876, chapter 18, section 63. But the allocation was not valid until approved by the superintendent general, who would issue the actual location ticket under sections 6 and 7.

57 *An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers*, S.C. 1884, chapter 28.

58 The Mississauga Band, by order in council in 1877. NAC RG10, volume 1079, No. 337, reference in the letterbook of the Deputy Superintendent General, 12 April 1880, quoted in Daugherty and Madill, *Indian Government* (cited in note 10), p. 4.

59 In modern times this has impeded Indian bands effectively from participating in the larger Canadian economy because of delays in getting access to their own funds for investment and development purposes.

60 The provision for the imposition of punishment continues in the present act. Where there is no local justice of the peace, it is still difficult for band councils to enforce their by-laws.

61 The Mississauga of the Credit, the Caughnawaga, the Cowichan, Kinolith, Metlekatla, Port Simpson and St. Peter's reserves, according to Leslie and Maguire, *Historical Development* (cited in note 48), p. 90.

62 A brief but excellent description of the policies underlying particular measures in the *Indian Act* is offered in Brian E. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), particularly the chapter entitled "General Aspects of Policy and Administration", pp. 37-59. For a more general perspective, see Rémi Savard and Jean-René Proulx, *Canada derrière l'épopée, les autochtones* (Montreal: Éditions de l'Hexagone, 1982), chapter 3, pp. 91-174.

63 House of Commons, *Debates*, First Session — Thirteenth Parliament, volume 132, p. 1049 (19 April 1918). See also Brian Titley, *A Narrow Vision*, p. 41.

About two months earlier, former Indian agent and agency inspector William Graham had been appointed commissioner for greater production for the prairie provinces as part of the scheme to improve wartime agricultural production. His powers included developing a production policy for each individual reserve, leasing reserve lands to non-Indian farmers where necessary, and establishing 'greater production farms ' on Indian lands expropriated under the *War Measures Act* and using Indian labour. A grant from war appropriations financed a large part of this overall scheme.

64 NAC RG10, volume 7484, file 25001, part 1, Duncan Campbell Scott to Superintendent General Arthur Meighen, 15 October 1918, quoted in Titley, *A Narrow Vision*, p. 44.

65 House of Commons, *Debates* volume 74, 30 March 1906, quoted in Titley, *A Narrow Vision*, p. 21.

66 The provision is still in the *Indian Act* (section 64(1)(a)) and is criticized by many Indian people as providing too much of an incentive to Indians to sell their homelands. See *The Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band* (Ottawa: Supply and Services, 1988), p. 409.

67 NAC RG10, volume 3617, file 4646-1, Chief Justice H.M. Howell, Manitoba Court of Appeal, to the Governor General in Council, 2 December 1907, quoted in Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980), p. 113.

68 Eventually legislation was passed *(An Act relating to the St. Peter's Indian Reserve* S.C. 1916, chapter 24) to settle the matter. Even today, however, controversy surrounds the surrender, by which the band exchanged the St. Peter's reserve for its present reserve. See Daniel, *A History of Native Claims*.

69 *Kruger* v. *The Queen*, [1986] 1 F.C. 3 at 24.

70 Although Mr. Justice Heald found a breach of the fiduciary obligation, ultimately he also found that the action by the band was time-barred. Justices Urie and Stone found no breach of the fiduciary obligation in the first place. In the result, all three judges dismissed the appeal.

71 House of Commons, *Debates*, 1910-1911, volume 4, column 7827, 26 April 1911.

72 Titley, *A Narrow Vision* (cited in note 62), p. 95.

73 *Re Indian Reserve, City of Sydney, N.S.* (1918), 42 D.L.R. (Ex. C.) 314 at 316-317 per Audette J.

74 *Dick* v. *The Queen*, [1985] 2 S.C.R. 309.

75 Duncan Campbell Scott, a deputy superintendent general of Indian affairs, stated with regard to the Wyandotte (Wendat) of Anderdon that by "education and intermarriage they had become civilized"; see *The Administration of Indian Affairs in Canada* (Toronto: Canadian Institute of Indian Affairs, 1931), p. 605. The enfranchisement of the Wyandotte of Anderdon is also discussed in Bruce G. Trigger, "The Original Iroquoians: Huron, Petun, and Neutral", in *Aboriginal Ontario: Historical Perspectives on the First Nations*, ed. Edward S. Rogers and Donald B. Smith (Toronto: Dundurn Press, 1994), pp. 59-61.

76 The Michel Band in Alberta, in 1958, discussed later in this chapter (see note 119 and accompanying text).

77 Department of Indian Affairs, *Annual Report*, 1920, p. 13, quoted in Titley, *A Narrow Vision* (cited in note 62), p. 48.

78 *An Act to amend the Indian Act*, S.C. 1919-1920, chapter 50, section 3.

79 The incident, along with a brief history of Loft's activities, is recounted in Titley, *A Narrow Vision* (cited in note 62), pp. 102-106.

80 In *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Supply and Services, 1978), Kathleen Jamieson cites the following figures (pp. 63-65), all derived from statistics provided to her by the department of Indian affairs. Between 1955 and 1965, for example, there were a total of 7,725 enfranchisements, 2,276 of which were voluntary enfranchisements of men and women (1,313) and included any children enfranchised along with them (963). Thus, 5,449 people — 4,274 women and 1,175 of their children — were involuntary enfranchisements. The disparity between voluntary and involuntary enfranchisements was even more pronounced between 1965 and 1975. There were 5,425 enfranchisements, of which 390 were voluntary, including both men and women (263) and any children enfranchised along with them (127). During the same period, however, a total of 5,035 people — 4,263 women and 772 of their children — were enfranchised involuntarily under section 12(1)(b) of the *Indian Act*.

81 For a fuller explanation of this period in Canadian history and of the policies designed to prevent Indian unrest on the prairies, see John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885", in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), pp. 212-240.

82 *An Act further to Amend "The Indian Act," chapter forty-three of the Revised Statutes*, R.S.C. 1890, chapter 29, section 9, making Indian agents justices of the peace for purposes of enforcing *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, chapter 157.

83 Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), pp. 303-304.

84 RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).

85 According to the Department of Indian Affairs and Northern Development, at the time of writing this report, those reserves were Akwesasne, Kahnawake and Mashteniatsh (Pointe Bleue).

86 The potlatch and the Tamanawas dance are described briefly in Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990), pp. 5-13.

87 NAC RG10, volume 3669, file 10,691, Gilbert M. Sproat, joint federal-provincial appointee to the British Columbia Indian Reserve Commission, to the superintendent general of Indian Affairs, 27 October 1879, quoted in Cole and Chaikin, *An Iron Hand*, p. 15.

88 This case arose in 1889 and is discussed in Cole and Chaikin, *An Iron Hand*, pp. 35-36. The *Indian Act* was amended later to overcome the specific problems with the wording that Begbie had pointed out.

89 J.R. Miller describes the role of these Indian converts to Christianity in the anti-potlatch crusade in "Owen Glendower, Hotspur and Canadian Indian Policy", in *Sweet Promises* (cited in note 81), p. 329.

90 Chief Alfred Scow, Kwicksutaineuk Tribe, in RCAP, National Round Table on Aboriginal Justice Issues, transcripts, Ottawa, 26 November 1992. For information about transcripts and other RCAP publications, see *A Note About Sources* at the beginning of this volume.

91 The campaign to eradicate dancing on the prairies is related in Katherine Pettipas, *Severing the Ties That Bind:*

Government Repression of Indigenous Religious Ceremonies on the Prairies (Winnipeg: University of Manitoba Press, 1994), particularly pp. 121-122, where the story of the arrest and jailing of Taytapasahsung is told.

92 NAC RG10, volume 3826, file 60, Duncan Campbell Scott to W.M. Graham, 4 October 1921, quoted in Titley, *A Narrow Vision* (cited in note 62), p. 177.

93 *The Queen* v. *Drybones*, [1970] S.C.R. 282.

94 Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-97", in *Sweet Promises* (cited in note 81), p. 360.

95 Parliament of Canada, *Sessional Papers*, volume 23, no. 12, *Annual Report for the year ended 31st December 1889*, p. 162, quoted in Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990), p. 213.

96 Jean Goodwill and Norma Sluman, *John Tootoosis* (Winnipeg: Pemmican Publications, 1984), p. 125.

97 This was the rationale of Duncan Campbell Scott, deputy superintendent general of Indian affairs at the time. In 1924 he had written to E.L. Newcombe, deputy minister of justice, requesting a legal opinion of the draft clause that eventually became section 149A of the revised *Indian Act* (R.S.C. 1927, chapter 98). See NAC RG10, volume 6810, file 470-2-3, volume 8, quoted in Leslie and Maguire, *Historical Development* (cited in note 48), p. 121.

98 The attempt to charge A.E. O'Meara is recounted briefly in Titley, *A Narrow Vision* (cited in note 62), p. 157, while that regarding F.O. Loft is told in Goodwill and Sluman, *John Tootoosis* (cited in note 96), pp. 136-137.

99 F. Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935", *Prairie Forum* 13/1 (Spring 1988), pp. 27-28.

100 NAC RG18, volume 1100, no. 134-35, from the Assistant Indian Commissioner to the Commissioner of the North-West Mounted Police, 20 September 1888; NAC RG10, volume 3285, file 60,511-1-7, p. 7, from F.H. Paget to the Commissioner of the North-West Mounted Police, 30 May 1896, quoted in Barron, "The Indian Pass System", pp. 34-35. See also Pettipas, *Severing the Ties That Bind* (cited in note 91), p. 113.

101 H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Vancouver: University of British Columbia Press, 1958), p. 486. See Peter Carstens, *The Queen's People: A Study of Hegemony, Coercion, and Accommodation among the Okanagan of Canada* (Toronto: University of Toronto Press, 1991), p. 88.

102 In this regard, see Carter, "Two Acres and A Cow" (cited in note 94), p. 368.

103 William M. Graham, *Treaty Days: Reflections of an Indian Commissioner* (Calgary: Glenbow Museum, 1991), p. 84.

104 House of Commons, *Debates*, Third Session — Fifth Parliament, 30 April 1885, p. 1484, quoted in Richard Bartlett, "Citizens Minus: Indians and the Right to Vote", *Saskatchewan Law Review* 44 (1980), p. 163. For a discussion of the federal and provincial franchise in relation to Indians, see also Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, volume 1 (Ottawa: Supply and Services, 1991).

105 This happened at different times in different provinces. See Bartlett, "Citizens Minus", pp. 183-184.

106 Although this put such women in a vulnerable position, they were nonetheless in a more fortunate situation than women who had actually been enfranchised through the actions of their husbands under the enfranchisement provisions of the act. Such women lost not only Indian status, but also all connection to the band. In law they were considered non-Indians, provincial residents and Canadian citizens like all others, regardless of their Indian origins and former Indian community.

107 Transcript of the evidence of Sandra Ginnesh, cited in the recent decision of the Federal Court of Canada in *Sawridge Band* v. *Canada,* [1995] 4 Canadian Native Law Reporter 121. The red ticket system is discussed in some detail in this case.

108 *A.G. of Canada* v. *Lavell — Isaac* v. *Bedard*, [1974] S.C.R. 1349 at 1386.

109 See note 80.

110 This power was used in 1942, when the Indian affairs branch investigated its band lists in the Lesser Slave Lake area and discharged 663 persons on the basis of their mixed ancestry. The protests led to the creation of a judicial inquiry conducted by Judge W.A. Macdonald of the District Court of Alberta. He found in his 1944 report that in almost half the cases the power had been used arbitrarily. See Daniel, *History of Native Claims* (cited in note 67), pp. 25-26.

111 NAC RG10, 577-127-33, volume 1A, quoted in Jamieson, *Indian Women and the Law* (cited in note 80).

112 Figure 9.1 is based on the excellent discussion of the post-1985 Indian status rules in Native Women's Association of Canada, *Guide to Bill C-31: An Explanation of the 1985 Amendments to the Indian Act* (Ottawa: NwAC, 1985).

113 Stewart Clatworthy and Anthony H. Smith, "Population Implications of the 1985 Amendments to the Indian Act", paper prepared for the Assembly of First Nations (December 1992), preface.

114 Projections in the study by Clatworthy and Smith (pp. 37-39) show that the expansion of the status Indian population will peak between 2021 and 2051 and will begin to decline thereafter, returning to its present level by 2091. A decline in the status Indian population is expected to set in then and to continue.

115 Special Joint Committee of the Senate and House of Commons appointed to examine and consider the Indian Act, *Minutes of Proceedings and Evidence* (Ottawa: King's Printer, 1946), p. 744.

116 Diamond Jenness, "Plan for Liquidating Canada's Indian Problem Within 25 Years", in Special Joint Committee, *Minutes of Proceedings and Evidence*, p. 310.

117 Special Joint Committee, *Minutes of Proceedings and Evidence*, p. 187.

118 *Indian Act*, S.C. 1951, chapter 29, section 8.

119 To this effect, see Bradford W. Morse, "The Aboriginal Peoples of Canada", in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. Bradford Morse (Ottawa: Carleton University Press, 1989), p. 1; and Linda Rayner, "The Creation of a 'Non-Status' Indian Population by Federal Government Policy and Administration", paper prepared for the Native Council of Canada (1978), p. 6.

120 The history of the Michel Band and the origins of the land claims, to which current status Indians descended from this band apparently do not have access, is set out in Bennett McCardle, "The Michel Band: A Short History" (Ottawa: Treaty and Aboriginal Rights Research of the Indian Association of Alberta, 1981). This paper can be obtained from the Assembly of First Nations. The federal specific claims policy and its failure to address potential claims from Michel Band descendants is described in William B. Henderson and Derek T. Ground, "Survey of Aboriginal Land Claims", *Ottawa Law Review* 26/1 (1994), pp. 201-202. A report by the Indian affairs branch (cited in note 121), p. 36, states that one other band enfranchised voluntarily in the 1950s. It consisted of one family living on a reserve but is not named in the document.

121 Indian Affairs Branch, Department of Citizenship and Immigration, *A Review of Activities, 1948-1958*, pp. 8-9, 35-36. See also John F. Leslie, "A Historical Survey of Indian-Government Relations, 1940-1970", paper prepared for the Royal Commission Liaison Office, DIAND (December 1993).

122 Joint Committee of the Senate and the House of Commons on Indian Affairs, *Minutes of Proceedings*, No. 16, including second and final report to Parliament (1961), p. 605.

123 *Survey of the Contemporary Indians of Canada* (cited in note 13).

124 *Survey of the Contemporary Indians of Canada*, p. 263.

125 House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Supply and Services, 1983).

126 S.C. 1984, chapter 18.

127 S.C. 1986, chapter 27.

128 *Lands, Reserves and Trusts Review: Phase II Report* (Ottawa: Supply and Services, 1990), preface.