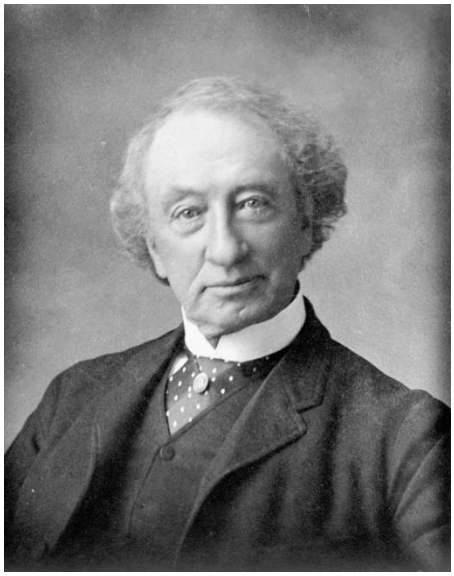
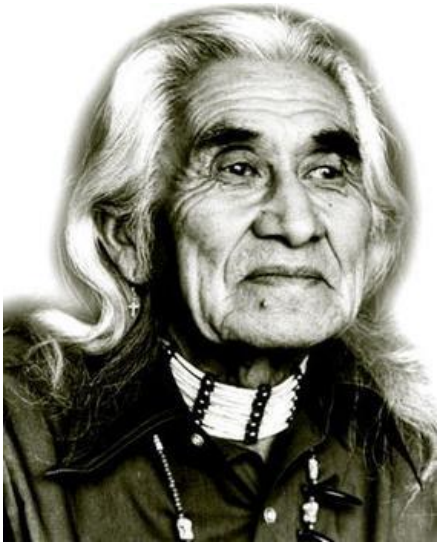
Module #5: The Indian Act

"The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change. "
- John A. Macdonald, 1887





"Can we talk of integration until there is integration of hearts and minds? Unless you have this, you only have a physical presence, and the walls between us are as high as the mountain range." - Chief Dan George

A. Creation of the Indian Act in an era of social and political change

The Indian Act was passed into law in 1876. The world was experiencing a time of accelerating social transition in the aftermath of the Industrial Revolution (1760 – 1840). The shift from an agrarian to an industrial economy created a population boom and migration from rural farming to urban industry. This created social pressures and changes in the relationship of the individual to their government.

The Communist Manifesto was written in 1848. In 1848 650,000 British men could vote, or one in five. Virtually no women could vote. In some ways the Communist Manifesto is a snapshot in time of ethics in 1948, just as the Indian Act is a snapshot in time of ethics today.

Cheap labour by the masses was the fuel for the economic engine. In 1848 the exploitative nature of this economic system in Europe prompted rebellions in Ireland, France, the German states, the Austrian Empire, Hungary, the Italian states, Denmark, and the Russian Empire. Rebellions which were brutally suppressed, and inspired government policy.

Human rights were an idea for a distant future. In Britain child labour had replaced slavery as a source of cheap labour. Textile mills and mines were the largest employers of child labour into the 20th century. The same political philosophy shaped the Indian Act in Canada.

The Colony of Vancouver Island was created in 1849, while the revolutions of 1848 would still have been fresh in the colonial administrations' considerations, a time when submission to the crown by any means was paramount. Within thirty years, by 1876, British Columbia was a Canadian province, and the Indian Act was passed. This was the same year that Queen Victoria was proclaimed Empress of India, a time when British priorities were consolidation of Crown authority across the empire.

The Colony of BC was founded in 1858. In 1859, Charles Darwin published *"On the Origin of Species*". The Province of BC was founded in1871. In 1883 Charles Darwin's cousin Sir Francis Galton coined the term "Eugenics" which has come to embody a misguided philosophy of racial improvement through planned breeding. Adolf Hitler was born six years later, in 1889, and took the eugenics philosophy developed by Galton and used it as a political tool. Duncan Campbell Scott, future Deputy Superintendent of Indian Affairs in Canada was born in 1862. He also used Galton's theory as a political tool. He wrote of the "final solution" for the Indian problem in 1910, fourteen years before Adolf Hitler wrote about his "Final Solution" in "*Mein Kampf"*.

B. Indian Reserves

Section 18 of the Indian Act empowers creation of Indian Reserves. Under Section 20 "*no Indian is lawfully in possession of land on a reserve without the approval of the minister*." Section 74 limits Indigenous political rights of governance to approved forms of government that have a Chief Counselor under the Indian Act on Reserve lands.

The Indian Act was designed to exclude traditional forms of Indigenous Self-government. The Indian Act empowers the government of Canada to decide who is an Indian. Indigenous people governed by the Indian Act have only limited authority under section 10 of the Indian Act to define the membership of their political constituency.

Reserve acreage varies across the country. Treaties 1 and 2 allotted 160 acres per family of five, whereas Treaties 3 to 11 granted 640 acres per family of five. In British Columbia non-Treaty reserves are considerably smaller, with an average of 20 acres granted per family; this average can be deceptive, as Osoyoos Indian Band (population about 575) has 32,000 acres, compared to a total for Musqueam (population about 1,375) of 620 acres.

Indian Reserves are federal land. The federal government maintains a federal land registry for these lands known as the Indian Lands Registry. In order for Indian reserve land to be leased or rented to non-indigenous peoples it must first be surrendered into the provincial land registry. Acknowledgement, but not ownership, of a land interest on an Indian reserve by an Indian is expressed through a "Certificate of Possession". A Certificate of Possession is often compared to "Fee Simple" ownership of land as recorded in a provincial land registry. The Certificate of Possession is recorded in the Indian Land Registry. In English common law, the Crown had radical title or the "allodium" of all land in England, meaning that it was the

ultimate "owner" of all land in the past feudal era. Allodial title is reserved to governments under a civil law structure. However, the Crown can grant ownership in an abstract entity - called an estate in land - which is what is owned rather than the land it represents. The fee simple estate is also called "estate in fee simple" or "fee-simple title".

For a long time, what are known as laws of general application did not apply on Indian Reserves. This was because these laws of general application were financial, or health related laws regulated by the provinces. With the evolution of Human Rights in International law the absence of economic and health opportunities available to other Canadians has slowly revealed that an absence of law can be a violation of human rights.

Some Indian reserves were created around or from Indigenous communities of long-standing occupation. Some Indian reserves were created to accommodate economic and labour priorities of the Canadians occupying Indigenous lands. In pre-colonial, and early colonial times, the Musqueam community included our kin at xʷmələcθən and Tsleil-waututh, who speak the same ancestral language, həńqəmińəḿ, as we do. In 1923 xʷmələcθən was amalgamated with Sḵwx̱wú7mesh speaking communities to the north to work for the timber mills. Our elders taught us that our kin at Tsleil-Waututh asked to separate from us in the 1920's too, as their community was smaller than ours, and so the Indian Agent never visited them, and consequently they never received anything from the Indian Agent. Musqueam ancestors were assigned to work for the fish canneries.

C. Pass System/Residential Schools/Potlatch law/Section 141 Indian Act

The Pass System (1885 - 1951) was policy, first initiated in the wake of the 1885 North-West Rebellion to confine Indigenous people to newly established Indian reserves. This policy became formalized and permanent under successive federal governments. In archived correspondence between the three federal officials who were the "most prominent in the development and implementation of Indian policy" in the 1880s and 1890s—John A. Macdonald (1815–1891), Edgar Dewdney (1835–1916), and Hayter Reed (1849–1936), it was evident that they were all cognizant of the lack of a legal basis for the pass system, and that it did not respect treaty agreements.

The Potlatch law was a part of a policy of assimilation, the federal government banned the indigenous ceremonies from 1884 to 1951 by an amendment to the Indian Act. the "Potlatch law" intent to control the socialization and daily activity of Indians paralleled the Pass System intent to control the mobility of Indians. Neither of these repressive laws, nor the ongoing genocide conducted at Residential Schools, suppressed a growing indigenous awareness of the colonial political system.

When Aboriginal political organizing became more extensive in the 1920s and groups began to pursue land claims, the federal government added Section 141 to the Indian Act. Section 141 outlawed the hiring of lawyers and legal counsel by Indians, effectively barring Aboriginal peoples from fighting for their rights through the legal system. Eventually, these laws expanded to such a point that virtually any gathering of more than four people was strictly prohibited and would result in a jail term. These amendments presented a significant barrier to Aboriginal political organizing and many organizations had to disband. However, it did not entirely stop political organizing—Aboriginal organizations such as the

Nisga'a Land Committee and the Native Brotherhood of British Columbia managed to continue to organize the fight for their rights underground.

There is now a learned opinion shared amongst the British Columbia Bar Association that Section 141 of the Indian Act as written did not ban the hiring of legal council by Indians as it was enforced, and that the erroneous interpretation of the law, not the law itself, resulted in these consequences for decades. It is my opinion that neither the introduction of Section 141 of the Indian Act, nor it's erroneous interpretation for decades, nor the complacency of the Crown regarding its erroneous interpretation for decades, substantiate the guidance of any moral philosophy other than complacent racism, which appears to be the current status quo of government legislation and its interpretation for the time being.

In summary the most important observation to be made about the Indian Act and its suppression of basic human rights through various sections, extant or otherwise, is that it has been, and continues to be law in Canada, through the guiding benevolence of complacent racism. This political philosophy of racism as a basis for governance is not unique to Canada; however, there are uniquely Canadian characteristics to the political philosophy of state racism in Canada; particularly irksome in this regard is the welcome extended to a South African Parliamentary Committee which inspired the introduction of the South African pass laws (and the tribal homelands equivalency to reserves) in 1952. For this reason, it can reasonably be said that Apartheid is a Canadian export.

D. Historical Precedent of the Indian Act for Apartheid and Ahnenerbe

Apartheid

The use of pass laws in British law far predates the Indian Act. Slaves of the British Empire in the 18th century often required a pass to move in society. What was unique about the interchange between Canada and South Africa in the 1930's and 1940's was the legal environment and knowledge that facilitated and constituted the technology transfer of state racism in contemporary British law. The Canadian definition of blood quantum in the Indian Act was used to determine Indian Status in Parliamentary legislation. This concept of legislating statutory blood quantum for the definition of legal status and personal identity was taken from the Indian Act and greatly expanded under Apartheid.

Apartheid was law in South Africa from 1948 to 1991. The first multi-racial elections there occurred in 1994. The last federally funded residential school in Canada closed in 1997.

An estimate of deaths caused directly by political violence during Apartheid is 21,000 people. No accurate estimate can reasonably be made of the mortality caused by the suppression of basic human rights and economic opportunities under Apartheid. What can be said with certainty is that millions and millions of innocent people suffered needlessly for generations under Apartheid.

Ahnenerbe

Ahnenerbe was the Racial Purity Office of the Geheime Staatspolizei, the Gestapo, in Nazi Germany. Ahnenerbe used blood quantum race law to determine legal status. The only other models or this at that time were in Canada and the United States. The Gestapo was

formed in 1933, the same year the United South African Party was created - the party that prepared the research in Canada necessary for the South African Labour government to enact Apartheid in 1948. In Canada in 1933 the *Indian Act* legally appointed RCMP officers as "truant officers" to enforce attendance and return truant children to residential schools, including experimental hospitals where biomedical experiments were conducted.

The Nazi party foreign minister Joachim Von Ribbentrop had lived and worked in Canada as an itinerant wine merchant between 1910 and 1914. He lived in Ottawa, and socialized at the Minto Club, founded 10 years previously by the Governor General Lord Minto. Duncan Campbell Scott, Deputy Director of Indian Affairs, who moved in the same circles as Von Ribbentrop, wrote of “the final solution” in 1910. Whether or not Von Ribbentrop conveyed this sound bite to Hitler or not is immaterial, what is significant is that this genocidal philosophy was foundational to the governing voice of national culture in both countries.

As an Indigenous person considering the racist parallels between these three countries, what is significant to me about the events of 1933, is that in Germany and South Africa the progress of racism in government and law eventually led to the replacement of their government systems; but not in Canada, where the beneficiaries of racist laws of 1933 remain to this day the beneficiaries of crimes against humanity.

E. Human Rights Based Amendments

In 2019 there were 1,008,955 people living under the Indian Act. Registered Status Indians under the Indian Act remain as wards of the state under Canadian law. This is the basis of the fiduciary obligation owed by the state to Indians, an obligation defined when First Nations were finally able to hire lawyers and argue our rights in Canadian courts.

Musqueam has won two significant cases defining our rights through successful litigation: *Guerin et al vs Regina*, and *Sparrow et al vs Regina*. The Guerin case proved that the government has a legal obligation to further our best interests; meaning we could no longer be defrauded by the government and treated like prisoners, and this case has been cited as precedent in more than six hundred court cases around the world. The Sparrow case proved that we have a right to resources that pre-exists Canada, a right which has not been extinguished.

We will explore more about the interpretation of legislation in Module # 8 Indigenous Law. What is important in this module is that in 1951 a complete redrafting of the Indian Act was undertaken, the 1876 Act was repealed and replaced by a statute reflecting the ethical standards and moral interpretation of 1951. It is these revisions and the gradual change of interpretation of policy and law which allowed Musqueam to eventually have the right to hire lawyers, and to eventually win our first case against the government in 1984.

The next year, in 1985, the Indian Act was amended to bring it under the Charter of Rights and Freedoms, an amendment intended to further Gender Equality. When I asked Musqueam’s lawyers what it meant to me to be under the Charter of Rights and Freedoms their reply was. “Congratulations, you are fully human under Canadian Law now.” Although I may be fully human, I am still not fully equal; my identity in Canadian law is still as a ward

of the state whose property, political, governmental, and spiritual rights are still subordinate to the beneficiaries of crimes against humanity perpetrated against my ancestors, my family and me.

Future Amendments to and eventual replacement of the Indian Act will occur in alignment with the United Nations Declaration on the Rights of Indigenous Peoples.