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# Legislating Indigenous Laws in the Wake of MMIWG Inquiry Calls for Justice & TRC Calls to Action

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**LEGISLATING INDIGENOUS LAWS IN THE WAKE OF  
MMIWG INQUIRY CALLS FOR JUSTICE & TRC CALLS TO ACTION**

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## INTRODUCTION

The *Indian Act* was passed in 1876 and has been the central tenet of the administration and management of Indigenous affairs in the 143 years that have followed. Indigenous people fell under federal jurisdiction and the federal Crown determined that Indigenous communities were unfit or unequipped to manage themselves. As a result, the functions of the federal government in relation to Indigenous people were carried out by local federal officials called “Indian Agents” who assumed a paternalistic role over the management of Indian affairs.<sup>1</sup>

Since then, there has been little in the way of change. Almost all programming and policy implementation related to Indigenous peoples remains under federal jurisdiction. The few exceptions are those First Nations groups who have negotiated modern treaties and comprehensive claims that have eliminated the authority of the *Indian Act*.

In relation to matters that are under provincial jurisdiction, the *Indian Act* continues to subject First Nations to provincial legislation and regulation without their consent simply by operation of section 88.<sup>2</sup> The cumulative impact of the imposition of federal and provincial laws over First Nations has resulted in the consistent and sustained erosion of Indigenous ways of organizing, legislating and determining their own membership.

I note that there are many capable minds who have, and continue, to articulate Indigenous laws’ rightful place in Canadian common law. I am an Indigenous women and legal practitioner who advises my clients on governance matters and analyzes how legislation (enacted and proposed) impacts their communities and their collective ability to achieve self-determination. It is through this lens which I offer some comments and perspective on Canada’s attempts to answer the various calls to recognize Indigenous peoples’ right to self-determination and restore their jurisdictions.

This paper will summarize some of the Truth and Reconciliation’s Calls to Action and the Missing and Murdered Indigenous Women and Girls Inquiry Report Calls for Justice as they pertain to the recognition of the inherent jurisdiction of Indigenous people over areas of membership, languages and

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<sup>1</sup> See the Chairman of the Royal Commission’s comments in 1914. He stated that Indian Agents were to tell Indians “what is best for them to do and look after them as a father would his children” (Chairman, Royal Commission, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 89, in Submissions of the Mamaleleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry).

<sup>2</sup> John Borrows, “Policy Paper: Implementing Indigenous Self-Determination Through Legislation in Canada”, (Ottawa: April 20, 2017) at 3 [Borrows]. Available at: <https://www.afn.ca/wp-content/uploads/2018/09/2017-04-20-Implementing-Indigenous-self-determination-through-policy-legislation.pdf>. Section 88 provides, with some exceptions, that provincial laws of general application also apply to status Indians.