Conspiracy of Legislation: The Suppression of Indian Rights in Canada

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"Without question, this legislation struck at the heart of what was most sacred to West Coast Indian societies. In so doing, it put in question the very survival of these nations."

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The recent escalation of aboriginal rights issues and litigation in British Columbia has prompted an oft-repeated argument from those who oppose the recognition of any Indian interest in land in this province. This argument basically asserts that First Nations did nothing over the past century to protect their rights and should therefore be barred at this late date from claiming those rights. Indians have, the argument goes, "slept on their rights."

In truth, the Indian assertion of aboriginal title has never ceased. The historical record is clear on this fact. This persistence has characterized Indian relations in this province despite an array of federal and provincial legislation specifically designed to eliminate Indian rights by denying them access to both legal and political institutions. Upon examination, these laws can be seen to be the root cause of much of the injustice and inequity that continues to permeate the Indian presence in Canada. By any just standard these laws are offensive.

The consequences of this legislation in terms of the loss of economic well-being, political power, cultural integrity and spiritual strength are immeasurable. We know with certainty that these laws deprived First Nations of their material wealth by denying them access to their traditional lands and resources. Further, we know that these laws prohibited Indian governments from exercising any real power in the political and legal systems. And we know that extensive legislation was passed, the sole purpose of which was to destroy the Indian identity and Indian values in Canada.

From an Indian perspective, this legislation represents nothing less than a conspiracy. Examined as a whole, it exhibits a clear pattern founded on a conscious intent to eliminate Indians and "indianness" from Canadian society.

What exactly did this legislation do? For one thing, it struck a crippling blow to the Indian relationship to their lands. In an effort to encourage European immigration, the colonial and provincial governments pursued a policy of land pre-emptions or grants. In essence, any European male over the age of eighteen could simply occupy 320 acres of land and ultimately claim legal title to it. This could be done regardless of any pre-existing Indian rights to these lands. No compensation was ever paid for this loss.

Moreover, the same legislation specifically prohibited any Indian from claiming a right of pre-emption. Thus, the Colonial Land Ordinance of 1870, for example, stated in section 3:

> 3. From and after the date of proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. Provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

This impairment of Indian land rights was compounded by federal legislation that denied First Nations access to the courts. In 1927, the federal government amended the Indian Act to make it illegal for an Indian or Indian nation to retain a lawyer to advance their claims, or even to raise money with the intention of retaining a lawyer. Anyone convicted of this offence could be imprisoned.

Section 141 of the 1927 Indian Act stated:

> 141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from an Indian any

payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

Indian nations were therefore denied those fundamental rights that are taken for granted in any democratic system. They were, as a matter of colonial and provincial policy, denied rights to lands they had occupied for centuries. This exclusion from the land was extended through the discriminatory provisions of colonial and provincial land legislation. And they were prohibited by federal law seeking a legal remedy for this injustice.

The federal government played an instrumental role in other parts of the country in severing the ties between Indians and their lands. The Indian Act of 1876, for instance, prohibited Indians from acquiring or pre-empting lands in Manitoba or the Northwest Territories. Section 70 of that Act provides that:

70. No Indian or non-treaty Indian, resident in the province of Manitoba, the North-West Territories or the territory of Keewatin, shall be held capable of having acquired or acquiring a homestead or pre-emption right to a quarter section, or any portion of land in any surveyed or unsurveyed lands in the said province of Manitoba, the North-West Territories or the territory of Keewatin, or the right to share in the distribution of any lands allotted to half-breeds, subject to the following exceptions: . . .

It is also worthy of note that after the McKenna-McBride Commission attempted to resolve questions about the nature and extent of Indian reserves in British Columbia in 1916, the federal and provincial governments passed legislation removing extensive tracts of valuable land from many reserves in the province. This was done without the approval of the First Nations and, indeed, was contrary to the express provisions of the Indian Act that required a surrender in order to alienate any reserve lands. Until recently, no compensation was paid for the loss of these lands.

The economic consequences of the loss of lands and resources is easy to appreciate. What is less obvious is the extent to which federal law in particular reached into Indian communities in an effort to suffocate the most forceful elements of traditional Indian political life and cultural identity. The Indian Act was repeatedly used to destroy traditional institutions of Indian government and to abolish those cultural practices that defined Indian identity.

For British Columbia First Nations, this assault focused on the potlatch and practices of the longhouse. Traditionally, the longhouse was the centre of Indian government and the spiritual focal point of an Indian community. All things of community importance took place in the longhouse: the passing of laws, the giving of names, spiritual dancing, funerals, and more. The potlatch was, and is, the most fundamental ceremony to take place in the longhouse. Elaborate and complex, the potlatch, through its ritual, reinforces the value systems upon which Indian societies have defined themselves for centuries.

Yet from 1880 to 1951, the Indian Act outlawed the potlatch and sacred dancing. Section 3 of the Indian Act of 1880, for example, provides that:

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

The 1927 Indian Act was even more extensive in its prohibition and in its efforts to increase the powers of federal officials over the lives of Indian people. Section 140 of this Act states that:

140(1) Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, or who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months and not less than two months.
(2) Nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereat.
(3) Any Indian in the province of Manitoba, Saskatchewan, Alberta or British Columbia, or in the Territories who participates in any Indian dance outside the bounds of his own reserve, or who participates in any show, exhibition, performance, stampede or pageant in aboriginal costume without the consent of the Superintendent General or his authorized agent, and any person who induces or employs any Indian to take part in such dance, show, exhibition, performance, stampede or pageant, or induces any Indian to leave his reserve or employs any Indian for such a purpose, whether the dance, show, exhibition, stampede or pageant has taken place or not, shall on summary

conviction be liable to a penalty not exceeding twenty-five dollars, or to imprisonment for one month, or to both penalty and imprisonment.

In order to avoid the criminal implications of seeking to preserve their traditional political power, and to follow their own religious beliefs, Indian communities were forced to take the potlatch to secluded places beyond the reach of the RCMP. On more than one occasion, elders were arrested, and even imprisoned, for participating in a potlatch. Without question, this legislation struck at the heart of what was most sacred to West Coast Indian societies. In so doing, it put in question the very survival of these nations.

Having outlawed the political institutions and traditional form of Indian government, the federal government proceeded to superimpose its own form of government on Indian nations. The band council system was introduced through the Indian Act and functioned on European perceptions of what constituted proper government. It was a system of government that had little meaning in Indian communities. Moreover, band councils were left with little or no ability to control the destiny of Indian political affairs. The jurisdiction of band councils was superficial. No substantive powers rested with these councils, and any decisions made were subject to the ultimate approval of the Minister of Indian Affairs.

Stripped of independent political power, Indian nations were then denied access to the political institutions of non-Indian governments. Both federal and provincial legislation operated to deny Indians the right to participate in the politics of the nation. In effect, no Indian voice could be heard in the debates of Parliament or the Legislative Assembly because Indians were prohibited from voting. Every federal Elections Act up to and including the Canada Elections Act of 1952 specifically disqualified Indians from voting.

At the provincial level, Municipal Elections Acts up to and including the Municipal Election Act of 1948 and the provincial Elections Acts up to 1949 prohibited Indians (as well as Chinese and Japanese) from voting. Lacking the right or the capacity to participate in the democratic processes of the nation, one begins to appreciate the full extent of the political debilitation of this legislation. Indian nations were denied the right and the means to function with any degree of independence or self-reliance and, at the same time, were prohibited from functioning in the larger society with the rights and powers enjoyed by non-Indians.

The government's answer to this dilemma was assimilation. Indians were encouraged to give up their aspirations to remain distinct peoples. Both policy and legislation sought to persuade Indians to take on the ways of

the white man, in essence, to cease to aspire for the return of their lands or the protection of their cultures and their heritage. The weight of government was brought upon Indians to assimilate.

To this end, Indian children were taken from their homes and placed in residential schools. In these institutions, young children were severed from their families and their cultural values. They were beaten for speaking their own languages or for attempting to practise their own ways. They were made to feel shame for their indianness. They were forcefully encouraged to become white. Any Indian child refusing to attend a federally run residential school was prohibited from attending a provincial school near his or her own community.

The desire of the non-Indian society to force assimilation on Indians is perhaps best expressed in section 99(1) of the Indian Act of 1880. This section provides for the enfranchisement of any Indian obtaining a university degree or becoming a lawyer, priest or minister. In addition, an Indian so enfranchised could be rewarded by the Superintendent-General of Indian Affairs with a grant of land from the reserve lands of the band. The implications of this legislation are clear. Any Indian aspiring to an advanced education was confronted with the loss of his or her Indian identity and Indian status. The message was simple: "We will reward you with Indian land if you give up your Indian ways."

Finally, it is important to appreciate that Indian governments were denied the power to determine how they would allocate their own monies and resources. Indian Acts from 1880 until the present have continually vested in the Governor-in-Council the power to determine if band councils are spending Indian money in an appropriate manner. The Indian Act of 1880, for instance, states in section 70 that:

> 70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands, and from the property held or to be held in trust for the Indians, or from any timber on Indian lands or reserves, or from any other source, for the benefit of Indians, (with the exception of any sum not exceeding ten per cent of the proceeds of any lands, timber or property, which is agreed at the time of the surrender to be paid to the members of the band interested therein,) shall be invested, from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given, — and may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Act, and for the construction or repair of roads passing through such reserves or lands, and by way of contribution to schools attended by such Indians.

It is clear from this examination that the federal and provincial legislation over the past one hundred years has impaired and restricted First Nations in every conceivable manner. It has worked not for the betterment of Indian societies but for the elimination of these societies as distinct and vital social orders within Canada. The fact that First Nations continue to exist — indeed, that they forcefully continue to assert their indianness — is testament to the tenacity and strength of these nations. If history has taught us anything, it is that the rest of Canada should be embracing and encouraging these unique identities and values.

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APPENDIX

Federal and Provincial Legislation Restricting and Denying Indian Rights

1. PROHIBITION ON RAISING MONEY AND PROSECUTING CLAIMS TO LAND OR RETAINING A LAWYER

A. *Federal Legislation*

i. Indian Act, R.S.C. 1927, s. 141.

141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from an Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

2. PROHIBITION OF RELIGIOUS CEREMONIES AND POTLATCHES

A. *Federal Legislation*

i. Indian Act, 1880 as amended, S.C. 1884, C. 27 (47 Vict.) s. 3.

3. Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or in the Indian dance known as the "Tamanawas" is guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement; and any Indian or other person who encourages, directly or indirectly, an Indian or Indians to get up such a

festival or dance, or to celebrate the same, or who shall assist in the celebration of the same is guilty of a like offence, and shall be liable to the same punishment.

ii. Indian Act, 1886, s. 114 (amended S.C. 1895, C. 35, s. 6).

iii. Indian Act, R.S.C. 1906, C. 81, s. 149.

iv. Indian Act, R.S.C. 1927, C. 98, s. 140.

140(1). Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, or who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months and not less than two months.

(2). Nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereat.

(3). Any Indian in the province of Manitoba, Saskatchewan, Alberta, or British Columbia, or in the Territories who participates in any Indian dance outside the bounds of his own reserve, or who participates in any show, exhibition, performance, stampede or pageant in aboriginal costume without the consent of the Superintendent General or his authorized agent, and any person who induces or employs any Indian to take part in such dance, show, exhibition, performance, stampede or pageant, or induces any Indian to leave his reserve or employs any Indian for such a purpose, whether the dance, show, exhibition, stampede or pageant has taken place or not, shall on summary conviction be liable to a penalty not exceeding twenty-five dollars, or to imprisonment for one month, or to both penalty and imprisonment.

3. PROHIBITION AND RESTRICTION ON ACCESS TO FUNDS

A. *Federal Legislation*

i. Indian Act, S.C. 1880, C. 28, s. 70.

70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom the moneys arising from sales of Indian lands, and from the property held or to be held in trust for the Indians, or from any timber on Indian lands or reserves, or from any other source, for the benefit of Indians, (with the exception of any sum not exceeding ten per cent of the proceeds of any lands, timber or property, which is agreed at the time of the surrender to be paid to the members of

the band interested therein,) shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given, — and may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Act, and for the construction or repair of roads passing through such reserves or lands, and by way of contribution to schools attended by such Indians.

ii. Indian Act, R.S.C. 1886, C. 43, s. 70 (amended S.C. 1906, C. 20, s. 1).

iii. Indian Act, R.S.C. 1906, C. 81, s. 89.

iv. Indian Act, R.S.C. 1927, C. 98, s. 92.

v. Indian Act, R. S. C. 1952, C. 149, s. 61.

vi. Indian Act, R.S.C. 1970, C. I-6, s. 61.

61.(1) 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.

4. PROHIBITION ON ACQUIRING LAND

A. *Federal Legislation*

i. Indian Act, S.C. 1876, C. 18, s. 70 (re Manitoba and N.W.T.).

70. No Indian or non-treaty Indian, resident in the province of Manitoba, the North-West Territories or the territory of Keewatin, shall be held capable of having acquired or acquiring a homestead or pre-emption right to a quarter section, or any portion of land in any surveyed or unsurveyed lands in the said province of Manitoba, the North-West Territories or the territory of Keewatin, or the right to share in the distribution of any lands allotted to half-breeds, subject to the following exceptions: . . .

ii. Indian Act, S.C. 1880, C. 20, s. 81.

iii. McKenna-McBride Agreement — 1919 legislation, without surrender.

B. *Colonial and Provincial Legislation*

i. 1861 and 1870 right to pre-emption of lands open only to British subjects; exempted only reserves and settlements.

ii. Land Ordinance, 1870 R.S.B.C. 1871, C. 144, s. 3.

3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British subject, of the age of eighteen years or over, may acquire the right to pre-empt any

tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. Provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

iii. Land Ordinance Amendment Act, 1873, R.S.B.C. 1873, C. 1.

iv. Land Act, S.B.C. 1874, C. 2, s. 3, s. 24, s. 11.

v. Land Act, S.B.C. 1875, C. 5, s. 3, s. 24, s. 11.

vi. Land Act, S.B.C. 1887, C. 16, s. 3, s. 11.

vii. Land Act, R.S.B.C. 1888, C. 66, s. 14.

14. The occupation of this Act shall mean a continuous bona fide personal residence of the pre-emptor, his agent, or family, on land recorded by such settler; but Indians or Chinamen shall not be considered agents.

viii. Land Act Amendment Act, S.B.C. 1892, C. 24, s. 1; S.B.C. 1893, C. 22, s. 2.

It is to be noted that all of these Lands Acts prohibited pre-emptions of lands by Indians.

5. PROHIBITION ON VOTING RIGHTS

A. *Federal Legislation*

i. Electoral Franchise Act, S.C. 1885, C. 41, s. 11, s. 64.

ii. Electoral Franchise Act, S.C. 1886, C. 5, s. 9, s. 42.

iii. Electoral Franchise Act, S.C. 1890, C. 8, s. 9.

iv. Dominion Bi-Election Act, S.C. 1919, C. 48, s. 5.

v. Dominion Elections Act, S.C. 1920, C. 46, s. 29.

vi. Act to Amend Elections Act, S.C. 1929, C. 40, s. 29.

vii. Dominion Franchise Act, S.C. 1934, C. 51, s. 4.

viii. Dominion Elections Act, S.C. 1938, C. 46, s. 14 as amended.

ix. Act to Amend Dominion Elections Act, S.C. 1951, C. 3, s. 6.

x. Canada Elections Act, R.S.C. 1952, C. 23, s. 14.

14.(2) The following persons are disqualified from voting at an election and incapable of being registered as electors and shall not vote nor be so registered, that is to say,

(e) every Indian, as defined in the *Indian Act*, ordinarily resident on a reserve, unless,

(i) he was a member of His Majesty's Forces during World War I or World War II, or was a member of the Canadian Forces who served on active service subsequent to the 9th day of September, 1950, or

(ii) he executed a waiver, in a form prescribed by the Minister of Citizenship and Immigration, of exemptions under the *Indian Act* from taxation on and in respect of personal property, and subsequent to the execution of such waiver a writ has issued ordering an election in any electoral district;

It is to be noted that all of these Elections Acts prohibited Indians from voting. This prohibition was finally repealed in 1960.

B. *Provincial Legislation*

i. Municipal Elections Acts up to 1949 prohibited Indians from voting.

Municipal Elections Act, R.S.B.C. 1948, s. 4:

4. No Chinese, Japanese, or Indians shall be entitled to vote at any municipal election for the election of a Mayor, Reeve, Alderman, or Councillor.

ii. Provincial Elections Acts up to 1949 prohibited Indians from voting.

Provincial Elections Act, R.S.B.C. 1948, s. 4.

4.(1) The following persons shall be disqualified from voting at any election, and shall not make application to have their names inserted in any list of voters:—

(a) Every Indian: Provided that the provisions of this clause shall not disqualify or render incompetent to vote any person who:—

(i) Has served in the Naval, Military, or Air Force of any member of the British Commonwealth of Nations in any war, and who produces a discharge from such Naval, Military, or Air Force to the Registrar upon applying for registration under this Act and to the Deputy Returning Officer at the time of polling:

(ii) Has been enfranchised under the provisions of the "Indian Act" of the Dominion:

(iii) Is not resident upon or within the confines of an Indian reserve:

6. PROHIBITION ON OBTAINING ADVANCED EDUCATION, AUTOMATIC ENFRANCHISEMENT

A. *Federal Legislation*

i. Indian Act, S.C. 1880, C. 28, s. 99(1).

99.(1) Any Indian who may be admitted to the degree of Doctor of Medicine, or to any other degree by any University of Learning, or who may be

admitted in any Province of the Dominion to practice law either as an Advocate or as a Barrister or Counsellor, or Solicitor or Attorney or to be a Notary Public, or who may enter Holy Orders, or who may be licensed by any denomination of Christians as a Minister of the Gospel, may, upon petition to the Superintendent-General, ipso facto become and be enfranchised under the provisions of this Act; and the Superintendent-General may give him a suitable allotment of land from the lands belonging to the band of which he is a member.

ii. Indian Act Amended, S.C. 1884, C. 27, s. 16.

B. *Provincial Legislation*

i. Public Schools Acts up to and including the Act of 1948.

92.(4) Chinese, Japanese, and Indians shall not be entitled to vote at any school meeting.

Paper Garrotes

Your promises are remembered
By paper,
Signed.
They are not of the heart,
Remembered by you.

Royal proclamations,
Laws, policies,
Treaties, reserves,
The Indian Act.

All said to be for our protection
"For the exclusive use and benefit of . . ."
Your paper words are violent,
The vulgar weapons of your undeclared war.

Double edged swords,
Your paper promises,
Confined us to little rocky plots,
And gave a country to you.
They built prisons for our children,
And gave privileges to yours.

Your Minister of Indian Affairs,
His special assistants, their consultants,
Secretaries,
They're all experts on Indian Affairs.

The Indian Act
Gives them a voice in our affairs,
And it strangles many of our voices.
Your government's paper garrote tightens

Canada, the mother/fatherland
Of countless immigrants,
Your paper promises
Are the white powders,
Heated once,
Now coursing through skid row
Veins.
They are the greasy white sheets
On countless cheap hooker beds.
They are the stiff white uniforms
Of countless uncaring doctors you send
To heal uncaring patients.