Indian Policy and Legislation: Aboriginal Identity Survival in Canada

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Abstract

This article examines the socio-historical construction of Indian policy and legislation as the processes set out to making the 'Indian' population legible to its rulers during the pre- and post-confederation periods in Upper Canada. I aim to demonstrate how Indian policy and legislation materialised into concrete actions that attempted to assimilate, civilise, and protect the 'Indians' by deploying different instruments of control or governmentalities, such as the residential school and reserve system. Nonetheless, resistance and political positioning of Indigenous people is present, and post-confederation Indian policymaking in Canada is a much more negotiated process.

In 2006, Statistics Canada noted 1,185,483 individuals who identified themselves as Aboriginal[1] people, which represented an increase of approximately 18.4% and 32.5% from the previous censuses of 2001 and 1996, respectively (Statistics Canada 1996; 2001; 2006). This upward trend accounts, to a certain extent, for the persistence and survival of native identity despite the aggressive policy and legislation exerted by the colonial British and post-colonial Canadian governments, which sought to assimilate, civilise, and protect the 'Indians'[2] during the pre- and post-confederation periods. As I intend to demonstrate, Indian policy and legislation was a much more contested and fluid process, which included the political positioning of Indigenous people across time, particularly during the post-confederation period.

Indian policy and legislation emerged from the state's interest in making this population legible to the state. Following Scott (1998:2), the concept of legibility

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is understood as the state's ability to rule by knowing, arranging, and categorising people in ways 'that simplified . . . state functions'. Consequently the state makes populations legible through multiple techniques (or governmentalities[3]), such as implementing large-scale campaigns, populating certain regions of the country, and performing or stimulating specific jobs or birth rates in order to fall under the state's 'schemata' (ibid.:82). Consequently the state will increase the probability of implementing successful interventions and planning new social orders (ibid.:78). According to Boldt (1993:69), Canadian Indian legislation emerged from dominant group motives and values that historically affected 'Indians', their families, and communities. Similarly, some scholars argued that political and economic interests of dominant classes shaped Indian policy rather than Aboriginal people's needs and interests (Little Bear, Boldt, and Long 1984; Ponting and Gibbins 1980; Weaver 1981). Nevertheless, the image of Indigenous people as passive victims of state policy and legislation has of lately been revised (see Miller 2004; Milloy 1983; Nichols 1998).

In this article[4] I examine how the British government, during the pre-confederation period, materialised Indian policy and legislation through the implementation of multiple instruments of control or governmentalities. This is followed by a broad discussion of the changes implemented to Indian policy and legislation during the post-confederation period with an emphasis on the persistence and revival of native identity and the inclusion of their Indigenous knowledge or 'practical knowledge' (Scott 1998:78) in contemporary Canadian Indian policy-making. Before launching into further details, I will provide an overview of Canadian Indian policy and legislation.

Overview

According to McNab (1983a:85, 91), the 1830s and 1840s were the formative years of Canadian Indian policy, and, until 1860, Canadian Indian policy was directed by both the Colonial Office in England and by the colonial governors. Each colony (the Maritime colonies, Upper Canada, Lower Canada, and later British Columbia) 'were administered separately and developed different approaches' (Harring 1998:19). In other words, each colony was responsible for its own Indian affairs (see, e.g., Fisher 1977; Goldring 2007; Lischke and McNab 2007; Ray 1974; Redmond 1998; Ross 2007; Smith and Burch 2007; Upton 1979). The Indian Department was responsible for the administrative activities that dealt with the 'Indians' in British North America. It was only after Confederation (1867) that the Canadian federal government took control over the Indian Department and its affairs (McNab 1983a:91; Milloy 1983:56). The department responsible for 'Indian' matters was delegated to the Department of Secretary of State, who became the Superintendent-General of Indian Affairs. The latter changes made possible a national and unified Indian policy and legislation in Canada (Milloy 1983).

By 1880, the Department of Indian Affairs received confirmation as an independent department, even though different ministries provided direction (Leslie and Maguire 1978). For instance, it was under the guidance of the Ministry of the

Interior, then moved to the Department of Mines and Resources (1936), and finally linked to the Department of Citizenship and Immigration Canada (1949). By 1965, the Department of Indian Affairs was transferred to the Department of Northern Affairs and National Resources, which culminated in 1966 with the establishment of the current Department of Indian Affairs and Northern Development Canada (DIAND) (Leslie and Maguire 1978). I now turn to explore Indian policy during the pre-confederation period in Canada.

Pre-Confederation Indian Policy

The Constitutional Act of 1791 divided the Quebec Territory in Upper (Ontario) and Lower (Quebec) Canada. In Upper Canada, the control of Indian affairs was under the Lieutenant Governor (Tobias 1983). Under this individual were a series of superintendents who controlled and implemented state policies (Stanley 1983). In 1760, the British government formally adopted a policy of gift giving, friendship, and diplomacy towards Indigenous people that lasted for seven decades (Surtees 1988:86; Tobias 1983:40).

By 1821, the British adopted the policy of civilising as a result of an increasing desire for controlling and protecting the 'Indians' and their lands through an 'orderly settlement' (Harring 1998:16; see also Surtees 1988; Stanley 1983; Tobias 1983). By the 1830s, the policy of 'Indian Friendship' was abandoned and replaced by the 'Civilisation Policy'. Much of this perception arose from the propaganda, anti-slavery movements, and protests led by protestant Christian denominations, romantic writers, and advocacy organisations such as the Humanitarians and the Aborigines' Protection Society (Tobias 1983:40–41). These advocacy organisations tried to induce both the British and the American governments 'to instruct the Indian in European civilization' (ibid.:41). Indigenous people were seen as 'uncivilised' and lacking the three 'civil Victorian qualities': order, manners, and industry (Francis 1998:57; Tobias 1983:40–41). The civilising policy included assimilating policies, which persisted throughout the nineteenth and twentieth centuries albeit contested by Indigenous tribes (Miller 2004; Milloy 1983; Trigger 1985). These policies were officially and unofficially implemented by missionaries, teachers, and Indian agents (or state agents), who wanted Indigenous people to become 'full members of the society' (Surtees 1988:88).

The following vignette provides a glimpse of how this policy was implemented by General Darling, Chief Superintendent of the Indian Affairs office from 1828 to 1830. He reported to Earl Dalhousie, Secretary of State, about the current state of 'Indian' settlements in Upper Canada:

> Mississaquas of the Credit . . . this tribe, amounting to 180 souls, who were lately notorious for drunkenness and debauchery . . . [is] now exposed to Christianity and civilization . . . They are now settled in a delightful spot on the banks of the Credit [River] . . . They have two enclosures of about seven acres of wheat, and a field on the banks of the river, containing about 35 acres of Indian corn, in a promising state of cultivation.
>
> (Reprinted in Aborigines' Protection Society 1839:6–7)

The Chief Superintendent of Indian Affairs not only sought the implementation of this policy but he also commended the protectionist policy of the Crown. He urged its practice among the 'Indians' in Upper Canada because its abandonment meant 'plunder and persecution' (Harring 1998:25). Surtees (1988:88) explained that these settlements became the basis of the reserve system in Canada and a 'social laboratory' (Tobias 1983:41), which in turn meant that this population categorised as 'Indians' were in the process of being legible to its rulers by practicing a civilised and settled life.

Major land cessions agreements between government agents and Indigenous people occurred during this period, and continued throughout the early nineteenth century, without any major challenge (Milloy 1978; Surtees 1983). During these cessions, the demands were minimal and 'government agents appear to have anticipated no trouble as they prepared for the formal surrender councils . . . [t]he picture one receives from these arrangements is one of a demoralized, even docile, race of people submitting to the will of government' (Surtees 1983:80). This lack of resistance to land cessions was interpreted by Surtees (ibid.:81) as an indication that Indigenous people have 'lost their confidence in survival', and, therefore, this process was interpreted as paving the way for their civilisation policy and their 'survival' in settlements. However, other scholars have emphasised Indigenous people's agency in the negotiation process of land treaties and land resources (see Telford 2003).

For instance, some cases documented that tribal councils decided the degree and direction of culture change: 'whether schools would be allowed on reserves, the rate and type of agricultural or resource development, and the extent to which Indian finances . . . would be devoted to projects of development' (Milloy 1983:56–57). Examples on how Indigenous people such as Mississaugas, Chippewas, Ojibwa, and Mohawks challenged and resisted the implementation of Indian policy have also been documented in other colonies (see Fisher 1977; Miller 2004; Smith 1987; Tanner 1983; Trigger 1985; Upton 1979). As Maclean (1978) explained, the Ojibwa living in the north of the Lower Great Lakes supported the work of the Methodist missionaries in educating their children and youth. However, once they recognised the missionaries' intention to assimilate them, they limited their support. Also, attempts to relocate and settle Indigenous people from the Coldwater-Narrows region in Upper Canada failed (Miller 2004:174). Thus, 'the reserve policy existed in Ontario', according to Miller, but 'its implementation was intermittent at best' (ibid.).

Another example of social civilising projects involved the missionary settlements established by religious orders such as Methodists, Catholics, and Anglicans where the civilisation, Christianisation, and protection of Indigenous people were the objective. The Lieutenant Governor, Peregrine Maitland, encouraged these projects that directed Indigenous people into agricultural activities in Upper Canada by the 1820s (Nichols 1998:187). The ones who settled received instruction in husbandry, agriculture, Christianity, and assistance in house construction, among other skills (Rogers 1994:125; Surtees 1988:88).

The implementation of this policy continued with Sir Francis Bond Head, the Lieutenant Governor of Upper Canada from 1836 to 1838, who practiced his own

'removal' program of Indigenous people from fertile lands to isolated territories (Rogers 1994). Under his jurisdiction, multiple 'land cessions' took place, and at the same time, it encountered resistance from Indigenous people, specifically from the Saugeen Ojibwa, who 'denounced the cession of their lands and circulated wampum belts calling for war' (Nichols 1998:191). This policy also contravened the findings of the Sub-Committee of the Aborigines' Protection Society (1839:5), which emphasised the embracement of civilisation by Indigenous people. At the end, the British Parliament rejected the policy of 'removal' honoured by Bond Head but nested the idea of 'Indian' land cessions through treaties (Rogers 1994).

It could then be argued that one of the intents of Indian policy was to craft new subjects: civilised, Christianised, and settled 'Indians', who were legible to the British government through the settlement system, which could then be interpreted as a form of governmentality. Indian settlements were a technology of control where Indigenous people were in the process of becoming 'civilised and assimilated Indians'. As McNab (1983a:87) succinctly noted, '[b]y the 1840's British civil servants, politicians, commentators, and white settlers believed that the native population did not fit into any future political or economic plans for the development of the British North American colonies.' This latter process of 'being assimilated' was formally regulated through the 1857 Act where the idea of enfranchisement was introduced.[5]

The civilisation process included the practice of a sedentary *modus vivendi* through agricultural production, husbandry, and Christian education. As Harring (1998:16) noted, 'the core of colonial policy in Canada was the idea of an orderly . . . settlement', where 'civilized, Christianized, and self-governing native communities seated securely on reserves protected by the British imperial government' (Milloy 1983:59). However, Sir Francis Bond Head acknowledged the failure on civilising Indigenous peoples, and it was clear that the implementation and success of Indian settlements required the actions of the 'Indians' themselves (Dickason 2002:213; Nichols 1998:190; Rogers 1994:127). Consequently, future legislation targeted the amalgamation of Indigenous people as the 'only possible Euthanasia of savage communities' (Merivale 1967:511, cited in McNab 1983a:87).

Pre-Confederation Indian Legislation

As early as 1777, there existed legislation that sought to control social, political, and economic relations between British settlers and 'Indians' in the North American colonies.[6] Thereafter, multiple pieces of legislation consolidated Indian policies from the second half of the nineteenth century to the third quarter of the twentieth century. In order to provide a coherent analysis of the Indian legislation, this section analyses the pre-confederation period from 1760–63 to 1867. As noted earlier, the British government regulated Indian policies through legislation that intended to protect, assimilate, and civilise them (see Ponting 1997:24–26; Tobias 1983:43). In Upper Canada, a number of acts enforced early Indian policy.[7] In particular, the *Act for the Protection of the Indians in Upper Canada*[8] in 1850 protected the 'Indians' and their property from trespass, purchase, and injury. This

legislation responded to the lack of 'protection' they received from the British government while settlers forced their land displacement (see Harring 1998:28–29). This process commenced long before the nineteenth century with the treaty-making process, which followed the 'Indian' land rights set out in the Royal Proclamation of 1763[9] (see Isaac 2004:4; Stanley 1983:7; Tobias 1983:40). However, as time progressed, some of these treaties were 'coerced . . . secured on false representations[,] . . . poorly described the lands transferred[,] . . . and . . . payments were not made' (Harring 1998:28). Settlers 'were not only engaging in outright frauds against Indigenous people, they were also killing them. Dispossessed Indigenous communities, in turn, became impoverished and socially disorganized, with high levels of crime, violence, and alcoholism' (ibid.:25; for details about alcoholism in Upper Canada, see Barron 1983). This Act also exempted Indigenous people, or persons married to them, from land tax payments, thus freeing them from seizure for non-payment of debt, and provided for damages from public works.

The need to enact a piece of legislation such as this one illustrates the resistance that the Commissioners of the Indian Department encountered while carrying into effect the Acts that pertained to Indigenous lands (see Milloy 1983; Tobias 1983).[10] Thus, the Crown deemed it necessary to create the 'Indian title' and define the term 'Indian'. It was not until 1851 that the *Act to Repeal in Part to Amend an Act, Intituled an Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*[11] defined who was an 'Indian' without any input from them:

> *Firstly*. All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands . . . and their descendants:
> *Secondly*: All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands . . .
> *Thirdly*: All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

At first glance, the emphasis lies on defining the 'Indian' person as someone who possesses Indian blood, descendants of such persons, those intermarried with other 'Indians', and/or those residing with or belonging to a tribe. For the British imperial government the necessity to provide an 'Indian title' was political and economic in orientation. In other words, it was designed to limit 'Indian' access to land and fiduciary services. For instance, the Crown held the exclusive right to purchase Indigenous lands by treaty before it was given to whites for settlement (Harring 1998:21), and once that purchase was negotiated, an agreement on amount to be paid in pounds, provisions, annual presents, and services of skilled people was to be rendered to the 'Indians' (Surtees 1983:71). Since the Royal Proclamation, a 'pattern of establishing treaties or treating with Indigenous occupiers for access to their lands' (Miller 2004:173) was the method of negotiation with them to surrender their tracks of land in return for

compensation. In Ontario this practice continued until the twentieth century (McNab 1983b).

As such, the picture of the Colonial Office, specifically the work of state agents, as being 'humanitarian' and 'protective' of Indian affairs was '[b]y the mid-nineteenth century, if not before . . . economic' (McNab 1983a:91). This economic interest also meant preparing the path for a 'developmental strategy' to enfranchise Indigenous people and to assimilate them (Milloy 1983:58). Enfranchisement was introduced and legislated in the 1857 Act entitled *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians*.[12] Sir John Macdonald, co-premier of Upper and Lower Canada, thought it was an honour to be 'enfranchised' because it meant that 'Indians' had reached a certain level of civilisation, even though this meant losing their Indian status (Dickason 2002:229). Enfranchisement enabled 'Indians' to hold private property, pursue higher education, and practice a skill and resource development (Milloy 1983:58). Enfranchisement, as a technology of control or governmentality, was orchestrated by the British government in order to control Indigenous people as new subjects: the 'English Indians'. The social profile of the enfranchised population included: men between twenty-one and forty years of age, knowledgeable of English and French, Christian, of good morals, free of debts, and with 'sober and industrious habits'.[13]

However, as time progressed, not many 'Indians' chose to enfranchise (Miller 2004; Milloy 1983; Warry 2007). Milloy (1983:58) noted that many resisted and an example of that resistance was the rejection of the concept of reserve subdivision by tribal councils across the colony in 1846. Warry (2007:34) claimed that the 'vast majority of status Indians from the nineteenth century onwards, never chose to become citizens despite the opportunities enfranchisement afforded'. Indigenous peoples' resistance forced the colonial government to create other pieces of legislation to enforce their enfranchisement.[14] The 1859 Enfranchisement Act incorporated most of the early legislation with the additional ban on the sale of alcohol.[15]

Surtees (1988:93) noted that Indian policy was mostly developed during the pre-confederation period and enforced through legislation under which Indian agents and officials exerted 'a series of new tactics'. Indeed, Indian legislation attempted to increase the power of these agents of the state (i.e., Indian agents and Indian Affairs officials), whereas their authority not only included pursuing the enfranchisement of Indigenous people but also liquor control, reserve resources, and land alienation (Leslie and Maguire 1978:33–34), albeit contested by them (Barron 1983; Telford 2003). Each colony was responsible for implementing their Native Affairs until 1862 when the British government formally transferred the authority on Indian affairs to the colonies (Surtees 1988:89). It was not until Confederation (1 July 1867) that Indigenous people and their lands became a federal government responsibility[16] and the department responsible for 'Indian' matters was delegated to the Department of Secretary of State who became the Superintendent-General of Indian Affairs. Thus, it is necessary to explore Indian policy and legislation during the post-confederation period.

Post-Confederation Indian Policy

The Dominion of Canada, established in 1867, included the provinces of Ontario, Quebec, New Brunswick, and Nova Scotia. Manitoba entered Confederation in 1870 and British Columbia in 1871 (Miller 2004:189). The federal government had jurisdiction over 100,000 to 120,000 Indigenous people and their lands (ibid.:171). Surtees (1988:93) contends that the policy of civilising and assimilating the 'Indian' was not formulated but applied through legislation during the post-confederation period (from 1867 until the first half of the twentieth century). Tobias (1983:43) noted that the 'emphasis placed on' civilisation, assimilation, and protection of Indian policy changed by Confederation where the 'protection of the Indian and his land was the paramount goal. Civilization of Indians was gaining in importance but was regarded as a gradual and long-term process. Assimilation was the long-range goal.'

In order to accomplish such goals, the Canadian Indian Department played an important role in transforming itself from a provincial government agency into an important and large federal government institution (Leighton 1983:105). After 1867 and during the early twentieth century, the Deputy Superintendent General of Indian Affairs led this department, and these men embraced the Victorian qualities of order, manners, and industry (ibid.:105). Under their control and administration, the British Indian policy took shape and was implemented throughout the Dominion by becoming 'intimately involved in the local and even the private affairs of Indian bands' (Surtees 1988:89). Indian policy implementation differed in Eastern and Western Canada (ibid.).

The Indian Department considered the Western territories not as 'advanced enough in civilization' (Tobias 1983:49). The federal government expressed dissatisfaction with the reserve system given that it did not encourage 'Indian' enfranchisement (ibid.:49). The ultimate goal of the Indian Department was, as Tobias (1983:45) noted, to end the reserve system and for that required enfranchisement. However, as other scholars have pointed out, this was not happening and only few (n=250) were enfranchised from 1857 to 1920, and their resistance included the revival of their Indigenous traditions and identity (see Milloy 1983:58; Warry 2007:34). New legislation was needed to regulate the policy where the government 'exercised its exclusive jurisdiction over Indians and Indian lands' (Tobias 1983:45). It was precisely the Indian Act of 1876[17] that responded to this call.

During the 1870s, the Dominion of Canada continued with its Indian policy and extended its authority through the treaty system (Miller 2004:176; Tobias 1983:43–44). For instance, Sir John A. Macdonald, Prime Minister of Canada (1867–73, 1878–91), continued with the policy of peaceful settlement and civilisation of the 'Plains Indians' who lived on reserves and practiced agriculture (Leslie and Maguire 1978:71). The decrease of buffalo herds stimulated the latter, and the government of the Dominion of Canada initiated its settler occupancy policy and expansion to the Western territories through a series of treaties signed between 1871 and 1923 with Indigenous people (ibid.:54). This territorial 'expansion' included the new Province of Manitoba, the 'Fertile Belt', and

the 'North-west Angle', which became known as the National Policy. British Columbia represented an exception under the premise that it had already 'dealt with the Indian title' (see Dickason 2002:240–41; Leslie and Maguire 1978:57–60).

To return to my analysis of crafting the 'English Indians' through assimilation, in 1883 the Department of Indian Affairs, a new branch of the civil service created in 1880, announced a policy on education for Indigenous children to attend industrial schools (Miller 2004:182; Tobias 1983:45). Missionary entities operated these schools and taught gendered trade skills where male children learned blacksmithing, carpentry, shoe making, and farming. In contrast, female children learned domestic skills for managing the household (Miller 2004:182–83). Initially, these industrial schools were implemented in the Prairie region followed by Ontario and British Columbia. By 1920, there were eighty industrial and boarding schools throughout the country, and by 1923, both types of schools amalgamated into one category: the residential school system (ibid.:183).

This policy 'of the Bible and plough' (ibid.) encountered resistance from both parents and children (Assembly of First Nations 1994; Milloy 1999). For example, the White Bear band, currently located on the south-east flank of Moose Mountain in Saskatchewan, taught their traditional ways to children rather than attending residential schools (Miller 2004:187). In other cases children escaped from these institutions, while others continued with their hunting and fishing activities, which hindered their children's school attendance (Miller 2004:118; Surtees 1988:92). The residential school system was yet another governmentality that had the aim, in the long term, to craft sedentary, civilised, and Christian 'Indian' subjects. If this was accomplished, then the 'English Indians' were going to be legible to the Canadian state. Despite the negative effects in their emotional, physical, mental, and spiritual life, residential schools operated until 1987. Residential school survivors were neither assimilated nor exterminated; rather, they managed to subsist.[18]

In 1927, the Deputy Superintendent General of the Department of Indian Affairs stated 'there is no intention of changing the well-established policy of dealing with Indians and Indian Affairs in this country' (Taylor 1984:5). Nonetheless, by the end of World War II, anticolonialism propaganda moved Indigenous veterans to reject the racism and oppression they experienced on reserves such as purchasing alcohol, voting, and selling their livestock or farm produce. In response, Indian leaders, the general public, and native advocacy groups and associations (e.g., the Indian Association of Alberta) lobbied against these policies and practices (Nichols 1998:287).

By 1946, government officials and church leaders recognised that Canadian Indian policy required changes. At this quintessential stage, from 1946 to 1948, members of the Senate and House of Commons formed a joint committee and invited native organisations and associations, spokesmen from the Six Nations reserve, and representatives of non-status or unaffiliated 'Indians' to speak to the committee. The attendees presented diverging proposals but all criticised the Canadian Indian Policy and the Indian Act (Nichols 1998:288; Surtees 1988:94). One of the problems the committee faced was the disagreement among Indigenous

people about the changes needed. By 1948, the special committee submitted its report to the Department of Indian Affairs with recommendations that included 'giving the tribes additional time for the assimilation process to work [and limiting] the ability of bureaucrats to hinder changes on the reserves' (Nichols 1998:289). In addition, Indigenous people unanimously opposed compulsory taxation and enfranchisement. This led to further revisions of the Indian Act in 1951 by parliament and its enactment. This collaboration represented a change in the social relations between Indigenous people *vis-à-vis* the state where the 'Indians' were politically engaging with the Canadian state in common social projects.[19]

'Contemporary' Indian policy has not yet been fully formalised through legislation but has been identified as the process that commenced in 1969 with the *Statement of the Government on Indian Policy*, usually known as the White Paper (Doern and Phidd 1983; Doerr 1971). It proposed the removal of 'Indians' special status'[20] and the dismantling of the reserve system (Doerr 1972). This policy encountered widespread Indigenous resistance, which subsequently strengthened political activism and networking across Canada through the emergence and strengthening of native organisations and Aboriginal leaders (see Cunningham 1999; Turner 2006; Weaver 1981; Weaver 1986). What was publicly demonstrated in the aftermath of the White Paper was the 'ability of Canadian First Nations and Inuit to articulate their interests directly and most effectively to politicians and to members of the public' (Dyck and Waldram 1993:10).

Since then, the process has developed into one with major Indigenous people's political participation and the inclusion of their 'practical knowledge' in Indian policymaking (see Cunningham 1999; Dubois 2003; Dyck and Waldram 1993; Turner 2006). As Cunningham (1999:3) stated, 'Canadian Indian policy is viewed as the product of relationships involving Indian peoples and the central state'. The persistent pattern of 'tight secrecy' (see Weaver 1981) prevalent in the policymaking process was slowly altered with Indigenous participation in initiatives such as the Parliamentary Task Force on Indian Self-Government (Canada 1983), and the amendments to the Constitution Act in 1982 and 1983 (sections 25, 35, and 37). Other examples are the First Ministers' Conferences on Aboriginal matters, the Ministerial Task Force on Program Review (Nielsen Report), the Royal Commission on Aboriginal Peoples, and the Indian Self-Government Community Negotiations policy statement (Boldt 1993:66). In the 1982 Constitution Act (section 35), the term 'Aboriginal' peoples of Canada was formally defined to include Indians, Métis, and Inuit. Yet, at the same time it excluded 'non-status Indians'. In addition, the federal government recognised the inherent right of self-government of Aboriginal peoples within section 35. This paved the way for their input in policy and decision-making over matters that affected them including self-government, programme delivery, and services. At the local level, policy agreements are being implemented by native organisations and native non-governmental organisations (NNGOs) in urban areas (see Manzano-Munguía 2007; 2009; 2010).

For instance, Aboriginal policy input from Aboriginal leaders has led to increased control over labour market training through the Regional Bilateral

Agreements negotiated by employment NNGOS. Despite the aforementioned changes in Indian policy, Indian legislation still has a long way to go but it has become an increasingly contested terrain excerpted by the political praxis of Aboriginal leaders and native organisations across Canada (see Borrows 2002; Manzano-Munguía 2008; Manzano-Munguía 2009). In order to understand this complexity, it is necessary to explore the Indian legislation during the post-confederation period.

Post-Confederation Indian Legislation

The federal government of Canada under section 91 (24) of the 1867 British North American (BNA) Act sought to achieve some sort of standardisation of the multiple pieces of legislation. This process began with the 1868 and 1869 Acts.[21] Tobias (1983:4) stated that the Act of 1868 'merely incorporated earlier colonial legislation concerning Indian lands . . . the . . . definitions of who was an Indian and the penalties imposed for trespass on Indian lands'. As such, this Act consolidated previous legislation and, in principle, sought the protection and management of Indigenous interests, in other words the protective or 'guardianship policy' (Leslie and Maguire 1978:53). Under the 1869 Act, 'Indians' voluntarily had to surrender their Indian status and band membership in exchange for a 'materialized benefit' such as private property, social status (becoming a priest, lawyer, or doctor), and the right to purchase liquor. Section 13 of the Act stated:

> [T]he Governor General in Council may on the report of the Superintendent General of Indian Affairs order the issue of Letters Patent granting to any Indian who from the degree of civilization to which he has attained, and . . . appears to be a safe and suitable person for becoming proprietor of land.[22]

Section 16 of the same Act clarifies what should be obtained before the state agent (Governor General in Council) who granted the 'Letters Patent' where '[e]very such Indian shall, . . . declare . . . the name and surname by which he wishes to be enfranchised and thereafter known'.[23]

This Act also began the process of 'democratising' band governments in terms of preparing them for 'civilisation' through Euro-Canadian standards such as adopting the election system for selecting Indigenous leaders. It meant a way of breaking down old customs and weakening Indigenous leadership and knowledge. Thus, the election of chiefs followed a protocol where the 'Governor may order that the Chiefs of any tribe, band, or body of Indians shall be elected by the male members of each Indian Settlement of the full age of twenty-one years . . . and they shall be elected for a period of three years'.[24] Furthermore, chiefs and councillors were limited to making by-laws that pertained to public health and policing, but not without final approval from the Secretary of State. In other words, the Enfranchisement Act (1869) not only intended to 'free [them] from their state of wardship under the Federal Government' but also included 'gradual assimilation' (Leslie and Maguire 1978:53). In addition, the 1869 Act emphasised the 'blood quantum' (see Leslie and Maguire 1978:53; Miller

2004:181) and the need to legally state the difference between none versus full-blooded 'Indians' and its subsequent inclusion in the Indian Acts from 1876 to 1927.

In 1876, the Indian Act was enacted across Canada and consolidated all previous Indian legislation. Since then, it has been amended numerous times in order to 'adequately' govern, assimilate, define, and discriminate against the 'Indians' (Jamieson 1986:117; Lawrence 2004:34; Royal Commission on Aboriginal Peoples 1996:257). This Indian Act and all subsequent Indian Acts were ongoing projects of making 'Indians' legible to the state. First, the state was interested in defining who was an 'Indian'.[25] In addition, five articles within the same subsection excluded individuals from Indian status and band membership, so Indian membership was not about the blood quantum but rather a legal entitlement.[26] Second, the state was also the ultimate ward and decision-maker about all the issues pertaining to 'Indian' lives, including the management and protection of their lands, money, and natural resources. Indian land could only be surrendered to the Crown. Reserve lands were neither taxed nor seized for defaulted debts; rather, lands were surrendered with the full consent from the adult band members. Money collected from the sales was held in trust for the band by the government (see Miller 2004; Milloy 1983; Tobias 1983). Third, 'Indians' were not entitled to the privileges of full citizenship like voting, property holding, selling the product of their labour, and investing (Miller 2004; Surtees 1988). Fourth, the consumption and sale of liquor on all reserves throughout the Dominion continued to be banned with little alteration from the first clause of the 1874 statute respecting the sales of intoxicants (see Leslie and Maguire 1978:68). Fifth, enfranchisement provisions continued '[w]henever any Indian man or unmarried woman, of the full age of twenty-one years, obtains the consent of the band which he or she is a member to become enfranchised'.[27]

From 1876 to 1886, the Indian Act experienced multiple amendments that enforced 'Indians' civilisation and assimilation.[28] For instance, the 1876 Indian Act and subsequent amendments included the provisions that banned the persistence of cultural practices such as the practice of traditional marriages and other Indigenous rituals (see Tobias 1983:45). The 1879 amendments to the Indian Act (Canada 1879) and the 1880 Indian Act also paid particular attention to withdrawing 'half-breeds' from the rolls of treaty Indians and to establishing separate policies for the Métis (see Leslie and Maguire 1978:76).[29] Indigenous people were neither assimilated nor civilised; rather, their native identity and cultural practices persisted albeit fragmented. This resistance meant further oppression, and from 1885 until 1951, the Indian Act was increasingly oppressive.

The Métis rebellion against the Canadian government in 1885 brought changes to Indian legislation. It became an excuse to increase restrictions already in place such as cultural bans and education policy. Specifically in Western Canada, the Department of Indian Affairs treated its wards with restrictions, rewards, and encouragement towards self-sufficiency (Leslie and Maguire 1978:89; Miller 2004:176). Forced assimilation and cultural bans were implemented in the Indian Act of 1886 and in subsequent Indian legislation. The first

cultural ban, against the practice of the Potlatch and the *Tamanawas* dances, was enacted in the 1884 Act.[30] The 1886 Indian Act[31] again banned cultural and religious practices: '[e]very Indian or person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or the Indian dance known as the "Tamanawas," is guilty of a misdemeanour, and liable to imprisonment for a term not exceeding six months and not less than two months.' This prohibition encountered Indigenous resistance and the dances became practiced as underground rituals (see Dickason 2002:266; Miller 2004:112). The attendance of children at either industrial or boarding school became compulsory.[32] The 1927 Indian Act[33] outlawed freedom of association or raising funds for pursuing land claims. This Act continued in the 'direction of increasing interference, attempted political control and coercive efforts to transform Native peoples culturally and economically' (Miller 2004:190).

After World War II, Parliament was forced to establish a Special Joint Committee of the Senate and House of Commons to revise the Indian Act legislation (see Leslie and Maguire 1978:132–49). Consequently, the 1951 Indian Act deleted fifty sections and subsections from earlier Acts because they were 'too aggressive' (Tobias 1983:52) including cultural bans and passlaws,[34] some prohibitions against alcohol, and fund raising to pursue land claims (see Miller 2004:190). In addition, women were allowed to vote and secret ballots became the norm in band elections (Leslie and Maguire 1978:150–51; Miller 2004:189).[35] Tobias (1983) argued that the 1951 Indian Act returned to the philosophy of encouraging civilisation rather than directing or forcing it and continued to focus on assimilation through education and enfranchisement.[36]

Leslie and Maguire (1978:151) argued that despite the government ending the aggressive assimilation policies and legislation, 'Indians' 'refused to surrender their separate status, treaty rights, and privileges'. The following example will illustrate this resistance. The 1869 Enfranchisement Act stated that 'Indian' women who married non-Indian men and the children of such unions lost their Indian status, band membership, and their entitlements as registered 'Indians' such as tax exemption, right to hold property, and live on-reserves.[37] This gender inequality and discrimination against women continued in subsequent Indian Acts until 1985 when the last set of major revisions to Indian legislation occurred.[38] Sandra Lovelace contested the Indian Act definition of Indian status,[39] but the Supreme Court of Canada failed to recognise that this section was discriminatory. She appealed that decision to the United Nations Human Rights Commission, which found it discriminatory in 1981 (Lovelace v. Canada 1981).

By 1985, Parliament passed Bill C-31 and recognised three types of registered Indians: (1) those registered under section 6 (1) who possess registration entitlement for all their descendants regardless of who they marry; (2) those registered under section 6 (2) who can pass the status to their children only if they marry another registered Indian; and (3) those individuals who are not registered under the Indian Act and their children are entitled to be registered only if the parent is registered under section 6 (1). If a child has one parent registered under section 6 (2) of the Indian Act and the other parent is non-Indian then he/she is

not entitled to registration (Isaac 2004:509). The category of 'Indian with status' only refers to people registered as 'Indians' pursuant to section 5 (1) of the Indian Act who hold a band membership.[40] Only registered 'Indians' possess status and are subject to the Indian Act entitlements. For this reason, as Isaac (2004:506) stated 'there may be persons who are members of a band but who are not registered, and persons who are registered but who are not members of a band'. The increased control that Bands exercised over Indian Band membership but not over the assignment of status was a direct consequence of the 1985 Indian Act.

Even though Bill C-31 (Canada 1985, s. 6 (1)) attempts to eliminate discrimination, the Indian Act remains discriminatory. Sharon McIvor, a member of the Lower Nicola First Nation in British Columbia, challenged this gender inequality or the Euro-Canadian preference for male lineage as applied to Indian status. In 2006, she received her Indian status as did her children; however, her grandchildren did not (McIvor v. Canada 2007). The government of Canada enacted Bill C-3, *An Act to Promote Gender Equity in Indian Registration* (short title: Gender Equity in Indian Registration Act), to respond to the Court of Appeal for British Columbia decision in *McIvor v. Canada*. It came into force on or after 5 April 2010.

The Indian Act regulates the lives of thousands of Indigenous people who may or may not live on-reserve and who have a 'special' dependency on government funding and its fiduciary responsibility to them (Isaac 2004:193). Yet this dependency on government funding is controversial and to which Alfred (1999) makes an illuminating contribution. His solution is to attain independence as sovereign nations through economic, sociocultural, and political Indigenous models rooted in their own traditions that include oral tradition and elders' advice. Other native activists and scholars proposed similar sustainability models for First Nations residing in both the United States and Canada (see Churchill 2003; Deloria 1969; Manuel and Posluns 1974; Valaskakis 2005). Under a similar line of thought is the proposed model towards self-determination and Aboriginal people working as communities with their own Indigenous identities as well as '[m]aintaining good relationships with [their] family, clan and nation' (Monture-Angus 1999:160–61). Guthrie Valaskakis (2005) argued that native identity refers to both the relationships established with 'other people – your people' and in tribal nations (e.g., Mohawk, Cree, Ojibwa).

Despite the aforementioned grassroots constructions of nationhood and native identity, legislation is contradictory and serves as a tool to exercise hegemony whenever dominant class interests collide with the needs, identities, and interests of Indigenous people across Canada (see for instance Monture-Angus 1999:30). The Indian Act not only enumerates the rules and entitlements that are applicable to 'Indians' but, at the same time, constrains and governs their mentalities and actions (including treaties and court decisions). Thus, I deem the Indian legislation to be a paradox or an unavoidable evil for two reasons. First, the Indian Act has been internalised and used by Indigenous people as a political discourse that defines and legitimises their legal identity and ratifies their 'special' legal status

(entailing fiduciary and fiscal responsibilities) with the federal government. This ensures the transfer of government funds to reserves and to other status or non-status 'Indians' living in urban areas on issues pertaining to housing, health, education, tax relief, and treaties (Lawrence 2004). Second, Indian legislation is a technology of control (or governmentality) where the state has been attempting to control and create 'Indian' subjects albeit that subjectivity has been locally contested and transformed. Still the extent of this paradox needs be evaluated in the future.

Conclusion

This article illustrates the historical complexity of Indian policy and legislation in Canada during the pre- and post-confederation periods. While the particular focus in this paper centres on Upper Canada, the socio-historical construction and deconstruction of 'Indians' since colonisation in this region is representative of similar social processes across Canada. Indian policy and legislation during the pre- and post-confederation set out the goal of making indigenous people legible to its rulers by attempting to mould them into replicas of 'English society'. After Confederation, the Canadian government also implemented a similar approach around Indian policy and legislation as undertaken by the British government. According to the ethos of these policies, Indigenous people were to be assimilated or amalgamated, civilised, and protected.

The complexity of materialising these policies and pieces of legislation into concrete actions required the use of different instruments of control or governmentalities that the British and the Canadian government implemented in specific contexts such as the residential school system and the reserve system. The complexity of the social relations between state agents, missionaries, and settlers *vis-à-vis* the indigenous population, shaped by particular economic and political interests, have also been characterised by resistance between these various parties. Despite the original intention behind Indian policy and legislation to assimilate the Indigenous population into wider Canadian society, the persistence of native identity in urban areas and on reserves remains a reality, despite claims about its 'disappearance' (see Statistics Canada 2006). The aftermath of resistance and political positioning of Indigenous people is reflected by the fact that post-confederation Indian policymaking has become a much more negotiated process. Currently, there is an ongoing participation by Aboriginal leaders and native organisations in contemporary Canadian Indian policy design and implementation (see Manzano-Munguía 2009; 2010).

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Notes

[1] The term 'Aboriginal people' encompasses Indian, Inuit, and Métis as defined by the Constitution Act of 1982, s. 35. Historically, this term has also been used to refer to the original peoples living in the Americas, due to Christopher Columbus' mistaken assumption that he had discovered India.

[2] Throughout this text the term 'Indian' denotes the objectified category that was created by the state as an attempt to control and arrange multiple Indigenous populations (e.g., Mohawks, Algonquians, Chippewas, Ojibwa) under one construct.

[3] Governmentality is understood as a form of power and control that encompasses institutions, tactics, procedures, reflections, and calculations, which make possible the articulation of governing people through techniques (Foucault 1991:102). Governing people might include implementing large-scale campaigns (e.g., improving health and well-being, wealth), technologies, and policies (e.g., promoting certain jobs, stimulating birth rates). In other words, governmentality is the escalating process of 'management control' through multiple techniques.

[4] This article encompasses only a section of my doctoral research findings (see Manzano-Munguía 2009).

[5] See *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians*, S. Prov. C. 1857, c. 26 (Canada 1857).

[6] Each colony had its own Indian Legislation although these all centred on a common theme: protecting, civilising, and assimilating or amalgamating the Indians (see Dickason 2002; McNab 1983a; Miller 2004).

[7] E.g., *An Act to Regulate the Statute Labour to be Done upon the Roads in the Tract Occupied by the Huron Indians in the County of Essex, in the Western District*, R.S.U.C. 1792–1840, 1801, c. 10 (Canada 1801); *An Act for the Protection of the Lands of the Crown in this Province from Trespass and Injury*, R.S.U.C. 1792–1840, 1839, c. 15 (Canada 1839).

[8] *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*, S. Prov. C. 1850, c. 74 (Canada 1850).

[9] Royal Proclamation of 1763, R.S. 1985, App. II, No. 1.

[10] *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*, S. Prov. C. 1850, c. 74 s. XIII (Canada 1850).

[11] *An Act to Repeal in Part to Amend an Act, Intituled an Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, S. Prov. C. 1851, c. 59 (Canada 1851).

[12] *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians*, S. Prov. C. 1857, c. 26 (Canada 1857).

[13] *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*, S. Prov. C. 1850, c. 74 s. IV (Canada 1850).

[14] E.g., *Act Respecting Civilization and Enfranchisement of Certain Indians*, 1859, c. 9 (Canada 1859); *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria*, Chapter 42 S.C. 1869, c. 6. Vict. (Canada 1869).

[15] *Act Respecting Civilization and Enfranchisement of Certain Indians*, 1859, c. 9 s. 3 (Canada 1859).

[16] The British North America Act (BNA), 1867, s. 91(24).

[17] *Indian Act of 1876*, S.C. 1876, c. 18 (Canada 1876).

[18] For details on the effects of Residential Schools, see the Aboriginal Healing Foundation (n.d.); Assembly of First Nations (1994).
[19] For details on how Indigenous law can be formally included in Canadian law, see Borrows (2002).
[20] Their 'special' legal status refers to the fiduciary and fiscal responsibilities that the federal government honours to treaty Indians such as the transference of funds to reserves, health, education, and tax relief.
[21] *An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, S.C. 1868, c.42, 31 Vict. (Canada 1868); *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria*, Chapter 42 S.C. 1869, c.6. Vict. (Canada 1869).
[22] *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria*, Chapter 42 S.C. 1869, c. 6. s. 13 Vict. (Canada 1869).
[23] *Id.* at c. 6 s. 16.
[24] *Id.* at c. 6 s. 10.
[25] *Indian Act of 1876*, S.C. 1876, c. 18 s. 3 (Canada 1876).
[26] See *id.*
[27] *Id.* at c. 18 s. 86.
[28] See *Indian Act of 1880*, c. 28 (Canada 1880).
[29] *An Act to Amend 'The Indian Act 1886'*, S.C. 1888, c. 22 s. 1 ss. 13 (Canada 1888).
[30] See *An Act Further to Amend 'The Indian Act, 1880'*, S.C. 1884, c. 27 s. 3, 47 Vict. (Canada 1884).
[31] *Indian Act of 1886*, c.43 s. 114 ss. 2 (Canada 1886).
[32] *Indian Act of 1894*, c. 32 s. 11 ss. 137 (Canada 1894).
[33] *Indian Act of 1927*, R.S.C., c. 98 (Canada 1927).
[34] Canada had a pass system in Treaties areas from 1886 until 1930. This pass system served to prevent Indians from participating in any uprising and to reside in a reserve (see Barron 1988; Purich 1986).
[35] See also *Indian Act of 1951*, R.S.C., c. 29 (Canada 1951).
[36] See also *id.* at c. 29 s. 113–22; *id.* at 108–12, respectively
[37] *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria*, Chapter 42 S.C. 1869, c. 6. s. 6 Vict. (Canada 1869).
[38] See *Act to Amend The Indian Act*, 1985, c. 31 [Bill C-31] (Canada 1985).
[39] *Indian Act of 1970*, s. 12 (1)(b) (Canada 1970).
[40] *Indian Act of 1985*, 1985, c. I-5 s. 10 (Canada 1985).

List of Abbreviations

c.	Chapter
s.	Section
ss.	Subsection
S.C.	Statutes of Canada
S. Prov. C.	Statutes Province of Canada
R.S.C.	Revised Statutes of Canada
Sch.	Schedule
Supp.	Supplement

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