Native Policy Since 1945

NATIVE POLICY SINCE 1945

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Introduction

In 1943, the Native Brotherhood of British Columbia sent Andrew Paull (Squamish leader and a founder of the Allied Tribes of British Columbia) and Dan Assu (a Kwakiutl from the coast) to Ottawa to protest against taxes that were being levied on aboriginal fishers in BC. Within a few months, their mission had prompted ever-expanding circles of interest, drawing in aboriginal leaders from across the country determined to unite to force the government to address their many grievances. Their actions marked the beginning of the first significant change in Canadian Native policy since confederation.

As the Second World War (1939-1945) was drawing to a close, Canadians everywhere were discussing what they wanted their post-war world to look like. The foundations of the old order had been profoundly shaken by years of economic depression in the 1930s and then the cataclysm of a second devastating global war. People wanted a return to stability and normalcy, but clearly not a return to the conditions that had permitted the recent conflagration. Throughout the offices and corridors of Parliament Hill, politicians and civil servants discussed changes to foreign and domestic policies and changes to the administrative arrangements that implemented those policies. Native leaders had been petitioning for change for generations, but this time their calls found fertile ground. In the spring of 1944, the House of Commons Committee on Reconstruction and Re-establishment proposed that a royal commission or special parliamentary enquiry be arranged to look into Indian affairs. At the same time,

aboriginal leaders from across the country were meeting in Ottawa to discuss their strategy. And in December 1945, they agreed to form the North American Indian Brotherhood to pursue the protection of hunting, fishing, and treaty rights, economic development programs, and a variety of social and cultural goals. The stage was set.

Background

Aboriginal people across Canada faced many problems in the mid-1940s. Legislation called *The Indian Act*, originally passed in 1876, governed every aspect of the lives of people whom the government recognized as "Indian," and was central to a longstanding policy to assimilate aboriginal peoples into the general population. Treaties had been signed with Native people in some parts of the country but problems with such things as reserve allocation and interpretation of the content of the treaties had arisen, while questions of whether provincial legislation could supersede treaty promises had become a major concern. In other parts of the country, no treaties had been signed, and the First Nations continued to demand that their ownership of the land be recognized before development went ahead. People who considered themselves to be aboriginal but whom the government did not recognize as "Indian" had not been eligible for aboriginal assistance and support programs and so had often suffered terribly in the Great Depression of the 1930s. Poverty was endemic on reserves from coast to coast.

Other issues that had been raised for generations also remained unresolved. Education continued to be a major problem. Successive Canadian governments had attempted to use the education of Indian children as a cornerstone in the assimilationist policy, while successive generations of First Nations parents had hoped that education would provide a bridge for their children between the two worlds. The government

supervised a network of "day schools" on some reserves and "residential schools" off-reserve where children were kept away from the influence of their families. The schools were staffed and managed by Canada's largest churches, which used them as part of their mission outreach to Christianize Native peoples. There had been problems with these schools from the beginning. Allegations of physical and sexual abuse had surfaced, while under-funding meant that the children were often poorly fed, badly housed and the frequent victims of disease. There was also a basic philosophical conflict between Canadian childrearing practices and those of the First Nations, who preferred to allow children much more freedom to learn by experimentation rather than the rigid discipline and control favoured by the teachers and school administrators. The few Native children who wished to go on for higher education found themselves seriously unprepared and their families complained about the poor quality of education that was available to them.

Since 1936, the Indian Affairs Branch of the Department of Mines and Resources had administered government programs and policies. No-one was happy with the branch. Administrative records were in a state of confusion, financial accounting was incomprehensible, and the legislation and regulatory system had grown so complex that few could pretend to truly understand it. Under-funded and poorly staffed, the branch was clearly in no position to lead the way into a brave new post-war world.

Inuit affairs had been handled in a very different way. In 1928, the Northwest Territories and Yukon Branch was given responsibility for the Inuit, and officials there had argued that Indian policy was a failure and so should not be applied in the Arctic. The Inuit in northern Quebec were essentially ignored until the Supreme Court ruled in 1939 that they were also a federal responsibility. Rather than attempt to assimilate the Inuit, the

Canadian government resolved to encourage them to pursue their independent economy as long as possible.

Federal Policy Review

That situation applied on the 13th of May 1946, when Cabinet agreed to establish a Special Joint Committee of the Senate and House of Commons to investigate and report on such matters as amendments to the Indian Act, treaty rights and obligations, voting rights, education, and "any other matter or thing pertaining to the social and economic status of Indians and their advancement...."[2] Before the committee issued its final report in June 1948, it heard 122 witnesses and received 400 briefs. Not surprisingly, civil servants, the major churches, and other non-Natives submitted briefs, but, for the first time, representatives from Native groups participated in the hearings. For many on the committee, the experience was highly revealing as they heard directly from Native people themselves and for the first time became aware of a variety of Native perspectives on the issues. Among the Native submissions were requests that their treaties be honoured and hunting, fishing and trapping rights be recognized. They sought the resolution of land disputes in British Columbia and at Oka, Quebec, and petitioned for recognition of the Iroquois Confederacy as a sovereign nation. They demanded immediate improvement in reserve conditions and measures to promote economic development. They asked for the transfer of control over school curricula and teacher selection to Native peoples, and they requested improvements in medical services, particularly on remote reserves. They wanted Canadian pension plans for the elderly extended to include Native peoples, and they asked for the transfer of greater power to band councils and reserve administrations, including greater control over band membership.

The Special Joint Committee issued both a formal report and a suggested draft for a revised Indian Act. Neither was really a radical departure from previous policy. The committee members continued to believe that "Indians" needed to be guided into full citizenship through the old system of protection and assimilation. However, they concluded that the old legislation and policies had become confused (and confusing), contradictory, and confrontational. They proposed a revision to the Indian Act to remove the anomalies and clarify the regulations. They called for a claims commission to investigate treaty violations and land issues, and they suggested the creation of a select standing committee of parliament and Indian advisory boards to monitor developments and deal with other issues that might arise. Finally, they recommended that the Indian Affairs Branch be reorganized to streamline administration and to raise its profile within the government bureaucracy.

The government responded first to the proposals for administrative change. In January 1950, the Indian Affairs Branch was transferred to the new Department of Citizenship and Immigration. The first minister of that department, Walter Harris, was thus responsible for dealing with changes to the Indian Act. On the 7th of June, he presented Bill 267 to the House of Commons. But just three weeks later, he withdrew the bill in response to widespread criticism of it in the media and among Native organizations. The problem, they argued, was that the new Indian Act looked very much like the old. The government (through the minister of the department) would continue to control band affairs, including membership and finances. Indians who wanted to vote would still have to give up their special status and any rights that inhered in that status.

And many feared that proposed changes to band lists would remove Indian status from some people.

Seven months later in February 1951, the government tabled a re-drafted version of the bill (now called Bill 79) in the House of Commons. Over the next few days in Ottawa, a special meeting of Native leaders and government representatives discussed the contents of the bill, and this time the government was able to shepherd the changes successfully through parliament. On 4 September 1951, the new Indian Act became law.

Although the new act introduced some changes to a variety of contentious provisions in the old act, its fundamental principles remained intact. The ban on dances and ceremonies such as the potlatch was removed, and band consent was now required for some actions of the minister responsible for Indian affairs. The ban on raising funds to pursue claims was removed. The act provided a new definition of "Indian." However, in the end, the minister still had considerable power over Native people's lives, status Indians could not vote in federal elections, and the underlying premise of assimilation was still in place, although officials now preferred the word "integration" to describe the goal. While the act specified that it did not apply to "Eskimos," it provided no clarification of federal policy for the Inuit.

Social Policy Review

Meanwhile, Canadian social policy was also being debated, and the state was taking on a larger and larger role in the provision of social welfare measures to all Canadians. The emphasis of Indian policy began to shift from land and treaty administration to a focus on the socio-economic problems of aboriginal people. The provision of new social services to aboriginal people posed something of an

administrative dilemma, since the federal government was responsible for "Indians" under the terms of *The British North America Act* (now called *The Constitution Act, 1867*) but the provincial governments were responsible for education, health, and other social services. Officials in the Indian Affairs Branch decided to pursue partnerships and co-operative agreements with the provincial governments and the Department of National Health and Welfare so that policies could be developed and services provided. One of the major initiatives of the period was an attempt to integrate Native children into the provincial school system where possible. Government officials saw the program as a means to facilitate assimilation, while many Native people hoped it would be an improvement over the old, church-run residential school system. Certainly there was also an economic motivation, as First Nations' birth-rates were rising with the prospect of ever-increasing costs for the old system.

Another Inquiry

In June 1957, the Liberals under Louis St. Laurent were defeated at the polls, and the Progressive Conservative party took its seats on the government side of the House under the watchful eye of the new Prime Minister, John Diefenbaker. The Prince Albert lawyer had a longstanding interest in the problems of aboriginal people and had defended a case before the Saskatchewan Court of Appeal in 1939 regarding treaty rights. Almost immediately after the election, he set his Minister of Citizenship and Immigration, E. Davie Fulton, to work on revising the Indian Act, with the particular intention of removing the compulsory enfranchisement section. Diefenbaker had only a minority government, however, and he decided to call an election to strengthen his position early in 1958. This time his government was returned with a much stronger mandate, and Ellen

Fairclough of Hamilton, Ontario, was given the responsibility for revising the Indian Act. She established a Joint Committee of the Senate and the House of Commons in April 1959, which was jointly chaired by Noël Dorion, the member of parliament for Bellechase (in the Quebec City region), and James Gladstone, a treaty Indian from southern Alberta who had been named to the Senate by Diefenbaker in 1958.

This committee functioned in many ways like the one appointed by the Liberal government ten years earlier. Native groups, churches, government officials (both provincial and federal), and other interested people made submissions. The committee heard the same grievances about reserve conditions, land disputes, lack of local control, and an unresponsive bureaucracy. On the other hand, this time more Native groups participated from a wider regional and political spectrum, and more discussion took place around the concepts of community development and co-operative action, ideas that had been gaining ground among social activists in North America more generally.

Before the committee issued its final report, Diefenbaker's government removed one of the major grievances of aboriginal peoples; in 1960, it gave them the right to vote in federal elections "without prejudice to their traditional culture, historical and economic benefits."[3] In other words, they could now vote without having to give up their special legal status. A year later, in March 1961, the compulsory enfranchisement section of the Indian Act (which had empowered the minister to enfranchise Indians without their agreement) was removed.

The final report of the 1959-61 Joint Committee was published in July 1961. Its recommendations were neither radical nor surprising. The authors suggested the need for research into community and economic development projects. They called for slightly

more band control of local affairs in particular communities that were deemed "ready" for it. And they proposed (again) that an Indian claims commission be established to deal with land issues. The Conservative government began the process of drafting revisions to the Indian Act to implement the committee's recommendations and sketched plans for a claims commission. Then the government lost a vote of confidence in 1963 and in the ensuing election, the Liberals were returned to power, this time under the leadership of Lester B. Pearson.

As a result, neither the Indian Act amendments nor the claims commission became a reality. Instead, the Pearson government hosted two federal-provincial conferences on Indian affairs in 1963 and 1964 to promote greater co-operation in the delivery of social services to Native people. And yet another study was commissioned. This one, which became known as the Hawthorn Report, was conducted by a team of social scientists who were commissioned to look into socio-economic conditions of Native peoples across Canada. The report was issued in 1966-67. Meanwhile, in December 1965, the Indian Affairs Branch was moved to the Department of Northern Affairs and National Resources. That year, the branch began to set up a series of Indian advisory councils at the regional and national levels, in which band-appointed representatives were to meet to discuss such issues as revisions to the Indian Act. However, the system had broken down within two years because of disputes over who was to represent whom, and how much funding was necessary for travel and organizational work. Instead, the government returned to the local consultation approach that had been tried in the mid-1950s. And it seemed to be signalling a new importance for aboriginal issues when it created the Department of Indian Affairs and Northern

Development in 1966. No longer would Native administration be relegated to a branch of another department.

The 1969 White Paper

Expectations of progress were running high in Native communities across the country when in June 1969, Pierre Trudeau's government dropped a bombshell. Indian Affairs minister Jean Chrétien issued a discussion paper on Indian policy (called a "White Paper" as are many discussion papers), in which the government proposed to abolish the Department of Indian Affairs, to repeal the Indian Act, and to transfer responsibility for any residual programs to the provincial governments. The proposals were consistent with Trudeau's belief that all citizens should be equal as individuals and that society had no place for group rights not shared by all.

Across Canada, Native groups and their supporters expressed their outrage. For them, the White Paper looked suspiciously like the climax of the old assimilationist program. They challenged it on a variety of grounds. It was illegal because the federal government was proposing to abandon its constitutional responsibility for Indian affairs. It was immoral because it amounted to a unilateral abrogation of the treaties. It was racist because it rejected the concept of aboriginal rights. Native groups launched protests formal and informal and took full advantage of the media and the widespread politicization of Native communities across the country that had already been blossoming under the nourishing warmth of the North American Indian rights movement. In July 1970, Trudeau's government formally withdrew the White Paper.

Unfortunately, the seeds of hostility and distrust had been sown. Native leaders feared a hidden agenda behind each new policy direction thereafter, so relations with the

government seemed permanently soured. For its part, the Department of Indian Affairs seemed unable to find a solution (or even a process to work towards a solution) for the fundamental conflict between aboriginal aspirations and the beliefs of that segment of the Canadian population that favoured individual equality under the law.

The Calder Case

In the face of this impasse, Native groups turned increasingly to the courts, hoping that the legal system would recognize the justice of their claims. The Canadian court system had initially not been particularly sympathetic to aboriginal plaintiffs; in the St. Catherine's Milling and Lumber case of 1885-88, for example, the Privy Council had ruled that the Crown (not First Nations) owned the land even before the signing of the treaties (in this particular case, Treaty 3). While the Privy Council was willing to admit that Native people had some kind of land rights, it insisted that these were only personal rights to occupy the land, "dependent on the goodwill of the Sovereign."[4] But after 1970, the Supreme Court of Canada became increasingly open to the arguments presented by aboriginal peoples, and as we shall see, its rulings have had an impact on federal policy.

The first major case has become known as the Calder Case, after Nisga'a leader Frank Calder. The Nisga'a of British Columbia turned to the courts to obtain recognition of their ownership of lands that had not been signed away in a treaty but that the province of British Columbia argued were crown lands. In 1973, the case reached the Supreme Court, where the justices ruled against the Nisga'a, but six of the seven acknowledged the existence of such a thing as aboriginal land title. Now that the Supreme Court had given legal validity to the idea, the government was forced to react.

A New Claims Process

Trudeau's government had established a body called the Indian Claims Commission in 1969 under the direction of Dr. Lloyd Barber of the University of Regina. The commission had been unable to accomplish much because the government had rejected the idea of aboriginal land title and because many Native leaders were suspicious of the commission's purpose, given the government's intransigence on the fundamental issue of aboriginal land rights. After the Calder decision, however, the government changed its approach and agreed to Barber's recommendation that Native groups should be able to research and present their claims, and that some sort of process should be established to evaluate the validity of these claims. Two types of claims would be considered under the new policy. The first, known as comprehensive claims, were cases in which no treaty had been signed and no laws had been passed to remove or reduce aboriginal "use and occupancy" of the land in question. The second type of claim, known as specific claims, were cases in which some form of "lawful obligation" of the government toward Native people had not been fulfilled, such as a failure to honour treaty provisions. Under the new policy, the government agreed to provide loans to claimants to allow them to research their cases. The hope was that the process would settle grievances once and for all and remove the long-festering sores of land and resource issues.

The first settlement of a land dispute under the new regime came in 1975. In 1971, the government of Quebec had announced plans to develop the hydro-electric potential of the James Bay region with a massive construction project that Premier Robert Bourassa claimed would be the biggest feat of engineering in North America. The

announcement was greeted with surprise and alarm among the Cree and Inuit whose lands would be affected. They had not been informed of the plans, let alone consulted. The Northern Quebec Inuit Association and the Grand Council of the Crees obtained a court injunction to stop the project until the question of aboriginal title to the lands was resolved. Although the Quebec Court of Appeal later ruled that aboriginal title had been extinguished by the Crown when it granted the Hudson's Bay Company charter in 1670, the James Bay issue had become the subject of such heated public debate that everyone realised negotiation was the only solution. Indeed, many Canadians in the 1970s were questioning the wisdom of this kind of mega-project for economic development that extracted such a high price from the environment and from the small societies who bore the brunt of the impact yet received few of the benefits.

In 1975, the James Bay and Northern Quebec Agreement was finally signed after several years of hard bargaining. At the time, it was hailed enthusiastically as the first modern treaty because, although its form was similar to the older Numbered Treaties, its monetary and land provisions were substantially larger, and it gave the Cree and Inuit more control over their affairs. The agreement guaranteed them outright ownership of some 5,500 square kilometers of land around their existing communities and set aside a little over 62,000 additional square kilometers where they had extensive hunting and fishing rights. $232.5 million in compensation was to be paid over 21 years. Arrangements were also made to establish joint wildlife and environmental management boards and to provide income support for hunters. In return, the Cree and Inuit gave up their claims to the remaining land and the Quebec government could proceed with the

first phase of hydro development. In 1978, the agreement was extended to the Innu of the Schefferville region through the Northeastern Quebec Agreement.

The second major claims agreement was signed in 1984, covering the Mackenzie Delta and adjacent lands in the western Arctic. The Inuvialuit Final Agreement is also sometimes called the COPE agreement, after the Committee for Original People's Entitlement, which had been formed in 1969 and represented the Inuit people of the western arctic (called the Inuvialuit) in the negotiations. As in the James Bay case, the precipitating factor was southern hunger for northern resources. Oil and gas had been discovered in the Beaufort Sea, and proposals were made to develop these resources and build a pipeline from the region through the Mackenzie River valley to southern markets. The Inuvialuit formed COPE to negotiate for their interests.

In 1974, the Dene of the Mackenzie Valley took a different approach and asked the courts to stop any development projects until the issue of aboriginal title had been settled. The government appointed Thomas Berger, a justice in the Supreme Court of British Columbia, to chair the Mackenzie Valley Pipeline Inquiry, which received tremendous media attention. In his final report (1977), Berger recommended that the pipeline proposals be shelved for ten years to permit a thorough review of the environmental and aboriginal rights issues that had been raised. The Dene and their Métis relatives in the region filed comprehensive claims with the government, as did the Inuvialuit of the Delta region. The latter claim was the first to be settled. In return for giving up their claims to all the land in the region, the Inuvialuit were given ownership of both surface and sub-surface rights to some 11,000 square kilometers of land, and surface ownership of an additional 78,000 square kilometers. $45 million cash was promised (to

be paid by 1997), and other benefits and joint-management arrangements were spelled out.

By the time the Inuvialuit Final Agreement was signed in 1984, however, many other interested groups had become utterly frustrated with the claims policy and process. Over $100 million had been spent on comprehensive claims, but only three agreements had actually been signed. The specific claims side was similarly entangled in administrative and procedural thickets. Complaints were emerging about the implementation of the James Bay agreement. Most importantly, a major philosophical disagreement had developed between the government and a number of aboriginal leaders. The government intended that claims settlements would be final agreements like the old numbered treaties, in which Native people gave up their ownership of specific lands in return for negotiated benefits. Some aboriginal leaders, however, feared that if people signed away their rights to the land, they would also be giving up all other aboriginal rights. Others argued that land *could not* be signed away, since the right to use the land was an inalienable right granted by the Creator. These opponents of the claims policy, including the important national organization called the Assembly of First Nations, argued that instead of piecemeal claims settlements, the government should make a philosophical leap and formally acknowledge the concept of aboriginal rights, and then protect those rights as tightly as possible in the constitution rather than in a statute. Making constitutional changes is more difficult than legal changes because constitutional change requires a degree of provincial consent, so the Assembly of First Nations argued that no future federal government would be able to remove aboriginal rights easily if these were recognized in the constitution.

The Constitution Act (1982)

The strategy was promoted particularly vigorously in the early 1980s because Pierre Trudeau's government initiated the process of "patriating" the Canadian constitution so that it could be revised without resorting to British approval. Aboriginal leaders argued that they should be represented at the constitutional talks, but they were unable to convince the federal and provincial governments of the validity of that argument. So the Assembly of First Nations and others campaigned outside the first ministers' conferences to have the existence of aboriginal rights recognized in the constitution. Several of the provincial premiers rejected the lobby on the grounds that they did not know what aboriginal rights meant and they could not recognize something that they considered undefined. The federal government negotiated a compromise. When the Constitution Act was finally passed in 1982, it included a statement in Section 35 that read, "The *existing* aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." (emphasis added)

More Studies

However, agreement on the constitutional issue had not settled the problems with the current claims policy, which many now considered unworkable. So in 1985, David Crombie (then minister of Indian Affairs) appointed a task force to investigate the problems. The group's report, entitled *Living Treaties: Lasting Agreements*, was received enthusiastically by some Native groups because it followed their advice in proposing that the government abandon the policy of negotiating final agreements like the old treaties and recent settlements, and instead develop a "social contract" between aboriginal peoples and the Canadian state through which specific land and resource issues could be

negotiated as they arose. The report recommended that the government recognize the ongoing and permanent interest of aboriginal people in the land, and approach resource development as a joint project. Officials at the Department of Indian Affairs responded with a number of policy changes that modified the existing claims process, but did not address the underlying idea of the social contract proposal.

Perhaps the most important among the new policies was the Department's agreement that self-government issues could now be considered as part of the negotiations. The self-government question had become a major issue among many Native groups. Increasingly, groups like the Assembly of First Nations were arguing that aboriginal rights were more than just land-ownership rights, and one of the most important of the aboriginal rights was the right for aboriginal groups to govern themselves. In 1982, a special parliamentary committee was struck to investigate the issue. Committee chair Keith Penner (Liberal MP for Cochrane-Superior in Northern Ontario) issued its report in 1983. The report recommended that the government should recognize the right to self-government as an aboriginal right and that such recognition should be inserted as an amendment to *The Constitution Act, 1982* as a safeguard. The Penner Report also recommended that the Department of Indian Affairs be replaced by a Ministry of State for First Nations Relations, to recognize the new relationship between aboriginal peoples and the state. The government drafted a bill to act on the report, but it died when an election was called in 1984 and the Liberal government was defeated.

Federal Policy in the 1980s

Instead of approaching the issue of self-government through first principles, the federal government preferred to experiment with the extension of aboriginal control over

aboriginal affairs through more limited local agreements. In 1986, after lengthy negotiations, the Sechelt people who live just north of Vancouver were given legal ownership of their reserve when it was removed from the provisions of the Indian Act. The band council was reconstituted as a sort of municipal government so that it had extended legal power over the administration of the reserve's affairs, and a financial package of $54 million was created to facilitate the transition. The Assembly of First Nations criticized the agreement as an abrogation of the inherent right to self-government, but others argued that local solutions like the Sechelt agreement were necessary to deal with the urgent economic and social problems that many reserve communities were still facing.

In the midst of these debates, yet another major policy issue captured headlines across the country. As part of the old assimilationist program, Native women who married non-Native men automatically lost their legal status as Indians under the terms of the Indian Act. In 1982, however, Canada adopted the Charter of Rights and Freedoms, which, among other things, prohibits discrimination on the basis of sex. Because Native men did not lose their status upon marriage to non-Natives, it seemed clear to a number of Native women that they now had legal grounds to challenge a restriction of their rights that they had been complaining about for years. Mary Two-Axe Early, a Mohawk woman from Kahnawake, Quebec, had first brought the issue to the attention of the House of Commons Standing Committee on Indian Affairs and Northern Development in 1976, and Sandra Lovelace of the Tobique reserve in New Brunswick had taken the issue to the United Nations Committee on Human Rights in 1977 (where the committee ruled in her favour, much to the embarrassment of the Canadian government). The National Advisory

Council on the Status of Women had also been effective at generating public sympathy for the rights of aboriginal women.

Now with the Charter of Rights and Freedoms in place, the government acted to remove the discriminatory clauses in the Indian Act. What initially appeared to be a relatively straightforward process quickly became highly complex and emotional when it was linked to the debate on self-government. It was pointed out that if the Indian Act were amended as proposed, and women who had lost their status regained it, the government was still essentially determining who was and who was not entitled to be an Indian, a determination that many now felt was a right that should belong only to Native people themselves. Minister John Munro wanted to give priority to the women's issue, as did the Native Women's Association of Canada. However, the Penner Report placed emphasis on recognizing the rights of bands to control their own membership, and a number of chiefs across the country agreed, particularly from regions where people feared large numbers of returning band members might put too much of a strain on local resources.

The issue was still not settled when the Liberal government was defeated in the 1984 election; the new Progressive Conservative administration and Minister David Crombie finally ushered the changes to the Indian Act into law through Bill C-31 (1985). The bill was a compromise. Women who had lost their status through marriage could now apply to the Department of Indian Affairs for reinstatement, as could their children. But the bill also separated legal status and band membership for the first time. Band councils could now develop their own membership codes (although these codes still had

to be approved by the minister). Thus one might conceivably be a status Indian but not a band member, or vice versa.

The implementation of Bill C-31 was almost as contentious as its genesis. A larger number of women than expected applied for reinstatement (over 80,000, which represented a 16% population increase), and many band councils called on the government to provide special funds so housing and other facilities could be expanded to accommodate the women. Certainly, housing problems had been reaching crisis proportions on some reserves even before C-31, but ironically, some of the bill's most vocal opponents were the councils of oil and gas-rich bands in Alberta.

Assessments of the implementation process in 1987, 1988, and 1990 all concluded that the new policy was a disappointment. Forms of discrimination against Indian women continued to exist; the implementation process was frustrating and slow; and many complaints about band membership codes arose. From the government's perspective, implementation was costing much more money than expected. And six Alberta bands launched court challenges against the amendments to the Indian Act on the grounds that these violated their inherent right to self-government. All of these issues remain unresolved.

Meanwhile, the debate about self-government continued. What did it mean in theory? What were its implications for Canadian law? How would it co-exist with other levels of government? With the deadlock on fundamental principles, the government decided in 1988 to make official its policy of negotiating local self-government arrangements with individual communities, as it had in the Sechelt experiment. The Assembly of First Nations opposed the move on the grounds that constitutional

entrenchment of the recognition of an inherent right to self-government was the only appropriate strategy. In spite of this opposition, however, the government went ahead with its new policy of local negotiations for local solutions, an approach that remains in effect at the time this essay is being written.

The Royal Commission on Aboriginal Peoples

Issues of lands and rights exploded in the summer of 1990 at Oka, Quebec when the people of Kanesatake and their supporters blockaded a road and occupied a building to prevent the local municipality from expanding a golf course onto lands claimed by the people of Kanesatake. The Canadian government attempted to resolve the immediate issue by purchasing part of the land in question for the people of Kanesatake. But the broader question of the place of aboriginal peoples in modern Canada remained, so Prime Minister Brian Mulroney responded by establishing the Royal Commission on Aboriginal Peoples (RCAP), chaired by Georges Erasmus (former president of the Dene Nation in the Northwest Territories) and René Dussault (a judge in the Quebec Court of Appeal). The commission issued its report in 1996 after an extensive consultation and research process that investigated almost every aspect of Native life in modern Canada. Over 400 separate recommendations were put forward. Among them, the commission called for massive increases in government spending to alleviate housing and health problems and to promote economic development. It also proposed a House of First Peoples that would function as an aboriginal parliament to represent Native people across the country and provide advice to the federal government. The government responded in 1998 with a document entitled *Gathering Strength: Canada's Aboriginal Action Plan*, a general

policy plan that reaffirmed the importance of treaties in the ongoing relationship between the government and First Nations, but the policy implications have yet to be worked out.

Court Rulings in the 1980s and 1990s

With the pace of change moving too slowly for many First Nations activists, the court system seemed another possible avenue to push successive governments into action. As was noted earlier, the courts had not been sympathetic to aboriginal rights in the nineteenth and early twentieth centuries. But the Calder case had raised hopes that times were changing. Then through the 1980s and 1990s, the Supreme Court issued a series of important judgements that added weight to the argument for recognition of a variety of aboriginal rights, and encouraged policy-makers to devise practical ways to work with those rights and responsibilities.

The Guerin case (1984) was important because the Supreme Court recognized that the federal government held a "fiduciary" responsibility for reserve lands: that is, the federal government had a duty to protect Indian interests in reserve lands. The case had arisen originally when lands of the Musqueam Band were leased in 1958 to the Shaughnessy Heights Golf Club of Vancouver at below market value and the band did not receive a copy of the lease until twelve years after the fact. The band sued the government in 1975 and the case made its way through the system; ultimately the Musqueam Band was awarded damages and an important principle had been established in the interpretation of the law.

The Sioui case of 1990 addressed the question of treaties. Four members of the community of Lorette in Quebec were charged with cutting trees and camping in a park contrary to provincial parks regulations. They claimed that they were following religious

practices to which they were entitled because of a document signed in 1760 by the British general James Murray that promised them "free Exercise of their Religion." For the Supreme Court, the question was whether this document constituted a treaty, and if so, whether its provisions were still in effect. The Court ruled that the document was, indeed, a treaty and stated that treaties must be interpreted not just according to their technical meaning as lawyers took it, but more broadly and liberally. The Sioui case became an important landmark in the question of treaty rights.

In the same year as the Sioui case, the Supreme Court ruled in the Sparrow case on aboriginal rights to resource use. A Musqueam man had been charged with fishing with a net larger than his band's fishing licence allowed. He argued that he had an aboriginal right to fish without constraint by government regulation and the case made its way through the courts. The Supreme Court ruled that a new trial had to be held, but in its ruling, made some important statements about aboriginal rights. The court repeated that the federal government had a fiduciary responsibility toward Indian peoples that extended beyond lands (as the Guerin case had considered) to rights. The court also concluded that the phrase "existing Aboriginal rights" in the Constitution Act (1982) had to be interpreted with flexibility and that aboriginal rights could be extinguished only by a clearly stated intention, not just by default. Insofar as the specific question of fishing was concerned, the court ruled that while conservation must take priority, Indian food fishing must take precedence over commercial and sport fishing.

While these court cases have established an important basis for future policy, they clearly have not settled all the issues. Who exactly can be a beneficiary of treaty and aboriginal rights? How are competing claims on resources to be negotiated? In what ways

can policy be reformulated to recognize and take into account the legal concepts of aboriginal and treaty rights?

Claims in the 1990s

In 1991, the Mulroney government created the Indian Claims Commision in response to ongoing complaints about the claims process. It was intended to be a review board for specific claims cases that had not been resolved to the satisfaction of the claimants in the regular claim process. To date, the Commission has completed a number of reports, but like the older claims process, the new process is slow and expensive and there have been no dramatic changes in policy direction arising out of its work.

Meanwhile, negotiations on various claims have continued. Three important northern comprehensive claims settlements were announced in the 1990s: the Gwich'in of the Mackenzie Delta (1992), the Sahtu Dene and Metis of Great Bear Lake and the Mackenzie Valley (1994), and the agreement that led to the creation of the new territory of Nunavut (the initial agreement in 1993 and the creation of Nunavut in 1999). An umbrella agreement was signed with the Council for Yukon Indians in 1993 and a number of specific self-government agreements were signed with member First Nations in Yukon between 1995 and 1998. And in 2000, the Nisga'a Agreement was finally ratified, recognizing Nisga'a self-government and ownership of about 2000 square kilometres in the Nass River Valley of British Columbia.

In British Columbia, another approach is being taken to deal with a large number of outstanding claims. In 1993, the British Columbia Treaty Commission was established through a three-way agreement among the Government of Canada, the Government of British Columbia and the First Nations Summit, representing aboriginal groups. So far,

51 First Nations groups have participated in treaty negotiations through this process. The first agreement-in-principle was signed in 1999 with the Sechelt First Nation.

Provincial Government Policies

Although responsibility for Indian affairs rests constitutionally with the federal government, provincial governments have, from time to time, introduced programs for aboriginal people or participated with Ottawa in jointly-administered programs. As has been discussed, federal policy in the 1950s was to pursue just such co-operative ventures. However, relations between First Nations and the provinces have always been strained because they are directly at loggerheads over the issue of resource rights. Since the provinces have control over crown lands, they have the right to legislate regulations governing the use of those lands. But the question arises whether they have the right to apply those regulations to Native people, particularly in the case of provinces, which are also covered by treaty agreements. Other problems have arisen in disputes over lands required for reserves.

The Saskatchewan government of Tommy Douglas, elected in 1944, was the first systematically to address aboriginal problems as a matter of policy. Committed to the socialist principles of his party, the CCF (Co-operative Commonwealth Federation), Douglas promised a range of reforms for both Métis and Indians under the slogan, "humanity first." The idea was to provide aboriginal peoples with the skills, political rights, and economic assistance that would allow them to integrate more successfully into Canadian society. In the end, however, intentions were perhaps more important than results, which were limited.

The results of federal-provincial co-operation, beginning in the area of education policy, were of longer-term significance. In 1945, the federal government decided to integrate aboriginal children into provincial schools where possible. By 1960, about 10,000 aboriginal children were registered in provincial schools, but participation varied from province to province. In 1963, for example, 43% of Indian pupils in BC attended non-Indian schools while only 17% did so in Saskatchewan.

Native families quickly became disillusioned with the provincial school system, and in 1973, the National Indian Brotherhood (forerunner to the Assembly of First Nations) issued a position paper entitled *Indian Control of Indian Education,* which the federal government eventually accepted as its official policy. By the early 1980s, over 100 bands were operating their own schools and today there are over 300 schools, which are attended by over 40% of the school-age population.

Federal-provincial co-operation also took place in areas such as social welfare, municipal services, and in some cases, economic development programs. Here, as well, arrangements varied considerably. Nova Scotia extended provincial child welfare services to cover all reserves by the mid-1960s while at the same time in New Brunswick no formal agreement had been reached and Children's Aid Societies provided only limited services to Native clients. The issue of child welfare exploded in the 1970s over the adoption of Native children among non-Native families, and some provinces now have Native-run child welfare agencies.

Economic and resource-management agreements have also varied considerably from province to province. Agreements regarding Native resource use had been signed in Quebec, Ontario, Manitoba, and Saskatchewan by the mid-1960s, but not in the Maritime

provinces, Alberta, or British Columbia. Today, the provinces continue to grapple with the issues of economic development and cultural identity, which seem so often to be in direct conflict. The most recent policy document (March 1996) from the province of Ontario, for example, is subtitled "Supporting Aboriginal Self-reliance through Economic Development."

Newfoundland has been a special case. When that colony joined Canada in 1949, the terms of union stated that lands that had been reserved for Indians would be transferred to federal jurisdiction and programs administered by the Department of Indian Affairs would be applied. However, nothing was done on either count, and the provincial government continued to administer programs for the Native people in Newfoundland and Labrador. The first federal initiative was a 1954 program to reimburse Newfoundland for Native health care costs. The provincial government initiated a policy of resettlement and relocation to facilitate administration. In the 1950s, Inuit in northern Labrador were moved to Nain and Makkovik, and in the 1960s, Innu families were moved to Davis Inlet and North West River (now called Shesatshit). The resulting problems, particularly at Davis Inlet, have become a terrible and very public issue.

Interestingly, very few scholars have studied the development of provincial Native policies, except in the context of their conflict with federal jurisdiction and aboriginal aspirations. Certainly much interesting work remains to be done.

Inuit Policy

Responsibility for the Inuit had been taken on by the Northwest Territories and Yukon Branch of the federal Department of the Interior in1928. Eleven years later, in a case involving the Inuit of northern Quebec, the Supreme Court ruled that the Inuit were

to be considered Indians; hence, under the terms of the British North America Act, they were a federal responsibility. In 1950, that responsibility was given to the Department of Resources and Development. The relationship of the Indian Act to the Inuit was not clarified until 1951, when the revised Indian Act included a statement in the preamble that any reference to "an Indian" in the act did *not* include "Eskimos."

Those responsible for Inuit affairs in the 1940s and 1950s believed that the Indian assimilation policy had been a failure that had resulted only in dependent and demoralized communities. The Inuit, they argued, could be spared these ill effects by being encouraged to pursue their "traditional" way of life. Other than several experiments with relocating communities in the 1950s (which would later prove highly controversial), federal government officials did not initially introduce the intrusive programs that characterized Indian policy.

In the 1960s, however, the natural resources of the Arctic attracted Canadians in the south, raising questions about Inuit policies. Could the Inuit continue to live off the land in a changing economy? The solution of the day was to promote limited economic development through co-operatives. The most successful of these were the art co-ops that married the artistic skills of Inuit carvers and printmakers to a world market hungry for an uncomplicated style that was unaffected by the conventions of the European tradition.

Questions of local control over cultural issues like education and land issues pressured the Inuit in the 1960s just as they did other aboriginal peoples. In 1969, the Inuvialuit of the Mackenzie Delta region formed the Committee for Original People's Entitlement and in 1970, Inuit across the Arctic joined forces in the Inuit Tapirisat of Canada (ITC). In 1978, the ITC linked the issues of land claims and self-government in a

bold proposal to create a territory out of the eastern half of the Northwest Territories that would be administered by the Inuit but would use Canadian forms of government. Since the Inuit were a majority of the population, they would be able to pursue their own culturally-appropriate policies within a parliamentary system. The Canadian government eventually agreed. A series of preliminary agreements was signed, and in 1992 the final arrangements were made to create a new territory called Nunavut officially launched in 1999. As in earlier land claims settlements, the government legally recognized Inuit title to some 350,000 square kilometres, and promised the Inuit $580 million in cash, which will be distributed over a 14-year period. Unlike other claims settlements, however, the region is a separate political jurisdiction with powers like those of Yukon and the NWT; residents hope one day to achieve full provincial status. Although the Inuit were among the last aboriginal groups to confront the state through contemporary lobby organizations, they have been the first to achieve such dramatic results.

Métis Policy

Until relatively recently, Canadian law did not explicitly recognize the Métis people as aboriginal. The Métis, people descended from children of Indian women and non-Natives, had long been considered by the government to be assimilated and hence in no need of special programs to achieve that goal. However, many Métis identified themselves as aboriginal people and demanded that they be given special status under the law.

When the government proposed the first treaties to the peoples of the northwest, Indian negotiators demanded that their Métis brothers and sisters be taken into the treaty, and the government agreed to give them the choice of signing or taking compensation in

the form of land or certificates redeemable for land. An artificial legal distinction thus arose between those who "took treaty" and were considered "Indians" under the terms of the Indian Act, and those who opted out and whom the government no longer considered a responsibility. The provincial government in Alberta attempted to deal with the acute socio-economic problems of the Métis in the 1930s by creating settlements for their exclusive use. In 1944, the Saskatchewan government of Tommy Douglas introduced its own less successful settlement program. And from time to time, the federal departments of health, justice, and others introduced their own programs to assist. But for the most part, the Métis were assumed to fall under the provisions of services available to the general population and received no special treatment.

Through the lobbying efforts of various groups representing the Métis and those people who consider themselves to be Indian but are not recognized as such under the Indian Act, the federal government agreed in *The Constitution Act, 1982* to recognize the Métis as an aboriginal people for the first time. The implications of that recognition are still to be worked out. Some groups, like the Métis National Council (which primarily represents the prairie Métis) and the Congress of Aboriginal Peoples, have argued that they have a right to their own land base as well as the right to self-government that other aboriginal peoples have claimed.

Conclusion

The period since 1945 has seen the first real change in Native policy since confederation. Aboriginal people have come to play a prominent role in the formulation of policies affecting them. Gradually, the federal government has been relinquishing its control over Native affairs though both legislative and policy initiatives. While aboriginal

people themselves have consistently pressured the government for these changes, many remain concerned that reduced expenditures and devolution of responsibility may also mark a decreasing commitment to aboriginal peoples on the government's part. They hope that the constitutional protection afforded aboriginal rights will be a guarantee that no-one will forget.

While positive changes have occurred during this period, other basic issues remain unresolved. Chief among these is the continuing lack of agreement on whether Canadians want a society composed of individuals who are equal under the law, or a society in which cultural groups are encouraged and protected, with special recognition for the unique place of the people who made this land their home before the arrival of Europeans. Until these basic questions are addressed, Native policy will remain highly contentious and undoubtedly problematic.

SUGGESTED READING:

For two very different perspectives on the issue of aboriginal rights and the role of the state, see:

Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State.* Vancouver: University of British Columbia Press, 2000.

Tom Flanagan, *First Nations? Second Thoughts*. Montreal and Kingston: McGill-Queen's University Press, 2000.

Other standard references on the issues covered in this paper include:

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Report of the Royal Commission on Aboriginal Peoples is available in a searchable version on the internet: http://www.204.191.119.101/RCAP/rcapdef.htm

Current statements of government policy and other related documentation can be found at: http://www.inac.gc.ca (Department of Indian Affairs and Northern Development)
http://www.indianclaims.ca (Indian Claims Commission)

For another perspective, see the Assembly of First Nations website at:
http://afn.ca

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[1] The views expressed herein, as well as any omissions or errors of fact, are those of the authors, and not the Department of Indian Affairs and Northern Development.

[22] House of Commons *Debates*, 13 May 1946, p. 1492

[3] Quoted in John Leslie, "A Historical Survey of Indian-Government Relations, 1940-1970," paper prepared for the Royal Commission on Aboriginal Peoples Liason Office, December 1993, p. 37

[4] Quoted in Anthony J. Hall, "*The St. Catherine's Milling and Lumber Company versus the Queen*: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada," in Kerry Abel and Jean Friesen (eds.), *Aboriginal Resource Use in Canada* (Winnipeg: University of Manitoba Press, 1991), p 280