

The Indian Act— A Barrier to Entrepreneurship

By Tom Flanagan

Indigenous leaders and Canadian politicians often call for the repeal of the Indian Act, yet repeal never seems to happen. There is no general agreement on what should replace the Act, and First Nations are deeply attached to some of the special protections it affords, such as immunity from taxation on reserve. Because repeal is politically impossible, the focus in practice has been on gradual improvement through amendments to the Act and passage of supplementary legislation.

The original purpose of the Indian Act (1876) was to create temporary protected spaces where Indians could live while they were assimilated into the Canadian community. Accordingly, Indian reserves were owned by the Crown and all economic transactions involving reserve land and its produce had to be approved by government officials. But by the middle of the 20th century it was becoming clear that Indians did not want assimilation and that the lands set aside by the Indian Act had become de facto permanent homelands. Thus arose a new challenge—how to make reserve communities functional in Canada's market economy, which depends on entrepreneurship and voluntary transactions, not top-down government decisions.

Canadian policymakers have been grappling with this challenge since the Indian Act revisions of 1951, which introduced certificates of possession (CPs), a new form of quasi-private property for reserve lands. CPs have allowed reserve residents to own their own homes, but their utility in the larger marketplace is limited because they can be sold only to members of the same band.

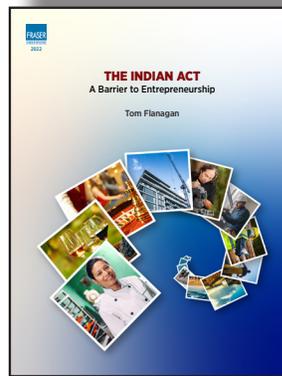
Canada has subsequently created a number of collective institutions to help First Nations participate in the economy. These include Indian Oil and Gas Canada, the First Nations Tax Commission, the First Nations Land Management Framework Agreement, and the First Nations Finance Authority. While created by federal statute, these institutions are run by First Nations people themselves. They offer advice and technical competence that individual First Nations would find difficult to achieve on their own.

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These achievements are the result not of repealing the Indian Act but of incremental amendments to the Act and of supplementary legislation to create opportunities not foreseen in the Act. Much has been accomplished, but much remains to be done in order to facilitate Indigenous entrepreneurship and participation in Canada's market economy. Here are three examples:

1. The collective institutions that Canada has created to foster Aboriginal entrepreneurship are helpful mainly to those First Nations whose reserve land is more valuable because of location near a city or town or because of location near valuable natural resources. On the urban side, Canada should continue to support creation of urban reserves, which can be important foci of business activity for First Nations. With respect to natural resources, Canada's federal government should stop blocking pipeline construction and other resource development. The exploitation of natural resources is by far the best opportunity for First Nations located in remote areas to improve their standard of living through entrepreneurship.
2. On-reserve property rights are still limited by the Indian Act, but experimentation is taking place. Several First Nations now have fee-simple ownership as a result of modern land-claims agreements, while the Westbank First Nation has introduced the "A to A lease" as a way of making certificates of possession freely tradable in the market. Such experiments need to be studied and made better known.
3. First Nations have entered the gaming industry to the extent allowed by the provinces, whose gaming cartels generally keep First Nations out of the more profitable metropolitan markets. Amendments to the Criminal Code, passed in 1985 without consulting First Nations, gave the provinces control over gaming. Ottawa could pass further amendments to create greater opportunities for Indigenous entrepreneurship in this area.

Through these and other legal innovations, Canada's First Nations can transcend the limitations of the Indian Act and profit from the same opportunities for entrepreneurship as other Canadians. This, not redistribution through government programs, is the true path toward prosperity and economic self-determination.



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