THE INDIAN ACT:

PROTECTION, CONTROL, OR ASSIMILATION?

A REVIEW OF CROWN POLICY & LEGISLATION, 1670-1996.

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EXECUTIVE SUMMARY.

The history and effect of the *Indian Act* has been bedevilled over the years by it's conflicting and parallel objectives: the **protection** of Indians and their lands on the one hand, and the **control**, **assimilation** and **civilization** of Indian peoples on the other. At the same time, by actively asserting itself as a protector or manager of Indian interests, the Crown has created **trust** and **fiduciary** responsibilities which it owes to the Indian nations and their citizens. These contradictions are present together throughout the first 300 years of Crown legislation related to Indians. They remain today.

1. Initially, "Crown law" relating to the relationship between the Crown and the Indian nations found its source in the treaties made with the Indian nations, and prerogative instruments issued by the Crown. This was true for the British and the French Crowns. An example of a prerogative instrument is the Royal Proclamation of 1763, issued after the conquest of the French and in the wake of Pontiac's War, by which the Crown assumed trust and fiduciary responsibilities to the Indian nations, to protect their rights and interests from frauds and abuses.

2. The Crown never pretended to have the authority to interfere in the internal affairs of the Indian nations. Rather, it used its authority to protect the Indian nations and their interests from intrusion or exploitation by colonial governments and British citizens. By requiring that Indian nations could not cede land except to the Crown, and by asserting its role as a protector of Indian interests and rights, the Crown assumed trust and fiduciary obligations to the Indian nations.

3. After the War of 1812, the Imperial government could not afford to maintain the empire. It began to off-load fiscal responsibilities to the colonial governments in exchange for a devolution of powers. Between 1830 and 1867 considerable powers were devolved to colonial legislatures, including the administration of Indian affairs and the management of Indian lands and trust funds.
By 1850, Upper and Lower Canada's legislatures were passing relatively comprehensive legislation related to Indians which emphasized the protective duties of the Crown - for instance, *An Act for the protection of Indians in Upper Canada from imposition, and the property occupied by them from trespass and injury* (1850).

4. However as settlement proceeded, Indians were increasingly seen as a barrier to development and a burden on the colonial treasury. Assimilation and Civilization became central to government policy objectives - for example the *Act for the Gradual Civilization of the Indian Tribes of the Canadas* (1857). The purpose of this *Act* was the "gradual removal of all legal distinctions" between Indians and settlers, and it provided criteria for enfranchisement. This marked the beginning of intrusive legislative measures which began to interfere in the internal affairs of the Indian nations. At the same time, these pieces of legislation increasingly contradicted the nature and scope of the treaty relationship, and the terms of the treaties themselves.

5. At Confederation, the federal government became responsible for “Indians and Lands reserved for Indians” through s.91(24) of the *British North America Act, 1867*. Existing Indian legislation was consolidated by the Liberal government of Prime Minister Alexander Mackenzie in the *Indian Act* of 1876. This *Act* embodied all of the contradictions of previous legislation, only more so. On the one hand, there were sections which highlighted the protective duties of the Crown, and provided a legislative base for the implementation of the treaties. On the other hand, there were sections which were highly intrusive and which focused on the government priorities of assimilation, enfranchisement, and civilization.

6. Over the next 80 years, the *Act* was amended numerous times, focusing more and more on intrusion, control, and assimilation, and less and less on protection and the treaties. Controls and/or prohibitions were placed on religious practises, leadership selection, mobility off-reserve, trade & commerce, and the raising of funds for claims. Government was given increased powers to break up Indian reserves and Indian Bands. In 1884, companion legislation was passed - *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.* Among other things, it provided for Band Councils to levy taxes from Band members.

7. After WWII, Canada revisited the *Indian Act* in light of its overall strategy in national reconstruction. A Joint Committee of the House of Commons and the Senate was struck to review Indian policy and the *Act* itself. Between 1946 and 1948, Canada undertook what has been called “the first systematic effort by Government to consult with Indians” - and the era of consultation was born. Predictably, the key concerns raised by Indian leadership - self-government, the treaties, the land question - were ignored or dismissed by officials. Efforts were made to ensure that future “consultations” would be under firmer government control. In 1951, a revised *Indian Act* was adopted by Parliament. In most respects it was the same as the 1876 *Act*. The protective obligations of the Crown were seen only as a temporary duty which would disappear once complete assimilation had been achieved.

8. Between 1968 and 1969, Canada once again took another look at Indian policy, in light of Prime Minister Pierre Elliot Trudeau’s vision of individual equality for all Canadians and the dismantling of collective rights. As in the 1940's and 50's, extensive consultations were carried out, which were duly ignored by officials. The result was the release of the White Paper in 1969. It called for elimination of legislative & constitutional recognition of Indian nations, mass enfranchisement, the gradual elimination of Reserve lands, and termination of the treaties. These recommendations sparked such a negative reaction from the First Nations that Trudeau was forced to formally withdraw the policy in 1970.

9. Canada once again tried to amend the *Act* through the *Indian Act Revision* process of the 1970's but it found no widespread support among the First Nations, and this effort was eclipsed by the constitutional process which led to patriation in 1982. The recognition and affirmation of “existing” Aboriginal & Treaty rights in s.35 of the *Constitution Act, 1982* were viewed as a setback by Indian Affairs officials in light of their long term goals of assimilation and the

termination of rights.

10. In 1984 by way of the *Guerin* decision, the Supreme Court of Canada found that the Crown owed a legally enforceable fiduciary duty to the First Nations. Up to this point, Canada had insisted that it could not be held to account for its management of Indian Affairs. The *Guerin* decision sparked a policy crisis within government once it realized the full extent of its liabilities. Instead of embracing its duties and finding ways of fulfilling them, Canada began to devise a two track strategy to discharge those duties and off-load them. The first track involved denial and delay - a refusal to discuss the nature and scope of its fiduciary duties with the First Nations. The second track involved policy and legislative measures which would focus on obtaining Indian consent for the reduction and elimination of those duties.

11. In 1985, Canada was forced to amend the *Act* to make it conform with the *Charter* and with international law. The result was Bill C-31, which it insisted, would leave no Band any worse off than before. The impacts of Bill C-31, however, were far beyond what anyone in government had predicted. In 1985, DIAND projected that C-31 implementation costs - including MSB - would be $300 million. By 1989 this figure had been revised upward to $2 billion, **not including MSB**. To make things worse, these revelations came at precisely the same time that the Tory government of Brian Mulroney was involved in major downsizing and budget cutbacks.

12. In 1986, the Auditor General of Canada reviewed DIAND's performance in fulfilling its fiduciary duties, in light of the *Guerin* decision. He blasted the Department for its limp and half-hearted efforts at coming to grips with the court's direction, particularly in the areas of Lands, Revenues and Trusts. His report demonstrated how costly it would be for Canada to effectively fulfil its duties in these areas. At the same time, it is clear that Canada had neither the will nor the wallet to rise to the occasion.

13. The combined pressure of *Guerin*, C-31, the Auditor General's report and budget reductions forced Indian Affairs into action in 1987, when it began the Lands, Revenues and Trusts Review. Not surprisingly, the LRT Review focused on the core areas where there was no question that it held a legally enforceable fiduciary duty to the First Nations. Its ultimate objective was to obtain Indian consent to the reduction of these duties. However, in its public information, Canada chose not to disclose these imperatives. Instead, it characterized the LRT Review as a vehicle for expanding First Nations powers and for reducing the control of the Department.

14. The LRT Review and its recommendations did not meet with broad based support among the First Nations. As a result, in 1990, Canada transformed the LRT Review into the Chiefs' Governance Working Group - also known as the *Indian Act Alternatives* process. This new approach involved individual First Nations working with DIAND to develop sectoral legislation in the areas of Lands, Revenues, Trusts, and Governance. Once the sectoral legislation had passed, Bands would be able to opt-in to the new legislation, and out of the *Act*. But by 1993, no concrete results had been achieved, and broad-based support among the First Nations was still absent.

ANALYSIS.

The *Indian Act* has been, and continues to be, an unjustified infringement on the Aboriginal & treaty rights of the First Nations. They have never consented to its application.

Amendments to the *Indian Act* have never seriously considered the wider issues:

* relationship between the *Indian Act* and treaty & aboriginal rights

* relationship between s.91(24) authority and the Crown's trust, fiduciary and treaty obligations

* relationship between the *Indian Act*, s.91(24) authority, and the inherent right of self-government

This remains the case today.

Upon finding that it owed a legally enforceable fiduciary responsibility to the First Nations, Canada's response has been to limit its liabilities and discharge its obligations, while at the same time denying that they exist. Almost every actual or proposed amendment to the *Indian Act* since 1984 can be traced back to this central motivation on the part of Canada.

Canada has never undertaken broad-based discussion with the First Nations to reach agreement on the nature and scope of its fiduciary responsibilities. Instead, it has chosen to try and get rid of those duties before they are defined more clearly.

In its efforts to amend the *Act* since 1984, Canada has stressed its commitment to empowering First Nations and getting rid of an "offensive" and "paternalistic" piece of legislation. It has also stressed its commitment to "cooperative approaches" in "partnership" with the First Nations.

However, Canada has consistently chosen not to provide full disclosure of the material facts relating to its motivation for amending the *Act*. Some of these motives include:

* shedding fiduciary and trust responsibilities

* fiscal restraint and cutting the costs of Indian expenditures

* reducing the burden of C-31 implementation

* encouraging integration into the provincial mainstream

* the imposition of taxation

* diluting or neutralizing constitutional and treaty protections and obligations.

Many First Nations are legitimately seeking changes to the restrictive legislative relationship that now exists with Canada. However, the evidence suggests that Canada has in some cases used these sentiments to advance its agenda and objectives, picking and choosing what it wants to move on, without giving due weight to the full spectrum of First Nation views and priorities.

Canada has not proved to be competent at projecting the impact of *Indian Act* amendments (ie., Bill C-31). At the same time, proposed amendments to the *Indian Act* are rarely, if ever, unconnected to wider federal policy objectives and fiscal imperatives.

HISTORICAL BACKGROUND RE: INDIAN ACT.

SUMMARY.

The history and effect of the *Indian Act* has been bedevilled over the years by it's conflicting and parallel objectives: the **protection** of Indians and their lands on the one hand, and the **control**, **assimilation** and **civilization** of Indian peoples on the other. At the same time, by actively asserting itself as a protector or manager of Indian interests, the Crown has created **trust** and **fiduciary** responsibilities which it owes to the Indian nations and their citizens. These contradictions are present together throughout the first 300 years of Crown legislation related to Indians. They remain today.

More recently however, federal policy has paid more attention to dismantling the Crown's fiduciary & trust responsibilities, and on accelerating the assimilation of Indians and their governments into the Canadian mainstream, than it has on the protective aspects of the trust.

The summary that follows is not exhaustive, and it doesn't pretend to be authoritative. However, it does cover some of the key developments and trends in federal legislative policy towards Indians over the past two centuries. The current proposals of the government of Canada respecting legislative change need to be considered in light of the historical record before they can be assessed properly.

1. BEFORE THE *INDIAN ACT*.

1.1. Treaties and the Royal Prerogative.

Initially, Crown policy and law came in the form of prerogative instruments - proclamations or instructions issued by the French or British King. The colonies had little authority to pass laws for themselves, much less for the Indian nations. Jurisdiction over Indian Affairs rested with the Imperial government, which conducted its relations with the Indian nations through the treaty process.

During this period, Crown policy and law related to Indian affairs was primarily directed at controlling the conduct of settlers and colonial governments in their relations with Indian nations. Although the Imperial government did try to influence inter-tribal relations in its colonial wars with France and the United States (by way of the treaty process) it could not pretend to intrude on matters internal to the Indian nations. Even if the Imperial government often faced difficulties in getting colonial interests to comply with its policy and law, the principles of non-interference and of relations through the treaty process were clearly established.

In 1670, the British Imperial government provided instructions for colonial governors in their management of Indian Affairs and directed that "they at no time give any just provocation to

any of the said Indians that are at peace with us... do by all ways seek fairly to oblidge them, and ... carefully protect and defend them from adversaries... more especially take care that none of our own subjects, nor any of their servants do in any way harm them."[1]

After the conquest of the French and Pontiac's War, these protective measures were expanded with the *Royal Proclamation of 1763*, which formally interposed the Crown between the Indian nations and the colonies, and explicitly set out to prevent "frauds and abuses" from being committed against the indigenous peoples. In recognizing and protecting the "Indian Hunting Grounds", the *Royal Proclamation* also set aside most of the North American continent as Indian territory. By establishing a procedure for the sharing of Indian lands (through public meetings and informed consent), and by requiring that Indian lands could only be ceded to itself, the Crown assumed an active role as a protector of Indian nations *vis a vis* the interests of the colonies. This was the beginning of the Crown's trust relationship with the First Nations.[2]

1.2. Colonial Legislation and Imperial Off-loading.

Between 1763 and 1850 some piecemeal legislation was developed, primarily in Upper and Lower Canada, to protect Indian reserves from trespass, and to prevent the sale of liquor.[3]

Throughout this period the Imperial Crown continued to maintain and extend the treaty process in establishing formal relations and in obtaining lands for settlement. But there were other factors at work. Increasingly after the War of 1812, Great Britain's treasury felt the weight of its colonial adventures, and a period of fiscal retrenchment took hold. The Imperial government wanted to off-load financial responsibilities to the colonial governments, and was willing to transfer jurisdiction as an incentive. During this period, significant responsibilities were devolved from the Imperial government to the colonies.

As a part of this process, between 1830 and 1867 colonial governments gained de facto control over Indian policy and the management of Indian affairs - as well as Indian lands and assets. Trust funds and lands administered by the colonial governments on behalf of the Indian nations dissipated and disappeared. They began to pass legislation that was contradictory to the terms of the treaties, sometimes in direct breach. The *Indian administration* came to be seen as a burden that had to be eliminated, and the continued presence of Indian nations was seen as a barrier to the colonies' expansion.

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[1]Canada, *Journals of the Legislative Assembly of Canada*, Appendix EEE (8 Victoria, March 1845), "Report on the Affairs of the Indians in Canada" (Montreal: Rollo Campbell, 1845).

[2]See John Leslie & Ron McGuire, eds., *The Historical Development of the Indian Act* (DIAND, Ottawa: 1978): p.6.

[3]Leslie & McGuire, 1978: p.24.

In 1850, more comprehensive legislation was passed: *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, and *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*.[4] Both Acts were intended to do the same thing, although the Upper Canada legislation was more detailed. It provided that taxes could not be levied against Indians; prohibited trespass by non-Indians & established penalties; and set out rules for timber leases. Both Acts contained a definition of who was an "Indian". A year later the Lower Canada legislation was amended to prevent non-Indian men who married Indian women from becoming "Indians".[5] This was the beginning of the Crown's unilateral intervention in determining status and entitlement.

These precursors to the *Indian Act* show how the extension of the Crown's "protective" measures also opened the door to intrusions in the internal affairs of the Indian nations.

In 1857, new legislation was passed which explicitly called for the assimilation and elimination of Indians. The *Act for the Gradual Civilization of the Indian Tribes of the Canadas* was intended to "encourage the progress of Civilization among the Indian Tribes... and the gradual removal of all legal distinctions between them and her Majesty's other Canadian Subjects".[6] Criteria for enfranchisement were established, and monetary and financial inducements were included to entice members. It is noteworthy that the focus was on individual Indians, and not on the collective.

After Confederation, the federal government became responsible for "Indians and lands reserved for Indians" through s.91(24) of the *British North America Act, 1867*. Further legislation and policy initiatives continued to encourage the *civilization* and *assimilation* of Indian individuals, while at the same time increasing the power of the Superintendent General and his Agents to interfere with the internal affairs of the nation. The *Act for the gradual enfranchisement of Indians* of 1869 added perks for enfranchised individuals, and was the first Canadian statute to dictate that Indian women who married non-Indians would lose their rights and status.[7] It also made Band Chiefs or Councillors officers of the Crown - subject to removal at the discretion of the local agent or superintendent.

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[4] *Journals of the Legislative Assembly of Canada (JLAC)*: Statutes of Canada (13-14 Vic, cap 74), 10 August, 1850; (13-14 Vic, cap 42): 10 August, 1850.

[5] *JLAC* Statutes of Canada (14-15 Vic, cap 59): 30 August 1851.

[6] *JLAC* Statutes of Canada (20 Vic, cap 6): 10 June, 1857.

[7] *JLAC* Statutes of Canada (32-33 Vic, cap 6): 30 June, 1860.

2. THE *INDIAN ACT*.

2.1. The Consolidation of 1876.

It was a Liberal government under Prime Minister Alexander Mackenzie which introduced the first consolidated *Indian Act* in 1876.[8] Far more than the Conservatives of John A. Macdonald, the Liberals subscribed to the long-term goal of Canadian Indian policy - one which was implied in earlier legislation, but was fully articulated in the 1876 *Act*. That goal was assimilation and extinguishment. To the maximum extent possible, Indian people were persuaded (or forced if necessary) to give up their languages, their cultures and their traditional economic pursuits - and to adopt the lifestyle and property concepts of Anglo society. The Indian Affairs Branch - through its Indian Agents or Superintendents - was to bring about this transformation.[9]

The consolidated *Indian Act* defined who or what an "Indian", "Band", "Reserve" was (a "person" was "an individual other than an Indian"). It included provisions for the "Protection of Reserves" (including trespass); the taking of surrenders; the management & sale of Indian lands and timber; the management of Indian Monies; "Privileges of Indians" (ie., no taxation); Intoxication; and Enfranchisement. It also contained a section on elections and the powers of Chiefs & Councils and by-law making. Traditional and hereditary Chiefs were accounted for: they could maintain their positions until death (unless removed by Indian affairs for "dishonesty, intemperance or immorality"), after which the elective system would take precedence.

The *Act* was not applied consistently across Canada. Large parts of western and northern Canada were initially exempt from its provisions, simply because there was no settlement activity to warrant a federal presence.

The *Act* had ambivalent connections to the treaties and the treaty relationship. On the one hand, the intrusive aspects of the legislation contradicted or breached the nature of the treaty relationship and specific treaty terms. On the other hand, some parts of the *Act* provided a legislative basis for the delivery of treaty entitlements (ie., agriculture, education).

Although it has undergone a number of amendments since 1876, today's *Indian Act* remains essentially the same as it was 120 years ago. The *Act* has **never** been considered or consented to by the Indian nations. Rather, it has been imposed.

[8]Statutes of Canada (39 Vic c. 18), 1876.

[9]With notes from James Morrison.

2.2. Other Amendments 1880-1900's.

During the last two decades of the 19th century, as settlement of the west began in earnest, the *Act* was amended to provide for more intrusive measures. In 1880, further efforts to undermine the position of traditional leaders were taken: their role as chiefs was not to be recognized by the Crown unless they went through the *Indian Act's* electoral process (although many First Nations continued to operate by custom).[10] 1881, restrictions on trade were introduced.[11] In 1884, prohibitions on traditional religious practises were imposed:

> Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or in the Indian dance known as the "Tawamanawas" is guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than six nor less than two months.... and any person who encourages, either directly or indirectly, an Indian or Indians to get up such a festival or dance, or to celebrate the same, or shall assist in the celebration of the same is guilty of a like offence, and shall be liable to the same punishment.[12]

During that same year the federal government passed *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*.[13] This legislation targeted the more "civilized" and "advanced" tribes east of Manitoba, some of whom were deemed ready for collective transformation and ultimate enfranchisement. Among other things, it provided for Band Councils to levy taxes from Band members' property interests on-reserve.

In the wake of the 1885 Rebellion, a permit system was established to control the movement of Indians off-reserve.[14] The restriction of mobility, combined with the residential school system and other *civilization* initiatives, was intended to undermine tribal identity and collective interests, as Indian Affair's Hayter Reed explained in 1889:

> The policy of destroying the tribal or communist system is assailed in every possible way and every effort made to implant a spirit of individual responsibility, instead.[15]

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[10]Leslie & McGuire, 1978: p.78.

[11]S.C. 1881 (44 Vic. Cap.17) s. 2, 3.

[12]S.C. 1884 (47 Vic. Cap. 27): s.3.

[13]SC (47 Vic. Cap.27): 19 April 1884.

[14]Leslie & McGuire, 1983: p.89.

[15] Canada, Sessional Paper No.12 (1890): *Annual Report of Commissioner Reed to the SGIA*, 31 October, 1889: p.165.

Part of this programme involved the marginalization and destabilization of Indian economies and trading patterns. Trade & commerce had been foundations of the relationship between Indian nations and the Europeans. They had also been the assurance of continued Indian prosperity and independence. If Indian Affairs was to consolidate its control over First Nations, their economic independence would have to be brought to heel. In 1890 amendments to the *Act* prohibited certain classes of people from trading with Indians; all others would require a special licence from the Superintendent General.[16] In the following year, further amendments were adopted which prohibited the sale or barter of Indian produce to anyone without written permission of the Indian Agent.[17]

At the same time, measures were taken to facilitate the breakup of reserve lands. In the 1890's and early 1900's, amendments focused on expanding government's powers of expropriation, while others gave the Superintendent General the authority to lease lands and resources without First Nation consent.[18]

Elimination of Indian nations as distinct political and social entities continued to be the ultimate objective of Indian Affairs policy. In a 1920 speech to a Special Committee of the House of Commons, Deputy Superintendent General Duncan Campbell Scott said bluntly:

> I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department.[19]

In 1926, amendments to the *Act* were passed which, among other things, restricted the ability of First Nations to raise monies for pursuing claims against Canada. This is a perfect example of the tension between the protective functions of the *Act* and the Department's use of the *Act* as a tool of control.

3. THE POST-WAR ERA.

Federal Indian policy since WWII has gone through many changes, but it has retained the same basic objectives which shaped the policy in the 1800's: assimilation of the Indian people, and the termination of "special rights".

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[16]Statutes of Canada (53 Vic cap.29): 16 May, 1890.

[17]Leslie & McGuire, 1983: p.96.

[18]*Ibid.*: pp. 100-112.

[19]NAC RG10 Vol.6180 File 470-2-3 Vol.7: Evidence of DC Scott to the Special Committee of the House of Commons examining the *Indian Act* amendments of 1920: pp.55; 63.

3.1. Consultations and Amendments, 1946-1951.

After WWII, the federal government revisited Indian Affairs policy in the context of national reconstruction. It was acknowledged that previous efforts at assimilation and mass enfranchisement had failed miserably. Meanwhile, the Indian population had continued to grow, and the lack of basic services was appalling. In the spring of 1946 a Special Joint Committee of the House of Commons and the Senate was struck to consider amendments to the *Indian Act* and future directions in Indian policy. Over the next few years they heard testimony from federal officials, social scientists and church groups. Indian Affairs staff admitted that the Branch was not even able to fulfil its duties effectively in two key areas - membership and Band assets:

> In two rather frank admissions, Branch officials acknowledged that they did not have an accurate register of Indians who were qualified to receive benefits from the Branch. Incomplete administrative records also made the management of Indian band funds, estates and reserve land transactions something of a hit and miss affair.[20]

It is instructive to note that 40 years later the Auditor General of Canada chastised DIAND for its continued failure in both of these areas (see below).

In what has been described as "the first systematic effort by Government to consult with Indians", the Committee also heard from a national cross-section of Indian leaders and organizations.[21] Indian leaders made their priorities clear. They wanted services and infrastructure on-reserve improved; control over Indian education; an expanded reserve land base to facilitate economic development; treaty implementation and a process for resolving land claims; increased powers of self government; and less meddling by Indian Affairs.

Indian assertion of special rights and status were dismissed by government officials, church groups and the social scientists who presented evidence to the Joint Committee. Diamond Jenness, an anthropologist from New Zealand, laid out a "Plan for liquidating Canada's Indian problem in twenty-five years":

> The scheme proposed the termination of the separate legal status of Indian people once enhanced access to higher education, an efficient process for enfranchising qualified Indians, and the gradual conversion of the more advanced reserves to municipal status had been achieved.[22]

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[20]Leslie, 1993: p.7.

[21]Leslie & McGuire, 1983: p.134.

[22]John Leslie, *A Historical Survey of Indian-Government Relations, 1940-1970* (paper prepared for DIAND's Royal Commission Liaison Office, December 1993): pp.8-11.

In June 1948 the Special Committee tabled its report, which focused on the legislative and administrative measures needed to bring about complete assimilation of the First Nations through time. A new draft *Indian Act* was also submitted by the Special Committee that month, which closely resembled the *Act* it was meant to replace. It took another two years before draft legislation was actually tabled in Parliament, as Bill 267, in June 1950. But Indians and the media attacked the Bill, saying that it had been prepared without adequate consultation, and it was withdrawn.

The Minister for Indian Affairs, Walter Harris, went back to the drawing board, holding some meetings with selected Indian leaders, and re-drafting with officials. A revised Bill 79 went to Committee hearings in April 1951 and in September 1951 the new *Indian Act* was proclaimed as law.

The prohibition on ceremonies and the sun dance were removed, as were the restrictions on raising money to hire lawyers to pursue claims. Some of the Minister's powers were reduced, but he retained substantial power to interfere in Band affairs. Perhaps most controversial were the new legal definition of "Indian" which led to the drawing up of new Band lists and led to hundreds of appeals & protests, and the notorious s.12(1)(b), which required that any Indian woman who married a non-Indian would be automatically enfranchised. "Indian Monies" were also formally defined for the first time.

With a few exceptions, the new *Act* was in the same mould as the old *Act*. At its base were the two contradictory objectives which had been there in the beginning: protection and assimilation. Some new jargon was introduced: "integration" (not "assimilation") was now the fundamental goal of the *Act*. Minister Harris told the House of Commons in 1951:

> The ultimate goal of our Indian policy is the integration of the Indians into the general life and economy of the country. It is recognized, however, that during a temporary transition period of varying length, depending upon the circumstances and stage of development of different bands, special treatment and legislation are necessary.[23]

3.2. "Consultation".

The consultations with Indian leadership that occurred prior to the 1951 amendments provided them an opportunity to identify their priorities and instruct their fiduciary as to the course of action that they wanted taken. However, the result did not meet with government approval.

> [The 1946-47 consultations] ... had been deemed unsatisfactory by senior Branch officials.... they seemed to offer a national political platform for "venal" and

[23]Canada. 21st Parliament (2nd session) House of Commons *Debates*. (21 June, 1950): 3938; Cited in Leslie, 1993 at p.16.

> "self-serving" Indian politicians. In the future this formal consultation process involving Indian rights was to be discouraged. Thus in October 1953, when Branch officials started another round of consultations concerning *Indian Act* implementation, hand-picked Indian leaders were invited to Ottawa to discuss ways to improve Indian administration.... This controlled discourse was repeated again at Ottawa in December 1955....
>
> In 1955-56 a series of regional Indian conferences was held across Canada. At these sessions, the Minister or Deputy Minister was present. Official agenda items were set in advance, and questions relating to treaty matters, land claims, or special rights were avoided or carefully deflected. The focus of discussion at these regional Indian conferences was the Branch's administration of the *Indian Act* and the improvement of social services to on-reserve Indians.[24]

This approach to "consultation" continues today: Indian priorities are dismissed or set aside, and Departmental resources are focused on policy initiatives which the Department deems to be appropriate.

3.3. Amendments, 1960-61.

A number of other piecemeal amendments took place after 1951. Two of the most significant were the repeal in March 1960 of s.86(2), which had required Indians to sign a taxation waiver before being allowed to vote in federal elections, and the repeal of s.112, which required the compulsory enfranchisement of "qualified Indians", in March 1961.

4. THE MODERN ERA.

4.1. The White Paper, 1969.

By the mid-1960's, the federal government had once again decided that it was time to revisit the *Indian Act* and Indian policy generally. It announced that it wanted to develop a new approach to Indian matters cooperatively. Between July 1968 and the spring of 1969, a series of formal "consultations" were held with the Indian leadership and other parties. These were wrapped up with a formal meeting in Ottawa in May 1969:

> Statements made by Ministers Chretien and Andras to Indian delegates during the consultation meetings raised Indian expectations about the nature of the new policy, including the amount of influence Indians should and could have in the policy-making process itself. The extensive consultations.... led Indian leaders to believe that their concerns and views would be taken into account by senior officials in policy and legislative formulation.[25]

[24]Leslie, 1993: pp.18-19.

[25]Leslie, 1993: p.47.

However, what was announced as a result of the "consultations" was something else altogether:

> ... during the formal *Indian Act* consultations from July 1968 to May 1969, Indian policy formulation developed in two different political fora. One forum, the public consultation process, involved Indian leaders and senior departmental staff in cross-country discussions on *Indian Act* revision. The second forum was hidden from view, unseen by the public and most senior departmental advisors, in which Ministers, PMO and PCO officials, and the Deputy Minister of Indian Affairs, John MacDonald, developed an Indian policy which proposed termination of the Indian Affairs Department, repeal of the *Indian Act*, and an end to separate legal status.... The government policy paper bore no resemblance to the issues, problems and solutions raised during the previous year of consultation.[26]

The White Paper sparked a legitimate and furious reaction from the Indian nations. Indian political associations from Alberta (*Citizens Plus* (the Red Paper)), Manitoba (*Wahbung: Our Tomorrows*), and B.C. prepared and tabled extensive policy papers of their own to counter an arbitrary effort to finally extinguish Aboriginal & treaty rights forever.

The Manitoba Indian Brotherhood emphasized that "Protection Should Not Be Equated With Paternalism", and stated that "Our people need and want legislation that will protect and guarantee our treaty and aboriginal rights." It called for amendments which would provide more freedom to First Nations in matters of internal governance, while at the same time spelling out Canada's duties and responsibilities in protecting Aboriginal & treaty rights.[27]

The Chiefs of Alberta rejected the repeal of the *Indian Act*, but proposed their own alternative:

> It is neither possible nor desirable to eliminate the Indian Act.
>
> It is essential to review it, but not before the question of the treaties is settled. Some sections can be altered, amended, or deleted readily. Other sections need more careful study, because the Indian Act provided for Indian people, the legal framework that is provided in many federal and provincial statutes for other Canadians. Thus the Indian Act is very complicated and cannot simply be burned.[28]

Although Prime Minister Pierre Elliot Trudeau and his Minister of Indian Affairs Jean Chretien formally withdrew the White Paper in July 1970, suspicion remained that it continued to form the basis of long term federal Indian policy.

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[26]Leslie, 1993: pp.54-55. See also Sally Weaver, *Making Canadian Indian Policy. The Hidden Agenda, 1968-70* (Toronto: University of Toronto Press, 1981).

[27]*Wahbung: Our Tomorrows* (Manitoba Indian Brotherhood, 1971): pp. 25-33.

[28]*Citizens Plus* (Indian Chiefs of Alberta, June 1970): p.12.

4.2. The *Indian Act* Revision Process, 1970's.

In the mid-1970's, Canada attempted once again to obtain amendments to the *Indian Act*, and engaged First Nations in the Revision process. Indian Affairs proposed that Bands negotiate "charters" with Canada to provide for delegated authority and ultimately replace the *Indian Act*. This approach was rejected by the First Nations. In 1979 the Union of Nova Scotia Indians provided its analysis of the process to then Minister of Indian Affairs Jake Epp:

> "Consultations" on Indian Act revision, continuing over the past decade, have not challenged the basic structure of the Act, or its assumption that BANDS ENJOY ONLY THOSE POWERS GRANTED TO THEM AS A PRIVILEGE BY PARLIAMENT. Under the Indian Act, bands are "allowed" to act like governments when, and to the extent that it pleases the Minister.... To end what it freely admits is "paternalism", the government proposes to amend the Indian Act so that bands may "negotiate" charters of self-government with the Minister.... The only difference would be this: today, under the Indian Act, the Minister exercises these powers without band consent, but under the proposed charter system, bands would be forced to give their consent to Ministerial paternalism as the price of symbolic self-determination.[29]

For the next few years, the attention of First Nations and other governments became focused on the patriation of the Canadian Constitution, and amendments to the *Indian Act* faded from view temporarily. The constitutional process led to the inclusion of s.35 in the *Constitution Act, 1982,* which recognized and affirmed "existing" treaty & Aboriginal rights.

4.3. *Guerin vs. The Queen*, 1984.

Even though the *Indian Act* asserted vast power over Indian people and their assets, Canada had long argued that it had no legal duty to be accountable for its actions pursuant to this authority. In November 1984, the Supreme Court of Canada found otherwise, and ruled that the federal Crown owed a legally enforceable fiduciary duty to First Nations, with particular reference to reserve lands.[30]

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[29] *Proposal of the Union of Nova Scotia Indians for the Revision of the Indian Act*, 2 August, 1979 [1979] 3 C.N.L.R.

[30] *Guerin vs. The Queen* SCC, 1 November 1984.

Indian Affairs officials were in shock and immediately set about to assess the damage and the implications. Federal lawyer Ian Binnie was quoted as saying "It is bad news for the Crown. The only question is, how bad?" He also noted that, "The discretion of the Crown under the Indian Act is narrowed in that actions must in fact be in the Indian interest. ... Serious reconsideration may have to be given to the devolution policy.... the Guerin case has serious budgetary consequences for DIAND and the federal government."[31]

Three days after the judgement was rendered, the Minister of Indian Affairs sent the Deputy Minister a series of 64 questions related to the Department's duties, policies, and liabilities in light of *Guerin*. Many of the questions dealt directly with the *Indian Act*, the Minister's discretionary powers, and the issue of Indian consent. All them pointed to a policy crisis based on the liabilities arising from the Supreme Court's decision.[32]

Ultimately, government reaction to *Guerin* took a number of forms. Canada now found itself with many more legally enforceable responsibilities than it had originally thought. In the minds of Justice lawyers and federal officials, this translated into significant current liabilities, and many more potential ones. Major changes in approach were required. However, instead of accepting the implications of the fiduciary duty and complying with its requirements, Canada's reaction was to seek ways of limiting and eliminating those responsibilities.

This included first and foremost, avoidance: refusing to discuss the scope, exercise or fulfilment of its fiduciary duties with the beneficiaries, the First Nations. Considering the magnitude of the *Guerin* decision, it is noteworthy that at no time in the past 12 years has Canada engaged in any serious discussion with the First Nations on defining or implementing its fiduciary duties.

Secondly, the federal response involved a detailed assessment of potential liabilities and possible escape routes to relieve the Crown of its duties (and liabilities). A DIAND briefing note prepared in light of the decision stated that: "The Guerin decision has raised the existence of a fiduciary obligation that will necessitate that the Department take steps to reduce its exposure to liability for the following functions: ... Land and Resource Management.... Trust Fund Management... Decentralization of Authority to Bands".[33]

Most federal efforts to amend the *Indian Act* and promote devolution since 1984 can be traced wholly or in part to the *Guerin* decision. As stated, these efforts have had little if anything to do with fulfilment of the Crown's duties - they have been focused instead on obtaining Indian consent for the reduction and/or the elimination of those duties.

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[31]"Briefing Memorandum on Musqueam case", DIAND, Minister's office, n.d.

[32]Memorandum Re: Exploratory Actions Needed as a Result of the Guerin Case: Minister, DIAND, to Deputy, 5 November 1984.

[33]Memo from F. Singleton, DIAND, 14 November 1984.

4.4. Bill C-31, 1985.

In 1985, Parliament passed a series of amendments to the *Act* known as Bill C-31. The stated objectives of the Bill were to remove the sections of the *Act* which discriminated against women (particularly s.12(1)(b)); to restore status and membership rights; and to provide Bands with more control over their membership. Canada was forced to make these amendments to comply with the *Charter of Rights and Freedoms*[34] and with international law.

First Nations expressed serious concerns about the impact of Bill C-31 as it was proposed, and some actively challenged it in the courts. At the time, then Minister of Indian Affairs David Crombie publicly gave the assurance that "no Band would be worse off" as a result of the amendment. The result was not as he predicted.

By 1990, around 80,000 Indians had obtained (or regained) status as a result of C-31, adding 25% to the Registered Indian population. This exceeded DIAND's projections by almost 50%. Needless to say, the unexpected numbers wreaked havoc with DIAND's implementation plan and its budgets. In 1985, the Department had estimated that the total costs for C-31 implementation would be $300 million (including Medical Services Branch (MSB)). By 1989, this figure had been revised upwards to $2 billion, **not including MSB**.[35] These extra costs could not have come at a worse time: the federal government was in the midst of a major programme of cost cutting and down-sizing. All of this was to fix a problem that government policy and legislation had created, and yet Canada has shrugged off its obligations to provide an equitable remedy.

In 1991, C-31 returnees' on-reserve housing needs alone were in the neighbourhood 13,000 units - over and above the huge backlog of houses needed for existing Band members. That same year, the Auditor General came to the following conclusions about DIAND's handling of C-31 with respect to housing:

> Despite the government's assertion that no band would suffer as a result of Bill C-31, DIAND did not, at the time of our audit, have a financial plan to identify how and when the existing and future housing shortfall would be met. Furthermore, although DIAND was aware that some reserves could not physically accommodate the requirements for more housing, it did not put forward any possible solutions to the problem.[36]

The recent "new" housing policy announced by Minister Irwin in July indicates that the federal government has given up on trying meet the C-31 shortfall, let alone the overall shortfall that continues to grow independent of C-31 impacts. And housing is only one area in which C-31

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[34] *Constitutional Amendment Act, 1983* s.35(4).

[35] *Report of the Auditor General* (Canada, Ottawa, 3 December 1991): pp.334-335.

[36] Ibid.

impacts have been felt. Other major cost centres affected by C-31 include medical services, education, and on-reserve infrastructure. Add to this the social, human and political costs of C-31, which can't be translated into "program dollars".

Needless to say, DIAND's handling of Bill C-31 represents a fiduciary breach of incredible proportions. It's projections on the impacts were grossly understated, and budget cuts have made it impossible to cover the real costs of implementation at the community level.

If there is anything to be learned from the C-31 amendment experience, it is that there is no way of knowing ahead of time what the actual result of amending the *Indian Act* will be. At the same time, it is clear that DIAND's assurances of "minimal impact" cannot be taken as gospel truth. The Department failed terribly at predicting C-31 impacts, and in most cases has left First Nations to cope with the massive changes that it has brought about without adequate support.

4.5. The Auditor General's Report, 1986.

In October 1986, Auditor General Ken Dye released his annual report, which included detailed coverage of the Department of Indian Affairs. His report focused on some of the areas in which, according to *Guerin*, Canada owed a fiduciary duty to the Indian people - Reserves and Trusts - including Land Management, Estates, Indian Monies, and Trust Accounts for Minors.[37] The objective was to determine "the Department's compliance with its legal mandate" in light of *Guerin*.

Some of the conclusions reached by the Auditor General are summarized below:

> Lands Management. DIAND is required to maintain an inventory of Indian lands and natural resources by Band, but no complete inventory has been kept, and no resources set aside to do it. DIAND lacks adequate access to legal advice; lacks trained staff compared to the standards prevailing in the private sector; supervision of staff carrying out fiduciary duties is inadequate.
>
> Estates. DIAND's system & procedures for handling estates "do not meet the standard exacted in the private sector"; personnel are inadequately trained; excessive delays in processing estates. Department was aware of these deficiencies, "but there is no evidence that the Department has taken steps to remedy them". In fact, the Department's response was that "with the planned reduction in the size of the Department, it will become even more difficult to provide effective administration of Indian estates".
>
> Indian Monies. Identified potential liabilities in transferring authority over monies to Bands without supervision: "DIAND should seek clarification of the nature and extent of

[37] *Report of the Auditor General of Canada to the House of Commons*, 31 March 1986.

its responsibility following the transfer to Indian bands of the authority to manage their own revenue accounts".

The Auditor General's report highlighted the fact that although the Department was now legally liable for its handling of these key functions, it was not meeting the basic standards accepted in the private sector. His report also showed how onerous fulfilment of the fiduciary duty would be in practise, and how costly - even for the most mundane of tasks. However, from DIAND's responses it appeared that there were no plans to obtain the resources needed to fulfil these duties properly.

4.6. The Lands, Revenues & Trusts Review, 1987-90.

The Lands, Revenues & Trusts review initiated by DIAND in 1987 was a response to the three events identified in the preceding sections: *Guerin*, Bill C-31 impacts, and the Auditor General's Report. It was also a response to the new theme of fiscal restraint and budget cutbacks which resulted from the *Nielsen Task Force on Program Review* of 1984-85.[38] In order to meet downsizing targets (and reduce liabilities), one of the conclusions reached by the *Nielsen Task Force* was that "**native problems be devolved to native communities from the federal government**".[39] [emphasis added] Together, these events put significant pressure on DIAND to revisit existing legislative and policy arrangements.

One of DIAND's responses was to ask Treasury Board to carry out a comprehensive review of the Lands, Reserves & Trusts sector of DIAND. The review began in February 1987, carried out by the Office of the Comptroller General and private sector consultants. There were three stated goals of the review:

* "to propose changes to the *Indian Act* and related regulations that will recognize Indian authority to exercise greater control of their own affairs, at their own pace"

* "to develop new policies and mechanisms that respond to the legislative changes and facilitate the attainment of local community objectives."

* "to adequately resource and staff the Lands, Revenues and Trusts Sector of DIAND to administer existing and revised legislation."

They produced a Phase I report which reflected Canada's view of what legislative and policy changes were required.[40] Nine areas were identified for more detailed study:

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[38]See paper on Fiscal Relations in Kit.

[39]*Report of the Ministerial Task Force on Native Programs* Memorandum to Cabinet from Deputy Prime Minister Eric Nielsen, 12 April 1985: p.19.

[40]*Lands, Revenues and Trusts Review* Phase I Report (DIAND, Ottawa, 1988).

-Indian Lands Registry
-Land management[41]
-Indian moneys

[41]In 1988, Bill C-115 was passed (the "Kamloops amendment"), which recognized conditionally surrendered land as reserve land, and enabled Bands to tax and regulate non-Indian interests on such lands.

-Individual accounts[42]
-By-laws
-Elections
-Estates
-Membership
-Legal liaison & support[43]

In the interim, the mandate of the Office of the Comptroller General was changed, and a decision was made to allow DIAND to review itself. Questions relating to the conflict of interest that this posed were either not asked, or ignored. As a result, during the winter of 1987-88, DIAND took over the Review and began what they described as "the most comprehensive examination of the *Indian Act* ever undertaken". A series of regional, local and national 'consultations' took place and a number of detailed studies were carried out by the Department and outside consultants, resulting in the Phase II report, which was released in 1990.[44] The Phase II report described the results of the studies and consultations, and laid out options for change under each of the study areas. Generally speaking, the options came under four headings:

* changes through policy and administrative measures;
* amendments to the *Indian Act*;
* stand alone sectoral legislation; and
* self government negotiations leading to self government agreements.

It should be noted that this last option - self government negotiations - was deemed to be outside the scope of the LRT Review. At the same time, a number of other critical issues appear to have been absent from any consideration during the course of LRT - for instance, the nature and scope of the Crown's fiduciary duties, or the nature and scope of Aboriginal & treaty rights. The absence of these factors in the LRT Review and analysis, and in the development of options, ensured that the Review could not address the issues within the full context of Crown-Indian relations and fiduciary duties.

4.7. Chiefs Governance Working Group/*Indian Act* Alternatives, 1990-93.

Between 1990 and 1991 a series of events changed the LRT Review's path. Although a number of individual First Nations and organizations were pursuing legislative change through amendments to the *Indian Act* or sectoral legislation, there was no national consensus on how to proceed. The Assembly of First Nations, at the direction of the Chiefs, was taking only an

[42]In August 1988, Bill C-123 was passed, which amended the *Indian Act* to provide the Minister with general authority to make payments from minors' trust fund accounts to parents or guardians.

[43]This area of study between DIAND and Justice was considered bound by solicitor-client privilege and was not subject to public disclosure.

[44]*Lands, Revenues & Trusts Review* Phase II (DIAND, Ottawa, 1990).

'observer' role in the proceedings, and not participating directly in the process.

Some DIAND officials took the view that Department-driven initiatives (like the LRT Review) were bound to fail because they did not originate within the First Nations. They also noted the difficulties inherent in obtaining national consensus on an issue as complex as the *Indian Act*.

Their view - accepted by then Minister Tom Siddon - was that incremental success was more likely to occur through sectoral legislation by working with those First Nations who desired specific changes to the status quo based on their particular circumstances.

At the same time, the events of the summer of 1990 and Prime Minister Mulroney's announcement of a "new approach" to First Nation relations (the "Four Pillars" policy of September 1990) meant that old initiatives and policies would have to be re-packaged and re-configured so that it would appear that they really were "different".

Finally, DIAND was still facing the same pressures that triggered the LRT Review in the first place: fiscal restraint, the perceived need to discharge fiduciary responsibilities, and the continuing growing costs of C-31 impacts.

As a result of all of these factors, Phase III of the LRT Review - implementation - was transformed into a series of sectoral legislative initiatives, led by a number of First Nation leaders, with technical and financial support from DIAND. This was announced in January-February 1991 and renamed the *Indian Act Alternatives* process (aka Chiefs Governance Working Group). On DIAND's side it was led by Don Goodwin, in his role as Special Advisor to Deputy Minister Harry Swain[45] . On the First Nation side, Neil Sterritt acted as Chairman of the Working Group itself.

In a July 1991 briefing to the media, Minister Siddon described their objective: "to fundamentally change the legislative relationship between governments and First Nations". He stressed that the result would be sectoral legislation, with First Nations having the choice of "opting-in" or staying with the *Indian Act*. He also stressed that the initiative was being driven by the First Nations themselves, and not DIAND: "You have heard the Chiefs tell <u>us</u> what needs to be done, rather than the other way around. That's a sign that things really are changing in our relationship with First Nations, and that they are changing for the better".[46]

Materials circulated by the Chiefs Governance Working Group discussed the pros and cons of the legislative approach and provided a rationale for their effort:

[45] *Assembly of First Nations Bulletin: Indian Act Alternatives Special Edition* (Vol.8#1, April 1991).

[46] Speaking Notes for DIAND Minister Tom Siddon, Ottawa, 10 July 1991.

> The Chiefs [Governance Working Group] are fully aware of the potential risks of legislative reform with implications for the inherent rights of First Nations, aboriginal and treaty rights, and the constitutional objectives of the First Nations. However, the Chiefs are also mindful that to ignore the process of exploring the alternatives to the current *Indian Act* raises the risk that the federal government will unilaterally proceed with legislative change without the involvement of Chiefs.[47]

Perhaps not surprisingly, the *Alternatives* process contained many of the same elements as the LRT Review, under somewhat different headings and with some additions:

* Governance (elections, membership, accountability, legal capacity, law-making, administration, enforceability, community constitutions)

* Lands (land management, taxation, lands registry)

* Indian Monies

* Forestry (ie., resource management)

It advocated what was termed the "bottom-up approach" in reconciling *Indian Act* alternatives with full self government and ultimately constitutional amendment.

As a first step, it proposed "interim" sectoral legislation with opt-in provisions in certain areas (as described above). The second step would be the development of community constitutions covering a range of governance activities. The "interim" legislation would be "consolidated in the near future as ready-made legislation to be adopted by our Indian governments and continued by us as we create our own community constitutions." The third and final step would be to negotiate a constitutional amendment with Canada and the provinces "explicitly recognizing the aboriginal right of self government as exemplified in various community constitutions".[48] This understanding appeared to differ from DIAND's which emphasized that the *Alternatives* process would be limited to examining the *Act* and alternatives to it, not broader issues of self government, fiscal relations or constitutional reform.[49]

Even though it mimicked the subject matter of the LRT Review, the *Alternatives* process was publicly characterized as being different because DIAND had agreed to take direction from the First Nations on any changes to existing legislative arrangements. It was cast as a new chapter in First Nation-Crown relations. Indeed, the participation of a number of First Nations in the

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[47] *Briefing note on Governance* (Chiefs Governance Working Group, July 1991).

[48] *Approach to First Nations Government: Governance* (Chiefs Governance Working Group, February 1991).

[49] *Assembly of First Nations Bulletin* April 1991.

Alternatives process only came about as the result of Minister Tom Siddon's personal commitment in this regard.

At the same time, however, there were concerns among members of the Chiefs Working Group and others that the Department intended to use the initiative as a cover for its own legislative agenda. Working Group Chairman Neil Sterritt wrote to Siddon in April 1991 expressing concern over indications that DIAND was hijacking the process. He stated that the unless the *Alternatives* project was truly Indian-driven, it would no longer have the support of those First Nations who were involved.[50] This issue remained a concern,[51] and the Working Group developed "Principles Guiding the Development of Alternatives to the Indian Act" which reiterated their requirement that the process be Indian-driven (see Attachment #1). There is no indication that these principles reflected First Nation-Canada consensus; rather, they appear to have been a statement of the Working Group members' principles.

Nevertheless, work proceeded. In June 1993, DIAND released an "information sheet" explaining the origins of the *Alternatives* process and the approach which was being taken (see attachment #2):

> Change is essential, but it cannot be imposed unilaterally. Rather, it must be achieved through collaboration between the more than 600 First Nations across Canada and the federal government, and at a pace that is acceptable to individual First Nations.... In 1990, a number of First Nations leaders approached the Minister... with proposals to address some of the more difficult aspects of the *Indian Act* through independent Chiefs' Working Groups. The Minister agreed to support their work by providing financial and technical resources.... Indian leadership set out some principles to guide their work. First nations would have the opportunity to "opt-out" of certain sections of the *Indian Act* in favour of assuming greater control over specific matters through alternative legislation. In recognition of the diversity of sentiment about the *Indian Act*, the process was to be completely optional; **no First Nation would be compelled to participate in the new legislative regimes**.[52] [emphasis theirs]

The same document outlined the areas in which legislation was being drafted jointly by Working Group members and Canada:

* Lands - a *First Nations Chartered Lands Act;*

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[50]Neil Sterritt, Chairman, Chiefs Governance Working Group, to Minister Tom Siddon, 15 April 1991.

[51]*Chairmen Discussion Paper: Need for a Communications Strategy* (Chiefs Governance Working Group, 24 April 1991).

[52]DIAND Information Sheet: *Indian Act Alternatives* (DIAND June 1993). Note: this information sheet is still posted on DIAND's www site as of this writing.

* Forestry - pass and enforce laws over timber extraction on reserve and "enter into joint forest management arrangements with provincial governments and private industry";

* Monies - transfer of monies held in trust in the Consolidated Revenue Fund for Bands & individuals to be transferred to Bands or Band trusts upon Ministerial approval.

Although the initiative was still alive, there had been some casualties: governance and its subheadings were no longer mentioned in DIAND's fact sheet, and no explanation was provided.

The same fact sheet emphasized that incremental amendments to the *Act* were no substitute for "constitutional amendment recognizing the right of First Nations to self-government within Canada". Consistent with the principles that had been established by the Chiefs Governance Working Group, it provided the assurance that "the process will not alter the federal Crown's special relationship with Indian people and will not abrogate or derogate from existing Aboriginal, treaty or constitutional rights". However, just as with the Working Group's principles, no definition was provided for these critical and important concepts, making it difficult to judge whether or not they in fact altered the Crown's duties or impacted on Aboriginal & treaty rights.

The government statement closed by renouncing unilateral action and committing to "a collaborative approach", recognizing that "change must be driven by First Nations and endorsed by non-Aboriginal governments on behalf of all Canadians".

4.8. Liberal Election/Repackaging of the *Alternatives* Process, 1993.

In the fall of 1993, the Liberals were elected to government in Ottawa under the leadership of Jean Chretien, the author of the White Paper. Now, however, he was supposed to be bound by a new set of policy principles, embodied in the *Red Book* and the Aboriginal electoral platform. These called for the recognition and advancement of First Nation rights, not their dismemberment.

As with all incoming governments, policy and practises were assessed, and decisions made about changing course. It fell to the bureaucrats to reconcile these stated policy principles with ongoing government policy and practise. As for the *Alternatives* process, it was acknowledged that most First Nations were either not interested, or outright hostile to the notion of sectoral legislative change, even after two years of federal support and even though individual First Nations had been actively promoting this route.

At some point, DIAND made a decision to end what was left of the *Alternatives* process. Between 1994 and 1995, the Department opted to return to the concept of across the board amendments to the *Indian Act* itself.

4.9. Indian Lands Management Framework, 1996.

However, this abandonment of the *Alternatives* process was not accepted by a number of First Nations who had been committed to it, particularly in the area of lands management. They put pressure on the Minister and his staff to revive the proposed *Chartered Lands Act* in some form or another. As a result, by the fall of 1994 there was a *Land Management Proposal for Specific First Nations* in circulation. While similar to the *Chartered Lands Act* in many respects, the big difference was that it discarded the call for omnibus legislation which allowed any First Nation to "opt-in".

Instead, tailor made legislation applying only to a select group of First Nations was proposed. Eventually, DIAND agreed, and on February 12, 1996, a *Framework Agreement on First Nation Land Management* was signed by Minister Irwin and representatives from thirteen First Nations. Generally speaking, the signatory First Nations are those with significant development opportunities on-reserve, based on geographic location or natural resources. As well, most if not all of them have been involved in exercising enhanced land management powers under sections 53 and 60 of the current *Indian Act*, and were involved in the *Chartered Lands Act* initiative.

With the signing of the Framework, each signatory First Nation was to begin development and ratification of its own land code. This would then form the basis of individual agreements between each First Nation and Canada. Once two such agreements have been signed, Canada is committed to introduce legislation in Parliament. The remainder of those who signed the Framework would come in under the provisions of the legislation once they have ratified their land codes and concluded individual agreements with Canada. Apparently there is no provision for non-signatories to be eligible for coming under the proposed legislation. After a four year period, a review is to take place, at which time Canada will determine whether to allow other First Nations to "opt-in".

In announcing the signing of the Framework Agreement, Minister Irwin made an oblique reference to the possibility of reviving other sectoral initiatives as circumstances warrant:

> The federal government is committed to working in partnership with First Nations and, where appropriate, with provincial governments to find innovative solutions to problems confronting Aboriginal communities.... The Framework Agreement on First Nation Land Management is the result of our sectoral approach to negotiations with Aboriginal leaders -- an approach which may be used as a model in the future with other areas of self-government.[53]

With the election of Jean Chretien's Liberals in 1993, a new approach was developed. The new approach involved pilot projects covering a range of sectoral issues; continued devolution of

[53]DIAND News Release: "Chiefs Land Management Proposal - Interim Lands Board" (February 12 1996).

programs & services and increased budget cuts. It also involved a return to across-the-board amendments to the *Indian Act*. As before, the stated commitment to increasing First Nations powers and removing the Minister of Indian Affairs from the day to day business of governance has been used as a disguise to hide Canada's core motivations, but the basic motivations of the federal government remained the same: dismantling of its fiduciary obligations and off-loading of costs and responsibilities, to advance the ultimate objective of Indian governments' assimilation into the Canadian mainstream.

5. ANALYSIS.

The *Indian Act* has been, and continues to be, an unjustified infringement on the Aboriginal & treaty rights of the First Nations. They have never consented to its application.

Amendments to the *Indian Act* have never seriously considered the wider issues:

* relationship between the *Indian Act* and treaty & aboriginal rights

* relationship between s.91(24) authority and the Crown's trust, fiduciary and treaty obligations

* relationship between the *Indian Act*, s.91(24) authority, and the inherent right of self-government

This remains the case today.

Upon finding that it owed a legally enforceable fiduciary responsibility to the First Nations, Canada's response has been to limit its liabilities and discharge its obligations. Almost every actual or proposed amendment to the *Indian Act* since 1984 can be traced back to this central motivation on the part of Canada. This is despite the fact that the Special Committee on Indian Self-Government in its 1983 report (the Penner Report[54]) had recommended against tinkering with the *Indian Act* (note: this was an all-party committee reporting to a Liberal government).

Canada has never undertaken broad-based discussion with the First Nations to reach agreement on the nature and scope of its fiduciary responsibilities. Instead, it has chosen to try and get rid of those duties before they are defined more clearly.

In its efforts to amend the *Act* since 1984, Canada has stressed its commitment to empowering First Nations and getting rid of an "offensive" and "paternalistic" piece of legislation. It has also stressed its commitment to "cooperative approaches" in "partnership" with the First Nations.

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[54] *Indian Self Government in Canada: Report of the Special Committee* (Canada, House of Commons, 1983).

However, Canada has consistently chosen not to provide full disclosure of the material facts relating to its motivation for amending the *Act*. Some of these motives include:

* shedding fiduciary and trust responsibilities

* fiscal restraint and cutting the costs of Indian expenditures
* reducing the burden of C-31 implementation

* encouraging integration into the provincial mainstream

* the imposition of taxation

* diluting or neutralizing constitutional and treaty protections and obligations.

Many First Nations are legitimately seeking changes to the restrictive legislative relationship that now exists with Canada. However, the evidence suggests that Canada has in some cases used these sentiments to advance its agenda and objectives, picking and choosing what it wants to move on, without giving due weight to the full spectrum of First Nation views and priorities.

Canada has not proved to be competent at projecting the impact of *Indian Act* amendments (ie., Bill C-31).

Amendments to the *Indian Act* are rarely, if ever, unconnected to wider federal policy objectives and fiscal imperatives.

Attachments

1. *Principles Guiding the Development of Alternatives to the Indian Act* (Chiefs Governance Working Group: Revised 7 July 1991).

2. *Information Sheet: Indian Act Alternatives* (DIAND, June 1993).