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Legislative Scan in a post-*Daniels* Context

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Department of Indigenous Services Act, 2019, c.29, s.336

Overview

The Department of Indigenous Services Act ("DISA") was passed in March 2019 as part of budget omnibus legislation, to give effect to the Trudeau government's promise to split Indigenous and Northern Affairs Canada into two separate departments covering indigenous services, on one hand, and governance over lands and resources, on the other. The legislation establishes the Department and the areas over which its Minister is responsible, which are:

(a) child and family services;
(b) education;
(c) health;
(d) social development;
(e) economic development;
(f) housing;
(g) infrastructure;
(h) emergency management;
(h.1) governance; and
(i) any other matter designated by order of the Governor in Council.

It contains a lofty preamble recognizing the goals of reconciliation, section 35 rights and the *Universal Declaration on the Rights of Indigenous Peoples* (UNDRIP), and sets out several guiding principles for the Department's work, including the goal of access to services, needs-based service provision, and a recognition of Indigenous ways of knowing. It also requires collaboration with Indigenous organizations in the "development, provision, assessment and improvement of the services" the Department provides (at section 7(a)).

While the legislation is relatively short, and has some structural issues as discussed further below, its improvements over its predecessor must be noted. The *Department of Indian Affairs and Northern Development Act*, or the DIAND Act, was even more cursory: it simply recognized the department's powers in relation to "Indian affairs" as well as northern and Inuit affairs.[1] It provided no elaboration of what "Indian affairs" were, how the Department was to exercise its powers, or any goals or objectives related thereto. Respected academic Naiomi Metallic has studied the evolution of policy and statute over Indigenous peoples, and has found that the absence of any statutory framework governing the federal government's provision of services has allowed the government to both consistently deny its provision of services as a legal obligation, and to unilaterally change its policies over time.[2] It has also prevented

[1] *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6, now repealed but found online at: https://laws-lois.justice.gc.ca/eng/acts/i-6/20140401/P1TT3xt3.html
[2] Naiomi Metallic, in *National Inquiry into Missing and Murdered Indigenous Women and Girls - Truth-Gathering Process*. Part III: Expert & Knowledge-Keeper, Panel "Human Rights Framework", Quebec City Part III Volume IV, May 14, 2018,

Indigenous peoples from challenging how those services are delivered and provided, in the absence of an overarching set of guidelines or standards, and has broadly led to the government failing to measure its progress.[3]

DISA changes this in a number of ways. First, by simply stating the areas over which the Department has responsibility, it provides the first formal recognition that the government is *legally* obligated to provide these services. Secondly, it also prescribes how those services are to be delivered, in accordance with the guiding principles in the preamble, which includes transparent service standards, needs-based provision, collaboration with Indigenous partners, and, crucially, a gradual transfer of responsibility to Indigenous organizations.[4] This establishes guidance against which service delivery can be assessed. Finally, DISA also provides for a reporting mechanism, through an annual report to Parliament. The DIAND Act did too, but only on its "operations."[5] The new Department must report on socio-economic gaps between Indigenous and non-Indigenous Canadians, measures to reduce them, and progress made towards the transfer of responsibilities to Indigenous organizations.[6] This establishes clear objectives for the Department and a required mechanism to measure progress.

Terminology and Structure

The DISA appears to be inclusive of the Indigenous people it serves; however, it is unclear in its definitions and does an end-run around inclusivity by effectively incorporating existing eligibility requirements into the entitlement to programming.

The Act uses "Indigenous" throughout, with some exceptions. It defines the term variously in its definitions in Section 2, which reads in relevant part as:

> ***Indigenous governing body*** means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. (*corps dirigeant autochtone*)
>
> ***Indigenous organization*** means an Indigenous governing body or any other entity that represents the interests of an Indigenous group and its members. (*organisation autochtone*)
>
> ***Indigenous peoples*** has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*. (*peuples autochtones*)

pp. 171-193. Available online at: https://www.mmiwg-ffada.ca/wp-content/uploads/2018/10/20180514_MMIWG_Quebec_HRF_Part_III_Vol_IV_final.pdf

[3] *Simon v. Canada (Attorney General)*, 2015 FCA 18; 2011 June Status Report of the Auditor General of Canada, available online at https://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html (see particularly "Structural impediments explain the lack of progress on reserves").

[4] See Naiomi Metallic, "Making the most out of Canada's New Department of Indigenous Services Act," Yellowhead Institute, August 12, 2019, available online at https://yellowheadinstitute.org/2019/08/12/making-the-most-out-of-canadas-new-department-of-indigenous-services-act/

[5] *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6 [Repealed, 2019, c. 29, s. 382] - 2019-07-15, s 7. Available online at: https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-6/latest/rsc-1985-c-i-6.html

[6] *Department of Indigenous Services Act*, S.C. 2019, c. 29, s. 336 at s. 15.

There is confusion in these definitions. An "Indigenous governing body" must represent holders of section 35 rights – which are by and large undefined. Section 35 notoriously does not define Aboriginal rights, it just recognizes and affirms those that already exist.[7] It similarly does not define who holds these rights, except for expressly including "Indian, Inuit and Métis Peoples" in the definition of aboriginal peoples who *may* hold such rights. Thus, the matter has been left to the courts to adjudicate, slowly, and on a case-by-case basis. The British Columbia Court of Appeal has expressly addressed the issue of who constitutes a holder of Aboriginal rights under section 35, finding the answer in the *Van der Peet* test for Aboriginal rights generally: that is, current rights holders are those whose pre-contact ancestors exercised the right as an integral part of their culture, and who have continuously practiced it in some form to the present day.[8] Thus, determining Aboriginal rights holders is part of the fact- and evidence-intensive section 35 rights enquiry being addressed, variably, in courts across the country. Unless and until such holders receive a court determination or the government engages in a process by which to determine these entities, who precisely "Indigenous governing bodies" are in many cases will be up for debate.

It must further be noted that holders of treaty rights – which are also section 35 rights – have also not been determined in a principled way. The paper commissioned by CAP on this subject, "Understanding Indigenous Rights in the Non-status Indian, Métis and Off-Reserve Community – Treaty Rights",[9] argues that treaty rights holders are also the descendants of the Indigenous treaty signatories, by virtue of the treaties themselves. However, *Indian Act* criteria has determined who receives at least some treaty benefits, including reserve residence and treaty payments (otherwise known as "annuities"), and arguably continues to influence who is understood to hold treaty rights, often in treaty communities themselves.

The other definition of a group is also less than clear. An "Indigenous organization" can be a "governing body" that represents holders of section 35 rights, or it can be a body which represents the interests of an "Indigenous group," left undefined. It is thus broader and more inclusive than Indigenous governing bodies, but subject to the same confusion with respect to its representation.

How these terms are used in the legislation is revealing. Section 6, which defines the Minister's powers, duties and functions to provide services, expressly states that services are to be provided to Indigenous individuals and to Indigenous *governing bodies* – and does not mention the broader Indigenous organizations. However, Indigenous *organizations* may enter into agreements with the Minister regarding the provision of these services under section 9. Moreover, Indigenous *organizations* are entitled to collaborate on service development, provision, assessment and improvement, and may be the recipients of the gradual transfer of responsibilities from the Department under section 7; they may enter agreements for this transfer of power under section 9. It thus seems that, while the entitlement to services currently is linked, confusingly, to section 35, it is envisioned that a broader category of representative organizations are entitled to take over authority for such services. Self-government

[7] *Constitution Act*, 1982, para 35(1): "The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed." Available online at: https://laws-lois.justice.gc.ca/eng/const/page-16.html
[8] *R v Desautel*, 2019 BCCA 151.
[9] By the same authors as this paper, dated March 20, 2020.

agreements thus have flexibility to deviate from section 35 when establishing or assigning responsibilities to Indigenous entities to take over service delivery.

There is less confusion in the definition of "Indigenous peoples," which is defined quite broadly by reference to Section 35(2) of the *Constitution Act,* 1982, that is, "the Indian, Inuit, and Métis Peoples of Canada." It is notable that the terminology seems to reflect collectives. Both the terms "Indigenous *peoples*" as well as the section 35(2) definition refers to groups of people, and section 35 rights are collective rights held by these groups. The provision of services under section 6 of the Act may thus be focussed on collectives, which may be problematic for individuals who have been excluded from categorized Indigenous collectives historically, systematically and due to the discriminatory provisions of the *Indian Act*. This will be discussed further below.

There is an even greater limiting factor in the Act than unusual definitions. While the use of the term "Indigenous" appears to make the legislation more inclusive on its face, in fact it is likely that no more people will be covered by the services for which the Department is responsible than previously, at least in the short term. In two key places, the preamble and section 6, the legislation specifically circumscribes access to the Department's programs and services to those who are "eligible." The preamble states:

> … the Department, in carrying out its activities,
>
> ensures that Indigenous individuals have **access** — in accordance with transparent service standards and the needs of each Indigenous group, community or people — **to services for which those individuals *are eligible***, … (emphasis added)

Section 6 makes it clear that this eligibility is determined by other legislation or by ministerial discretion:

> **Powers, duties and functions**
> **6 (1)** The Minister's powers, duties and functions extend to and include all matters over which Parliament has jurisdiction — and that are not by law assigned to any other department, board or agency of the Government of Canada — relating to **the provision of services to Indigenous individuals who, and Indigenous governing bodies that, are eligible to receive those services under an Act of Parliament or a program of the Government of Canada for which the Minister is responsible.**

Such "Acts of Parliament" include the *Indian Act,* where applicable, and "program … for which the Minister is responsible" is any service-related program currently being operated by the government. That is, the eligibility criteria relating to *Indian Act* status continue to apply where they already apply, and other limiting criteria imposed by Departmental programs also continue to apply, and will continue to apply as long as the Minister uses his discretion to apply them. The Minister's "powers, duties and functions" are limited by these eligibility criteria.

As we shall see, DISA uses a structural approach employed in other legislation to keep the impact of the *Indian Act* in full effect while not actually referring to it directly. In one sense, it is a legislative

convenience to ensure that not all legislation needs to be altered in order to effect changes to the *Indian Act* or to those to whom it applies. However, it leaves the *status quo* in place and at the mercy of the bureaucracy.

There is one final point to make with respect to DISA's terminology. The defined terms are not uniformly used in the legislation. The Minister may support "Indigenous bodies" that undertake research or statistics in terms of providing documents and data (s. 13), and may disclose information to an Indigenous organization or a non-profit controlled by Indigenous individuals (s. 12(2)). The Minister may also appoint a special representative to consult or engage with a "Indigenous group, community or people" under section 10(1). None of these appear to be too significant in the overall scheme of the Act.

However, "First Nations, Inuit and Métis" are specifically referred to twice, which may be significant. Once is in the preamble, in which each group is singled out by the commitment to achieve "reconciliation with First Nations, the Métis and Inuit." The second is in section 15(a), regarding the Minister's annual report to Parliament. The Department must report on the socioeconomic gaps between First Nations, Métis, and Inuit, on an individual basis, and other Canadians and on measures to reduce them:

> **15** The Minister must cause to be tabled in each of House Parliament, within three months after the end of the fiscal year or, if the House is not then sitting, on any of the first 15 days of the next sitting of the House, a report on
>
> **(a)** the **socio-economic gaps between First Nations individuals, Inuit, Métis individuals and other Canadians** and the measures taken by the Department to reduce those gaps;

The term "First Nations individuals" does not import the criteria of the *Indian Act*, and is not otherwise defined in the Act; neither is "Métis individuals." The terms specifically refer to individuals, unlike elsewhere in the Act. These terms may be the broadest terminology used in the Act, and will be further discussed below.

Impact of Terminology and Structure on Off-Reserve Indigenous Populations

The first major problem with DISA with respect to CAP's constituency is with the continued application of the status criteria of the *Indian Act* and of Ministerial discretion to determine eligibility to all services and programming. As discussed above, these mechanisms still determine who is eligible for programs, and are thus continuing to block access for the non-status and Métis and reinforce reserve-based programming generally. The eligibility criteria in individual programs needs to be changed for more inclusive access to those programs. This means that CAP remains stuck with the bureaucracy and its glacial pace of change in seeking to enhance the eligibility of off-reserve peoples.

Even without this blanket eligibility problem, the terminology used in the statute poses some obstacles to full recognition of the entitlement of off-reserve people to the services and programs that DISA has the responsibility to provide. The first is the lack of clarity around section 35 rights-holders, who

determine who an Indigenous governing body is; the second is the use of a collective as the unit to which services will be provided.

As noted above, an Indigenous governing body under the Act is an entity that represents section 35 rights-holders. Determining who holds section 35 rights is a fact-intensive exercise undertaken on a piecemeal basis by the courts; a small proportion of Indigenous groups can claim with certainty that they are such holders. More problematically, the court-developed test for determining rights-holders relies on descendance from a pre-contact (or pre-European control[10] - for Métis) group which exercise that right, and continuity over time, in terms of both the existence of the right and of the group.[11] The practice or right must also be "integral to the distinct culture" of the entity claiming it. There has been some acknowledgment in academic literature about the application of the criteria in light of colonial practices that may have interfered with continuity,[12] but in terms of court application, this test remains problematic with respect to the divisions of community and curtailing of membership wrought by the *Indian Act* and colonial practices, such as enfranchisement. To our knowledge, there has been no case that discusses the rights of non-status people who are not members of a modern *Indian Act* Band, and it is not clear to me that such individuals would ever be able to prove they continued a practice that was "integral to the culture" of an entity from which they had been excluded, even where such exclusion arose from discriminatory practices.

On the present criteria for holding section 35 rights, then, it will be difficult for an entity like CAP to be recognized as an Indigenous governing body. However, the impact of this may not be too great. Under section 6 of DISA, Indigenous governing bodies are entitled to the provision of programs and services, along with Indigenous peoples. However, Indigenous *organizations* – which are more broadly defined as representing Indigenous "groups" – may also receive services under agreement with the Department, and are the entities who are entitled to be consulted on the development and provision of services as well as the focus of self-government agreements. There is no reason to think that CAP is not an Indigenous organization, as it represents a group that is clearly Indigenous. It should thus have a seat at the table when discussing services per section 6, and may request an agreement regarding service provision for off-reserve peoples under section 9.

A bigger challenge will be ensuring that off-reserve individuals are recognized beneficiaries of the services provided by the Department under section 6, even before *Indian Act* or policy-based restrictions apply. Section 6 makes service provision in ten areas an obligation of the Minister, owed to Indigenous peoples as well as Indigenous governing bodies, subject of course to eligibility restrictions in other statutes and policy. The definition of Indigenous peoples as the Indian, Inuit and Métis Peoples under section 35(2) of the *Constitution Act*, 1982, seems inclusive. The use of the term "Indian" does not necessarily import the criteria of the *Indian Act*. In a post-*Daniels* era, in which the Supreme Court has interpreted "Indian" specifically to include non-status Indians and Métis, this definition likely broadly applies to non-status individuals and specifically applies to the Métis. However, I am troubled by the use

[10] See paragraph 37, *R. v Powley*, [2003] S.C.J. No. 43, [2003] 2 S.C.R. 207 (S.C.C.).
[11] *R v Van der Peet*, [1996] 2 S.C.R. 507 para 59, available online at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do , *R v Desautel*, 2019 BCCA 151.
[12] McNeil, Kent. "Continuity of Aboriginal Rights." Wilkins, Kerry, ed. Advancing Aboriginal Claims: Visions, Strategies, Directions. Saskatoon, SK: Purich Publishing, 2004. ISBN: 1895830249

of collective terms in this section and in the definition. Services are to be provided to *peoples*; those peoples are defined as three categories of *peoples*, each of whom hold *collective* rights. The intended beneficiaries under the Act are collectives, rather than individuals, which reflects how the Department has generally provided services, through bands (which are often now referred to as First Nations, but are the same entities on the long-kept Department's band list).

The Métis are explicitly recognized to be entitled, but it is not clear how non-status Indians or other off-reserve individuals fit into this scheme. While they should, technically, be recognized as "Indian peoples," it is not clear how services are to be delivered to them within in a scheme that delivers services to collectives. Given the issues with recognizing them as holders of section 35 rights, as discussed above, they do not have an Indigenous governing body to represent them, and have by definition been excluded from the traditional collectives – bands – through which services are delivered.

CAP can address this potential gap with several arguments. First, it can advocate for non-status Indians and urban Indigenous people to be explicitly recognized as Indigenous peoples in the bureaucracy; with the *Daniels* decision, the government has little principled ground to refuse. It can then point out the gap in service delivery to such individuals within a collective scheme, and argue for the government to enter an agreement under section 9 with CAP as an Indigenous organization for the provision of services to this group.

Other sections of DISA can be used to support this position. The preamble explicitly notes that the Department should ensure access for Indigenous *individuals* to services for which they are eligible, not just collectives. Moreover, under section 15, socio-economic data needs to be collected on a disaggregated basis, with an explicit focus on individuals. The specific language is "First Nations *individuals*, Inuit, Métis *individuals*" (emphasis added). The socioeconomic data of all Indigenous individuals must be collected and compared to "other Canadians," and both that data and measures to reduce those gaps must be reported to Parliament. This and the preamble clearly establish a key objective – and what Naiomi Metallic submits is a primary mandate of the Department – of the reduction of socio-economic gaps, across all Indigenous people, on an individualised basis. The government must measure its success on this data; it would make little sense for it to exclude from its programming a segment of such individuals on the basis of the outdated criteria and structures of the *Indian Act*. Moreover, from a statutory interpretation perspective, statutes must be read holistically, to give effect to all of its provisions. If improving the socioeconomic status of all First Nations, regardless of Indian status or residency, is an established objective of a Department, other provisions of its enabling legislation should not be read to exclude some of those individuals.

There is a clear case to put to any DISA bureaucrats who attempt to exclude non-status Indians or urban Indigenous individuals from the provisions of DISA, and for requesting that they enter negotiations with CAP under section 9 to enter an agreement for the provision of these services. This avenue may be pursued alongside advocacy to remove the restrictive criteria applied in the Minister's discretion and under the *Indian Act* in individual programs and services.

Department of Crown-Indigenous Relations and Northern Affairs Act, 2019, c.29, s. 337

Overview

The Department of Crown-Indigenous Relations and Northern Affairs ("DCIRNA") was also passed in March 2019, along with the DISA. Both were part of budget omnibus legislation to give effect to the Trudeau government's promise to divide Indigenous and Northern Affairs Canada into departments covering indigenous services and governance over lands and resources, respectively. The legislation establishes the Department and the areas over which its Minister is responsible, which is generally "relations with Indigenous peoples."[13]

More specifically, at section 7, DCIRNA specifies the Minister's responsibilities as:

> **(a)** exercising leadership within the Government of Canada in relation to the affirmation and implementation of the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act*, 1982 and the implementation of treaties and other agreements with Indigenous peoples;
> **(b)** negotiating treaties and other agreements to advance the self-determination of Indigenous peoples; and
> **(c)** advancing reconciliation with Indigenous peoples, in collaboration with Indigenous peoples and through renewed nation-to-nation, government-to-government and Inuit-Crown relationships.

That is, the Department is to pursue rights recognition, treaty fulfillment, modern treaty negotiation, and reconciliation. Section 10, which lays out the Department's reporting requirements, requires reporting on measures towards self-determination and reconciliation.

The legislation does not specify how these responsibilities are to be undertaken, by and large, or any further specifics regarding what they mean and what success would be. However, as with DISA above, it is significant – and positive – that the Act exists at all. It contains a clear goal of self-determination, through a pro-active rights recognition and treaty-making approach. It is fair to say that, while Indigenous self-determination has variously been a policy of governments in the past, enacting DCIRNA into law gives the goal of self-determination legal status and permanence that will not be as easily altered or foregone as it has been in the past.

Terminology and Structure

DCIRNA contains the same definitions for Indigenous groups as DISA does, but never uses the term "Indigenous governing bodies" and uses the term "Indigenous organizations" only once, to allow information disclosures. This indicates sloppy legislative drafting, which may explain the confusing terms used in DISA as well.

[13] The legislation also creates and empowers a Minister for Northern Affairs, which is not relevant to this paper.

The main term regarding Indigenous entities in the legislation is "Indigenous peoples":

> ***Indigenous peoples*** has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*. (*peuples autochtones*)

That is, it refers to the "the Indian, Inuit, and Métis Peoples of Canada." These categories are peoples whose section 35 rights are to be recognized, treaties to be fulfilled and negotiated, and with whom reconciliation is to be advanced by the Department under section 7 of the *Act*.

Impact of Terminology and Structure on Off-Reserve Indigenous Peoples

It does not appear that DCIRNA significantly alters the policy environment for CAP or off-reserve individuals. Its definition of Indigenous peoples accords with the relatively broad categories of the Constitution, it does not incorporate the status criteria of the *Indian Act*, and it is silent with respect to the entities with whom the government should negotiate for self-determination.

As with DISA, the struggle lays in ensuring that the "Indians" within Indigenous peoples are inclusive of non-status Indians in policy and in operation and are not focussed exclusively on the band council structure. Post-*Daniels*, there is no basis for excluding non-status people. However, what self-determination looks like for off-reserve and non-status populations may be unclear; similarly, the parameters of reconciliation with these populations may not be understood by policy-makers. While the issue of who represents Indigenous groups in rights recognition, reconciliation and treaty-making processes is left open, it would be easy for government officials to sideline CAP because it simply does not envision these processes in urban settings for urban people. They need to understand that nothing in the legislation precludes CAP's inclusion, and in fact the commitment to *all* Indigenous peoples requires inclusion of the urban population, particularly on account of their demographic representation in urban and rural areas.

Specific Claims Tribunal Act, 2008, c.22

Overview

The *Specific Claims Tribunal Act* was passed in 2008 as part of the government's "Justice at Last" policy on specific claims. Specific claims are grievances against the Crown by Indigenous groups for historic wrongdoing, such as breaches of treaty or in reserve creation, which are barred by statutes of limitations from being adjudicated in court. The government has attempted to resolve specific claims since the 1970s, through a bureaucratic process. The Act establishes the Specific Claims Tribunal as a final adjudicative body for the resolution of specific claims, accessible to complainants after they have submitted their claims to the government and provided it with the opportunity to negotiate the claim.

The Act generally provides for the composition and operation of the SCT, which is presided over by superior court judges from the provinces of Quebec, Ontario and British Columbia for five-year terms, and determines the types of claims over which the SCT has jurisdiction and preconditions for eligibility.

In brief, claims must be grounded in treaty breaches, breaches of statute such as the *Indian Act*, breaches of fiduciary law, usually relating to reserve creation but also with respect to trust account management, illegal dispositions or leases of reserve lands, a failure to compensate for taken lands, or fraud in the acquisition, leasing or other disposition of reserve lands. Valid claims may be remedied by monetary compensation only, up to $150 million per claim. The Act was developed in collaboration with the Assembly of First Nations (AFN) and the AFN continues to have a role on the Advisory Committee of the SCT.

Structure and Terminology

The Act generally uses the terminology of "First Nations" in determining to whom is applies. The preamble expresses the objectives of reconciliation with First Nations through the final, fair and expeditious resolution of specific claims, and the right of First Nations to have access to the Tribunal.

However, First Nation is defined in the Act to mean an *Indian Act* band or a self-governing entity which used to be a band (see s. 2). Only such bands and former bands may file claims at the SCT. As the Tribunal is an administrative tribunal, it is entirely governed by its mandate, so this definition effectively forecloses its ability to address claims by non-bands. For even greater certainty, section 5 expressly states that only the rights of First Nation claimants may be affected by the Tribunal:

> This Act affects the rights of a First Nation only if the First Nation chooses to file a specific claim with the Tribunal and only to the extent that this Act expressly provides.

Non-band "persons" may intervene in Tribunal proceedings to offer oral or written submissions, under section 24, if they have a direct interest and a unique or helpful perspective on the claim at issue and will not unduly burden or prolong the proceedings.[14] An individual who may have been a non-status Indian applied for intervenor status in one instance, but was not found to have a sufficient interest to justify his intervention.[15] Regardless, the Tribunal does not have jurisdiction over entities that are not parties before it, and cannot directly affect the rights of even a successful intervenor.

Impact of Terminology and Structure on Off-Reserve Indigenous Peoples

The status of a First Nation as a band is a threshold issue of entitlement to file at the Tribunal, and party status is a requirement to be subject to Tribunal jurisdiction (ss. 5, 14 & 23). Thus, Métis and non-status organizations have no standing at the Tribunal, and to the extent that bands refuse to recognize non-status members, non-status individuals will not be entitled to the Tribunal's adjudication or monetary compensation orders.

Moreover, the grounds for specific claims are limited to the types of historic injury suffered by bands. There is no room for discriminatory provisions of the *Indian Act* or other legislation to be challenged; only breaches of those legislative instruments as they were at the time of the breach may be

[14] See e.g. *Tsleil-Waututh Nation v. Canada*, 2014 SCTC 11, *Metlakatla Indian Band v. Canada*, 2018 SCTC 4.
[15] *Birch Narrows First Nation* and *Buffalo River Dene Nation* v *Canada*, 2020 SCTC 2

compensated. Community divisions and exclusions were done in accordance with the *Indian Act*, not in violation of it, and thus are not grounds for specific claims as defined in the Act.

Income Tax Act, 1985

Overview

The *Income Tax Act* is a 3,246 page document detailing on what and how Canadians – both individuals, corporations, and all structures in between – pay income tax. Its longest section concerns how to calculate income, but it devotes sections to income obtained any imaginable way, from various ownership structures through various investment vehicles, as well as detailing its administrative and enforcement regime.

Structure and Terminology

The references to Indigenous peoples in the *Income Tax Act* are to both Aboriginal governments and to Indians.

Aboriginal governments are recognized in two ways. The first is as government entities to whom taxes may be made pursuant to tax sharing agreements with the federal government (sections 120(2.2), 156.1(1)). The amounts of taxes paid to Aboriginal governments is deducted from any taxation amount owing to other levels of government, preventing double taxation by Aboriginal and non-Aboriginal governments.

The second way the Income Tax Act recognizes Aboriginal governments is as entities whose laws on taxation are to be respected as any other government (section 241). For the latter, they must meet the definition laid out in subsection 2(1) of the *Federal-Provincial Fiscal Arrangements Act*, which is a fairly broad definition inclusive of but not exclusively band councils:

> ***aboriginal government*** means an Indian, an Inuit or a Métis government or the *council of the band*, as defined in subsection 2(1) of the *Indian Act*; (*gouvernement autochtone)*[16]

The *Income Tax Act* thus has space for greater self-determination by Indigenous governments over taxation matters, and generally recognizes Aboriginal governments quite broadly and beyond the structures created by the *Indian Act*.

There are also a few references to "Indian" in the Act. Most concern payments in the 1970s made by a certain program of the Department of Indian Affairs concerning mineral exploration (section 66). Another exempts Indian Residential Schools Settlement Agreement trusts from taxable income (section 81). Two specifically reference the *Indian Act.* In one, the Canada Child Benefit eligibility requirements make "Indians under the Indian Act" eligible (oddly, as an alternative to being a Canadian citizen) (section 122.6).

[16] *Federal-Provincial Fiscal Arrangements Act*, R.S.C., 1985, c. F-8 (some emphasis added)

Notably, the part of the Act most frequently associated with Indigenous people, section 81 regarding the tax exemption of on-reserve property, does not actually refer to Indigenous people directly. It rather exempts from income any amount that is exempted by other statute, in this case, the *Indian Act,* s. 87. The provisions in full are:

> **81 (1)** There shall not be included in computing the income of a taxpayer for a taxation year,
>
> **Statutory exemptions**
>
> **(a)** an amount that is declared to be exempt from in- come tax **by any other enactment of Parliament,** other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;

The *Indian Act* is one such "other enactment," providing by virtue of section 87 that "personal property of an Indian or a band situated on reserve" is exempt from taxation. The final reference to "Indian" in the Act is a section defining "exempt earned income" for the purpose of pooled registered retirement plans to include tax exempt income under 81(1)(a) as it applies with respect to the *Indian Act* (section 147.5).

This approach, of legislation referring back to "existing statutes" to govern its implementation, can also be seen in the *Department of Indigenous Services Act*, discussed above. That legislation referred to "other legislation" to determine eligibility for services and programs. In the *Income Tax Act,* it refers to other legislation with respect to a benefit or entitlement, the income tax exemption. The existing statute is the *Indian Act* for both. Once it is changed, subject to different interpretation, or individuals are no longer governed by the *Indian Act*, the implementation of these other Acts will also be affected.

Impact of Terminology and Structure on Off-Reserve Indigenous Peoples

The structure of the income tax exemption for Indians has always excluded non-status and Métis people, and, given its explicit requirement that property be "situated on a reserve" to be exempt, often excludes off-reserve people generally. The exemption is a creature of the *Indian Act*, and the Supreme Court has found that its purpose is to prevent the erosion of reserve lands. Its extension to off-reserve property thus seems unlikely.

However, Indigenous people have flexibility in creating "Aboriginal governments" that can take over matters of taxation under self-government agreements, whose own taxation initiatives are recognized in the *Income Tax Act* and whose laws on taxation will be respected under it. The Act expressly recognizes Aboriginal governments beyond band councils and of Indians, Inuit and Métis. Eventually fewer "Indians" will live under section 87 of the *Indian Act* and more will live under governments with their own laws on taxation. There may be room for entities like CAP in this, as an Aboriginal government, especially if it negotiates agreements under DISA for service provision. CAP may be viewed as a conduit to closing some gaps for urban Indigenous peoples in service provision.

An Act respecting First Nations, Inuit, Métis children, youth, and families, 2019, c.24

Overview

This Act was passed in spring 2019, and unlike DISA and DCIRNA, was not buried in an omnibus bill. Academics were able to scrutinize a version of the bill and provide input in House and Senate Standing Committees, resulting in a number of changes.[17]

The bill aims to do two main things. The first is to impose federal standards on child and family services in relation to Indigenous peoples across Canada, which includes prevention, early intervention and child protection services. This is the first time the federal government has legislated on this matter, historically leaving the matter to provincial jurisdiction. Federal standards are governed by the principles of cultural continuity and substantive equality, and relevant considerations are laid out regarding the provision of services, including in apprehensions, and in the placement of apprehended children with families, with priority given to placements with Indigenous families.

The second goal of the legislation is to recognize the jurisdiction of Indigenous governing bodies to govern child and welfare services. Indigenous laws on child and family services may be developed, and if they are, and the community also enters a coordination agreement with the federal and relevant provincial governments, the Indigenous law has the force of federal law and is paramount over other federal law (sections 20-22). The best interests of the child is the overarching guiding principle of both the federal standards and of any Indigenous law, the provisions of which will not be applied where they do not accord with this principle (s. 23).

It is worth noting that a number of prominent Indigenous academics have been critical of the Act, for, among other things, the discretion it leaves with social workers regarding intervention decisions, a failure to address long-standing separation of children from their families and aging-out provisions, the potential for the subordination of Indigenous laws to provincial ones, and the lack of enforceable funding commitments, a dispute resolution mechanism or mandatory data collection.[18]

Structure and Terminology

The Act is structured along its two main goals, first laying out national standards and the second focussed on Indigenous jurisdiction over child and family services. These are both preceded by an extensive preamble citing international covenants including the Rights of the Child as well as the Truth and Reconciliation Commission recommendations and UNDRIP.

[17] Naiomi Metallic, Hadley Friedland and Sarah Morales, "The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit and Metis Children, Youth and Families", Yellowhead Institute, July 4, 2019, pg 4.
[18] *Ibid.*

The Act uses similar definitions as DISA and DCIRNA, though without using the term Indigenous organizations and including a definition for Indigenous individuals. The relevant definitions, found in section 1, are as follows:

> ***Indigenous***, when used in respect of a person, also describes a First Nations person, an Inuk or a Métis person. (*autochtone*)
>
> ***Indigenous governing body*** means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982. (*corps dirigeant autochtone*)
>
> ***Indigenous peoples*** has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act*, 1982. (*peuples autochtones*)

Regarding national standards, the main subject of the section is an "Indigenous child," whose interests are to drive all decisions relating to him or her and whose connection to his or her community and family is recognized to be central to his or her interests (section 9). Given the broad definition of Indigenous, these provisions should theoretically apply to all Indigenous children regardless of status or membership. Similarly, the Indigenous entity to which an "Indigenous child" belongs is broadly defined as an "Indigenous group, community or people" (see e.g. sections 9(2), 10(3)(d) & (f)), thereby recognizing and protecting membership of an Indigenous collective or group quite broadly.

Regarding Indigenous jurisdiction over child and family services, the Act recognizes the legislative authority of "Indigenous groups, communities or people" over child and family services, but designates an "Indigenous governing body" to enact that authority and/or enter a coordination agreement with the federal government regarding that authority (section 20). In addition, it is the "Indigenous governing body" that is entitled to notice of any "significant measures" to be taken with respect to an Indigenous child and that may make representations in any civil proceedings (12 & 13).

An "Indigenous governing body" is a representative of section 35 rights holders by definition. As discussed in the analysis of the DISA, above, reference to section 35 rights holders causes confusion (see pages 3-4). Adjudication of who holds section 35 rights has been left to the courts, which have been deciding cases in a fact-intensive enquiry to determine the modern-day entities descended from those who undertook practices "integral to their distinctive culture" that can now be recognized as rights. Only a small number of cases on this issue have been decided, and the status of other ostensible rights holders have not been proven. Thus, while Indigenous children and the communities to which they belong are broadly recognized, the Act recognizes only governing bodies that have section 35 rights on behalf of their people.

Finally, there are a few notable deviations from the definitions in the Act. The preamble explicitly "affirms the need … to enact legislation for the benefit of Indigenous children, including First Nations, Inuit and Métis Nation children". This is the first and only reference to the "Métis Nation," and seems to be a bit of an anomaly. Section 28 concerns data collection, and allows agreements on collection and sharing in order to "ensure that Indigenous children are identified as a First Nations person, an Inuk or a Métis person…." That is, data should be disaggregated by Indigenous group. Finally, each group is also

to have a role in the review of the legislation, which must happen every five years: the government must collaborate "with Indigenous peoples, including representatives of First Nations, the Inuit and the Métis, …" (section 31).

Impact of Terminology and Structure on Off-Reserve Indigenous Peoples

There are three major issues with the Act with respect to the treatment of off-reserve people. The first concerns the geographic scope of Indigenous laws, and the extent to which off-reserve members will be covered by these laws. Under the Act, Indigenous laws are to exist concurrently with provincial laws, unless there is a conflict, in which case the Indigenous law applies (ss. 4, 22(3)). For First Nations residing on a reserve, it is quite clear that the First Nation's law will apply; same for non-Indigenous individuals living off-reserve. However, where members of a First Nation live in an urban setting – which is most of them – jurisdictional issues are raised that are not answered in the legislation. The Yellowhead Institute suggests the default may be the application of provincial law:

> An issue raised by many Indigenous groups is jurisdiction over the large number of Indigenous children in urban areas who are First Nations but live off reserve, or non-status, Metis or Inuit. While federal officials publicly stated that Indigenous laws may apply to children and families living on and off reserve, and even out of province, this was not reflected in the wording of the Bill. As a result, there may be confusion from provincial ministries as to the scope of their jurisdiction and it may lead to situations where provincial laws remain paramount in practice.

A related issue concerns how non-status Indian individuals and groups will be treated under this legislation. Per the broad definitions of Indigenous children and the groups to which they belong, the national standards should apply to non-status Indian children and their communities as well. However, in the absence of any guidance on how to treat urban, off-reserve residents, urban social workers are left to determine the relevant Indigenous groups in an urban setting – and may not, because it is too difficult or fraught or, because they do not believe they have to.

This is compounded by the final major issue with the legislation, the confusing use of section 35 in the definition of Indigenous governments. As noted in the DISA discussion, the place of non-status Indian people in section 35 rights is fraught, to say the least (see pages 3-4). They have been historically excluded from the groups purportedly exercising those rights, and are by definition not members of them, all because of discriminatory colonial legislation and practices. It is difficult to understand how groups of non-status Indian individuals may be section 35 rights holders under the current test for Aboriginal rights. They thus appear to be precluded from having an "Indigenous governing body" to represent them in coordination agreements or to legislate child and family services laws on their behalf. Entities such as CAP may be unable to seek coordination agreements or laws with respect to non-status Indian people, and, given the potential of social workers failing to recognize urban Indigenous groups as relevant communities for Indigenous children, non-status people may be excluded wholesale from the implementation of this legislation.

This would be manifestly unfair. It would also amount to the government selectively ignoring *Daniels*, and continuing to exercise its jurisdiction without considering non-status Indian individuals. Notably,

the legislation envisions data being collected by Indigenous categories, Indian status notwithstanding (section 28). As a policy as well as a matter of law, the government should be convinced to take a broader view of Indigenous governing bodies, away from section 35, and should proactively consider Regulations with respect to the application of the Act in an urban environment, as is authorized under section 32.

Corrections and Conditional Release Act, 1992, c. 20

Overview

The purpose of the Corrections and Conditional Release Act is to carry out court sentences and assist in rehabilitation, and the Act covers both the incarceration aspect as well as the post-incarceration release and supervision aspects of sentences. The Act covers everything from care in prisons to decisions regarding conditional release and reintegration, and also establishes a Correctional Investigator to conduct investigations relating to the work of Corrections.

One of the principles that the Act states guide the correctional services is that its actions are to be responsive to the particular needs of Indigenous people:

> 4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:
>
> > (g) **correctional policies, programs and practices** respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and **are responsive to the special needs of** women, **Indigenous persons,** visible minorities, persons requiring mental health care and other groups;

Further to this, the Act contains a section on Indigenous offenders in particular. It allows for "systemic and background factors" as well as culture and identity to be considered in making any decision with respect to an Indigenous offender, except to increase his or her risk assessment (s. 79). It requires correctional services to provide specific programs to Indigenous offenders focussed on their needs and their reintegration (ss. 76, 80). It allows Indigenous organizations to provide correctional services to Indigenous offenders, under agreements with the federal government, and allows Indigenous communities to receive released prisoners under certain conditions (ss. 81, 84). Indigenous advisory committees at regional and local levels are mandated, and elders given the same status as other religious leaders (ss. 82, 83).

It seems clear that these provisions have not greatly improved the experience of Indigenous peoples with Corrections. The Canadian Senate is undertaking a multi-year investigation of human rights within the correctional services, and, in its interim report, has found that Indigenous offenders fare worse in almost every area: they are more likely to be segregated from the rest of the prison population, they serve more

of their sentence, and women in particular are more likely to be in maximum security.[19] This is in addition to the fact that Indigenous people are enormously overrepresented in the prison system, constituting 28% of the prison population but just 4.3% of the population as a whole. From what we can tell, no one has critiqued the legislation for these appalling facts; the flexibility to address issues facing Indigenous people in prisons is in the Act, but there are clearly issues in its implementation.

Structure and Terminology

The Act uses the terminology of "Indigenous" and "Indigenous peoples," following other legislation by referring to section 35 in some parts. However, for Indigenous persons, which applies to Indigenous offenders, the definition is contained in the definitions section for the whole Act and is quite broad, including a First Nation, an Inuit or a Métis person (s 2):

> ***Indigenous***, in respect of a person, includes a First Nation person, an Inuit or a Métis person; (*autochtone*)

The section on Indigenous offenders uses definitions consistent with other statutes, with the exception of "Indigenous organizations," which broadly includes any Indigenous-led organization:

> ***Indigenous governing body*** means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982. (*corps dirigeant autochtone*)
>
> ***Indigenous organization*** means an organization with predominantly Indigenous leadership. (*organisme autochtone*)
>
> ***Indigenous peoples of Canada*** has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the Constitution Act, 1982. (*peuples autochtones du Canada*)

The institutions defined above arise only once each in the legislation. Any "Indigenous organization" may enter an agreement with the federal Minister to provide corrections services; this section enables the nine healing lodges operating under various organizations across the country (s 81). Regarding Indigenous governing bodies, when an Indigenous offender requests a release into an Indigenous community, it is the "Indigenous governing body" which must receive notice and an opportunity to draft an integration or supervision plan under section 84.

Impact of Terminology and Structure on Off-Reserve Indigenous Peoples

In general, there are few definitional problems with this legislation for off-reserve people. It appears that *any* Indigenous person, regardless of status, is entitled to the provisions for Indigenous offenders in the

[19] Bernard Wanda, Salma Ataullahjan and Jane Cordy, Interim Report – *Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right is to be Treated as a Human Being*, by the Standing Senate Committee on Human Rights (1 February 2017-26 March 2018). See pages 50-53.

Act, including going to facilities for Indigenous offenders. The issues seem to concern the availability of such facilities generally, and other issues of implementation of the legislation.

The one issue involving terminology is in the circumstance of an Indigenous offender seeking to be released into an urban Indigenous community. Under the legislation, an offender may request release into an Indigenous *community*, but it is the relevant *governing body* that is notified and required to develop a plan for integration or supervision. An Indigenous governing body represents a group of section 35 rights holders, and it is not clear that a non-status Indian or urban group could satisfy this test (see pages 3-4 above). Thus, an Indigenous offender may have the option of returning to a reserve or Métis community whose rights are recognized, but may not be released under the supervision of an Indigenous body in an urban setting under the legislation.

Indigenous Languages Act, 2019, c. 23

Overview

This Act was assented to June 21, 2019, and does two primary things: makes the Minister of Heritage responsible for some Indigenous language promotion, primarily through funding and other cooperation agreements, and creates an Office of the Commissioner of Indigenous Languages.

The lengthy preamble recognizes that revitalizing Indigenous languages is at the core of reconciliation, and that Indigenous languages are "fundamental to shaping the country". It also reaffirms the right of self-determination, including self-government. Section 6 recognizes that section 35 of the *Constitution Act*, 1982, includes "rights related to Indigenous languages."

Regarding the Minister's duties, he or she is to engage in consultation with Indigenous entities to provide adequate and long-term funding to support and revitalize Indigenous languages. The Minister may also cooperate with provincial or territorial governments to coordinate efforts to support Indigenous languages, including through agreements formalising such arrangements. The Minister may also enter agreements with Indigenous organizations to further the objectives of the Act. The Act provides that federal government services may be provided in Indigenous languages, by agreement or otherwise, and translation of written materials may be undertaken.

The Office of Commissioner of Indigenous Languages is to promote Indigenous languages and efforts to revitalize and strengthen them, to promote public awareness of the importance of doing so, and to support innovation including harnessing new technologies. The Office can provide services directly to Indigenous organizations, and also acts as a dispute resolution mechanism under this Act or any agreement regarding Indigenous languages. It can receive complaints, conduct reviews and make recommendations, and must report annually on the use and vitality of Indigenous languages, the needs of groups, communities and peoples, and the adequacy of funding and implementation of the Act in a report to the Minister that must be tabled in Parliament.

The legislation is to undergo a five-year review by an independent entity, and a parliamentary review every three years.

The Act is relatively new, but was subject to some criticism during its passage through Parliament. Chief amongst the criticism was the failure to actually recognize specific Indigenous language rights, such as a right to educate children in their indigenous language through public schools.[20] Lorena Sekwan Fontaine, David Leitch and Andrea Bear Nicholas point out the lack of teeth in the *Act*, noting that the only positive obligation of the Minister is in consulting with Indigenous communities on their funding needs, and generally observe the shortfalls of the legislation compared to the *Official Languages Act*, which recognizes specific language rights, and provides recourse to the courts when disputes arise.

Structure and Terminology

The preamble of the Act is lengthy, and mostly refers to Indigenous peoples and their languages. However, it specifically notes the diverse nature and needs of Indigenous collectives in Canada with respect to languages, in a fairly inclusive way. First, it recognizes the separate identities and cultures of the different collectives as follows:

> Whereas **First Nations, the Inuit and the Métis Nation** have their own collective identities, cultures and ways of life and have, throughout history and to this day, continued to live in, use and occupy the lands that are now in Canada; (emphasis added)

There is also recognition of the role of a "variety of entities" working to restore languages:

> Whereas a **variety of entities** in different regions across Canada have mandates to promote the use of Indigenous languages and to support the efforts of Indigenous peoples to reclaim, revitalize, maintain and strengthen them and there is a need for the Government of Canada to provide **continuing support for those entities**;

Finally, it recognizes the variable needs of different groups in unique circumstances:

> Whereas a flexible approach that takes into account the **unique circumstances and needs of Indigenous groups, communities and peoples** is required in light of the **diversity of identities, cultures and histories** of Indigenous peoples;

The Act offers definitions in line with other recent statutes, referencing section 35 with respect to governing bodies and peoples, but defines Indigenous organizations differently, as any entity that represents an Indigenous group or has a language specialization. This is also more inclusive of a variety of interests and groups. The relevant definitions in full are:

[20] Lorena Sekwan Fontaine, David Leitch and Andrea Bear Nicholas, "How Canada's Proposed Indigenous Languages Act Fails To Deliver", Yellowhead Institute, May 2019, online at https://yellowheadinstitute.org/2019/05/09/how-canadas-proposed-indigenous-languages-act-fails-to-deliver/

> ***Indigenous governing body*** means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act*, 1982. (*corps dirigeant autochtone*)
>
> ***Indigenous organization*** means an Indigenous entity that represents the interests of an Indigenous group and its members or, other than in section 45, that is specialized in Indigenous languages. (*organisme autochtone*)
>
> ***Indigenous peoples*** has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the Constitution Act, 1982. (*peuples autochtones*)

Moreover, the Act does not limit any of its provisions to only Indigenous governing bodies, but rather explicitly includes organizations and entities in all of its provisions. The purpose of the Act, described in section 5, includes the facilitation of cooperation and collaboration between all levels of government, Indigenous and otherwise, and Indigenous organizations, including on policy development. The Minister must consult with governing bodies and "a variety of Indigenous organizations" regarding appropriate funding (s. 7), and can enter agreements with organizations or "other entities" (ss. 8 & 9). The newly created Office of the Commissioner must engage in consultation with all, including Indigenous entities, in fulfilling its mandate (s. 23). The Minister must consult with all in appointing the Commissioner and Directors, and the appointees explicitly must be able to represent the interests of First Nations, Inuit and Métis (ss. 13, 16). Requests for support for language revitalization may come from any community (s. 25). Moreover, the complaints and mediation processes are open to all, indigenous organizations and individuals included (ss. 26, 27).

Impact of Terminology and Structure on Off-Reserve Indigenous Peoples

This Act is unusually inclusive in its terminology and structure, conferring consultation and other rights on not only entities representing section 35 rights holders, but a variety of Indigenous entities. Such entities need not be limited to representing bands or reserve residents, and can logically include all language speakers, with Indian status or without, on reserve or in urban centres.

There are certainly challenges for non-status Indians and other off-reserve Indigenous peoples in maintaining and revitalizing languages, including simply being away from a larger community of language speakers and language instruction through on-reserve schools. However, this Act is inclusive of all efforts at language promotion, and does not impose a legislative bar to off-reserve language initiatives. It does not necessarily create such initiatives, however, thus entities must be created and requests for support made in order to access the Act's strongest provisions.

A.D.C.