

A TROJAN HORSE: CAN INDIAN SELF-GOVERNMENT BE PROMOTED THROUGH THE *INDIAN ACT*?

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*Section 90(1), first included in the Indian Act (“Act”) in its present form in 1951, deems “treaty” or “agreement” property to be situated on reserve. It is read together with sections 87 and 89 of the Act to exempt Indian property on reserve from taxation or attachment. Historically, all Indian property on reserve was broadly exempted from possible taxation or attachment. In *McDiarmid Lumber Ltd v God’s Lake First Nation*, the Supreme Court of Canada held that Parliament intended a narrow interpretation of section 90(1) such that only treaty-related property should be exempted in order to promote Indian self-government. I deconstruct the historical, social, and political events leading up to 1951 as depicted in Parliamentary records to demonstrate that the Court’s interpretation in *McDiarmid* is not supported by the record. I first argue that the promotion of Indian self-government cannot be achieved through the assimilation effect of the Act. Next, I argue that, because only half of the Indian population were treaty Indians in 1951, it was unlikely that Parliament would have contemplated only treaty Indians in making amendments to the Act. I conclude that *McDiarmid*-type decisions demonstrate dissonance in the Court’s interpretation of laws that impact Indigenous peoples. The consequence for Indigenous peoples is that the status quo remains.*

*Selon le paragraphe 90(1), qui a fait son apparition dans la Loi sur les Indiens (la Loi) sous sa forme actuelle en 1951, les biens [donnés aux Indiens ou à une bande] en vertu d’un traité ou d’un accord sont réputés situés sur une réserve. Lu de pair avec les articles 87 et 89 de la Loi, ce paragraphe exempte d’imposition ou de saisie les biens sis sur les réserves et appartenant à des Indiens. Par le passé, tous les biens sis sur les réserves et appartenant aux Indiens étaient globalement exemptés d’une possible imposition ou saisie. Dans l’arrêt *McDiarmid Lumber Ltd. c. Première Nation de God’s Lake*, la Cour suprême du Canada a affirmé que le Parlement avait eu*

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l'intention de restreindre l'interprétation du paragraphe 90(1) pour faire en sorte que seuls les biens connexes aux traités soient exemptés, afin de promouvoir l'autonomie gouvernementale indienne. L'auteure déconstruit le contexte historique, social et politique qui a conduit à la rédaction du paragraphe de 1951 tel que les archives parlementaires le décrivent afin de démontrer qu'il ne justifie pas l'interprétation faite par la Cour dans l'arrêt McDiarmid. Dans un premier temps, l'auteure fait valoir que la promotion de l'autonomie gouvernementale indienne ne peut être atteinte au moyen de l'effet d'assimilation découlant de la Loi. Ensuite, elle soutient que parce que seulement la moitié de la population indienne de 1951 était visée par les traités, il était fort peu probable que le Parlement ait envisagé ces seules personnes lorsqu'il préparait les modifications à la Loi. L'auteure conclut que les décisions du genre McDiarmid créent de la dissonance dans l'interprétation de la Cour quant aux lois qui ont des répercussions sur les peuples autochtones. Il s'ensuit que pour ces derniers, le statu quo demeure.

Contents

1. The Promotion of Indian Self-government through the Trojan Horse of Section 90(1)	699
2. Gauging Incongruencies in Indian Policy that Result from <i>McDiarmid</i> -type Interpretations	704
A) The Pre-1951 Social and Political History of Indian Policy	706
B) Sovereign We Stand: Neglecting Indian Evidence on Self-Government	707
3. The Implications of <i>McDiarmid</i> -type Decisions: The Status Quo Remains	717
Conclusion	719

1. The Promotion of Indian Self-government through the Trojan Horse of Section 90(1)

Since the source of judicial power often cascades from the dominant group's ideological headwaters, bias spills onto the pages of legal decisions from a contextualized, politically hued stream.¹

Although distinct legal doctrines that applied to Indians² can be traced as far back as the eighteenth and nineteenth centuries, the *Indian Act* ("Act")³ was created in 1876 as a consolidation of previous statutes.⁴ The *Act* has been under political, social and legal scrutiny since its inception. In fact, this statute has been criticized for its overreach into the affairs of Indigenous peoples in Canada and its inability to fully reconcile Indigenous peoples as sovereign peoples within the context of Canadian society.⁵ In 1996, the Royal Commission on Aboriginal Peoples found that, historically, the *Act* has worked to "interfere profoundly in the lives, cultures and communities of First Nations peoples" and that within the confines of the *Act*, change is unlikely to occur.⁶ However, out of fear that historical rights will not be protected, unless and until a new legal basis is

¹ John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC L Rev 1 at 2 [Borrows, "Self-Government and the Royal Proclamation"].

² Indian is defined in section 2 of the *Indian Act* as: "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian": *Indian Act*, RSC 1985, c I-5, s 2 [Act]. I use this term interchangeably with Indigenous to be consistent with the *Act*.

³ *Act*, *supra* note 2.

⁴ See e.g. *Royal Proclamation, 1763* (UK), reprinted in RSC 1985, Appendix II, No 1; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, SC 1850, c 74 [*Indian Protection Act*]; *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*, SC 1868, c 42 [*Act providing for the organization*]; *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6 [*Act for the gradual enfranchisement*].

⁵ See e.g. John Borrows, "Unextinguished: Rights and the Indian Act" (2016) 67 UNBLJ 3; Richard Bartlett, "The Indian Act of Canada" (1978) 27:4 Buff L Rev 581 [Bartlett, "Indian Act of Canada"]; Richard Bartlett, "Indian Act of Canada: An Unyielding Barrier" (1980) 6:4 Am Indian J 11 [Bartlett, "Act of Canada: An Unyielding Barrier"]; Robert G Moore, *The Historical Development of the Act*, 2nd ed (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs, 1978); Wayne Daugherty & Dennis Madill, *Indian Government under Indian Act Legislation: 1868-1951* (Ottawa: Department of Indian and Northern Affairs Research Branch, 1980).

⁶ Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 601 [RCAP, *Looking Forward*].

created for Indigenous peoples, many communities will continue to fall within the purview of the *Act*.⁷

Historically, the *Act* extended broad exemptions from attachment to Indian property located on or connected to the reserve. The use of the terms “any real or personal property” in provisions of the *Act* of 1876 and 1927⁸ signified that all Indian property was broadly exempt from seizure. Notwithstanding, provisions such as sections 89(1) and 90(1) of the *Act*⁹ are double-edged swords for Indigenous peoples. Whereas these provisions were allegedly intended to preserve and protect Indigenous property, the same provisions constrained Indigenous peoples from engaging in economic development because property on reserve could not be used as collateral in credit arrangements. In *McDiarmid Lumber Ltd v God’s Lake First Nation*,¹⁰ the Supreme Court of Canada noted that—from the 1920’s to 1950’s—the broad exemption of virtually *any* real or personal property came into question because exempting all Indian property from being pledged or mortgaged constrained Indians from engaging in economic development initiatives.¹¹ In addition, by the 1940’s, Indian leaders in Canada argued that the *Act* stood in the way of good Indigenous governance. Consequently, leaders called for a review of the *Act* by a Royal Commission to investigate Indian and government relations.¹²

A Royal Commission was eventually directed and a Special Joint Committee of the Senate and House of Commons (“Committee”) was created in 1946 to examine the administration of Indian affairs under

⁷ *Ibid.*

⁸ *Indian Act*, SC 1876, c 18, s 66 [*Act*, 1876]; *Indian Act*, RS 1927, c 98, ss 1, 105 [*Act*, 1927].

⁹ *Act*, *supra* note 2, ss 89(1), 90(1):

89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

90(1) For the purposes of sections 87 and 89, personal property that was purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

¹⁰ *McDiarmid Lumber Ltd. v God’s Lake First Nation*, 2006 SCC 58, [2006] 2 SCR 846 [*McDiarmid*].

¹¹ *Ibid* at para 51.

¹² Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 20-2, No 9 (27 June 1946) at 420 [Committee 1946, No 9].

the *Act*.¹³ Even though Indians had requested there be comprehensive Indian participation in the process, consultation was mainly restricted to Indian leaders being permitted to make written and oral submissions to the Committee. Indian leaders were not in fact permitted to be actual participating members of the Committee.¹⁴ When a final Committee report was provided to Parliament, the Committee recommended, among other things, that more progressive measures involving Indian self-government be implemented.¹⁵ It was after the Committee's final report was submitted that Parliament first included section 90(1) in the *Act* to narrow the normative broad exemptions over *any* Indian property to only property that resulted from "treaty" or "agreement".¹⁶ Because section 90(1) *deems* treaty or agreement property to be "situated on reserve," when it is read together with section 89(1), only treaty-related property is exempt from seizure.¹⁷ The effect is that unrelated Indigenous property may form a valid attachment in credit arrangements.

Insofar as the consultation process leading up to this *Act* amendment, the manner in which government representatives engaged with Indian leaders was criticized. In 1984, Ivan B Johnson wrote a report for the Treaties and Historical Research Centre, Indian and Northern Affairs Canada about the *Act* consultation process, criticizing government representatives for the lack of deep consultation with Indian leaders.¹⁸ Johnson also accused representatives of engaging in a kind of double-mindedness in delivering recommendations on critical policies that impacted Indians. He claimed that while government representatives touted the need to promote Indian self-government on the one hand, they supported assimilationist policies on the other. I build on Johnson's criticisms to argue that the social and political consequences for Indigenous peoples is further exacerbated when courts render legal decisions that

¹³ *Ibid.*

¹⁴ Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 20-2, No 11 (9 July 1946) at 492-4 [Committee 1946, No 11].

¹⁵ Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-4, No 5 (13 April-21 June 1948) at 187 [Committee 1948, No 5].

¹⁶ Section 69 was an antecedent provision in the *Act*, 1876, *supra* note 8 that was somewhat similar to section 90. It exempted "presents" and "annuities" given to Indians from seizure. Similar provisions appeared in versions of the *Indian Act* up until 1951 when section 90 first appeared. See *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 129, 71 DLR (4th) 193 [Peguis].

¹⁷ *Peguis*, *supra* note 16.

¹⁸ Ivan B Johnson, *Helping Indians to Help Themselves – A Committee to Investigate Itself: The 1951 Indian Consultation Process* (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1984).

reflect this double-mindedness. The *McDiarmid* decision is particularly insightful in this regard. In this decision, the Court considered the period leading up to the 1951 amendment to surmise Parliament's motivation for including section 90(1) in the *Act*. The Court held that Parliament intended a narrow interpretation of this provision in that exemptions were to be restricted to only treaty-related property in order to promote Indian self-government.¹⁹ It will become apparent in this paper that self-government means different things to different groups, whether it be the Court, the government, Parliament or Indian leaders.

While the Court in *McDiarmid* asserted that Parliament intended to promote Indian self-government by narrowing exemptions to treaty property via the section 90(1) amendment, the regulation of Indian affairs through every kind of legislative reach, such as the *Act*, is wholly inconsistent with the nature of Indian self-government that imbues nation-to-nation relationships between settler and Indian societies. The Court's legal analysis in *McDiarmid* erroneously presumes that Indian self-government can be promoted within the context of the *Act* via a mere tweak of a provision. This presumption fails to consider that the insidious effect of the *Act* has historically been to assimilate Indians. Ultimately, it is likely that Parliament's eventual inclusion of section 90(1) was merely a stopgap mechanism to tout support for Indian self-government on the one hand while supporting larger assimilationist policies on the other. Pursuant to the Court's interpretation in *McDiarmid*, self-government would resemble a form somewhat akin to municipal government and the assimilation of Indians into the broader political system. However, Indian leaders at that time claimed that self-governance was consistent with the pre-existence of sovereign Indigenous nations. For example, some leaders claimed that treaties were the result of nation-to-nation agreements.²⁰

¹⁹ In Canada we often see the terms "self-government" and "self-determination" used interchangeably. Typically, the term "self-determination" is used more prevalently in international law, while in Canada, "self-government" is predominantly viewed as an expression of the right of self-determination. See Jennifer E Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 CJLS 11 at 13.

²⁰ This paper is not intended to be a comprehensive assessment of the merits of Indian self-government, rather it argues that Indian self-government when interpreted through a colonial lens in Canadian jurisprudence leads to conflicting policy decisions that negatively impact Indigenous peoples. Currently there are 22 self-government agreements across Canada involving 43 Indigenous communities. See "[Self-government](#)" (last modified 27 August 2019), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100032275>. Having these agreements in place does not obviate the interpretation of this case. In fact, it highlights the problems with the *McDiarmid* decision: out of well over 600 different groups in Canada, only 22 self-government agreements exist involving 43 Indigenous communities.

The Court's claim that exemptions be limited to treaty property is also curious given that only half of the Indian population in Canada at that time were treaty Indians. The government acknowledged in the House of Commons in 1951 that it was concerned for *all* Indians in Canada—not just treaty Indians. That Parliament would subsequently intend a narrow interpretation of section 90(1), so that only treaty Indians would be exempted, is improbable.

This article is divided into three sections. In section two, I discuss the *McDiarmid* decision against the backdrop of the social and political milieu regarding Indians up to and at the time of the amendment. I then discuss the sovereignty of Indigenous nations and the disruption of this sovereignty by settlers, legislation and the process of colonization. Here, I also demonstrate that little weight was given to Indian evidence on self-government during the *Act* amendment consultation process. In section three, I argue that the *McDiarmid* decision perpetuates conflicting Indian policies in its double-minded legal reasoning that Indian self-government could possibly be promoted through an amendment to the *Act*. I discuss how these double-minded decisions have implications for Indigenous peoples in that conflicting laws continue to be created that promote the historical status quo for Indigenous peoples. I conclude that it is troubling that the Court claimed Parliament had intended a narrow interpretation of section 90(1)(b) as a means to advance the promotion of Indian self-government. While there are some Indian governance powers under the *Act*,²¹ the administration of the *Act* in relation to Indian affairs is largely inconsistent with Indian self-government. In addition, the historical record indicates that all Indians were in the purview of government representatives at the time of the amendments. It is difficult to fathom then that Parliament subsequently intended that only treaty property be exempted. The deleterious impacts of these kinds of legal decisions on Indigenous peoples is augmented by this kind of specious interpretation because laws continue to be constructed under conflicting policy goals. Without due consideration given to the historically sovereign nature of Indigenous societies, these legal pronouncements undoubtedly promote the status quo. In the next section, I discuss the historical incongruencies in Indian policy that continue to be perpetrated through contemporary legal decisions such as *McDiarmid*.

²¹ See e.g. sections 74–80 of the *Act*, *supra* note 2 provide for election powers and sections 81–86 of the *Act*, *supra* note 2 provide for the power to make by-laws.

2. Gauging Incongruencies in Indian Policy that Result from *McDiarmid*-type Interpretations

McDiarmid—a case involving God’s Lake First Nation, an isolated Indian Band in northern Manitoba who entered into Treaty No. 5 with the federal government—is widely regarded as a key decision in Canada on the interpretation of sections 89(1) and 90(1) of the *Act*. This sensitive decision was decided in 2006 at a time when Indian self-government and the Indian economy was at the forefront of discussions around Indian policy in Canada.²² The key issue was whether certain Band bank account funds could be considered property situated on reserve because they resulted from treaty or agreement. This issue relates more specifically to section 90(1)(b) which indicates that property given to Indians or Bands under “treaty” or “agreement” shall be “*deemed* always to be situated on reserve.”²³ The Band claimed that, although certain bank account funds were located in Winnipeg, the funds should be exempted from seizure under sections 89(1) or 90(1)(b) of the *Act*; it claimed that these funds were a result of treaty or agreement because they resulted from a “Comprehensive Funding Arrangement” which was provided to the Band in exchange for the extinguishment of claims against the Crown.²⁴ If the funds were found to result from treaty or agreement, they would be *deemed* situated on reserve and exempt from seizure, pursuant to section 89(1).

In this decision, the Court affirmed *Mitchell v Peguis Indian Band*,²⁵ the first key legal decision rendered on the interpretation of section 90(1) in which the Court held that the section should be narrowly interpreted based upon both the rules of statutory interpretation and the history of this provision.²⁶ The reliability of the Court’s interpretation of the history of the provision, however, should be assessed against the backdrop of

²² See e.g. Canada, Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996); John Provart, “Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada” (2003) 2:1 *Indigenous LJ* 117; Sally Weaver, “An Assessment of the Federal Self-Government Policy” in Andrea P Morrison, eds, *Justice for Natives: Searching for Common Ground* (Montreal & Kingston: McGill-Queen’s University Press, 1997); John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right” (2005) 38:2 *UBC L Rev* 285.

²³ *Act*, *supra* note 2, s 90(1)(b) [emphasis added].

²⁴ *McDiarmid*, *supra* note 10 at paras 1–2.

²⁵ *Peguis*, *supra* note 16.

²⁶ Before the *Peguis* decision, the Court found in *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193 [*Nowegijick*], that when dealing with the interpretation of statutes that apply to Indigenous peoples, a liberal interpretation should be applied, and any doubt or ambiguity should be resolved in favour of Indians.

that which was actually happening at the time of the 1951 section 90(1) amendment.

Chief Justice McLachlin (as she was then) claimed that the history of section 90(1)(b) supports the likelihood that Parliament intended a narrow interpretation of the word “agreement” in order to promote Indian self-government. The Court asserted that exempting property broadly would be inconsistent with self-sufficiency by depriving Indians of credit opportunities, a cornerstone of economic development.²⁷ On the other hand, eliminating all exemptions could run the risk of Indian exploitation.²⁸ McLachlin claimed that the re-emergence of traditional Indigenous values signified that a shift in the law was necessary to promote Indian self-government and entrepreneurship.²⁹

McLachlin’s assertion necessarily presumes that, in Parliament’s view, Indian self-government could be promoted within the confines of the administration of the *Act*. This presumption is a curious one to say the least. If McLachlin’s analysis is correct, the Court would have one believe that the *Act* can “aid the red man in lifting himself out of his condition of tutelage and dependence”³⁰ and that section 90(1) could assist in guiding Indians to independence. What has become more obvious through decisions such as *McDiarmid* is that Indian self-government means different things to different parties. While the Court alleges that Parliament intended to promote Indian self-government through the section 90(1) provision, it is far more likely that Indian leaders viewed the mechanisms within the *Act* as instruments of colonialism rather than a means to assert Indian self-government.

Ostensibly, the colonization of Indians has been at the centre of Indian policy conflict for hundreds of years. Given this history, the apparent conflict in the Court’s interpretation that Parliament undertook *Act* amendments as a means to advance Indian self-government seemingly demonstrates that the “process of colonization which began hundreds of years ago” was “still going on, using the same strategies and many of the same tools developed in past centuries.”³¹ When courts of competent jurisdiction are complicit in making precedent-setting legal decisions that do not call out these strategies and, in fact, perpetuate conflicting legal policies as it relates to Indigenous peoples, the status quo remains.

²⁷ *McDiarmid*, *supra* note 10 at para 55.

²⁸ *Ibid.*

²⁹ *Ibid* at para 66.

³⁰ Bartlett, “Indian Act of Canada”, *supra* note 5 at 582, citing Canada, “Report of Department of Interior” *Sessional Paper*, No 9 (1876).

³¹ Mary Eberts, “Still Colonizing After All These Years” (2013) 64 UNBLJ 123 at 124.

McLachlin's claim that section 90(1) signified a necessary shift in the law does not hold up to scrutiny when considering the continued overall assimilationist effect of the *Act*. In what follows, I examine the social and political circumstances that existed up to and around the time of the amendment to consider the veracity of the Court's claim that the section 90(1) amendment was, indeed, intended to loosen the constraints of paternalism.

A) The Pre-1951 Social and Political History of Indian Policy

In the early to mid-1900's the "broad exemption of Indian property" approach was beginning to be abandoned in favour of limiting exemptions to only certain kinds of Indian property.³² While the record is not entirely definitive on the 'whys' and 'wherefores' of this shift,³³ prior critical developments signified that a certain change in philosophy was impending. For instance, by the early 1920's it became apparent that Indians on reserves were undeniably disadvantaged economically.³⁴ As has been reiterated by both the Court and the Royal Commission for Aboriginal Peoples, the persistence of toxic social conditions of Indigenous peoples historically included "ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at levels usually associated with impoverished developing countries."³⁵

By the early 1930's the federal government began to support new forms of development for Indians. In 1938, during a debate in the House of Commons, the Honourable TA Crerar, Minister of Mines and Resources, recommended that the Department of Indian Administration be more open to encouraging a "spirit of self-reliance and independence in our Indian wards."³⁶ Crerar proposed an amendment to the *Act* whereby the government would be able to introduce a revolving loan fund in which the Minister of Finance could advance loans of up to \$350,000 to individual Indians or nations on reserve.³⁷ The loans would be used generally for development purposes³⁸ by enabling the Superintendent-General "to make loans to Indian Bands, group or groups of Indians or individual Indians

³² *McDiarmid*, *supra* note 10 at para 49.

³³ *Ibid.*

³⁴ *Ibid* at para 27.

³⁵ Canada, Royal Commission on Aboriginal Peoples, *Gathering Strength, vol 3* (Ottawa: Canada Communication Group, 1996) at 1, online (pdf): *Government of Canada* <data2.archives.ca/e/e448/e011188230-03.pdf>. See also *R v Kapp*, 2008 SCC 41 at para 59, [2008] 2 SCR 483 [*Kapp*].

³⁶ *House of Commons Debates*, 18-3, vol 3 (30 May 1938) at 3350 (Hon TA Crerar) [Debates 1938, vol 3].

³⁷ *Ibid* at 3349.

³⁸ *Ibid.*

for the purchase of farm implements, machinery, live stock, fishing and other equipment, seed grain and materials to be used in native handicrafts and to expend and loan money for the carrying out of cooperative projects on behalf of the Indians.”³⁹ It appeared that the motivation for making a revolving loan fund available was to provide solutions for Indians to secure credit for economic development purposes. The revolving loan fund was not to be connected, directly or indirectly, with any proceeds directed from the alienation of lands or mineral rights.⁴⁰

This was but one example of circumstances that would eventually lead to abandoning the approach of exempting Indian property broadly. Agreeing to extend credit in order to rework the Indian economy—in hopes of promoting Indian economic development—would seemingly be a new direction for Indian policy. By the time of the *Act* consultation period, there was a certain government impetus to consider Indian policy as it related to economic advancement. Nonetheless, Indian leaders, who had called for a review of the *Act* through the formation of the Committee, were only able to present limited evidence to the Committee on the effects of the *Act* upon the pre-existing Indian sovereignty. Below, I discuss this Indian evidence on self-government to demonstrate that, in the end, little weight was likely given to Indian views on Indian self-government.

B) Sovereign We Stand: Neglecting Indian Evidence on Self-Government

The tone was set from the outset denoting the manner that the Committee was willing to engage with Indian leaders in contemplation of the effects of the *Act*. As the process unfolded, Indians were not an integral part of the investigation into the effects of the *Act* as only government representatives comprised the Committee. Whether having Indians on the Committee may have made a difference is debateable but after the Committee came under public scrutiny,⁴¹ it eventually accepted submissions from Indian leaders across Canada. Based upon the standards of the day, and up to that

³⁹ *An Act to amend the Indian Act*, SC 1938, c 31, s 2. Loan funds would be advanced from the Consolidated Revenue Fund of Canada. The livelihood of Indian hunters and trappers was also under attack due to a diminishing wildlife population and Indian Game Reserve and fur-conservation programs were created; legislation was enacted that regulated the buying of skins and other parts of wild animals only from Indians in designated regions in northern Canada. See Moore, *supra* note 5 at 127–9.

⁴⁰ Debates 1938, vol 3, *supra* note 36 at 3352.

⁴¹ Notably, newspaper articles were published informing the public of the fact that the Committee did not want to engage Indian leaders in reviewing the *Act* and so members later agreed to accept submissions from Indian leaders.

See Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*,

point in time, it was likely considered the most extensive “consultation” that had occurred between government representatives and Indians. It nonetheless appeared that, if given the chance to participate in a more complete consultative process, more Indian leaders would have participated.⁴² Yet, other than accepting oral and written submissions, Indian views were not meaningfully considered to inform the direction that Indian policy should take.⁴³

As Indian leaders made these numerous submissions to the Committee, there was a demonstration of a persistent and common theme. The leaders emphasized the veracity of both Indian sovereignty and self-government, which pre-dated any alleged notion of Crown sovereignty. Andrew Paull, President of the North American Indian Brotherhood, presented before the Committee and immediately made it clear that he stood before the Committee “not as a suppliant” but as somebody who was an equal in every sense.⁴⁴ He declared that Indians condemned the *Act* as a “piece of useless legislation” that they would like to see changed; he addressed the issue of self-government to say that lifting up the morale of Indians was most critical. He further remarked that passing useless legislation about a variety of issues, without enabling Bands to look after themselves and their people, was futile.⁴⁵ Paull also reminded the Committee that Indian nations were not Canadian subjects, rather were allies of the Crown.⁴⁶

Brigadier OM Martin, Magistrate for the County of York and a Six Nations Band member, recommended greater autonomy in controlling education and public services; he suggested that the interest from Indian Trust Accounts could be used to facilitate operational budgets.⁴⁷ Reginald Hill, representing the Six Nations Council, also made an oral statement

20-2, No 12 (11 July 1946) at 512 [Committee 1946, No 12]. See also “Defeat Move to Let Indians Give Opinion”, *Toronto Star* (10 July 1946).

⁴² Paull, the President of the International Brotherhood of Indians, informed the Committee that he had invited Indian leaders to attend Committee meetings and the Committee, in turn, notified them to not come. See Committee 1946, No 9, *supra* note 12 at 419.

⁴³ For example, Committee member Reid indicated that he thought it was “useless to have Indians sitting around here” in response to a suggestion that at least five Indian leaders from across Canada should constitute members of the Committee: Committee 1946, No 11, *supra* note 14 at 485. For a discussion more generally, see Johnson, *supra* note 18 at 21–2.

⁴⁴ Committee 1946, No 9, *supra* note 12 at 419.

⁴⁵ *Ibid* at 426–7.

⁴⁶ *Ibid* at 421.

⁴⁷ Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 20-2, No 20 (8 August 1946) at 762–3 [Committee 1946, No 20].

reminding government representatives that the Haudenosaunee's origins were rooted in sovereignty, as is conveyed by the Haldimand Deed to the Grand River Valley, and that the British historically recognized them as allies, rather than subjects.⁴⁸ Hill did concede that the Council was aware that absolute self-government might be impractical at this time⁴⁹ but that the Committee should be reminded that Six Nations held a unique position with the Crown through the Haldimand grant.⁵⁰ Chief Sam Lickers of Six Nations further asserted that the 1784 Treaty, made with their great forefathers, was an agreement between “two *equal sovereign nations*”.⁵¹ He told the Committee that the colonialists created Bands and that Band entities should only be comprised of non-sovereign nations, which did not apply to the Indians of the Six Nations.⁵² A further assertion was made by the Akwesasne Mohawk from the St. Regis Reserve in which it was emphasized that:

We members of the St. Regis Iroquois Band want to retain our tribal identity, with our reservations. We have no desire to cast these aside. We have no wish that white men enter our reservations, using the Indian Act as an excuse, to create works of any kind (over the heads of our Chiefs and people) to interfere with our tribal life ... We are confined and dictated to by federal and bureaucratic departments with no representations by our chiefs or by our people. We have no share in the disposing of our destiny and rights!⁵³

This submission was supplemented by the Longhouse Chiefs of Akwesasne who stated that, as “Chiefs of the Mohawk Nation who swear allegiance to the Six Nations Confederacy, as the only *true government* for our people,” we assert that:

- 1) We occupy our territory, not by your grace, but by a right beyond your control.
- 2) We hold original title.

⁴⁸ Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-3, No 25 (22 May 1947) at 1273 [Committee 1947, No 25].

⁴⁹ *Ibid* at 1274.

⁵⁰ *Ibid* at 1284.

⁵¹ Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-3, No 33 (12 June 1947) at 1708 [Committee 1947, No 33] [emphasis added].

⁵² Committee 1947, No 25, *supra* note 48 at 1285.

⁵³ Committee 1947, No 33, *supra* note 51 at 1744.

- 3) We have never voluntarily submitted to the domination of the Canadian government, and have never been conquered by it in a just war.
- 4) According to International Law, no nation can legislate over another without first acquiring title to the land.⁵⁴

As submission after submission was made, it became apparent that Indian leaders were most passionate about their firmly held position that the historical existence of Indian sovereignty prevailed over the *Indian Act*.

Indian leaders sought to impress upon the Committee the significance of Indian self-government and the existence of organized Indian societies that predated contact, independent of Crown control. Further, the leaders asserted that concluding alliances and treaties with the French and British Crowns demonstrated that Indian nations were *sovereign nations* with some form of self-government. In fact, on the issue of treaties Paull enquired of the Committee: “[w]hy does someone make a treaty with somebody? You have to be equal to somebody before you can make a treaty with somebody. We say to you now that those Indians at that time were your equal when they made the treaty.”⁵⁵ Through entering treaty agreements, Indians regarded themselves as autonomous nations with their own systems of dealing with property; in fact, initially when Europeans first arrived, some nations made efforts to acquaint them with the Indian traditional systems of land use.⁵⁶ Indians have long argued that, to enter into treaties, they must have held independent land interests.⁵⁷ There was no indication that Indian nations viewed themselves as less than equal in entering into treaty agreements. Paull’s statement was not surprising given that Indians have historically claimed that treaties set the terms between Indigenous peoples and Britain in the form of “*nation-to-nation* agreements”.⁵⁸

Notwithstanding Indian submissions, the Committee viewed evidence submitted by a non-Indian anthropologist, Dr. Diamond Jenness, Chief of

⁵⁴ Committee 1948, No 5, *supra* note 15 at 209, Appendix ID [emphasis added].

⁵⁵ Committee 1946, No 9, *supra* note 12 at 422.

⁵⁶ John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 5th ed (Toronto: LexisNexis Canada Inc, 2018) at 1, 193. Powers of governance were closely connected to land and family with an emphasis on the spiritual, familial, economic and political spheres.

⁵⁷ Brenda L Gunn, [“Exploring the International Character of Treaties 1-11 and the Legal Consequences”](#) (January 2018) Canada in International Law at 150 and Beyond Paper No 5, online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/publications/exploring-international-character-treaties-1-11-and-legal-consequences> at 1.

⁵⁸ *Ibid* [emphasis added].

the Inter-Services Topographical Section, Department of National Defence as highly regarded. In a submission before the Committee in 1947, Jenness introduced a *Plan for Liquidating Canada's Indian Problem Within 25 Years* to solve this "Indian problem".⁵⁹ The objective of Jenness's plan was to "abolish, gradually but rapidly, the separate political and social status of Indians (and Eskimos)" while also working to "enfranchise them and merge them into the rest of the population on an equal footing."⁶⁰ The plan included the eradication of Indian reserves, which Jenness labelled as "leprous spots", and the assimilation of Indians through an integrated education system.⁶¹ Jenness received overwhelming support for his proposed plan, which emphasized education as a key tool to assimilate Indians.⁶² Committee member, Mr. Reid, surmised that he was confident that the Committee representatives unanimously supported Jenness's proposed plan; he stated: "I think I voice the views of all the committee when I say that this is one of the finest talks we have heard, and at the same time we have had presented to this committee a real plan, and with most of what has been said by Dr. Jenness I am personally in *entire accord*."⁶³ Despite the Committee's acknowledgement of the inability of government to fully accomplish the assimilation objective,⁶⁴ Jenness's proposed plan was well-regarded.

Apparently, the Committee did not fully grasp that Indian self-government and Indian assimilation were not compatible policy objectives that, if met, have different outcomes. Assimilation demands that Indians conform to the mainstream economy and denies Indians control over their affairs. Self-government assumes Indians the responsibility of maintaining their own political and economic systems without external control. Yet the Committee, demonstrating a diminished understanding of Indian autonomy, followed the same 100-year-old government pattern of thinking in acclaiming an extreme assimilationist plan. Notwithstanding that Indian self-government could be better understood through careful deliberation with Indian leaders, the differences in Indian and government philosophies seemed to be insidiously present throughout the consultation process. Johnson acknowledged this in his 1984 government report on the *Act* amendment process. He noted that a "significant philosophical dichotomy" existed between Indian leaders and

⁵⁹ Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-3, No 7 (25 March 1947) at 310-11 [Committee 1947, No 7].

⁶⁰ *Ibid* at 310.

⁶¹ *Ibid*.

⁶² *Ibid* at 311.

⁶³ *Ibid* [emphasis added].

⁶⁴ Bartlett, "Indian Act of Canada", *supra* note 5 at 586.

government representatives in that in “examin[ing] the same facts and focused on the same Institutions, they did so with fundamentally different visions of the future for Indian people.”⁶⁵ The presence of this kind of philosophical dichotomy meant that the prevailing and predominant government objective was to attain Indian assimilation; Indian leaders, on the contrary, had the objective of Indian self-government in mind.⁶⁶

Seemingly, from the Committee’s view, self-government was somewhat akin to municipal government that would still permit the assimilation of Indians into the broader political system.⁶⁷ It is most certain that from the Indian leaders’ perspective, limited governance provisions and self-administration cannot be equated with Indian self-government of the kind that existed at contact. Indeed, the Court’s interpretation that Parliament was motivated by the desire to promote Indian self-government and entrepreneurship should be viewed with scepticism. From all accounts, it appears that while the 1951 *Act* appeared to remove some of the government controls and cultural prohibitions on reserves, the policy of encouraging Indian dependence continued and comprehensive powers that approximated that of Indian self-determination or self-government were not conferred.⁶⁸

Furthermore, the historical events at the time of the section 90(1) amendment, as it relates to confining exemptions to only treaty Indians, should be considered. In *McDiarmid*, McLachlin found that “Parliament’s documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties.”⁶⁹ If the Chief Justice’s analysis is correct, that protection should be limited to only treaty Indians, it would necessarily be presumed

⁶⁵ Johnson, *supra* note 18 at 43.

⁶⁶ *Ibid.*

⁶⁷ Committee 1948, No 5, *supra* note 15 at 187. In the end, the Committee recommended: 1) that greater responsibility and more progressive measures of self-government of Reserve and Band affairs be granted to Band Councils to assume and carry out such responsibilities; 2) that financial assistance be granted to Band Councils to enable them to undertake, under proper supervision, projects for the physical and economic betterment of the Band members; and 3) that such Reserves as become sufficiently advanced be then recommended for incorporation within the terms of the Municipal Acts of the province in which they are situate. See also *House of Commons Debates*, 21-4, vol 2 (16 March 1951) at 1352 (Mr. Harris Grey-Bruce) [Debates 1951, vol 2] where MP for Grey-Bruce, Mr. Harris, indicated that “we can impose safeguards to see that a band council does not exercise authority greater than a municipal council unless it is in the interests of the band”.

⁶⁸ Bartlett, “Act of Canada: An Unyielding Barrier”, *supra* note 5 at 14; Bartlett, “Indian Act of Canada”, *supra* note 5 at 587.

⁶⁹ *McDiarmid*, *supra* note 10 at para 66.

that Parliament was only concerned with the possible exploitation of treaty Indians. Given that section 90(1) is read together with sections 87 and 89, it is curious that section 90(1) should only apply to treaty-related assets. Indigenous societies in Canada at the time of the section 90(1) amendment were comprised of diverse nations with a range of personal circumstances.

While it is no doubt that Indians were granted a special political status through treaties to facilitate assimilation, Indians were also given special status through enacted legislation.⁷⁰ Section 18(1) of the *Act* indicates that reserves are held for the “*use and benefit*” of Bands whether by “treaty or surrender”.⁷¹ Numerous “formal and informal instruments” had been used to set apart reserve lands recognized under the *Act*.⁷² As such, reserves were also created through other means besides the entering into of treaty. In fact, section 3(6) in the *Indian Act*, 1876 defined a reserve to include land “set apart by treaty or otherwise” such that there were several ways by which a reserve could be created.⁷³ Between the 1790’s and 1840’s in Lower Canada and the Maritimes small reserves were established in response to the many Indian disruptions by European settlers.⁷⁴ Therefore, many reserves were created long before the federal government assumed jurisdiction over Indians, pursuant to section 91(24) of the *Constitution Act, 1867*.⁷⁵ Some of the non-treaty reserves currently administered under the *Act* had already been established in Nova Scotia, New Brunswick, Quebec’s pre-union borders and the southern portion of Upper Canada or Ontario by the date of confederation; notably, the reserves created at that time (as a result of formal treaty negotiations) consisted of only

⁷⁰ Bartlett, “The Act of Canada”, *supra* note 5 at 583. See e.g. *Indian Protection Act*, *supra* note 4; *Act providing for the organization*, *supra* note 4; *Act for the gradual enfranchisement*, *supra* note 4.

⁷¹ *Act*, *supra* note 2, s 18(1) [emphasis added]. The *Act* is not instructive on the creation of reserves, rather, it provides mechanisms for the management and protection of existing reserves.

⁷² *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 10, [2002] 2 SCR 816 [*Ross River*]; *Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654, 91 NBR (2d) 43; Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland—A Study in Law and History* (Saskatoon: Native Law Centre, University of Saskatchewan, 1990) [Bartlett, *Indian Reserves and Aboriginal Lands*]; Jack Woodward, *Native Law* (Toronto: Carswell, 2001). For example, a reserve may be created via an Order-in-Council under the royal prerogative.

⁷³ *Act*, 1876, *supra* note 8, s 3(6) [emphasis added].

⁷⁴ See Robert K Groves, “The Curious Instance of the Irregular Band: A Case Study of Canada’s Missing Recognition Policy” (2007) 70:1 Sask L Rev 153 at 161.

⁷⁵ Bartlett, *Indian Reserves and Aboriginal Lands*, *supra* note 72 at 24–5; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

a few reserves in Upper Canada.⁷⁶ The process of reserve creation in Canada, whether via treaty or non-treaty measures, has gone through “many stages and reflects the outcome of a number of administrative and political experiments” and over time “procedures and legal techniques” have changed.⁷⁷

Notably, Justice Binnie’s assertions that Parliament could not have intended to only be concerned about treaty Indians is supported by communications, depicted in the historical record, between members in the House of Commons at the time of the amendment period. Given the varied circumstances under which reserves were created in Canada, the issue of whether Parliament had intended to extend equal exemptions to all Indians on reserves arose during the *Act* amendment period. This issue was addressed in the House of Commons during the period that Bill 76 (the specific Bill on the 1951 *Act* amendments) was being contemplated by Parliament. Member of Parliament, Mr. Blackmore, questioned whether the Crown should have further obligations to certain groups of Indians who did not have treaty rights, for instance.⁷⁸ Blackmore indicated that some people believed that because the numbered treaties were not signed with Indians in the east, they were not entitled to as fair a consideration as Indians in the west.⁷⁹ Notably, Blackmore went on to emphasize that the concern was for all Indians and he clarified on the record that “our fathers had become a great deal more civilized by the time they dealt with the Indians of the west than their fathers were several generations before when they dealt with the Indians in the Maritimes.”⁸⁰

Discussions by government at the time of the amendments demonstrated then that the focus was necessarily on *all* Indians and not just treaty Indians. Member of Parliament for Grey-Bruce, Mr. Harris, also pointed out to the House that only half of the Indians in Canada (69,000) were treaty Indians, while just under half were non-treaty Indians.⁸¹ He noted that twelve Treaties were negotiated by commissioners to

⁷⁶ Groves, *supra* note 74 at 161.

⁷⁷ *Ross River*, *supra* note 72 at para 43. The legal and political methods gave form and existence to a reserve and evolved over time. Reserves were created by various methods in the Maritimes, Quebec, Ontario or later in the Prairies and in British Columbia. In *Ross River* the Court found that the historical circumstances of the “agreement” that resulted in reserve lands being set aside determine whether a reserve was actually created.

⁷⁸ *House of Commons Debates*, 21-4, vol 4 (15 May 1951) at 3048 (Mr. Blackmore) [Debates 1951, vol 4]. At that time, apart from the peace and friendship treaties, Indians in eastern Canada had not entered into treaty in the same manner that Indians in the western provinces had become treaty Indians.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid* at 1351.

obtain the surrender of the Indian interest in lands and so the lives and property of Indians from roughly Lake Simcoe in Ontario to the Rocky Mountains would be affected.⁸² This meant that Indians in all other parts of Canada were non-treaty Indians. It is inconceivable that Parliament would not have contemplated the effect of the *Act* on just under half of the Indian population at that time. It is conceivable, however, that given the contemporary significance of Indian treaties in Canadian society, McLachlin may have erroneously imparted that significance to Parliament's intentions at the time of the 1951 amendments.

Justice Binnie presumed, and rightly so, that if the record is any indication, Parliament would have been aware of the dire conditions on most reserves.⁸³ Arguably, Parliament would have intended section 90(1) (b) to "operate equitably to all Indian bands, and should not be given an interpretation that favours treaty bands over non-treaty bands."⁸⁴ It was more likely that, if Parliament had intended such inequitable treatment between treaty and non-treaty Indians, it could have demonstrated this in clear language.⁸⁵ We see this in earlier provisions of the *Act*, 1876 where Parliament explicitly stated that exemptions applied to both "Indians and non-treaty Indians."⁸⁶ It stands to reason then that Parliament could have just as easily indicated that section 90(1) works to apply to "treaty Indians and *not* non-treaty Indians" if it had intended to distinguish the two.

Putting the issue of the alleged promotion of self-government and treaty obligations aside, it is clear that because the Committee—with its Euro-centric bias and proclivity for assimilation—did not involve Indian leaders in the decision-making process, its representatives likely did not fully grasp the rationale of the Indian's political positions at the time (or at least chose to ignore it). It was nonetheless apparent from the Indian leader's submissions that they viewed having comprehensive control over Indian affairs as being consistent with the pre-existence of sovereign Indigenous nations. Regardless, without meaningful engagement with Indigenous leaders, it should not be surprising that, in the end, the Committee was ambiguous in its recommendations, which were captured in the Committee's final report.⁸⁷ On the one hand, the Committee recommended that sections of the *Act* be repealed or amended to enable

⁸² *Ibid.*

⁸³ *McDiarmid*, *supra* note 10 at para 82.

⁸⁴ *Ibid* at para 78.

⁸⁵ *Ibid.*

⁸⁶ See e.g. *Act*, 1876, *supra* note 8 and *Act*, 1927, *supra* note 8, ss 64, 66, 102, 105 respectively.

⁸⁷ Committee 1948, No 5, *supra* note 15 at 186–90.

Indian self-government and advance Indian economies.⁸⁸ On the other hand, the Committee overwhelmingly supported Jenness's assimilation plan, meant to assist in liquidating Canada's "Indian problem", and recommended that provisions be included in the *Act* to regulate the affairs of Indians not "sufficiently advanced to manage their own affairs."⁸⁹ All in all, the recommendations made by the Committee demonstrated a misguided view of Indian self-government in that the limited governance powers presented in the *Act* only provided Indians with restricted control over Indigenous affairs. This control merely amounted to Indian self-administration in that reserves and treaties were administered by Indian Affairs with limited control exercised by Bands.⁹⁰

This inconsistency in approach is strangely reminiscent of the *Indian Advancement Act* of 1884.⁹¹ This statute sought to confer wider powers upon the Band Council, including the raising of money, while at the same time an Indian Agent was appointed chairman of the Council to oversee Indian affairs.⁹² Notably, over 60 years later, we see the same tension in competing Indian policy considerations. This tension was conveyed by Minister Walter Edward Harris in 1951 when he asserted that the problem was to maintain a balance between providing for Indian self-determination and self-government in the one instance, while maintaining legislative authority through administration of the *Act* in the other instance.⁹³ It becomes even more problematic, and serious implications result for Indigenous peoples, when this incongruity in Indian policy is crystallized and reflected in key legal decisions, especially those from the highest court in the land. These resulting implications will be briefly discussed in the next section.

⁸⁸ *Ibid.* Bartlett writes about this as well. See Bartlett, "Indian Act of Canada", *supra* note 5 at 586.

⁸⁹ Committee 1948, No 5, *supra* note 15 at 187.

⁹⁰ Bartlett, "Indian Act of Canada", *supra* note 5 at 581. For example, Indians can create by-laws pursuant to sections 81–86 of the *Act*, but the by-laws must be consistent with the *Act*. Further, the election powers under provisions 74–80 of the *Act* provide for the election of Band leadership under an electoral system. While some Bands still adhered to an election of leadership based upon the custom of the Band, the majority of Bands in Canada adhered to the *Act* system of elections. See Canada, Special Joint Committee of the Senate and House of Commons on Indian Affairs, *A Commentary of the Act* (Ottawa: Department of Citizenship and Immigration, 1960) at 29.

⁹¹ *Indian Advancement Act, 1884*, SC 1884, c 28.

⁹² Bartlett, "Indian Act of Canada", *supra* note 5 at 585.

⁹³ Debates 1951, vol 2, *supra* note 67 at 1352.

3. The Implications of *McDiarmid*-type Decisions: The Status Quo Remains

The record is not entirely clear on Parliament's motivations for the specific manner in which section 90(1) was included in the *Act* after receiving the Committee's recommendations. The Court's interpretation in *McDiarmid* was that Parliament created section 90(1) to deal with the tension in Indian policy objectives. Allegedly, Parliament sought to strike a balance between encouraging Indians in self-government and managing their own internal affairs, while allowing the Crown to retain legislative authority over Indian property.⁹⁴ Pursuant to this kind of interpretation, the Court did not actually resolve the long held incongruencies in Indian policy that constrain Indigenous self-sufficiency. In fact, Binnie, writing for the dissent in *McDiarmid*, acknowledged that this incongruity is likely exacerbated by following a narrow interpretation of the word "agreement", purportedly to promote Indian self-government, because it eliminates exemptions for non-treaty Indians. The result would be a kind of "checkerboard of exemptions and non-exemptions" across Canada.⁹⁵ Binnie found that this would *not be consistent* with promoting Indian self-government for those Bands attempting to provide public services to their members through Comprehensive Funding Arrangements. That is, if a Band is concerned with the possibility of taxation, seizure or garnishment of funds that are supposed to be allocated for essential services on reserve, the Band is better off allowing the government to provide essential services directly to the reserve so that those funds cannot be intercepted off-reserve by creditors.⁹⁶ In the end, section 90(1) does not really serve the alleged purpose that the Court has set out in *McDiarmid* for Bands like God's Lake First Nation who are situated in remote areas and have not yet attained self-sufficiency.

Furthermore, if this interpretation were correct, the section 90(1) amendment proved that the inconsistency in Indian policy in Canada established at least by 1869—where the Superintendent General had full control over Indian affairs and yet sought to encourage Indian self-government⁹⁷—continued to 1951. In its interpretation of section 90(1), which does not demonstrably deviate from the earlier justifications of the *Act*, the Court has merely promoted Crown "internal colonization".⁹⁸ That is, despite the claim of the promotion of Indian self-government, the effect of this legislation is that it enables the Crown to attempt to "complete the job which was begun over a century and a half ago"—to assimilate

⁹⁴ *Ibid* at 1353.

⁹⁵ *McDiarmid*, *supra* note 10 at para 124.

⁹⁶ *Ibid* at para 94.

⁹⁷ Bartlett, "Indian Act of Canada", *supra* note 5 at 584.

⁹⁸ Eberts, *supra* note 31 at 124.

Indians.⁹⁹ While certain paternalistic controls adopted in the first half of the twentieth century seemed to be loosened through the section 90(1) amendment, aggressive Indian assimilation was still encouraged.¹⁰⁰ It is necessarily presumed then that section 90(1) was merely a stopgap mechanism. The Court's claim that section 90(1) advanced Indian policy for the "benefit" of Indians, without the Committee having conducted any meaningful consultation to address Indian concerns, is duplicitous at best.

The *McDiarmid* decision continues to be a critical Canadian legal decision in determining key legal issues in relation to *Indian Act* exemptions. The Court's reasoning has been applied in subsequent legal decisions as a leading precedent on sections 89 and 90.¹⁰¹ As was the case for God's Lake First Nation, these decisions demonstrate that the current interpretation of these exemptions by the Court do not "prevent creditor enforcement from disrupting a Band's provision of important public-sector services,"¹⁰² thus having a detrimental impact on the self-determination of Indigenous Nations on reserve. Consequently, laws that continue to be created and interpreted with little regard for the inherent nature of Indian sovereignty, or whether the impacted groups have been restored to a level of self-sufficiency,¹⁰³ likely make a *McDiarmid*-type outcome an unjust one. The irony is that the circumstances like those at God's Lake were the very circumstances that Indian leaders sought to address during the *Act* consultation process. They cried for greater control over all matters on reserve so that Nations could be restored to self-sufficiency. Nevertheless, seemingly a mere tweak of the *Act* was interpreted by the Court as the means to accomplish this. The depth of the philosophical dichotomy that separates Indians, governments and apparently the Court cannot be underestimated. The impact is great for Indigenous peoples because, as has been so eloquently enunciated, "judicial power that cascades from the dominant group's ideological headwaters" advances a kind of bias that "spills onto the pages of legal decisions from a contextualized, politically hued stream."¹⁰⁴ The end result is that the status quo remains. The

⁹⁹ *Ibid* at 125.

¹⁰⁰ Bartlett, "Indian Act of Canada", *supra* note 5 at 587; Johnson, *supra* note 18 at 25.

¹⁰¹ *Pavage Levesque Paving Ltd. v Eel River Bar First Nation*, 2007 NBCA 31, 314 NBR (2d) 90; *Joyes v Louis Bull Tribe No 439*, 2009 ABCA 49, 2 Alta LR (5th) 84; *Borden & Elliot v Temagami First Nation*, [2009] 3 CNLR 30, 2009 CarswellOnt 211 (WL Can) (Ont Sup Ct J). See also Anna Lund, "Judgment Enforcement Law in Indigenous Communities — Reflections on the Indian Act and Crown Immunity from Execution" (2018) 83 SCLR (2d) 279.

¹⁰² *Lund*, *supra* note 101 at 291.

¹⁰³ Lest we forget that the plight of Indigenous peoples was created in the first place due to the absolute dispossession and unjust seizure, in many cases, of Indigenous lands.

¹⁰⁴ Borrows, "Self-Government and the Royal Proclamation", *supra* note 1 at 2.

status quo has remained and will remain for Indigenous peoples if legal decisions continue to be rendered from the “dominant group’s ideological headwaters.”¹⁰⁵

Conclusion

It is clear from this legislation that Canada wanted Indians to adopt Euro-Canadian social norms and wished to suppress Indian values and Native culture through education in ‘white’ religion, political systems, economic principles, concepts of property and social mores. The goal was to annihilate Indians as a separate and distinct ethnic group, after which the social laboratories designed to achieve this end would disappear as well.¹⁰⁶

In the above-noted quote in which Ivan Johnson was referring to the *Act*, 1876, he may as well have been referring to the *Act*, 1951. Just as Indian leaders rejected the *Act* in 1876,¹⁰⁷ they also rejected the *Act* in 1951. In this paper, I examined the historical circumstances of the *Act* consultation period to analyze the context in which section 90(1) was included in the 1951 *Act*. I found that government representatives, tasked with making recommendations to Parliament regarding amendments to the *Act*, failed to consider Indian views on Indian self-government and entrepreneurship. Therefore, any acknowledgement of Indian self-government and entrepreneurship by government representatives must be regarded as insincere when viewed in conjunction with the reluctance to meaningfully engage with and include Indian leaders in the *Act* amendment process. Further, in spite of previous acknowledgment by policy makers that Indian assimilation had not succeeded, the Committee fully supported Diamond Jenness’s *Plan for Liquidating Canada’s Indian Problem Within 25 Years*. The government’s continued support of assimilationist policies demonstrated that it did not fully grasp the incongruity between the policy goal of Indian assimilation through provisions in the *Act* and that of Indian self-government. This incongruity became apparent in the Committee’s final recommendations to Parliament that Indians be given the responsibility of self-government but also be properly supervised on projects for the economic betterment of the Band. If the Court in *McDiarmid* is correct, Parliament appeared to run with this incongruity.

In parsing out and deconstructing the history that led to this amendment, I found that the Crown has historically engaged an indomitable commitment to assimilate Indians into Western culture. The *Act* is merely an extension of those assimilation policies. By its very

¹⁰⁵ *Ibid.*

¹⁰⁶ Johnson, *supra* note 18 at 7.

¹⁰⁷ *Ibid* at 8.

nature, legislation that regulates Indian affairs also promotes Indian assimilation into the greater colonial society. Is it possible to promote Indian self-government while maintaining legislative authority over Indians? In *McDiarmid*, the Court asserts that section 90(1) was born of the tension between the two.¹⁰⁸ Notwithstanding, Parliament's notion of Indian self-government, allegedly promoted through limited provisions in an otherwise restrictive *Act*, and the Indian's notion of the inherency of Indian self-government are in opposition to each another. Arguably, Parliament's enactment of section 90(1) was a regulatory stopgap, that is, a contrived way to assert that it supported Indian self-government while continuing adherence to the assimilationist mechanism of the *Act*.

The Court's finding in *McDiarmid* that Parliament intended to promote Indian self-government by reforming the *Act* clearly demonstrates a lack of understanding that legislating Indians is wholly inconsistent with the inherent nature of Indian self-government in which Indian peoples have claimed for hundreds of years. These kinds of legal decisions ensure that Indigenous peoples will almost certainly continue to be disadvantaged. Contradictory laws impacting Indigenous legal interests continue to be created and construed from the dominant power structure of Western laws which, in the end, results in inconsequential change for Indigenous peoples. The double-mindedness found in the Court's interpretation of the 1951 amendment in *McDiarmid* exclusively privileges the settler interpretation of self-government. Further, the attempt to contextualize the amendment through Parliament's desires at the time means that Indigenous leaders' understandings of self-government as sovereignty were overlooked. As such, inscribing colonialist legal interpretations continues to promote the status quo for Indigenous peoples. Despite the *McDiarmid* decision and the alleged promotion of Indian self-government, self-government is a non-reality for most Indigenous nations in Canada today.

¹⁰⁸ *McDiarmid*, *supra* note 10 at para 55.