

The *Indian Act*, and women's and children's rights

Excerpts from the Act's amendments over the years:

In 1868,

"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"

followed the 1867 *British North America Act* - the confederation of Canada, and its first constitution.

This first version of the *Indian Act* provided definitions:

5. The Secretary of State shall be the Superintendent General of Indian affairs, and shall as such have the control and management of the lands and property of the Indians in Canada.

15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property :

Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, 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, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated ; the children issue of such marriages, and their descendants.

S.C. 1868, c. 42. (31 Vict.)

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In 1869

"An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act"

announced the first measures to unilaterally define and diminish the people's entitlements within their own nations.

"Enfranchisement" is the term used by the government to transfer an Indigenous individual's citizenship from that of his or her own nation to Canadian citizenship. Without this enfranchisement, and loss of Indian Status and accompanying rights and recognition by government, a person could not vote, own property, or become a doctor, lawyer, or any of several other professions. In spite of the hardship the Indian Act created for people who were subject to it, so few people voluntarily enfranchised that the scheme was considered a failure of the assimilationist objective.

Then, the Indian Agents were empowered to enfranchise Status Indians unilaterally. If a man was enfranchised, so were his wife and children.

4. In the division among the members of any tribe, band, or body of Indians, of any annuity money, interest money or rents, no person of less than one-fourth Indian blood, born after the passing of this Act, shall be deemed entitled to share in any annuity, interest or rents, after a certificate to that effect is given by the Chief or Chiefs of the band or tribe in Council, and sanctioned by the Superintendent General of Indian affairs.

6. The fifteenth section of the thirty-first Victoria, Chapter forty-two, is amended by adding to it the following proviso :

"Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the

children issue of such marriage be Indians, not to considered as Indians within the meaning of this Act ;

Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only."

51st Victoria, Chapter 42. S.C. 1869, c. 6. (32-33 Vict.)

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This section was confirmed in every subsequent iteration of the *Indian Act* until it was amended in 1985 with section 12.1(b).

These sections of the *Indian Act* were not informed by Indigenous tradition, nor were any of them consented to. The entire *Indian Act* was – and continues to be – a violation of Treaties and an extra-constitutional anomaly that can only be compared to such auxiliary acts of governance as a "war measures act" or some kind of emergency measure. The problem that Canada did not have jurisdiction over its treaty partners' governments continues to date.

In 1876,

An Act to amend and consolidate the laws respecting Indians, the Indian Act, adjusted those first three definitions of who is an Indian from the 1868 *Act*.

3. The term "Indian" means,

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such person.

3(c) Provided that any Indian woman marrying any other than an Indian or a

non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act

(d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member :

11. No person, or Indian other than an Indian of the band, shall settle, reside or hunt upon, occupy or use any land or marsh, or shall settle, reside upon or occupy any road, or allowance for roads running through any reserve ...

S.C. 1876, c. 18. (39 Vict.)

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Given that women who “married out” were no longer Indians, they could no longer live in their communities or access resources on their reserve.

In 1880,

a mechanism was added to the *Indian Act* to pay out women who “cease to be an Indian.”

12. Any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents ; but this income may be commuted to her at any time at ten years’ purchase with the consent of the band.

24. If any person or Indian, after having been removed or notified as aforesaid, returns to, settles, resides or hunts upon or occupies, or uses as aforesaid, any of the said land, marsh or lots or parts of lots ; ... bring him before any Stipendiary Magistrate, Police Magistrate or Justice of the Peace, who may, on conviction, commit him to the common gaol of the said county or district, or if there be no gaol in the said county or dis-

trict, then to the gaol nearest to the said reserve in the Province or Territory, there to remain for the time ordered by such warrant, but which shall not exceed thirty days for the first offence, and thirty days additional for each subsequent offence.

25. Such sheriff or other person shall accordingly arrest the said party, and deliver him to the gaoler or sheriff of the proper county, district, Province or Territory, who shall receive such person or Indian and imprison him in the said gaol for the term aforesaid.

26. The Superintendent-General, or such officer or person aforesaid, shall cause the judgment or order against the offender to be drawn up and filed in his office; and such judgment shall not be removed by *certiorari* or otherwise, or be appealed from, but shall be final.

36. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act, excepting that in cases of aged, sick and infirm Indians and widows or children left without a guardian, the Superintendent-General shall have the power to lease the lands to which they may be entitled for their support or benefit.

37. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions: — 1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, ...

The Indian Act, 1880. S.C. 1880, c. 28. (43 Vict.)

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So, the 1880 amendments made returning to the reserve punishable by fines and jail time. It also clarified that only men would vote on band matters, except that the government became the power of attorney for lands held by widows.

The empowerment of individuals to arrest and transport Indians, S.24, was a major development, and so was the refusal of the right of appeal in S.26.

In 1927,

parents’ rights were suspended under the *Indian Act*.

10. (1) Every Indian child between the full ages of seven and sixteen years who is physically able shall attend such day, industrial or boarding school as may be designated for the full periods during which such school is open each year;

(3) The Superintendent General may appoint any officer or person to be a truant officer to enforce the attendance of Indian children at school, and for such purpose a truant officer shall be vested with the powers of a peace officer, and shall have authority to enter any place where he has reason to believe there are Indian children between the ages of seven and fifteen years, ...

(4) Any parent, guardian or person with whom an Indian child is residing who fails to cause such child, being between the ages aforesaid, to attend school as required by this section ...shall be liable on summary conviction before a justice of the peace or Indian agent to a fine of not more than two dollars and costs, or imprisonment for a period not exceeding ten days or both, and such child may be arrested without a warrant and conveyed to school by the truant officer.

INDIAN ACT. R.S.C. 1927, c. 98.

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Note that this provision continued until 1970, at which time it was modified only by this clause:

117. An Indian child is not required to attend school if the child is, by reason of sickness or other unavoidable cause that is reported promptly to the principal, unable to attend school; is, with the permission in writing of the superintendent, absent from school for a

period not exceeding six weeks in each term for the purpose of assisting in husbandry or urgent and necessary household duties;

is under efficient instruction at home or elsewhere, within one year after the written approval by the Minister of such instruction ;

...but otherwise the penalties for truancy remained the same.

In 1951,

amendments distinguished between "Band List" and General List" of the government Registrar:

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

7. The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

The Indian Act. S.C. 1951, c. 29.

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By 1970,

"enfranchisement" had almost never been voluntarily undertaken. Indian people now had the federal and provincial vote, but the government continued its interest in removing people's names from the Registrar, by enfranchisement, which was often effected arbitrarily by the government's Indian Agents, for many reasons.

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.

11. (1) Subject to section 12, a person is entitled to be registered if that person

(a) on the 26th day of May 1874 was, ...considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada ;

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act ;

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (6);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

(2) Paragraph 1.e. applies only to persons born after August 13th, 1956.

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who (i) has received or has been allotted halfbreed lands or money scrip, (ii) is a descendant of a person described in subparagraph (i), (iii) is enfranchised, or (iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(l)(a),(b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e), unless, being a woman, that person is the wife or widow of a person described in section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

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In 1985,

after debate and presentations during the First Ministers Conference, and Senate Standing Committee hearings, the Indian Act was adjusted against sex discrimination, but for "12(1)b."

It also made a change that separated band membership from Indian Status, so Status was not conferred by membership but *only* government registration:

Persons entitled to be registered

6 (1) Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately before April 17, 1985;

(a.1) the name of that person was omitted or deleted from the Indian Register, or from a band list before September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as any of those provisions;

(a.2) that person meets the following conditions:

(i) they were born female during the period beginning on September 4, 1951 and ending on April 16, 1985 and their parents were not married to each other at the time of the birth,

(ii) their father was at the time of that person's birth entitled to be registered or, if he was no longer living at that time, was at the time of death entitled to be registered, and

(iii) their mother was not at the time of that person's birth entitled to be registered;

(a.3) that person is a direct descendant of a person who is, was or would have been entitled to be registered under paragraph (a.1) or (a.2) and

(i) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or

(ii) they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;

R.S.C., 1985, c. I-5

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In 2010,

An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada:

Paragraph 6(1)(a) of the Act is replaced by the following: (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

Paragraph 6(1)(c) of the Act is replaced by the following:

(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions; (c.1) that person

(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,

(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,

(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

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In 2017,

the government of Canada again adjusted the Indian Act to remove sex discrimination going back to 1869, in *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada*.

The following is only a partial excerpt:

Unknown or unstated parentage

(6) If a parent, grandparent or other ancestor of a person in respect of whom an application is made is unknown — or is unstated on a birth certificate that, if the parent, grandparent or other ancestor were named on it, would help to establish the person's entitlement to be registered — the Registrar shall, without being required to establish the identity of that parent, grandparent or other ancestor, determine, after considering all of the relevant evidence, whether that parent, grandparent or other ancestor is, was or would have been entitled to be registered.

Paragraph 6(1)c is replaced by the following ... (c.1) that person meets the following conditions:

(i) the name of one of their parents was, as a result of that parent's mother's marriage, omitted or deleted from the Indian Register on or after September 4, 1951 under subparagraph 12(1)(a)(iii)

pursuant to an order made under subsection 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as either of those provisions,

(ii) their other parent is not entitled to be registered or, if that other parent is no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred before September 4, 1951, and

(iii) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;

(c)(2) that person meets the following conditions:

(i) the name of one of their parents was omitted or deleted from the Indian Register on or after September 4, 1951 under subparagraph 12(1)(a)(iv) or subsection 12(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as either of those provisions,

Subject to section 7, a person is entitled to be registered if one of their parents is entitled to be registered under subsection (1) or, if that parent is no longer living, was so entitled at the time of death.

Subsection 6(3) of the Act is amended by striking out “and” at the end of paragraph (b), by adding “and” at the end of paragraph (c) and by adding the following after paragraph (c): (d) a person who is described in paragraph (1)(c.1) or (c.2) or any of paragraphs (1) (c.2) to (c.6) and who was no longer living on the day on which that paragraph came into force is deemed to be entitled to be registered under that paragraph. 2.1 (1) Paragraphs 6(1)(c.01) to (c.2) of the Act are repealed. (2) Paragraphs 6(1)(c.4) to (c.6) of the Act are repealed. . . .

64-65-66 ELIZABETH II

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