



determi NATION

Interim Report

An Indigenous-led summit building solutions
for moving past the Indian Act.

determinationsummit.ca



Nishnawbe Aski Nation

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EXECUTIVE SUMMARY

The future of First Nation governance must be a future without the *Indian Act*. The determiNATION Summit was convened with the goal of exploring the premises, principles, institutional, legislative and constitutional mechanisms which will need to be in place in order to move beyond this colonial framework. The Summit was hosted on the unceded territory of the Algonquin Nation in Ottawa on May 23-24, 2018, by Nishnawbe Aski Nation and Osgoode Hall Law School.

The Summit spurred powerful conversations between Indigenous youth, women, leaders, Elders, legal and scholarly experts, and keepers of traditional Indigenous knowledge, around the *Indian Act* and its harmful effects on First Nation communities.

Delegates overwhelmingly asserted that the process of moving beyond the *Indian Act* must not be dictated by the federal government, but instead should be designed by Indigenous people beginning at the community level. It is clear that no one solution will address the needs of all communities. Communities and Nations must each be empowered to define their own priorities and chart their own futures. The Government of Canada's role must be to support and empower these conversations - not to consult or offer its own solutions.

WHY determiNATION?

Background on the *Indian Act*

In 1867, with the passage of the British North America Act (now the Constitution Act, 1867) Canada asserted sovereignty over Indigenous territory, and quickly expanded its territorial reach from sea to sea to sea in the ensuing decades. Section 91(24) of the Constitution Act, 1867 assigned to it the responsibility for "Indians and lands reserved for Indians" – a constitutional authority still asserted by Canada. The Rupert's Land Order in Council transferred the vast Hudson's Bay territories to Canada's exclusive jurisdiction. And finally, in the *Indian Act* of 1876, the government set out its own colonial vision of future Canada-First Nations relations: a vision of assimilation not only of First Nations in those territories but of all First Nations throughout Canada.

As successive federal governments amended the 1876 *Indian Act*, most key decision-making authority with respect to First Nations has been legislatively placed in the hands of a division of the Canadian civil service. That structure survived without effective opposition or change until 1969 and has continued to be a barrier to reconciliation until the present. Almost all official structures of First Nation governance now reflect particular forms influenced or mandated by the *Indian Act*.

The purpose of the *Indian Act* was to disrupt and dismantle systems of Indigenous law, spiritual practice and community governance, with the ultimate goal of complete assimilation – as reflected in the Residential Schools system, whose program of cultural genocide was the subject of the Truth and Reconciliation Commission of Canada. As late as the White Paper of 1969, the Government envisioned the only alternative to the *Indian Act* as the complete assimilation of Indigenous Peoples.

The resistance of Indigenous Peoples prevented the destruction of Indigenous communities. Some Aboriginal Rights have been recognized and protected through the courts, but while recent amendments to the *Indian Act* have addressed some of its most egregious injustices the colonial premises of the *Indian Act* remain current and in place. These include the assertion of Canadian sovereignty over Indigenous lands and people and denial of Indigenous sovereignty over Indigenous lands and people.

By virtue of this assertion of Canadian sovereignty, the *Indian Act* imposes non-Indigenous methods and criteria for recognizing membership in Indigenous Nations and interfering with Indigenous communities from determining their own use of territory and living by their own laws.

WHY NOW IS THE TIME

It is imperative that another generation of children not grow up under the shadow of the *Indian Act*. While the need to move beyond the *Indian Act* is urgent, imposing a new framework or new set of principles on Indigenous Peoples would perpetuate the paternalistic, top-down approach that is the hallmark of the *Indian Act*.

When Prime Minister Justin Trudeau appeared at the Special Meeting of the Assembly of First Nations shortly after his election in 2015, he said there was no relationship more important to him, and to Canada, than the one with Indigenous Peoples. The Prime Minister committed Canada to a Nation-to-Nation relationship, informed by Treaties and the inherent and constitutionally-protected rights of First Nations. He further promised that the “profoundly damaging” adversarial relationship and top-down approach of past governments would be abandoned in favour of one that is based on partnership.

Notwithstanding this pledge, recent developments have demonstrated a willingness for the Canadian Government to pursue reforms to the legal and constitutional rights of Indigenous Peoples unilaterally.

In February 2018, Prime Minister Trudeau gave a speech to the House of Commons in which he indicated he wishes to “give new life” to Section 35 of the Constitution Act, 1982, which recognizes and affirms Aboriginal and Treaty rights. He suggested Government recognition of Section 35 rights would eliminate the need for Indigenous Peoples “to prove, time and time again, through costly and drawn-out court challenges, that their rights existed, must be recognized and implemented.”

At that same time, Attorney General Jody Wilson-Raybould announced that the Government would pursue reconciliation with Indigenous Peoples based on 10 principles. While these principles indicate respect for partnership with Indigenous Peoples, and recognize Indigenous Peoples’ inherent right to self-determination, the principles were not developed through a collaborative process, and reaffirm that Government may infringe Indigenous rights if it meets a “high threshold of justification” (Principle 7).

The framework which replaces the *Indian Act* cannot be based on a governmental reformulation of Section 35 of the Constitution Act. Rather, such a framework must flow from the empowerment of Indigenous Peoples and must be guided by Indigenous laws and the diverse contexts, circumstances and needs of Indigenous Peoples.

KEY QUESTIONS

Discussion Sessions

The determiNATION Summit asked delegates to discuss various aspects of moving beyond the *Indian Act*. In nine breakout sessions, facilitators helped to guide participants through an examination of the limits and failures of the current colonial system, what possibilities exist for changing the system or creating new systems, and what steps will be needed to achieve that change.

Sessions attempted to answer the following questions:

- What are the possibilities and limits of Nation-to-Nation dialogue?
- What barriers must be overcome within the public service and bureaucracy?
- Besides the *Indian Act*, what other colonial structures stand in the way of decolonization?
- What potential does Indigenous law hold for moving beyond the *Indian Act*? Could traditional principles and practices replace elements of the colonial system?
- How are Indigenous political organizations and individual communities already taking steps to move beyond the *Indian Act*?
- What framework will replace the *Indian Act*? How do we set this process in motion?
- How can we create the right conditions - at the individual and organizational level - for policy change?
- What are Indigenous People doing to resist colonialism, and what are the barriers they must overcome?
- Can educational settings be transformed into catalysts for decolonization? What actions are needed to accomplish this?

World Café

The Summit concluded with a large group activity led by Indigenous youth, where delegates were invited to imagine a future without the *Indian Act* and record feedback freely through words, diagrams, or drawings on large sheets of paper. In this less structured forum, ideas that had been generated over the course of the Summit were exchanged and built upon, as participants rotated through tables and added to the input of previous groups.

Youth leaders asked delegates to consider the following questions:

- Imagine the first generation without the *Indian Act*. What does it look like? How does it feel? How is this going to affect the next generation?
- What are we responsible for? What work do we have to do now to get into a position for change?
- How do we need to define Nations moving forward? What do we need to leave behind?

SUMMARY OF DISCUSSIONS

Not a Federally-Dictated Process

A recurring and consistent thread woven through the Summit is that the framework which replaces the *Indian Act* must not be a federally-dictated process. The era of treating Indigenous Peoples as the object of governmental action must come to an end. Free, prior and informed consent of Indigenous Peoples over laws which affect their rights and their lands must be the point of departure for any new framework.

Nations Defining Their Own Citizenship and Territories

As stated throughout the Summit, there is and can be no one-size-fits-all solution for Indigenous Peoples. Indigenous Nations must pursue their own destiny, including relations with Canada, with Provinces and municipalities, and with each other.

This process will require new forms of governance and dispute resolution, developed by Indigenous Nations and communities, and informed by Indigenous laws. This process may acknowledge but must not be limited by current colonial practices for determining “status.”

Those people whose status was lost through unfair or discriminatory policies under the *Indian Act*, or because of the arbitrary discretion of civil servants, or whose status lapsed because of where and how Indigenous individuals and families chose to live, must be subject to equal respect and inclusion, subject to Indigenous laws, as those who are accorded status under the current system.

As NAN Grand Chief Alvin Fiddler observed, no Indigenous child should be assigned a number in a post-*Indian Act* future.

Must Not Replace the *Indian Act* with a Top-Down Legal Framework

There was significant concern expressed with the current direction of the federal government’s discussions of the *Indian Act*. The Attorney General’s 10 principles were announced, for example, without prior discussion or reflection with Indigenous communities. Where consultations are called, they often come with last minute materials or a vague agenda, that preclude meaningful community engagement.

PERSONAL REFLECTIONS

Impacts of the *Indian Act* on Individuals, Families and Communities

Throughout the Summit, delegates consistently returned to the frustrating and oftentimes devastating impact that the *Indian Act* has personally had on them, their families and communities. This provided essential context to the discussion, and the recommendations and outcomes of this Summit cannot be separated from the stories and reflections that were shared.

One of the clearest themes that surfaced from the personal reflections was that the impacts of the *Indian Act* reverberate across generations and throughout communities, and cannot be fully understood at an individual level. Many participants explained the experiences of their grandparents or their grandchildren as an intrinsic part of their personal experience. Just as the effects of residential schools are still being felt today, the effects of dismantling colonial legislation will take several generations to be fully felt in all communities.

The most common emotions mentioned by delegates were pride and shame. The *Indian Act* used shame to attempt to eradicate Indigenous language and culture, and delegates explained that the patronizing top-down bureaucratic system it created perpetuates this dynamic to this day. When speaking about the future they imagined for Indigenous People, delegates referred to ending this shame and fostering pride in Indigenous identities and nationhood. Reclaiming ceremonies, collective memories, matriarchal systems, continuity between generations, and self-government were a few of the elements described as generating pride.

Delegates often spoke about Nations asserting control over their own territories as an issue of rights and a key element of self-determination (for example, the ability to control resource extraction and housing), but the cultural and spiritual importance of this land was emphasized by many as being just as important. The land was described as being a source of knowledge, healing, language and culture. Reclaiming this land is an integral part of achieving balance in the mental, emotional, spiritual and physical health of people and communities, and must be part of decolonization.

CONCLUSIONS

An Indigenous-Led Process

To understand and respond to the needs of diverse Indigenous communities, it is necessary to empower communities to develop approaches and mechanisms which replace the *Indian Act*. For example, it must be for Indigenous Peoples to determine questions of citizenship and membership, and to develop Indigenous governance mechanisms to ensure accountability in relation to such questions. Therefore, as a necessary step in the dismantling of the *Indian Act*, communities must be empowered to develop their own roadmap and to set out their context and needs.

Solutions from the Community Level

The guiding principle for a community empowered process of dismantling the *Indian Act* is for solutions to be found at the grassroots level. This means explicit opportunities for the perspectives and needs of Elders, youth, women, two-spirited and other communities within Indigenous communities to have a voice in this process.

Canada to Fundamentally Rethink its Legal Framework

Canada has paid lip service to acceptance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Nation-to-Nation political processes and the implementation of Treaties and the Treaty process. That said, Canada's legal framework continues to advance colonial projects. For example, while the courts have recognized a duty to consult Indigenous communities over the use of Indigenous territories, those same courts have legitimized the right of federal and provincial governments to override the wishes of Indigenous communities where they conflict with governmental objectives.

For the most part, Canadian governments still do not recognize Indigenous law, or the right of Indigenous People to govern their communities according to Indigenous laws. In addition to the adoption of UNDRIP as a framework for Crown-Indigenous relations in Canada, and aside from any elaboration of s.35 rights which the government may choose to put in place (which we know a subsequent government could simply modify or reverse), the government must acknowledge the centrality of Indigenous laws and legal traditions in the governance of Indigenous Nations and communities.

The establishment of a Treaty Tribunal, as a joint endeavour between Indigenous Nations and the Government of Canada, would provide a more appropriate venue for true Nation-to-Nation dialogue. With both parties on equal footing, Treaty rights and their meanings could be re-examined and conflicts resolved.

Beyond the clear inconsistency of the *Indian Act* with an Indigenous-led legal framework, the federal government should also seek Indigenous input in a review of other Canadian laws which have had a detrimental impact on Indigenous Peoples, such as the recently announced reforms to the criminal justice system.

To decolonize Canada's legal frameworks, it is necessary both to recognize the legitimacy and authority of Indigenous laws and to address the harmful impact of Canadian laws on Indigenous Peoples.

RECOMMENDATIONS

Community Empowerment

It is clear that the only way to redress the harms done through the imposition of colonial top-down structures through the *Indian Act* is to empower communities to chart their own self-determined futures.

First, NAN calls upon the Government of Canada to clarify its commitment to repeal the *Indian Act* and to replace it with a legal and constitutional framework based on a Nation-to-Nation relationship and the principles set out in UNDRIP.

Second, NAN calls upon the Government of Canada to make resources available to enable NAN to support its communities to develop their own vision for what lies beyond the *Indian Act*.

Third, NAN to facilitate a (fully funded) community empowerment process across NAN territory to develop Indigenous laws and practices in areas now imposed through the *Indian Act*.

Fourth, the Government of Canada to further develop and expand this engagement to support a national process to assist all Indigenous communities develop their own laws and practices in areas now imposed through the *Indian Act*.

Finally, a Community Empowerment Fund should be established by the Government of Canada to support an Indigenous-led, community-driven process for dismantling the *Indian Act* and replacing it with a Nation-to-Nation reconciliation framework.