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**Like an Ill-Fitting Boot:  
Government, Governance and Management Systems  
in the Contemporary Indian Act**

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**Like An Ill-Fitting Boot:**  
**Government, Governance and Management**  
**Systems in the Contemporary Indian Act**

**A Report Prepared for the**  
**National Centre on First Nations Governance**

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*Today the Indian Act is the repository of the struggle between Indian peoples and colonial and later Canadian policy-makers for control of Indian peoples' destiny within Canada. The marks of that struggle can be seen in almost every one of its provisions.*

*Final Report of the Royal Commission on Aboriginal Peoples, Volume 1, Chapter 9, p. 258.*

## Introduction

Few people are satisfied with the Indian Act, but no one will deny its importance. For the individuals to whom it applies, the Act is a basic and specific constitutional document. It defines their rights and entitlements, their citizenship and their relationship to the federal and provincial governments. It provides the mechanisms that include or exclude them from membership in a Band. For First Nations, it creates the framework within which both public and First Nations officials and political leaders must work, profoundly shaping the nations' political and economic life. For Canadians as a whole, the Indian Act to a large extent defines their collective institutional relationship with members of First Nations, while it powerfully shapes their relations as neighbours and business partners.

This report is an analysis of the contemporary Indian Act from the perspective of public administration and political science. It relies upon some concepts used in governance<sup>1</sup>, organizational and management research. The purpose is to understand to what extent the Indian Act creates a good institutional setting for healthy democratic government and effective administration and management in First Nations communities.

This study is intentionally incomplete. It examines the Indian Act as *a written document* –as the legal starting point. It does not consider how people have or have not made the Indian Act work. For the most part, it ignores important court decisions that have affected the way the Indian Act is applied. Those matters are the subject of other studies in this series.

## Overview of Main Findings

The Indian Act seems to have at least four purposes related to governance:

- it establishes the authority of the executive branch<sup>2</sup> of the federal government over the core areas of reserve life, while spreading specific responsibilities among various federal officials;
- it defines the relationship between Indian individuals and the state;
- almost in passing, it creates a governance framework for Band administrations, by outlining the powers and responsibilities of Band Councils, and the limits to these;

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<sup>1</sup> Governance is a term for the processes through which citizens, social institutions (mass media, companies) and government make decisions and exercise power. The similar but narrower term 'government' refers to the institutions of the state –legislature, Cabinet, public service, judiciary. See the Glossary in Appendix A for more details.

<sup>2</sup> The 'executive branch' is one of three traditional parts ("branches") of government. In the federal government of Canada these are the legislature (House of Commons and Senate), the judiciary (the courts) and the executive (Cabinet, public service, Governor-General).

- it sets in motion certain organizational patterns while remaining silent about most common facets of organizational design (for example, it defines lines of accountability but ignores policy research and human resource development).

The Indian Act's emphasis on the authority of the executive branch of the federal government over individuals and communities shapes virtually every aspect of governance. Powers and authorities are concentrated in this branch to a remarkable degree. This limits institutional options and the ability of Band governments to be responsive their members.

The Indian Act appears to be a legislative fossil. It reflects administrative and organizational practices that were characteristic of public institutions in the early and mid-twentieth century, but that have been modified and superseded in other governments. The Act relies upon regulation, top-down authorities, fiscal control, and enforcement. Today most Canadian governments and other organizations rely upon collegial decision-making and policy development, policy research, human resource development, management accounting systems, and citizen engagement. The Indian Act does not mention these things, and the basic provisions do not leave much room for them.

The Indian Act has a powerful impact on the quality of democracy in Band governments. Having the force of law and backed by financial power, the Act mandates one particular set of institutions and practices to the exclusion of others. In this way it affects the abilities of First Nations to shape more accountable and democratic governments.

In the rest of this report there is an explanation of the basis for these findings. The explanation begins with a specific and detailed tour of the main provisions of the Act from the perspective of governance and administration. Then, two different lenses are used to consider the specific provisions. The Indian Act is assessed in terms of the systems of administration and management that it sets up, and then in terms of the implications of these for governance and democratic government. When the Indian Act is considered in this light, it resembles an ill-fitting boot that pinches in all the wrong places and provides no support where support is needed the most.

### **A Few Qualifications**

Although this report analyzes a law, the analysis itself is not legal, but rather institutional and organizational. It is an attempt to understand the logical implications of various provisions of the Indian Act for First Nations governance, and to compare these to standard Canadian practice in governance and management.

Inspiration for the organizational analysis came from a number of sources. Systems analysis<sup>3</sup> is applied in this study in an adapted form. It is useful because it permits a

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<sup>3</sup> The term 'systems analysis' refers to an approach to analyzing organizations that emphasizes the study of the regular patterns of interacting parts. The basic features of system analysis are drawn from engineering,

systematic focus on the processes and outcomes that the Act enables. Organizational science in general identifies some basic features and purposes of all organizations. The Indian Act is assessed for its impact on these basic features. Studies of public management that have tracked the changes of the last forty years are useful for putting the Indian Act in comparative context.<sup>4</sup>

This study considers the current consolidated version of the Indian Act.<sup>5</sup> It does not examine related jurisprudence, the sequence of important revisions to the Act, or the many accumulated policy decisions that have been taken by officials who have interpreted its provisions. It does not consider the legacy of the Indian Act as it may be embodied in the learned practices of First Nation politicians and officials and in those of federal officials as well. Further, as far as possible, the analysis here tries not to make assumptions about motivations or purposes, but rather, simply to interpret the words of the Act as they appear on the page.

Although the purpose of this study is to analyze the Indian Act as written, from time to time it does refer to current practices. This is done wherever to omit such information would be to create an incorrect impression of what is now possible under the Act.

One general comment about purposes may be appropriate. It is obvious that the original Indian Act was not created with the self-determination of First Nations communities in mind.<sup>6</sup> Its original purpose was to permit federal officials to control First Nations and to enable social engineering –the coercive transformation of Indigenous societies and governments to bring them into line with the purposes and visions of the Canadian government. The various provisions of the 2006 version of the Consolidated Indian Act bear the marks of this historical origin very clearly, despite important amendments to the Act, and the ways that the people who must live with the Act on a daily basis have found to adapt its provisions to better purposes.

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where a factory might be analyzed in terms of the systems (processes and working parts; inputs, processes and outputs) that enable it to produce goods.

<sup>4</sup> The authors whose work has been most useful in supporting the analysis in this report are listed in Appendix 3.

<sup>5</sup> <http://laws.justice.gc.ca/en/I-5/text.html> downloaded March 2006.

<sup>6</sup> There is a good discussion of the origins of the Indian Act in the final report of the Royal Commission on Aboriginal Peoples, Volume 1, Chapter 9, and an excellent analysis of its fate in the changing public service after the Second World War in Shepherd 2006 pp 95-127.

# 1. What is in the Indian Act?

This section of the report presents an analytical walking tour of the Indian Act. The sections of the Act are grouped according to the effects that they have on government, governance and/or management. The purpose is highlight what is included and what is not; what is emphasized and what is minimized; and what the general effect of specific written provisions might tend to be.

On the basis of the commentary in the “walking tour,” the second part of this report considers governance and management practices under the Indian Act and the implications of these for good government and the prospect of democratic government on reserve.

## **First Principles -- Land and Political Authority (Section 2)**

Section 2 of the Indian Act defines the political relationship between a First Nation and the Crown, and it states what the political shape of a First Nation shall be (for the purposes of the Act).

The term ‘band’ is defined as follows:

“band” means a body of Indians

- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951.
- (b) for whose use and benefit in common, moneys are held by Her Majesty, or
- (c) declared by the Governor in Council to be a band for the purposes of this Act.

This definition asserts the Crown’s control over what it will consider to be a relevant political entity in its relations with Indigenous peoples: a band is an entity “declared” by the Governor in Council to be a band. In the same breath, so to speak, this first definition also asserts Crown title to reserve land and resources and it indicates generally how the “Indians” will make use of reserve land (“use and benefit in common”). Then it indicates by definition (in parts b and c) that these are held by the Crown for the common use and benefit of the band. This last clause puts a limit on the Crown’s discretion, at least in principle. Although the Crown holds title, it does so with a specific mandate, to exercise its power in the best interests of the Band. (This limitation is commonly identified as the Crown’s fiduciary responsibility<sup>[FA1]</sup>.)

What is excluded from the definition of a band is just as interesting as what is included. There is no suggestion that a band might be self-defining: that is, that the pre-existing political entities encountered by the Crown would or could be recognized as the relevant party to the political relationship. What are now called the traditional governing structures of various nations are not recognized in the Indian Act. Further, Section 2 of the Act does not suggest that the relationship between a Band and the Crown might under some circumstances be mutually defined, nor that there might be joint decision-making or shared authority. The power to define the nature of the relationship is assigned to the Crown.

Section (2) also defines, in rudimentary fashion, the form of band government that will be countenanced, and to specify who will be considered an Indian.

The *form* of band government is specified in Section 2 (3):

- (3) Unless the context otherwise requires or this Act otherwise provides,
  - (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band, and
  - (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councilors of the band present at a meeting of the council duly convened.

This clause installs majority rule, in which each elector's vote has the same weight as any other. Authority resides both in the entire body of electors (that is the force of (a) above) and in their duly convened representatives (the band council). In Sections 80-86 of the Indian Act, much more detailed procedures are set out; these are discussed below.

While all societies need some generally accepted form legitimate public decision-making, not all use majority rule in which each elector (usually, an adult of sound mind) has an equal vote in all major decisions. For example, a hypothetical alternative would involve a more complex decision-making system in which a council of elders would advise and oversee on general matters, a second group of representatives from each family would decide major questions, and day to day decision-making would be delegated specific individuals. This alternative would seem to be excluded by these provisions of the Indian Act, because it does not involve the consent of a majority of electors or councilors.

(It is important to note that in contemporary practice, it is possible for bands to remove themselves from the majoritarian and Band Council-focussed provisions of this part of the Indian Act. They may do this by developing an alternative policy for elections, membership and/or decision-making. With the alternative policy in hand, they may apply

to the Minister of Indian Affairs for removal from the Indian Act provisions and this may be granted as a matter of departmental policy<sup>[FA2]</sup>.)

Section 2 also stipulates *who is considered to be an Indian*, who is included in the Register (that is, who has status as an Indian), who is a member of a Band, who is an elector, and who is “mentally competent” to have a political voice. Thus the drafters of the Indian Act assumed control over who would be recognized as an Indian (who had status) and also over who would be recognized as a member of a Band. Today, these powers have been adapted<sup>[FA3]</sup>. Indian Affairs still controls the matter of status, of who will be registered as an Indian and thus have access to specific tax exemptions, and to funding for post-secondary education and health care. Bands, on the other hand, may assume control over membership (by application to the Minister of Indian Affairs under Sec. 10 of the Indian Act). If they are successful, they will then exercise control over who is a member with voting rights and the right to hold land. A Band with control over membership would then be free to accept as members individuals who were not recognized as having status under the Indian Act.

Finally, consider what is said in Section 2 about reserve lands. It asserts that the lands set aside for Indians are actually owned by the Crown (“the legal title to which is vested in Her Majesty” [Sec 2 (1)]). This point is reinforced in the definition of “designated lands”: “a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests...” The point is made yet again in the definition of “reserve”:

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band

This assertion of ownership is repeated one more time, when “surrendered lands” are defined [Sec 2 (1)].

It is interesting that each time Crown title to reserve lands is asserted, limitations to this title are also mentioned; the Crown is obliged to managed the “surrendered lands” in the best interests of the Band. Thus there is both the assertion of the domination of the Crown, through title and other power, and the assertion of fiduciary responsibility, in the insistence that the lands are held by the Crown for the use and benefit of the other party.

### **Government or Governance: the Minister Rules (Sections 3, 73-79, 80-86)**

In Canada as in all systems of government modeled on that of Great Britain, the executive branch of government has three parts: the Crown, the political executive, and

the permanent executive. *The Crown* is a constitutional construct, embodied by the Governor General (also called the vice-regal representative) –an office of symbolic importance and a limited range of constitutional roles.<sup>7</sup> *The political executive* refers to the Prime Minister or Premier and Cabinet (otherwise known as Governor-in-Council). The political executive is elected, and it exercises the most power. It is responsible through Parliament to the people of Canada. The political executive oversees and is responsible for the actions taken by the permanent executive. *The permanent executive* is a term used to refer to the departments and agencies of the public service, who must give effect to the laws and regulations passed in Parliament and spend funds in line with the budgets approved there. The powers of the executive branch are constrained by the oversight of the elected representatives of the people (through the House of Commons procedures) and more generally by the scrutiny of the media and the public.

All three parts of the executive branch of Canadian government are given extensive powers over Indian people and lands by the Indian Act.

The short section on “Administration” in Section 3 assigns overall responsibility for ensuring that the Act is respected and implemented to the Minister of Indian Affairs and Northern Development, or his designate.

Section 73 authorizes the federal Cabinet to make regulations in a variety of areas of reserve life. The areas in which the federal Cabinet may make regulations (and punish contraveners) include: protection and preservation of animals, fish and game on reserve; destruction of noxious weeds, pests and disease to vegetation, control of vehicles on reserve, protection of sheep and the destruction of dogs, operations and control of pool rooms, dance halls, etc. on reserve, measures to prevent the spread of disease including compulsory hospitalization, to provide medical treatment and health services, to inspect, destroy, alter or renovate premises on reserves, to provide for sanitary conditions in private and public areas, to construct and maintain boundary fences, and “empowering and authorizing” band councils to borrow money for housing purposes.

Sections 80-86 describe in remarkable detail the jurisdiction of band councils with respect to by-law making. Section 80 asserts Ministerial dominance:<sup>8</sup>

The Governor in Council may make regulations with respect to band meetings and council meetings and, without restricting the generality of the foregoing, may make regulations with respect to

(a) presiding officers at such meetings;

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<sup>7</sup> The Governor-General has the responsibility to respond to the request of the political executive to call elections, and may in very rare cases be called upon to resolve issues to do with the results of elections.

<sup>8</sup> This provision is given effect in the Band Council Procedure Regulations.

- (b) notice of such meetings;
- (c) the duties of any representative of the Minister at such meetings; and
- (d) the number of persons required at such meetings to constitute a quorum.

Section 81 (1) states that “The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes...” Then a very wide range of purposes are listed, some very general [for instance Sec 81 (1) (c) the observance of law and order] and some rather specific [Sec 81 (1) (k) the regulation of bee keeping and poultry raising]. More powers are conferred in Section 83, which provides that “Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes...” These include a very wide range of powers to do with revenue generation (including the power to tax), regulation and expenditure –all subject to the approval of the Minister.

In Sections 81 and 83<sup>9</sup> and in Sections 82, 84-86 extraordinarily detailed procedures are specified dealing with the minutia of legislative business, including a special section devoted to the regulation of alcohol consumption. Section 82 is worth quoting here, for it sums up the relationship between executive and legislative power, and the limits to band self-government, very clearly:

**82.** (1) A copy of every by-law made under section 81 shall be forwarded by mail by the chief or a member of the council of the band to the minister within four days after it is made.

(2) A by-law made under section 81 comes into force forty days after a copy thereof is forwarded to the Minister pursuant to subsection (1), unless it is disallowed by the Minister within that period, but the Minister may declare the by-law to be in force at any time before the expiration of that period.

The Indian Act also gives the Minister the power to order that elections be held:

**74.** (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councilors, shall be selected by elections to be held in accordance with this Act.

The federal Cabinet may decide whether the chief has to be elected from among the elected councilors or directly by a vote of the “electors of the band.”

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<sup>9</sup> This Section deals in part with financial management. The relevant provisions are discussed under that heading, below.

The Indian Act provisions with respect to governance have a number of noteworthy features.

First, it appears likely to undermine the legitimacy of Band governments. The Minister of Indian Affairs is responsible to the people of Canada, through Parliament, for the governance and government of Indian Bands. In one perspective, this is a normal provision: federal legislation must “belong” to some branch of the federal government, which will be responsible for implementing it, and there must be an official who is responsible to Parliament. From the perspective of democratic governance of Indian bands, however, this provision is remarkable. Ultimate power and responsibility is lodged in the Minister, not in the members of the Band or the officials they elect. Nowhere in the Act is “room” created for different lines of responsibility (from the Chief and Council to the Band members for example) even though there are several references to majority rule. Indeed, even the sections of the Act that establish the decision-making framework for Band Councils also, at the same time, maintain overriding Ministerial authority.<sup>10</sup> The insertion of Ministerial power and authority into both elections and the decision-making of the elected seems likely to undermine a sense of political responsibility and autonomy among Band electors.

Secondly, the Indian Act inverts the normal balance of power and influence in a democracy, under which the executive must do the will of the electorate. The Minister of Indian Affairs may regulate who will preside at meetings of *elected* representatives, what sort of notice should be given, and the nature of a quorum. The elected band council is subject to this authority and furthermore must make by-laws that are consistent with Cabinet-issued regulations. This is an example of the legislative branch of government (the band council) being made subject to the executive branch of another level of government (the federal Cabinet). One might say that the full array of executive powers in Canada are brought to bear on Indian reserves, but the check that comes on these powers through the legislature is absent. Even the legislative branch of Band government (the Chief and Council) is subject to federal executive oversight and authority.

Thirdly, the Indian Act concentrates governing responsibilities to the relationship between the Department of Indian Affairs and the Band government. The oddly assorted list of Cabinet powers on reserve covers a wide swath of normal governance functions. In Canadian public governance, these functions would be distributed over different levels of government. For example, dance hall regulation is subject to municipal by-laws. The regulation of vehicle speeds, and the much larger area of public health, are both municipal and provincial or territorial responsibility. The provision of health care is a provincial responsibility, with substantial federal funding, and housing is a matter that

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<sup>10</sup> As in Section 73, which lists Cabinet powers to regulate on reserve in a wide range of areas with no requirement that the Band Council be consulted or referred to for a decision.

engaged municipal, provincial/territorial and federal authorities. The protection and preservation of animals, fish and game –part of what is meant by environmental protection—is shared by provincial and federal governments.

Two diagrams in Appendix 2 attempt to graphically represent the situation that these circumstances create for government, governance and management on Indian reserves. There is at once a “flattening” of governance institutions (so that on reserve the normal political opportunities presented by federalism and an array of arrangements that regulate the affairs of municipalities and provinces) and a confusion and surfeit of executive authority, arranged so that the federal executive powers always overshadow and at any time may override the executive authorities on reserve. This weakens the linkages between Band members and their elected representations, and also the relationship between the Band Council and the Band administration.

Finally, it should be noted that it is not necessary that the undemocratic effects of flattening and confusion be operational for them to have a profound effect on the culture of governance and management. It is sufficient that they may sometimes be operational..

### **Membership? Citizenship? (Sections 4 – 17)**

The Indian Act gives the federal executive branch very strong powers to determine who is or is not a member of a Band, and who is or is not covered by the Indian Act. Band members are people who have voting rights and the right to hold land on reserve. People who are covered by the Indian Act –that is, who appear in the Indian Affairs Register of Indians-- are eligible for certain tax exemptions, some funds for post-secondary education, and healthcare.

Not all of the people who appear on the Indian Affairs Register are Band members. Furthermore, it is possible for a Band to take control of its membership, and exercising this control, to accept members who are not on Indian Affairs’ Register. Control of the Register –of the decision about who is or is not covered by the Indian Act—is reserved to the Minister of Indian Affairs.

Section 4 of the Indian Act gives the Minister of Indian Affairs the authority to determine to whom the Act applies. Inuit are excluded entirely from the provisions of the Act, and Section 4 also excludes Indians living off reserves from Sections 114 – 122, which deal with schooling.

Sections 5 - 17, collectively entitled “Definition and Registration of Indians,” deal with the Indian Register and with Band Lists.

The Indian Register is a list of individuals maintained by the Department of Indian Affairs “in which shall be recorded the name of every person who is entitled to be registered as an Indian under the Act” [Sec 5 (1)]. The Register is entirely under the control of the Department:

5.(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

There are detailed provisions in the Act concerning entitlement to be registered, many dating from the 1985 amendments that attempted to remove gender discrimination. It is possible for an individual to appeal a decision of the Registrar.

The Band List is a document maintained by the Department or by a Band to record the members of the Band. There are provisions for Bands to assume control of the list from the Department, to return control to the Department, and for individuals to appeal decisions about their inclusion on the list. If the Band chooses to maintain its own list, it must adopt its own membership rules by majority decision.

In addition, Section 17 empowers the Minister to amalgamate bands (after a majority vote of electors), create new bands (on request), and allocate resources as required by these measures.

The Indian Register and the Band Lists can be seen as matters of operational administrative requirements, a device of the federal authority for identifying persons who are or are not eligible for particular benefits. But the Band Lists, of course, however, have another life. Because they define the membership of the Band, they also identify who is a citizen of a First Nation government, and who thus has the political, social and economic rights of citizenship. This ‘double’ and perhaps contradictory function of the Band Lists is embedded in the provisions of the Act, with its references on the one hand to eligibility for specific benefits (like schooling) and on the other to political decision-making (as in the references to majority rule).

### **Her Majesty’s Indian Lands (Sections 18-41, 53-60)**

The Indian Act assigns enormous power and discretion over Indian lands to the Minister of Indian Affairs. Overall, this power is governed by the fiduciary principle that while the Crown holds title, and it must exercise its power “for the use and benefit of the band.”

A review of the specific matters covered under Sections 18-41 and 53-60 provides some indication of the impact of Ministerial control over reserve lands.<sup>11</sup><sub>[FA4]</sub>

Sections 18-41 deal with jurisdiction over reserve lands, while Sections 53-60 concern the management of, and generation of revenue from, reserve lands. The principle stated in Section 2, in which “Her Majesty” is said to hold legal title to reserves, is sustained and elaborated here. Subject only to “the terms of any treaty” and the Indian Act, “the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.”[Sec 18 (1)] Effectively, the Governor in Council in this context is the Minister and his departmental officials (that is, the members of the political and permanent executives of the Government of Canada. The sections following give the federal executives authority over: improvements, compensation for loss of use, rights of temporary possession, transfer or cancellation of location tickets, remedy for trespass, approval of commercial transactions concerning reserve produce (in the three prairie provinces only), infrastructure maintenance, and the taking of reserve lands by other authorities (such as provincial or municipal governments). These are the basic tools of land development and management, and they are not in the hands of the Band government.<sup>12</sup>

A rather arresting provision singles out reserves in Manitoba, Saskatchewan and Alberta:

**32.** (1) A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops of plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing.

But:

**32.** (2) The Minister may at any time by order exempt a band and the members thereof or any member thereof from the operations of this section, and may revoke any such order.

It is notable that neither these provisions, nor the others dealing with possession, improvements, lands to be taken for public purposes, and so on, is subject to agreement of the Chief and Council or the members of the Band. These authorities are not mentioned.

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<sup>11</sup> This is an area where there has been important jurisprudence. The Musqueam case, *Guerin v. Canada*, 1984 2 SCR 335, recognizes Aboriginal interest in reserve lands.

<sup>12</sup> The First Nations Land Management Act ( 1999, c. 24 ) permits Bands to opt out of the land management provisions of the Indian Act.

A striking illustration of the import of this appears in Section 35, which deals with expropriation or appropriation of reserve lands:

**35.** (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or an interest therein.

(2) unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by statute by which the powers are conferred.

This section gives the federal Cabinet authority to consent to the appropriation of reserve lands by, essentially, any Canadian authority legally empowered to expropriate lands anywhere in Canada. In contrast to the provisions concerning Band List maintenance, for example, there is no mention in this part of the Indian Act of a requirement for the members of the Band to consent to appropriation of reserve lands. This is consistent with the terms of the Act, which state that reserve lands are owned by Her Majesty.

Section 37 covers voluntary surrenders of reserve lands. Surrenders are exclusive to the Crown (so that reserve land cannot be sold or surrendered to another party) and with respect to this section, there is a requirement that the surrender be agreed by a majority of electors.

All of the actions related to management of reserve lands in these sections are identified as matters that are under the authority of the Governor in Council, the Minister or his designate. Some of the actions the Minister might take require the prior consent of the band. No actions related to the management of reserve lands can be undertaken without Ministerial consent, but a cautious delegation of power is provided for:

**60.** (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

(2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

Several aspects of the Indian Act provisions dealing with land are important to the present analysis. First, these provisions are clear examples of the “fossil” aspect of the Indian Act. They are the legacy of the time when Indian Affairs sought and exercised very substantial control of the most fundamental features of economic life on reserves,

untrammelled by local oversight. With the 1999 passage of the First Nations Land Management Act, it became possible for Bands to opt out of these provisions, but most are still subject to them.<sup>13</sup>

Second, the provisions with respect to reserve lands assert federal executive power in all areas, and include very scant mention of any role for Band governments. Since a basic function of government is the authoritative allocation of commonly held resources, this is a feature of the Act that will tend to undermine Band governments.

A third area of interest is the general approach to land use implied in these provisions. There is no mention of a land management system in the modern sense of the term, involving conservation, stewardship, recreational uses, spiritual values, or even multigenerational planning for land use. In Sec 73, the federal Cabinet is empowered to make binding regulations with respect to some areas of environmental protection (specifically concerning “fur-bearing animals, fish and other game”, and “noxious weeds...insects, pests or diseases that may destroy or injure vegetation on Indian reserves”), but these provisions do not point towards even the beginnings of a modern land use management system such as those now enshrined in municipal, provincial and federal legislation.

As regards economic development, the sole policy choice is implicitly limited to staple resource or agricultural production for sale. There is no hint that either the federal executive or the Band executive and legislative branches might take a larger role in promoting or managing more diversified economic development. The Indian Act as it operates in 2007 embodies a vision of public responsibility typical of governments that existed in Canada before the Second World War --before Keynesian economics, the welfare state, and later revisions to these regimes, and the whole mechanism of environmental protection provisions, existed.

### **Indian Moneys and Finance: Minister is in Control of This Too (Sections 61-72, 83 )**

Section 61 (1) establishes the overriding principles of financial management under the Indian Act:

Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

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<sup>13</sup>See the backgrounder at [http://www.ainc-inac.gc.ca/nr/prs/j-a2003/02282bk\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/j-a2003/02282bk_e.html)

“Indian moneys” must be used for the benefit of Indian individuals or bands; the determination of benefit belongs to the federal Cabinet.

Expenditures must have the consent of the band council. These include the distribution of revenues from resource extraction or economic activity, from capital acquisition, and of social payments of various sorts. (Sections 64-66) Section 70 authorizes the Minister of Finance to advance loans to bands, through the Minister of Indian Affairs.

Under Section 83 (1) a band council is empowered, subject to the approval of the Minister, to make by-laws for a number of fiscal purposes, including:

- taxation of land or interests in land for local purposes;
- licensing of businesses, callings, trades and occupations;
- appropriation and expenditure to pay band expenses;
- payment of remuneration to chief and council;
- enforcement of payments, including charges to arrears and interest; and
- raising of funds from band members for band projects.

In general, although subject to some interpretation, all of these provisions draw a line of accountability from the Band Council to the Minister or his agents. They do not create a specific role for the electors in approving or disapproving budgets, or in overseeing expenditures. As in the Indian Act provisions with respect to land, in the provisions concerning finances the ‘fossil state’ effect is also visible. There are no references to management accounting, public auditing, or the use of financial control as a management or development tool.<sup>14</sup>

### **The Act and Individuals**

#### **Sections 42-52.5, 87-93, 101 – 108, 114 – 122<sup>15</sup>**

The provisions grouped in this section share the feature that each pertains to the lives of individual persons who are subject to the Indian Act, rather than to collectivities of Indians (Bands or nations).

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<sup>14</sup> A useful review of the use of accounting as a development tool is presented in Joseph 2006. There is little discussion in the Act of the actual accounting procedures that are imposed on Bands, but of course in practice these are substantial and have a profound effect on Band administration. Although “practice” is outside the ambit of this study, I would like to mention two studies in this regards. Shepherd 2006 is a masterful and exhaustive study of ‘accountability’ and the sources of the failure of repeated efforts to reform federal practices in this area to make them more amenable to healthy democratic development. See Neu 2000 for an argument about the role of accounting in promoting genocide.

<sup>15</sup> Not all sections of the Indian Act are still applicable. Sections 94 – 100 [Repealed, R.S. 1985, c. 32(1<sup>st</sup> Supp.) s. 17] and Sections 109-113 [Repealed, R.S. 1985, c.32 (1<sup>st</sup> Supp.) s. 20] were repealed in 1985 and they are not discussed here.

Sections 42-52.5 deal with inheritance, wills and guardianship. “[A]ll jurisdiction and authority in relation to matters and causes testamentary” are assigned to the Minister of Indian Affairs. The Minister has a very large authority, including for example the authority to set aside wills, for cause. In the absence of an executor, the Minister (that is, department officials) takes on this role. (Sec. 46). The Minister is also assigned authority for the mentally incompetent (Sec 51). In this section there is no mention of any other authority (such as the Band council) or to any duty to consult with family members.

Sections 87-93 are concerned with sorting out the interaction of laws of general application in the provinces and the Indian Act (the Indian Act is dominant), and the exemption of property on a reserve from taxation and the immunity of reserve property from mortgage, seizure and sale.

Sections 101 and 105 deal with the requirements of prosecution: what shall count as “evidence” and how a suspect or person of other material interest to the law shall be identified.

Sections 102-104 establish the range of penalties available to be applied to violators of Sections 33, 90 and 93 (which deal with various kinds of trade of reserve property) and Section 85.1 (which deals with intoxicants).

Sections 114-122 concern the requirement for Indian children to attend school. The Minister has powers which normally fall within the provincial or territorial jurisdiction and also the Act confers powers regarding determining individual students’ school attendance requirements. There are also measures pertaining to the designation of the religious denominations of instruction, assigning power over this to the Minister.

Considering the implications of this part of the Act for governance systems, it is noteworthy that these sections set up an individual relationship between Indian individuals and families, and the Minister of Indian Affairs. Indian organizations or governments are not mentioned even generally, in what is quite a detailed and specific section of the Act.

## 2. Government, Governance, Management and Administration Under the Indian Act

The provisions of the Indian Act do not constitute a design for a system of government, governance, or management on reserves. Taken together, however, the provisions do create the framework within which these systems must operate. Reflecting upon what was revealed in the analytical tour of the Act in Part 1. above, it is possible to identify following characteristics of the governance framework that the Indian Act provides:

- The federal executive branch (present as Her Majesty, the Governor in Council or the Minister or his designate) possesses extraordinary authority in the affairs of both Indian individuals and Bands.
- The Indian Act asserts Crown ownership of reserve land and assigns rights related to land management and economic development to the Crown. The Crown's discretion is limited by its fiduciary responsibility to use this power for the benefit of the Band, and the Crown's claim to exclusive property rights in reserve lands has been limited or refined by jurisprudence.<sup>16</sup>
- The Band Council is identified in the Act as the prime site of local decision making, and the rules under which the Council will operate (including its jurisdiction which is subordinate to the Minister) are defined in the Act. Although they are not mentioned, clearly governance and management systems must be aligned with these.
- Explicitly or implicitly, expenditure of moneys is a shared function, with all Band initiatives subject to Ministerial oversight. Financial management by Bands receives very little attention.
- The Act contains no mention at all of a Band administration or staff, though numerous tasks are assigned to *federal* bureaucrats.
- The Indian Act pays most attention to control of the membership and registration lists, land and regulation of its use, law enforcement, and education entitlements and arrangements.
- The Indian Act is silent about the following matters that in principle would seem to be relevant to Band government, governance and management: internal communication, internal accountability, policy research and analysis, community relations, leadership, staff recruitment and development, and organizational design, among others.

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<sup>16</sup> For example, *Guerin v. Canada*, 1984 2 SCR 335.

The significance of these features becomes apparent in an examination of some particular aspects of governance systems, specifically:

- (a) Legislative-executive relations, and relations of these branches with the members
- (b) Norms of administrative practice and management principles
- (c) The implications of the Indian Act for: communications, accountability, transparency, and division of labour; and
- (d) Larger implications for democratic government.

These are discussed in turn below.

### **(a) Legislative-executive-membership Relations: Tangled.**

The Canadian federal government (and most other governments in the country) depend upon a specific division of labour—a separation of responsibilities—to support good governance. Canadian systems do not incorporate ‘checks and balances’ as thoroughly as is common in the United States, but there are many integral ‘checks’ to sources of power. One of the most important of these is the division of power between the legislative authority (the law-making authority) and the executive branch (the part of the government charged with administration of the laws). Each of these parts of the government has a specific role, and though the balance of power shifts sometimes dramatically over time, there is always a tension that represents a constraint on each.<sup>17</sup> A similar arrangement is present in provincial, territorial and municipal governments. These arrangements are part of the Canadian constitution (written and unwritten), and they are also enshrined in federal legislation (as it applies to the governments of the territories) and in provincial legislation (as it applies to municipal governments).

If Band Councils are governments operating under the Indian Act, they are governments that operate with a different set of tensions. Band Councils, as the legislative branch of Indian Act governments, do have an “executive” on the reserve to which they relate, in the person of the Chief and the Band administration. The Indian Act is silent on the question of what the relationship should be between the Band Council and the Band administration. Indeed, there is no comment in the Indian Act that would suggest that the drafters were aware that a Band Administration would necessarily exist, and no provisions were made to establish its professional status.<sup>18</sup>

The Band Council is also in an unusual position in that it must work with two distinct executives. Besides the Band Administration, there is federal executive, prominently featured in every major section of the Indian Act, including those that define the powers of the Chief and Council. This situation creates a unique system of ‘double responsibility’ for Band Councils. Rather than legislative-executive relations, the Indian Act sets up Executive-legislative-executive relations, with the capital E-executive being the federal

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<sup>17</sup> For discussion of current tensions in the Canadian federal government placed in historical perspective, see Savoie 1999, Savoie 2003, Lindquist 2006.

<sup>18</sup> On the importance of this, see Dwivedi and Gow 1999; Hodgetts 1973.

executive power. In this respect, Indian Act governments<sup>19</sup> are unlike any other governments in Canada.

In principle, the Chief and Council are responsible to the Band membership who elect them, just as the Prime Minister and Cabinet are responsible, through the House of Commons, to the Canadian electorate. The Band administration is the executive arm of Band government, and it should serve the electors along the lines identified by the Chief and Council. But the Band administration *and* the Chief and Council are also subject to the authority of the federal executive branch, due to many, many provisions of the Indian Act. And as the Act is written, anyway, the dominant executive branch is clearly the federal one. This creates an imbalance in all relationships, and an extremely complex set of relationships all operating in what is after all typically a very small government dealing with the full range of policy and service delivery issues.<sup>20</sup>

While the Indian Act draws very clear lines of responsibility from the Chief, Council and (implicitly) the Band administration, to the federal executive branch, very little is written about the relationships *among* the Chief, the Council and the Band administration. About Band membership, the Act has two concerns: regulating who has it, and ensuring that “a majority” of Band members is available to consent to various specific measures. A very graphic illustration of the dominance of the federal executive is the requirement that by-laws passed by duly elected Band Councils must be forwarded to the Minister of Indian affairs for approval before they come into force. There is no similar attention to the matter of how Band Councils are to be held accountable to members.

The dominance and omnipresence of the federal executive branch in the provisions of the Indian Act must inevitably colour the relationships among the Chief, Council, Band Administration and Band members. Federally generated rules govern the form of these institutions, their operating procedures and their ambit. Their daily operations are specified by the Act, often in great detail.

Furthermore, a number of the provisions of the Act deal with Indians as individuals, without reference to the Indian government to which they may relate. In Canada, having Indian status means being subject to two lines of responsibility. One line leads through the Band council to the collective resources held by the Band. The other leads directly to the federal executive branch, usually the Department of Indian Affairs. Band membership and Registered Indian status are two separate situations.

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<sup>19</sup> For the purposes of this study, the term “Indian Act governments” is used, though sparingly, in the same spirit as it appears in Bish and Cassidy 1989, and Cassidy 1990.

<sup>20</sup> An independent study of First Nation leaders and their staff concluded that: “...the longstanding doctrine of creating a clean split between politics and administration must be discarded as overly simplistic and seriously flawed both on theoretical and practical grounds. The empirical evidence, for example, is very clear –the clean separation of politics and administration does not hold up in practice. “ This study advocates a “partnership based on complementarity” instead. (Graham 2006 p 43.) Analysis of the provisions of the Indian Act as has been completed in this study indicates why a “clean split” may be so difficult to sustain.

It seems inevitable that the both the general legal and procedural dominance of the federal executive in the provisions of the Indian Act, and the Act's specific and detailed provisions with respect to individuals, will have the effect of weakening relations of responsibility between Band members and both their elected representatives and the administration of the Band.

### **(b) Norms of Administrative Practice and Management Principles: Top-down and Underdeveloped**

The Indian Act is in many respects a legislative fossil, showing the outlines and traces of early and mid-twentieth century approaches to public administration.

Beginning in the 1960s and accelerating after the 1980s, Canada has seen numerous successive waves of public sector reform.<sup>21</sup> Taken together, these have attempted radical reforms of public accounting practices (meant to align control of spending with policy purposes), relations between public service employees and members of the public (making bureaucrats much more visible and accessible), and encouraging "horizontal" and more collegial decision-making (to moderate the perceived rigidity and inefficiency of "top-down" administration). The New Public Management of the 1990s resulted in a new approach to public administration, seeking ways to 'contract out' or collaborative manage as many public services as possible.

The contemporary Indian Act is a fossil because its provisions bear no sign that these changes in public administration have occurred—even while Indian Act governments and Indian service delivery organizations have grown and multiplied as a consequence of the New Public Management approach. It is as if the last sixty years of Canadian public administration reforms have entirely passed the Indian Act by.

Some provisions date from the period when the open purpose of the Act was protection, control and the encouragement of assimilation, reflected in the provisions concerning trespass [Sec 30-31] and those requiring prairie on-reserve producers of agricultural products to have the written permission of the superintendent [Sec 32-33]. In addition, these assume obedience on the part of all parties (residents of the reserves and the superintendent) to rules passed down from a superior authority.

The entire Act, though, embodies a mid-twentieth century approach to public administration. Behaviour of public servants and those who are subject to the public authority is prescribed, and it is assumed that the system of hierarchical authorities in the Department of Indian Affairs will ensure that people at each tier will obey and ensure that those below them will do so also. This approach is carried through to the Band level, where Band Council and members will be subject to the provisions of the Act. There is no mention of a Band administration or government at all, but clearly such that exists on

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<sup>21</sup> These are described in Sutherland 1990, Savoie 1999, Savoie 2003, Howlett 2000, Perkins and Shepherd 2001, Lindquist 2006.

reserves is meant to be subject to the same hierarchical, span of control,<sup>22</sup> regulatory approach. There is no whisper of a recognition that something like intergovernmental relations might be in order.

Normal public administration and public management include procedures and policies in the following areas:

- Staff recruitment, training and development
- Leadership (as opposed to control)
- Bureaucratic relations with businesses on reserve (except the top-down regulation of resource producers by federal officials)
- Opportunities for promoting responsibility for social, health and educational policies by First Nations councils (beyond such regulatory provisions as attention to alcohol and drug use)
- Means to stimulate, acknowledge and support voluntary social support activity on reserves
- Accountability regimes, public accounts or evaluations.

The procedures and policies in these areas guide, socialize and control modern public administrations. Staffing is governing by rules and standard procedures that embody fairness and effectiveness. Leadership is recognized as a valued set of qualities and skills, and there are generally measures in place to identify promising leaders and to train them. There are accepted ways in which public servants must interact with the public, and expectations about how they will respond to requests and opportunities. Considerable effort is now expended by most organizations to encourage volunteerism and the formation of non-governmental organizations. And, of course, there are numerous mechanisms to ensure that public administrations are accountable to the public.

Donald Savoie was thinking of the federal public service when he observed that the public service “works” because it is “an institution with shared values and beliefs.” (Savoie 1999 p 350). As Savoie explains, much as an administration incorporates a system of formal rules, sanctions and rewards, it carries as well a common culture of values and beliefs. It is the common culture of public organizations that permits the people who animate the organizations to work smoothly together towards common objectives, to offer and to accept trust and responsibility, and to commit themselves fully to the organization’s purposes. Shared values and beliefs permit the accurate anticipation of consequences. They provide a means for people with different opinions on issues to work out their differences; they are the backbone of public service independence.

There is no doubt that administrative cultures have developed in the administrative branches of Band governments, and that these cultures serve the purposes that have just been outlined. What is the role of the Indian Act in creating these cultures? Thinking only about the Act as written (and without regard for any empirically based knowledge of how

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<sup>22</sup> This term refers to the number of subordinates under the supervision of a manager or boss. It is discussed more fully, along with division of labour, below.

Band administrations actually work) it is clear that a few aspects of the Act must be important for the administrative cultures of Band governments. These would include:

- emphasis on regulation and control, rather than collaborations and incentives;
- a lack of local autonomy and perhaps, the development of techniques for accomplishing ‘the necessary’ while maintaining the appearance of respecting externally generated rules;
- underdeveloped or unpredictable systems for staff development and leadership training.

It is important not to underestimate the difficulty of actually demonstrating the impact of the Indian Act on Band management practices. Other influences will include the economic situation of the Band, its history, traditional cultural practices, and, of course, size. Graham White, in an interesting study of the importance of size in how bureaucracies operate, commented that while size was an important determinant of how bureaucracies function, administrative culture was equally important. He noted further that

Although size does influence culture, so too do many other variables unrelated to size. Disentangling the effects of size and culture is far beyond the scope of this paper; any conclusions about how size influences bureaucracy must be tempered with a recognition of the key role of organizational culture. (White 1990 p544)

In general, the Indian Act would appear to foster a punitive, restrictive, regulatory organizational culture. No bureaucratic “space” is provided for such modern accoutrements of statecraft as leadership development, collegial problem-solving, experimentation and evaluation, decentralization, innovative approaches to transparency or engagement of the public (or membership) in decision-making.<sup>23</sup> While these are not prohibited by the Act, they are culturally incompatible with its spirit; that is, they are discouraged.

### **(c) Performance in four key areas**

If the preceding section describes the overall tenor of the Indian Act as a factor in influencing Band management, it may be helpful to consider how four key features of public management would appear to be affected. These are communications, accountability, transparency and division of labour.

This consideration is not grounded in empirical research, and indeed, this section could be read as a prospectus for further research, in order to provide a better understanding of how these features are developing in Band Governments. By considering how the organizational culture of the Indian Act, and its specific provisions, would likely affect these areas, though, we can gain a better understanding of its overall influence on the

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<sup>23</sup>A good discussion of features of the modern public bureaucracy in Canada appears in Perkins and Shepherd 2001, Malloy 2004.

developmental directions of Band governments. We will begin to see more concretely where the Act supports and where it discourages, democratic development.

### ***i. Communications***

Students of public administration have focused on patterns of internal communication as a way understanding the operating characteristics and overall effectiveness and responsiveness of organizations (Nigro 1965). Most of these patterns must be studied as actual behaviours, since internal communication rarely remains confined to the formal pathways that are provided for it. Some research on actual communication pathways, as opposed to the formal ones, would be helpful, but that is outside the ambit of this study.

What channels does the Act itself provide? Most obvious are the explicit and implied requirements that information be communicated to the federal executive, whether in the person of the federal Cabinet, the Minister, or a “designate” (public servant). An example of an explicit requirement for communication is the requirement that by-laws passed by the Band Council be forwarded to the Minister of Indian Affairs before they can come into force. Another would be embodied in the provision that the Minister have the consent of a majority of the Band Council concerning expenditures of funds. Necessarily, communication underlies consent.

Some implied requirement for communication between the Band administration or political leadership and the federal executive concerns the regulatory provisions of the Act with respect to land use, environmental protection or schooling. For these regulations to be enforced, knowledge concerning lands and people must be shared.

What of communication among the Band leadership, administration and the membership? The Band administration is never mentioned in the Act. Band members are mentioned only with respect to (i) their eligibility to be members, and (ii) their role in forming the majority necessary to consent to various actions. Band leadership (the Chief and Council) are referred to only in this connection as well. There is no requirement or suggestion that these three parties should communicate anything, at any time, to each other.

### ***ii. Accountability***

The term ‘accountability’ has become prominent in public discourse over the last few years, as a way of expressing some general public concerns about a disparate range of problems. There has been concern about the potential for corruption in high places –as sense that public officials are “getting away with things”, leading to a desire to make politicians and senior bureaucrats “more accountable.” The Office of the Auditor General is a primary means by which the whole federal public service is held “accountable” to Parliament and to the people of Canada; as this office has become more visible and more activist, it has drawn attention not only to matters of financial probity (such as expense account fiddles) but also to questions of the prudent management of public funds and their expenditure in line with policy choices.

Accountability has also been applied with new energy to the evolving fiscal relations between Indian governments and the federal government. In fact, there is a long history of ‘accountability’ as the focus of the relationship –rather than such alternatives as ‘co-management’ or ‘intergovernmental relations’, for example. This large story, concerning the succession of changes in the fiscal relationship and their failure to result in much loosening of control, is a story outside the remit of this report, and it is one already well-told in Shepherd 2006.

The Indian Act provisions with respect to accountability are simple in the extreme. The Band Council and Band members are made accountable to the federal executive branch in virtually every section of the Act, because executive power and initiative is lodged in the federal order of government, and not in the Band.

There are also several clauses which could be interpreted as making the federal executive branch accountable –or at least responsible-- to the Band, or to Registered Indians in general. The first of these clauses is Sec. 2 (1):

“band” means a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart...

If Her Majesty holds the title to the land (and she also holds the moneys [b]), she holds these for the “benefit in common” of the Band. This formulation appears repeatedly in the Act, limiting what the representatives of the Crown can do with the lands and moneys held on behalf of the Band. The use must be for the common benefit. This is the essence of the fiduciary responsibility of the Crown to Bands.

It is notable that given the stress that is place upon the fiduciary responsibility in the Act, there are no provisions that would require the Crown to provide specific information, in a timely fashion, about decisions taken in the exercise of this role. Many specific claims and some legal actions have been prompted in part by the failure of the Crown to do just this, however.

### **iii. Transparency**

The term transparency, always carrying a positive connotation, has come to signify the responsibility of public officials to make their intentions, actions, compromises and plans known to the members of the general public. A close cousin to “accountability,” transparency might be seen to enable political accountability. For example, in the federal and provincial public arenas, the Auditors-General ensure a certain transparency of departments and agencies, by publishing the results of research on their actions. But day-to-day, as well, transparency and extensive communication about officials’ actions is seen to be an important aspect of democratic political life.

The Indian Act, of course, is entirely silent on this question. There is no suggestion that “Her Majesty” should be transparent in her responsibilities for the lands and moneys she holds for the common benefit of the Band, and similarly, no requirement that the Chief

and Council or the Band administration provide information of any kind about their actions to the members. First Nations or members thus face significant difficulties in getting access to information about the actions of either the federal executive branch, or their own.

#### *iv. Division of Labour*

All human organizations require a division of labour to organize the efforts of the people charged with serving the organizations' purposes. Very frequently, a division of labour also involves a hierarchy of authority and responsibility, and along with this, a certain "span of control." That is, there may be a functional division of responsibility –say an accounting team and a public relations unit. There will also be a hierarchy, with an officer in charge of the team and one in charge of the unit. Usually, in all but the very smallest organizations, there will be a few people reporting to the senior person, and then a few people reporting to each of these secondary leaders. In organizational science, the number of people reporting to one person in a hierarchy is termed the "span of control," and there has been considerable effort devoted to determining what is considered to be the ideal number.<sup>24</sup>

While it is perhaps unfair to criticize a piece of legislation for its utter lack of attention to organizational design, it must be said that the Indian Act provides no guidance at all for the organization of either the federal public service or the Band administration in discharging their responsibilities. The only principles for dividing 'labour' evident in the Act are the division of responsibilities among the three parts of the federal executive (the Crown, the political executive, and the public service) –which are variously assigned areas of responsibility—and that between the federal executive and the Band itself. Very little authority is assigned to the Band itself.

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<sup>24</sup> The concepts discussed in this paragraph are among the very oldest in organizational science. Division of labour was studied by Adam Smith (1776); span of control by Henri Fayol (1916).

#### **(d) The Larger Implications for Healthy Democratic Government**

The preceding discussion describes some significant inadequacies in the administrative and management principles embodied in the Indian Act. Some of these arise from the problematic relationships among Band members, Band administrations, Band Councils and the federal executive branch. It is also likely that the same relationship problems have an effect on the possibility for healthy democratic government in Bands operating under the Indian Act.

Naturally, some Bands will have overcome the relationship problems, to a great extent managing to realize democratic government under difficult circumstances. This section, like the rest of this report, can only point to the tendencies that appear to be fostered by the Act –to describe, perhaps, the specific problems that democratic Band governments have had to overcome.

Any government, organization or business requires systems to deal with four basic requirements. These are:

- Authoritative decision-making;
- The generation, distribution and management of common resources;
- Creating social cohesion (that is, building a sense of social trust and mutual responsibility);
- Keeping order and maintaining peace.

The requirements are met through a blend of rules, institutions, habits and interpersonal commitments, all reinforcing each other over time to build up a specific organizational culture.<sup>25</sup>

#### ***Authoritative public decision-making***

A means of public decision-making on matters of collective import is fundamental to legitimacy of any government or organization. In democratic governments, it is expected that the means of decision-making be known to all and be seen by them to be fair.

As we have seen, under the Indian Act almost all decisions are reserved to one part of another of the federal executive branch. In some but not all cases, the consent of the Band Council is required. In a few other cases, Bands are able to negotiate the delegation of some executive oversight functions.

The form of Band government itself is minimally described. The Indian Act installs majoritarian rule, and, implicitly, in the manner of all majoritarian systems, it treats each

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<sup>25</sup> Pfeffer 1981.

elector's vote as having equal weight to every other vote. Authority is located by times in the entire body of electors or in their duly convened representatives (the Band Council), but all major decisions of the Band Council are subject to the final authority of the Minister of Indian Affairs.

Except for references to the necessary 'consent' of the Band Council to specific measures, there is no provision for democratic control of, or communication with, the federal executive branch by the people who are subject to its substantial authority.

The Act itself comprises a framework of rules and enforcement procedures. The rules and procedures are set out in extraordinary detail in some areas (such as education and agricultural production) and are entirely missing in others (environmental protection, community development, child protection).

The system of public decision-making under the Indian Act suffers from the double lines of accountability created for Band Councils, in which they are accountable to both the federal executive and their own executive and electors. The formal and informal lines of responsibility create a very complex situation in which both Band Councils and Band members must navigate many conflicting pressures. This is illustrated in Appendix 2, where two diagrams compare the situation of citizens and their representatives on reserve with the situation of citizens and their representatives in the greater Canadian society.

### ***Generation, distribution and management of common resources***

Collectively held resources –land and money—are fundamental to building good governance and health societies. They provide the means for public, collective action, and necessary employment for citizens and residents.

Under the Indian Act, both land and moneys, are held by the Crown. Crown use of these common resources is limited. In the case of moneys, expenditures must be approved by the Band Council. In the case of both land and moneys, there is a duty on the federal executive branch to manage these in the best interests of the Band. While in practice it is likely that direct Ministerial authority has been somewhat attenuated, in the law there is no moderation of these principles.

As we have seen above, the approach to land and natural resource management envisioned in the Act is almost entirely regulatory. Other provisions for land and resource management, now common in other levels of government, are not mentioned. These other provisions include, for example, land use planning, waste management, and public hearings about land use. Not only are these devices not envisioned in the Act, but the regulatory approach and the dominance of the federal executive branch in such matters would appear to weaken the possibility that they would be developed by Band governments.

The Act generally appears to assume that matters of public wealth or resource distribution that are not decided by federal executive authority will be decided by a majority of the Band Council.

While some Bands have made substantial progress in moving away from the system of resource generation and distribution that is created by the Indian Act, they are not aided by the general orientation of the Indian Act.

### *Creating social cohesion*

“Social cohesion” is a term invented to describe the intangible attitudes and expectations, leading to actions, that help people feel that they are part of a group upon which they can depend. In a society that lacks social cohesion, there is likely to be conflict and crime.

Social cohesion depends upon members of the society having a sense of social trust and mutual responsibility. While specific individuals may “break the rules” (whether written in the form of law or existing as unwritten expectations), social cohesion depends upon most individuals, most of the time, respecting these rules. The general sense that this will be the case is sometimes called ‘social trust’ – an expectation that the behaviour of others will be somewhat predictable. Closely related to this is a sense of mutual responsibility –the expectation that one should assist other members of society when they are in need, and the expectation that others will do the same. This expectation may be based entirely upon calculated self-interest or it may be rooted in other human capacities. Whatever its source, a sense of mutual responsibility is necessary for there to be sufficient sharing of resources to ensure social peace.

The Indian Act is silent on matters of social cohesion and distribution of benefits. One might speculate, though, that the overwhelming assertion of executive authority in the Act, and the consequent absence of multiple avenues of recourse, probably does have a negative impact on social cohesion. Unlike what is the case in most parts of Canada, the Indian Act creates a single level of authority for a uni-dimensional governance system. In most places in Canada, citizens who are unhappy with, for example, the level of housing stock available in their town might seek relief from municipal authorities, who might join with them in demanding action from the federal government. Provincial responsibilities for the preservation of habitat for game are to some extent reinforced by federal obligations with respect to environmental review of certain large projects. In some provinces, provincially constituted land use appeal boards can override questionable decisions of local authority. The existence of such plural authorities does sometimes lead to duplication, conflict and buck-passing, but the complexity of the system also creates opportunities for citizens to influence outcomes and to find leverage in the decision-making system. The multiple opportunities tend to enhance citizens’ sense of political efficacy, and so to increase the likelihood that they will experience social trust. Similar opportunities are absent on reserve.

### *Keeping order and maintaining peace*

All organizations must have rules and means of enforcing compliance with the rules. A prime responsibility of all governments is the maintenance of order and security of the person.

The Indian Act provides for some Band powers in these regards, exercised by passing By-Laws, although these must be approved by the federal executive branch. There may also be agreements with local police forces concerning policing.

The Act also delineates, very concretely, the laws to which individuals are subject, and the means of the law enforcement, by the federal executive branch. These are substantial. It regulates, again in detail, the terms under which Indians engage the greater justice system. In a similar vein, the Indian Act assigns the most of the means of commercial and economic regulation to the federal executive branch, with some exceptions (such a licensing, for example).

## **Last Thoughts**

The people who live under the Indian Act in Canada live in unique circumstances. There are no other citizens of Canada for whom a specific piece of federal legislation regulates their social and political citizenship, and the most fundamental features of their social and economic lives. No other groups of people, except those who are in prisons, live so thoroughly under the supervision and control of the executive branch of the federal government.

A close reading of the Act itself, without a complementary investigation of real circumstances, can only go part of the way towards understanding what social life under the federal Indian Act has meant and means today for communities, families and individuals. What a purely textual analysis can do is to identify the specific provisions of the Act that have probably been most significant in shaping political life and Band organizations. By comparing these provisions with those that pertain in the rest of the country, a textual analysis can also suggest how the Indian Act might have shaped organizational life and the governance framework on reserves in a distinctive direction.

## Thanks

I accepted the assignment to prepare this analysis out of a sense of confidence in the research direction of the National Centre for First Nations Governance. A political scientist with a strong leaning towards empirical analysis attempting to analyze the political implications of the text of a law, looking at its logic only –the prospect gave me vertigo. I knew that the report I would prepare was to be part of a set, and I had faith that the Centre’s brain trust knew what they were doing. Readers will have to decide whether this was the case.

Expecting that the analytical work would be challenging, I had not anticipated how emotionally difficult it would be to live (through my imagination) inside the provisions of the Indian Act. Lacking any empirical grounding, I was confined to the logic of that oppressive document. In the long winter days, trapped with the calm, overbearing, persistent, implacable voice of administration colonialism –it made me angry. For this very unpleasant and instructive experience, I will always be grateful to the National Centre.

I would also like to thank Patricia Monture for patience, perceptive comments, useful advice, many insights, and steady editorial direction. Micha Menczer and Jonathon Swanson were model reviewers, saving me from legal and other errors in a positive spirit. Catherine Waters prepared some early analyses of the Indian Act that were clear and insightful, though she may not endorse the final shape of this report. My husband, George Kinloch, was as always strong companion and intellectual co-conspirator. Thank you, all.

## Appendix 1: Key words

A few technical terms appear throughout this study. They are defined as follows:<sup>26</sup>

**Government** refers to the institutions through which citizens make decisions of collective importance, create and distribute resources, build mutual trust, and resolve disputes.

**Governance** refers to the processes that engage citizens and the institutions of government and other institutions (such as non-governmental organizations, the mass media, and private enterprises) in the exercise of power, decision-making, and public discussion. It involves the institutions of the state, but also other institutions and actors in society. Elements include agreements, procedures, conventions, policies, institutional arrangements, and also history, culture, technology and tradition.<sup>27</sup>

**Legislative Branch (of Government)** refers to the law-making institutions of a government. In the Canadian federal government, the legislative branch is also called the Parliament of Canada, made up of the House of Commons and the Senate.

**Executive Branch (of Government)** refers to the institutions developed to implement the laws (and policies) of the legislative branch. In the Canadian federal government, the executive power is divided among three separate institutions: the Crown (represented by the Governor General), the political executive (the prime minister and Cabinet) and the permanent executive (the federal public service).

**Judicial Branch (of Government)** refers to the offices charged with enforcing and interpreting the laws.

**Management** is an organizational process that includes strategic planning, setting objectives, allocating resources, organizing work, keeping records, and measuring results. Management functions are not limited to managers and supervisors. Every member of the organization has some management and reporting functions as part of their job.

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<sup>26</sup> Some useful distinctions and references –and a nearly exhaustive discussion of definitions-- appear in Plumptre and Graham (1999). These authors insist that the term ‘government’ now refers generally to the institutions of governing (legislatures, bureaucracy, courts) while the term ‘governance’ includes these institutions but emphasizes the processes of which they are a part, as well as the processes that engage such political parties as the mass media, non-governmental organizations, and businesses. Governance is thus a broader term, and one that emphasizes processes over institutions. As Plumptre and Graham acknowledge, there is a well-established meaning of the term ‘government’ that is so defined as well, but they believe that this usage has faded. Whether the older sense of ‘government’ as an activity will be entirely replaced by the term ‘governance’ is unknown, but for the purposes of this paper, it is handy to have the two terms. See also Osborne 2006.

<sup>27</sup> Based on John Graham and Jake Wilson, *Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change*. Ottawa: Institute on Governance, 2004. An alternative definition is offered by Les Pal: “the process of governing or steering complex systems in cooperation with a variety of other actors.” (Pal 2006 p 400).

**Political culture** refers to the politically relevant values, attitudes, beliefs, and symbols that exert an unseen influence on the political life of a society. Political culture helps shape the outlook and discourse of both citizens and political leaders. It affects the way they react and talk to one another, the problems they consider politically significant, the kinds of solutions and government policies deemed legitimate.<sup>28</sup>

**Systems analysis** is an approach to organizational research that enables the analysis of complex, large scale systems and the interactions within those systems. Typically, systems analysis sees organizations operating over time in terms of “inputs,” “processes” and “outputs” linked by causal chains.<sup>29</sup>

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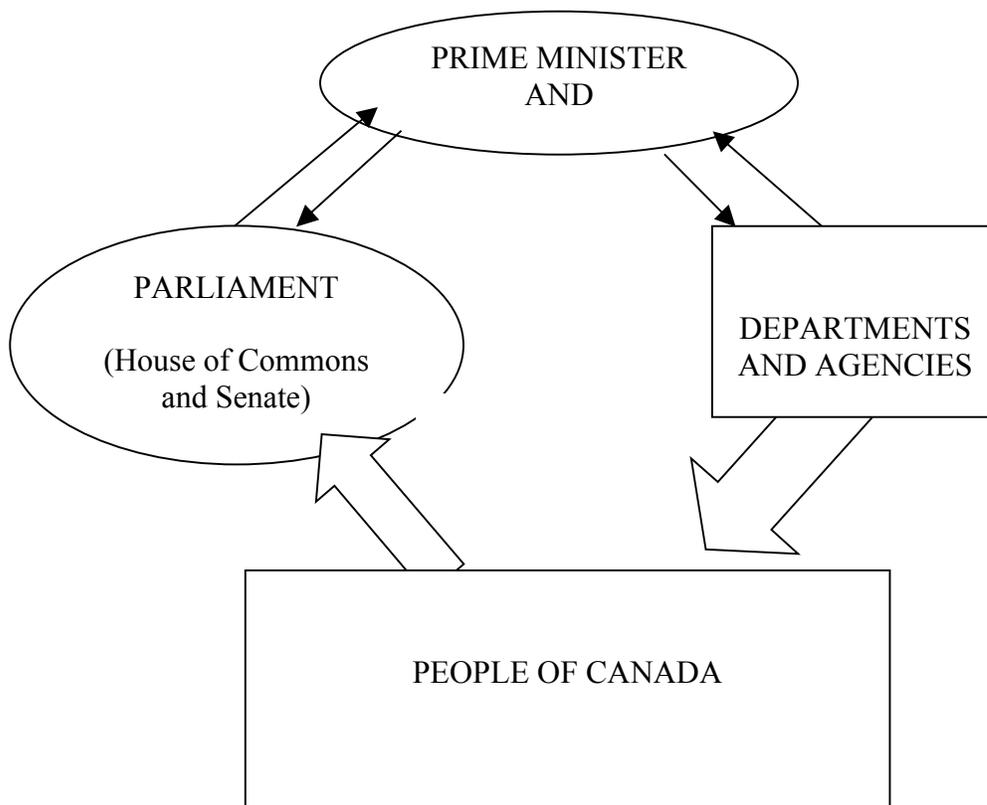
<sup>28</sup> David V. J. Bell, *The Roots of Disunity: A Study of Canadian Political Culture*. Rev. ed. Toronto: Oxford University Press, 1992, p. 19, quoted in Archer et al (2002).

<sup>29</sup> An important challenge to traditional systems analysis has been mounted by proponents of “complexity theory” or “chaos theory”, who stress that a simple systems approach does not take into account the complexity, indeterminacy and ambiguity that is part of how all organizations work. (See Webber 2005) In this study, complexity theory is not used, but multiple lines of analysis have been created to reflect the complexities and indeterminacy of Indian Act administrations.

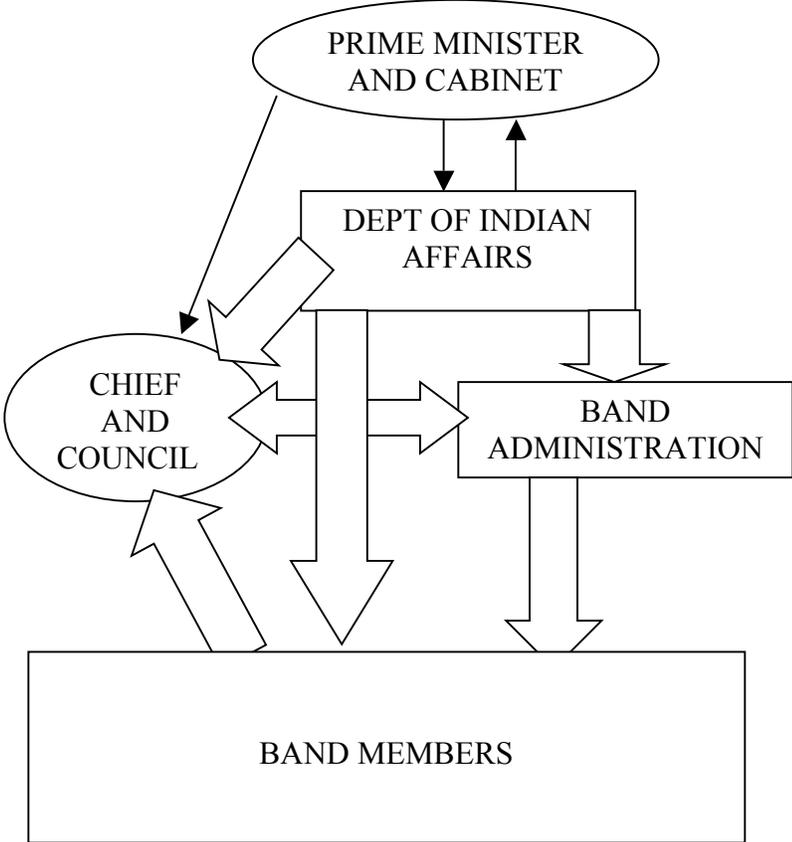
## Appendix 2: A Comparison: Administrative Life under the Indian Act

The diagrams in this appendix illustrate the consequences of the Indian Act for public life. They compare the relationships of mutual responsibility that prevail for the citizenry of Canada (on this page) with those that govern the lives of people who fall under the jurisdiction of the Indian Act (see the next page).

### GOVERNMENT OF CANADA



**GOVERNMENT UNDER THE INDIAN ACT**



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