The Indian Act:
Disempowering, Assimilatory and Exclusionary

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Facilitator:
The Indian Act has come to be known as the primary mechanism by which the federal government instituted a legal power for itself and its Indian agents over the lives, rights, and identities of First Nations peoples. The terms of the Act apply only to those recognized as having Indian status—the legal recognition by the Crown that one is in fact an “Indian”—and the federal government does not, and has never, recognized Indian status for all people of First Nations descent within the boundaries of what is now Canada. The purview of the Act also does not extend to Métis or Inuit peoples. This is largely due to a history of the federal government seeking to limit the liabilities flowing from its constitutional responsibility for Indigenous peoples. The very nature of the Act as scrutinizer and bestower of Indian status thus created the status/non-status divide, and is why we even have a concept of “non-status Indian” in the first place.

Thus, the Indian Act is profoundly 1) disempowering, 2) assimilatory and 3) exclusionary.

Participant 1:
The Indian Act was neither the sole nor the first legislation to envisage the paternalistic control and assimilation of First Nations. Both prior to and just after Confederation, instances of pre-Indian Act legislation were enacted that envisaged a “civilizational” process of assimilation that was meant to eventually remove all legal distinctions between Indians and the Crown’s Canadian subjects. In the shift from the pre-Confederation to post-Confederation legislation, the efforts at assimilation became more acute. Enfranchisement is a very important historical term. It means the removal of Indian status. It went from voluntary to involuntary, although it had been forcible from the beginning for wives and children of husbands who were enfranchised. It precluded First Nations women from the leadership and political life of their communities, and also provided for the automatic enfranchisement of women (and their children) when they married a man not recognized as an Indian.

The post-Confederation Act also enabled the government to impose its own style of band council in cases where it desired to remove the traditional governance structure of a First Nation. This is the heart of the recent struggle in British Columbia over the building of the Coastal GasLink pipeline. Protests across the country supported the Wet’suwet’en hereditary chiefs who opposed the pipeline while the elected band council has been in support. Who is in charge? The answer is complicated. Basically, some bands did not accept the disenfranchisement of their traditional governance structure and continue to have hereditary chiefs who oversee the management of traditional lands. Their authority predates the imposed colonial law of an elected band council. According to the Royal Commission on Aboriginal Peoples (RCAP), not only was the style of imposed governance structure assimilative, but so was its limited scale. In effect, 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”
Participant 2:
It was not until 1876, nine years after Confederation, that An Act to amend and consolidate the laws respecting Indians was passed, modifying and consolidating much of the former legislation into Canada’s first incarnation of the Indian Act. Cora Voyageur encapsulates the Act’s functions as “to define who was and was not an Indian, to civilize the Indian, and to manage the Indian people and their lands.” According to John Leslie, “it touched on all aspects of Indian reserve life.” It preserved the assimilatory and discriminatory provisions of its predecessors, even expanding on some of them.

The original Indian Act retained the federal government’s power to remove traditional Indigenous governance structures and added to the list of reasons for which the federal government could remove chiefs from band leadership. The federal government did exactly this to the Six Nations band within the Haudenosaunee Confederacy in Ontario, purely because the band created anxiety within the Canadian government through their travels to London and Geneva, seeking recognition of their sovereignty. Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, secured approval from Cabinet to remove the confederacy council that governed Canada’s largest reserve. According to the account of John Borrows and Leonard Rotman:

Without prior notice to the chiefs, they were removed from office by an order-in-council on the morning of October 7, 1924. The Royal Canadian Mounted Police seized the wampum used to sanction council proceedings, and posted a proclamation on the doors of the council house announcing the date and procedures for an elected government on the Six Nations reserve. (A wampum is a ceremonial belt used as a gift, as currency, and for recording treaties and historical events).

The cleavage created within this First Nation by the government’s imposition of a second, competing governance structure has remained for generations.

Participant 3:
The Indian Act also retained compulsory enfranchisement (that is, loss of status) and extended it to individuals if they were to earn a university degree or become a doctor, lawyer or member of the clergy. It even aspired for the voluntary enfranchisement of entire bands through a process that planned for the surveying and subdivision of reserves. It was theoretically feasible, then, if history were to progress as the federal government had desired it, for all reserves to be subdivided into individual lots and, through the assimilatory processes of enfranchisement, the entirety of any given reserve to be eroded away into private lots held by owners with no Indian status.

By the end of the nineteenth century, as John Leslie notes, the lack of tangible results in assimilating Indigenous peoples encouraged officials to become even more interventionist:

“In the view of government officials, a relatively effortless way of dealing with the apparent lack of progress was to revise the Indian Act to give more powers to local Indian agents and to heavily penalize Indian people for persisting in the old ways.” (Leslie, 2002)

For example:

- In the 1880s, Indian agents acquired additional powers as justices of the peace in order to prosecute Indians.
In April 1884, the Indian Act was amended to outlaw the Potlatch in order to assimilate the Indigenous population into a capitalist, settler culture. Christian missionaries and Indian agents had lobbied the federal government to outlaw the Potlatch. Due to a lack of definition on what constituted a Potlatch the law was amended in 1914 so that any Indian who participated in a pageant in Aboriginal costumes without the consent of the Superintendent General of Indian Affairs or his authorized agent was liable to a month in prison, a $25 penalty, or both. This ban was lifted in 1951.

In 1894, section 11 gave the Minister of Indian Affairs the power to direct industrial or residential schools, and made school attendance compulsory with strict truancy penalties.

In 1918, as part of a campaign to crack down on Potlatches, the offense became punishable by summary conviction. As a result, 135 individuals were charged between the years 1918 and 1922.

In 1918, the Act allowed the government to lease out uncultivated reserve land to non-Indigenous farmers.

In 1930, an amendment prevented pool hall owners from admitting Indians.

The additions and amendments in this vein are too numerous to explore in their entirety, but the sheer number of them gives a sense of how the Indian Act has been used as a multifaceted instrument of control and assimilation for generations with varying applicability on- and off-reserve—from the 1880s through much of the twentieth century.

Participant 4:
A 1927 amendment to the Indian Act brought a unique element, since governments were anxious that some First Nations might manage to bring claims for legal title over their own lands before the courts. Such anxieties were especially acute in British Columbia. Section 141 of the 1927 Indian Act therefore made it illegal to raise funds for the benefit of First Nations who sought to pursue claims against the Crown in court. (Relatedly, a 1906 amendment to the Criminal Code had “provided that it was an offence to incite or ‘stir up’ Indians to riotous or disorderly behaviour. Indeed, it was even an offence to incite them ‘to make any request or demand of government in a disorderly manner.’”)

It is essential to note the interwoven chronology of treaties and assimilatory legislation of the Indian Act. Canada began, in earnest, the honing of the law as a tool of assimilation prior to Confederation. This is prior to any of the Numbered Treaties signed from Ontario westward from 1871 to 1930. In fact, the Indian Act was used numerous times to contravene treaty promises. The government failed, of course, to spell out in direct terms the provisions of the Indian Act that contravened the treaty promises it was making. This is significant because, according to RCAP, First Nations were assured orally in the treaty negotiation process “that their way of life would not change unless they wished it to. They understood that their governing structures and authorities would continue undisturbed by the treaty relationship.

Participant 5:
The Indian Act of today is not the same as the one first consolidated in 1876, or even what existed in the first half of the twentieth century. Many of the most controversial amendments mentioned above were eventually removed from the Act, and multiple legislative efforts since 1985 have begun a long and imperfect process of removing gender discriminatory provisions in the Act that saw generations of Indigenous women and their children lose their status.
Enfranchisement and assimilation continue as a fundamental element of the current Indian Act, however, through a mechanism referred to as the second-generation cut-off. This essentially means that if two generations in a row have children with non-status partners, then Indian status is not carried beyond that second generation. In addition, legal scholars John Borrows and Leonard Rotman still consider the Act to be a major obstacle in maintaining Indigenous governmental diversity and autonomy, given that its “provisions narrowly define and heavily regulate their citizenship, land rights, succession rules, political organization, economic opportunities, fiscal management, educational patterns and attainment.”

Getting beyond or removing the Indian Act, however, is not as simple as it sounds. The paradox of the Act is that it is also integral to securing the legal protection of reserve land for the common use and occupation of First Nations—and there remains very little Canadian territory that is set aside specifically for Indigenous groups. For First Nations, the only way out from under the Indian Act is through the negotiation of self-government agreements, a process that is itself subject to some staunch criticisms.

References


