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***The Indian Act***  
**& Aboriginal Women's Empowerment:**  
**What Front Line Workers Need to Know**

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**for Battered Women's Support Services**  
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## GLOSSARY OF TERMS

### Identity

**Aboriginal** refers to the descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people — Indians, Métis and Inuit. These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs.<sup>1</sup>

**First Nation** refers to a band, though it may also refer to a person belonging to a band.

**Indian** refers to someone who self-identifies as an Indian but who is not a Status Indian, though Status Indians sometimes self-identify as simply Indian.

**Indigenous** refers to “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”<sup>2</sup>

**Native** refers to a person whose ancestry is indigenous to North America.

**Status Indian** refers to a person who has proven—to Indian and Northern Affairs Canada—their right to be considered a Status Indian and is listed on the Indian Registry.

### Other definitions

**Band**—a body of Indians for whose collective use and benefit land has been set apart or money is held by the Crown [the government], or declared to be a band for the purposes of the *Indian Act*. Each band has its own governing band council, usually consisting of one chief and several councillors. Community members choose the chief and councillors by election, or sometimes through custom. The members of a band generally share common values, traditions and practices rooted in their ancestral heritage.<sup>3</sup>

**Bill C-31**—“the pre-legislation name of the 1985 Act to Amend the *Indian Act*. This act eliminated certain discriminatory provisions of the *Indian Act*, including the section that resulted in Indian women losing their Indian Status and membership when they married non-status men. Bill C-31 enabled people affected by the discriminatory provisions of the old *Indian Act* to apply to have their Indian Status and membership restored.”<sup>4</sup>

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<sup>1</sup> <http://www.ainc-inac.gc.ca/ap/tln-eng.asp>

<sup>2</sup> *Convention Concerning Indigenous and Tribal Peoples*, [1989] 4 Canadian Native Law Reporter, 49.

<sup>3</sup> *Urban Aboriginal Women in British Columbia and the Impacts of Matrimonial Real Property Regime*, Indian and Northern Affairs Canada, February 2003, p. 1.

<sup>4</sup> *Urban Aboriginal Women in British Columbia and the Impacts of Matrimonial Real Property Regime*, Indian and Northern Affairs Canada, February 2003, p. 1.

**Certificate of Possession**—record by which the federal government recognizes an individual band member’s right to use a particular parcel of reserve land on a permanent basis (under the *Indian Act*).

**INAC**—Indian and Northern Affairs Canada, the federal government body responsible for overseeing and administrating Aboriginal peoples across Canada. INAC was first known as DIA (Department of Indian Affairs), and then became DIAND (Department of Indian and Northern Affairs).

**Reserve**—a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.<sup>5</sup> In B.C. there are 488 Indian reserves.

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<sup>5</sup> *Urban Aboriginal Women in British Columbia and the Impacts of Matrimonial Real Property Regime*, Indian and Northern Affairs Canada, February 2003, p. 2.

## I. Introduction

The Aboriginal peoples of Canada are at a severe disadvantage in Canadian society.

The health indices show the disparity between Aboriginal peoples and the rest of Canadian society. In 2000, the life expectancy of Status Indian men was 8.1 years shorter than other Canadians males.<sup>6</sup> Status Indian women could expect to live 5.5 years less than other Canadian women.<sup>7</sup> Status Indians are six to 11 times more likely to have tuberculosis than other Canadians.<sup>8</sup>

The suicide rate for Status Indians is nearly three times the national average.<sup>9</sup> Amongst Aboriginals aged 15-29 it accounts for about one-third of all deaths. Young Aboriginal females are 5.5 times more likely to commit suicide; and the equivalent male youth are at even higher risk.<sup>10</sup>

With regard to housing conditions, the percentage of people on-reserve living in inadequate housing increased from 35.0 per cent in 1996 to 37.0 per cent in 2001.<sup>11</sup> At this time, safe water remains an on-going concern for on-reserve Indians. Of 740 community water systems, 29% posed a possible high risk to water quality; 46% had a medium risk. For wastewater systems, the assessment indicated that 16% posed a possible high risk, and 44.% posed a medium risk.<sup>12</sup>

In 2001, only 6% of Aboriginal people had attained university degrees, compared to 26% of other Canadians.<sup>13</sup> In 2001, 15% of non-Aboriginal youth did not complete their high school education, 58% of on-reserve youth did not complete high school, and 41% of those off-reserve did not attain their high school diplomas.

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<sup>6</sup> Life expectancy was 68.9 years for Status men and 77 years for other Canadian men. Source: Indian and Northern Affairs Canada, 2001, Basic Departmental Data 2001, Catalogue no. R12-7/2000E.

<sup>7</sup> Life expectancy was 76.6 years for Status women and 82.1 for other Canadian women. Source: Indian and Northern Affairs Canada, 2001, Basic Departmental Data 2001, Catalogue no. R12-7/2000E.

<sup>8</sup> Source: Health Canada, 2001, Tuberculosis in First Nations Communities, 1999, Ottawa.

<sup>9</sup> Source: Health Canada, First Nations and Inuit Health Branch in-house statistics.

<sup>10</sup> Cited by Jennifer White and Nadine Jodoin, "Aboriginal Youth: A Manual of Promising Suicide Prevention Strategies," Centre for Suicide Prevention, Canadian Mental Health Association, Alberta Division.

<sup>11</sup> Source: Canada Mortgage and Housing Corporation, 2004.

<sup>12</sup> Indian and Northern Affairs Canada, *National Assessment of Water and Wastewater Systems in First Nations Communities* (2003).

<sup>13</sup> Source: Statistics Canada, 2001.

In terms of employment, in 2001, 61% of the Aboriginal population aged 25 to 54 years were employed, with on-reserve Indians having a 50% employment rate.<sup>14</sup> Same-aged non-Aboriginal people had an employment rate of 80%.

Aboriginal people are greatly over-represented in the incarcerated population, accounting for 3.3 per cent of the Canadian population, but comprising 18% of the federally incarcerated population, and 16% of people sentenced.<sup>15</sup>

The situation of Aboriginal people in Canada is dire. There is an entire history that needs to be explored in order to begin to understand why Aboriginal peoples face the up-hill battles they do today. The attitudes, policies and legislation of the federal government have negatively shaped the modern world that exists for Aboriginal people in Canada. In evaluating how Canada has created a climate of inequality for Aboriginal peoples, it becomes clear that beyond the general inequality faced by Aboriginal peoples, there has been more specific discrimination waged against Aboriginal women in particular.

To study the status of Aboriginal women in Canadian society, it is necessary to look back at the forces that steered Canadian society, and even Aboriginal communities, to undermine the status of Aboriginal women as meaningful, respected and equal members of First Nations communities, and Canadian society at large.

Bonita Lawrence, in *Gender, Race, and the Regulation of native Identity in Canada and the United States* states:

Understanding how colonial governments have regulated Native identity is essential for Native people, in attempting to step away from the colonizing frameworks that have enmeshed our lives, and as we struggle to revive the identities and ways of living that preceded colonization.<sup>16</sup>

Lawrence goes on to explain that “bodies of law defining and controlling Indianness have for years distorted and disrupted older Indigenous ways of identifying the self in relation not only to collective identity but also to the land.”<sup>17</sup>

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<sup>14</sup> Source: Statistics Canada, 2001 Census.

<sup>15</sup> Source: Correctional Services Canada, 2004.

<sup>16</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 4.

<sup>17</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 4.

Thus, this paper attempts to illuminate *how* contemporary Aboriginal women have become situated in present-day Canadian society. Arguably, the largest component effecting their position has been the *Indian Act*—laced with sexist language, racist policy, and belittling the esteem of Aboriginal women through Euro-centric opinions of women in general, and Aboriginal women in particular.

However, though this paper explores the subjugation of Aboriginal women, it does not diminish from the strength Aboriginal women have maintained over the more than one hundred and thirty years since the inception of the *Indian Act*. Aboriginal women have learned to adapt and survive the most deplorable social and economic conditions in Canada. Their ability to subsist in sub-standard conditions, to fight for equal rights, to raise children, to face violence and discrimination, and to endure marginalization under the law and within their communities is how Aboriginal women more rightly ought to be recognized. Aboriginal women are warriors, not victims. It is because of overwhelming factors that Aboriginal women have suffered and continue to suffer.

## **II. Aboriginal Peoples Before the Arrival of Europeans in Canada**

Aboriginal peoples lived in organized societies before the arrival of Europeans. Though the organizational structures, cultural practices, and languages differed across what we now know as British Columbia—and across modern-day Canada—there are some generalizations that may be made concerning all Aboriginals.

A strong connection to the land and respect for its resources, and its animals, was intrinsic to indigenous peoples.

Sustenance was gained from fish in the oceans and creeks, plants in the forests, mountains and plains, and animals from the land and waters. And so valued were these resources that obtaining foods was part of the spiritual practices of the Indigenous peoples.

A rich oral history was also ubiquitous amongst indigenous peoples and this was how stories, beliefs and spiritual practices were passed down.

Indigenous women and men lived in equality—having separate but distinct roles that were respected each for their diversity and contribution to their society. Politics often followed matrilineal lines of descent. Community membership was decided by heredity,

matrimony, patrimony and clan-systems. And each community would have their own traditions surrounding residency, adoption and marriage. Self-identification and gender-neutral kinship ties were the basis of citizenship.<sup>18</sup>

### III. Early Relationships Between Aboriginal Women and Europeans

At a time when European settlers depended on the assistance of Indigenous peoples to learn how to survive on this continent, the *Royal Proclamation, 1763*, recognized Aboriginal title to all lands not ceded and acknowledged a nation-to-nation relationship with the Indigenous Nations.<sup>19</sup> The *Royal Proclamation, 1763* basically set out that there be a division between Indian territory and British territory, that only the Crown could acquire Indian land, and that Indian lands be decided by formal treaties.<sup>20</sup>

However, over time, as Europeans became less reliant on Indigenous cooperation, European recognition of Indigenous sovereignty eroded.

Ironically, North America was colonized largely by “displaced and marginal white men,” whose survival—via trade—depended on integration into Indigenous communities through intermarriage with Aboriginal women.<sup>21</sup> These family bonds secured European settlers economic ties to Aboriginal communities.

The European perspective of Aboriginal women became so twisted, that the *Indian Act*, as will be discussed next, made Indian women legally “white” and white women legally “Indian.”

Winona Stevenson, in “*Colonialism and First Nations Women in Canada*,” holds that colonialists viewed Aboriginal women as the “exact counter-image of their own culture’s ideal”. She states that in European culture at that time, domesticity was the pinnacle of womanhood.<sup>22</sup>

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<sup>18</sup> Lynn Chabot, *The Concept of Citizenship in Western Liberal Democracies and in First Nations: A Research Paper* (Ottawa: Department of Indian Affairs and Northern Development, 2007) at 32 as cited by Rosalie Wilson, “The Colonial Concubine: Canadian Federal Policy on Indian Status and the First Nations Woman,” at p. 2.

<sup>19</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 6.

<sup>20</sup> Winona Stevenson, “Colonialism and First Nations Women in Canada” in Dua 1999, p. 66.

<sup>21</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 8.

<sup>22</sup> Winona Stevenson, “Colonialism and First Nations Women in Canada” in Dua 1999, p. 57.

Stevenson characterized the cultural discrepancy between European and Aboriginal women as such:

Where European women were fragile and weak, Aboriginal women were hard-working and strong; where European women were confined to affairs of the household, Aboriginal women were economically independent and actively involved in the public sphere; where European women were chaste and dependent on men, Aboriginal women had considerable personal autonomy and independence—they controlled their own sexuality, had the right to divorce, and owned the products of their labour (Leacock 1980; Grumet 1980; Devens 1992; J. brown 1975).<sup>23</sup>

However, even though Aboriginal women played a central role in the fur trade, their status began to rapidly decline as the relationship between European men and Aboriginal men began to change. It is argued by Winona Stevenson that:

As Aboriginal men were increasingly drawn into European circles, they grew more receptive to introduced practices and values that promised better success in dealing with outsiders. Because men interacted more closely with Europeans through various economic and political transactions, they realized early the advantages of cultivating relationships with missionaries who could provide access to new forms of spiritual and mundane power (Devens 1992; Anderson 1992; Grant 1984; Leacock 1980).<sup>24</sup>

Says Stevenson:

The historical evidence demonstrates that when Aboriginal women were faced with losing personal autonomy and power, they resisted. They resisted the patriarchy because it threatened to undermine their socio-economic autonomy and because it threatened the socio-cultural cohesion of their communities. Studies on Aboriginal women's resistance strategies against colonial domination are recent and few but what they tell us so far is that women developed resistance tactics ranging from overt violence to covert symbolic acts. cursory studies of indigenous resistance to genocide and colonization indicate that 'it was women who have formed the very core of indigenous resistance to genocide and colonization since the first moment of conflict between Indians and invaders (Jaimes 1992, 3110). That women were the primary caregivers for children and keepers of the home compelled them to maintain traditional values, norms, and belief systems. The strength and tenacity of female resistance to colonial intrusion is well known among Aboriginal Peoples—as the old Cheyenne proverb goes, “A nation is not conquered until the hearts of its women are on the ground.”<sup>25</sup>

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<sup>23</sup> Winona Stevenson, “Colonialism and First Nations Women in Canada” in Dua 1999, p. 61.

<sup>24</sup> Winona Stevenson, “Colonialism and First Nations Women in Canada” in Dua 1999, p. 61.

<sup>24</sup> Winona Stevenson, “Colonialism and First Nations Women in Canada” in Dua 1999, p. 63.

The damaged status of Aboriginal women would become further entrenched through the law. As will be reviewed, the collective pre-*Indian Act* legislation was a harbinger of the oppressive stance of the government about to be thrust out into the open.

#### **IV. Pre-*Indian Act*, 1876 Legislation Relating to Aboriginal Peoples**

There were several pieces of legislation, directed at Aboriginal peoples, that preceded the *Indian Act, 1876*. These separate bodies of law slowly augmented the regulation of Aboriginal peoples, their lands and their activities. The laws also became more specific in their discrimination against Indigenous women.

##### **An Act for the better protection of the Lands and Property of the Indians in Lower Canada and An Act for the protection of the Indians in Upper Canada from imposition, and the Property Occupied or Enjoyed by Them From Trespass and Injury**

In 1850, two pieces of legislation were passed that defined who was an “Indian.”<sup>26</sup> The broad definition of “Indian” included: any person deemed to be Indian by birth or blood; any person reputed to belong to a particular band or body of Indians, any person married to an Indian; any person residing amongst Indians whose parent is an Indian; any person adopted by Indians.

The *Act for the better protection of the Lands and Property of Indians in Lower Canada* set up a “Commissioner” who would hold the lands *in trust* for Indians, though the Commissioner could manage and dispose of the property at will. The second piece of legislation, *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, disallowed Indian land to be disposed of except through the Crown (the government), protected Indian lands from trespass, injury, taxation or judgment, and barred the sale of intoxicants to Indians.

These Acts allowed for the creation of Indian reserves, defined an Indian and restricted Indians to limited territories, even though the Province of Canada had no legislative authority over the Indigenous peoples. Through these laws, the government was guaranteeing the rights of European settlers to Aboriginal land.<sup>27</sup>

Then, in 1857, the *Civilization of Indian Tribes Act*,<sup>28</sup> offered the opportunity of *enfranchisement* of Indians of “sufficiently advanced” education, capable of “managing their own affairs”. Enfranchisement was the loss of Indian Status, and enabled the Indian to be a “person” under the law with all the same rights as other British subjects

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<sup>26</sup> *An Act for the better protection of the Land and Property of Indians in Lower Canada* S.C. Prov. C. 1850, c. 42, and *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* S.C. 1850, c. 74.

<sup>27</sup> Bonita Lawrence, “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview,” published in *Hypatia* 182, (2003), p. 7.

<sup>28</sup> *Civilization of Indian Tribes Act*, S.C. 1857, c. 26 as cited by Richard H. Bartlett, “The Indian Act of Canada,” 2<sup>nd</sup> Ed. University of Saskatchewan, Native Law Centre (1988), p. 4.

and “removed the disabilities and distinctions imposed upon the Indian people for their protection.”<sup>29</sup>

These early actions by the government have been viewed as a “policy of paternalistic control and gradual removal of Native people from the path of white settlement.”<sup>30</sup>

### **The British North American Act, 1867**

The government would finally base its power over Indigenous peoples on Section 91(24) of the *British North American Act, 1867*. It described the exclusive jurisdiction of the Federal Government of Canada over the Indians and their lands.

### **Gradual Enfranchisement Act, 1869**

By 1869, the “nation-to-nation” relationship described in the *Royal Proclamation 1763* had all but disappeared. That year marked the first appearance of the notion of status and non-status Indians under the *Gradual Enfranchisement Act, 1869*.

Under the *Gradual Enfranchisement Act*, no Indian, or person married to an Indian, was permitted to lawfully possess land.<sup>31</sup> This *Act* also stated that if an Indian was prosecuted of any criminal offence, the cost of the prosecution could be drawn from the Band’s annuities or interest.<sup>32</sup>

### **An Act to amend certain laws respecting Indians, 1874**

*An Act to amend certain laws respecting Indians, 1874* set out that an Indian found intoxicated would be arrested and jailed for a period of up to one month.<sup>33</sup> Additionally, if that Indian knew who supplied his liquor but refused to report that person, he could be jailed for an additional 14 days.<sup>34</sup>

Unfortunately, the legislation leading up to the *Indian Act* were ominous harbingers of what lay ahead for Aboriginal peoples.

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<sup>29</sup> Richard H. Bartlett, “The Indian Act of Canada,” 2<sup>nd</sup> Ed. University of Saskatchewan, Native Law Centre (1988), p. 4.

<sup>30</sup> Bonita Lawrence, Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview, published in *Hypatia* 182, (2003), 7.

<sup>31</sup> *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42*. S.C. 1869, c. 6 (32-33 Vict.), s. 1.

<sup>32</sup> *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42*. S.C. 1869, c. 6 (32-33 Vict.), s. 5.

<sup>33</sup> *An Act to amend certain laws respecting Indians and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*. S.C. 1874, c. 21. (37 Vict.), s. 4.

<sup>34</sup> *An Act to amend certain laws respecting Indians and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*. S.C. 1874, c. 21. (37 Vict.), s. 5.

## V. The *Indian Act*

### What is it and who created it?

The *Indian Act* is a set of laws first passed by the federal parliament in 1876. It brought together the earlier colonial and federal laws relating to Indians. It has been amended, or changed, many times since its inception, and was most recently amended in 1985. And even though it was about “Indian” people, it was never translated into any First Nations languages.

The *Indian Act, 1876* dealt with these main areas: land, membership, local government, and made the federal government guardians over all First Nations people.

The *Indian Act* was extremely restrictive in its administration of Indians. To this day, the *Indian Act* regulates the daily lives of Status Indians, including determining who is and who is not a Status Indian. But more than just overseeing the lives of Status Indians, it has organized the Indian identity—both individually and communally—in ways that were once foreign, but now seem, to some, almost “natural” in today’s Aboriginal society.<sup>35</sup>

### Why was it created?

The uninhibited goal of the *Indian Act* was to assimilate First Nations people into mainstream society.

In 1914, the Deputy Superintendent General of Indian Affairs Duncan Campbell Scott wrote:

The happiest future for the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.<sup>36</sup>

Further, Canada’s Department of the Interior stated, in its Annual report, 1876:

Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State...[The] true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.

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<sup>35</sup> Bonita Lawrence, “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview,” published in *Hypatia* 182, (2003), 3.

<sup>36</sup> Titley, E.Brian. *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. UBC Press, Vancouver, 1986.

Thus, colonization was “predicated on maintaining racial apartheid, on emphasizing racial difference, white superiority and “Native” inferiority.”<sup>37</sup> One more neutral interpretation, however, was that Indian Status under the *Indian Act* was needed in order to set out who was “interested in and entitled to be protected on the lands reserved for Indians.”<sup>38</sup> Most scholars adhere to the former explanation.

After the *Indian Act* had been in place for nearly one hundred years, the *White Paper* (1969) was presented by Jean Chretien, then Minister of Indian Affairs. It proposed a plan to eliminate the *Indian Act*, and espoused ending the collective rights of Aboriginal people. It was fiercely opposed by First Nations across Canada, and the proposal was eventually withdrawn by the government.

## **VI. Other legislation that govern Status Indians**

### **The Charter of Rights and Freedoms and the Indian Act**

The *Constitutional Act*, 1982 entrenched the *Charter of Rights and Freedoms*. In the Charter, section 35 specifically protects Aboriginal and treaty rights. The appropriateness of applying the Charter to First Nations communities is debatable. Wendy Cornet and Allison Lendor in “Discussion Paper: Matrimonial Real Property on Reserve” argue:

...conventional western rights analyses, including equality rights analysis, involve labeling rights, interests and people, thereby breaking down the collective into what are perceived to be “different” constituent parts. This labeling process is regarded by some leading First Nations scholars as necessarily polarizing or as aggravating the division and “differences” created by the colonization process. If one accepts this analysis, proposed remedies for addressing gender inequality in an *Indian Act* context must also promote social cohesion and conflict resolution. In any event, this issue demonstrates the need to engage First Nation communities in discussions about their conception of rights and the role rights play or should play in their communities. These concerns underline the fact that matrimonial real property is not “just” a women’s issues. It affects the entire community – while having a critical impact on the place of First Nation women in their communities.<sup>39</sup>

Furthermore, Cornet and Lendor, supported by other scholars, go on to state that “[s]ome First nation women feel that courts still do not sufficiently take account of such

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<sup>37</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), 8.

<sup>38</sup> Richard H. Bartlett, “The Indian Act of Canada,” 2<sup>nd</sup> Ed. University of Saskatchewan, Native Law Centre (1988), p. 11.

<sup>39</sup> Wendy Cornet and Allison Lendor, “Discussion Paper: Matrimonial real Property on Reserve” (2002), p. 16.

contextual factors, much less reflect an understanding of First Nations cultural contexts.”<sup>40</sup>

### **Band By-laws**

A band by-law is a local law passed by a Band Council to regulate or control certain activities within a community (though they must ultimately be approved by INAC).<sup>41</sup> By-laws typically cover these matters: health (pest and animal control, dogs, garbage disposal, etc.), traffic, law and order (enforcement officers, fire controls, etc.), disorderly conduct and nuisance, trespass of cattle, local works (constructing and maintaining watercourse, roads, bridges, ditches, fences, etc.), zoning (for construction and maintenance), buildings, land survey, noxious weeds, water supplies, public games, hawkers and peddlers, wildlife, residency, and many other administrative areas.

## **VII. Who can be a Status Indian?**

Before discussing the term Status Indian, we must, necessarily, scrutinize the origin of the word *Indian*. The word *Indian* had no meaning before the colonization of North America.<sup>42</sup> The application of the word Indian to define the Indigenous peoples of North America was in fact a case of mistaken identity. Christopher Columbus, in search of a shorter trade route to the Orient, thought he had met his goal when, in fact, he was on the east coast of North America. Thus, he erroneously, yet firmly, named the Indigenous inhabitants he found “Indios”—or the people of India. The inaccurate description was retained through the centuries and became, in law, the name for the Indigenous peoples of North America.

Today, the *Indian Act* has specific requirements that regulate who may acquire Indian Status. This is the only legally created race-based identity in the world. To attain Indian Status, an individual must complete an application process. And until recently, Indian Status could only be proven through male lines of inheritance.

In brief, a person is eligible to become a Status Indian if they:

- were eligible before the *Indian Act* was changed in 1985;
- are a woman who lost her registration as a result of marriage to a non-Indian man;
- are someone who lost registration because their father was not an Indian;
- are someone who lost registration because they or their parents applied to give up registration and First Nation membership through "enfranchisement"; or

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<sup>40</sup> Wendy Cornet and Allison Lendor, “Discussion Paper: Matrimonial real Property on Reserve” (2002), p. 17, relying on Mary Ellen Turpel, “Home/Land” in (1991) 18 *Canadian Journal of Family Law* 17; Vina Starr, “The Charter and Aboriginal Rights” in *The Charter: Ten Years Later*, Proceedings of the April 1992 Colloquium of the Canadian Bar Association and the Department of Justice of Canada (Cowansville, Quebec: Les Editions Yvon Blais, 1992) 153.

<sup>41</sup> Department of Indian and Northern Affairs Development, Band Governance By-Laws Workshop Materials, p. 1.

<sup>42</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), 4.

-have two parents who are eligible for registration for any reason.

For children born after the 1985 amendment, there are three steps to completing the application for Indian Status:

1. Obtain a certified copy of the child's birth registration showing the names of the parents.
2. Write a letter, signed by both parents, stating the desire to register the child as an Indian.
3. Send the birth registration and letter to the First Nation with whom the parent wishes to register the child, or to the nearest Indian and Northern Affairs Canada office.

There is a separate form to fill out for adults who want to apply for Indian Status. The applicant must also write a letter detailing as much as possible about their ancestry—band membership of their relatives and whether those relatives have Status. These documents are sent to INAC. Ultimately, INAC researches the Indian Registry to determine whether they will grant Indian Status.

The *Indian Act* amendments in 1985 permitted bands to apply to create their own membership rules. In those cases, a person can be eligible for Indian Status, yet, if their band is responsible for maintaining band membership, the band can choose to exclude that person from membership within the band.

Also, depending on whether a band has its own membership rules, an Indian who is eligible for band membership may not be eligible as a Status Indian.

However, if INAC is responsible for maintaining band membership, then an approved Indian Status applicant will automatically be added to the band membership list upon registration.

### **The Benefits of Being Status Indian With Band Membership**

The Government of Canada provides funding to First Nations bands for various programs: housing, infrastructure, schools and other community-based services. The kinds of help that many people living on reserve may expect to have access to are:

- Social Assistance,
- Patient Transportation (to cover the cost of travel to doctors appointment, and treatment facilities),
- Children's Oral Health (a dental program for children 0-6 years),
- Alcohol and Drug Counseling and Referral,
- Home Care Aide Workers (for elders and others recently discharged from hospitals),
- Home Maker Services (for those unable to help themselves and in need help cleaning their homes),
- Maternal Child Care (for pre- and post-natal mothers).
- Post-secondary education financial support

- Non-Insure Health Benefits (a very limited extended medical coverage program)

These services are administered almost exclusively by bands, and many First Nations have their own policies in place.

### **The Benefits of Being Status Indian Without Band Membership**

There are not many programs available to Status Indians who are not band members (and who, subsequently, are not living on reserve). For those who do not have band membership there is some post-secondary education funding and Non-Insured Health Benefits.

As an aside, the government is presently trying to eliminate the post-secondary education funding for both band and non-band members.

## **IX. General discrimination in the *Indian Act***

The *Indian Act* is renowned for its paternalistic treatment of Indians. These are some of highlights of the discriminatory sections of the *Indian Act*.

### **An Indian was not a “person” in the eyes of the law**

The *Indian Act, 1876* defined a “person” as an individual who was not an Indian.

### **Voting**

Upon British Columbia joining the Dominion of Canada, First Nations people were still entitled to vote in provincial elections. However, that would change soon since only male British subjects could vote, and with the introduction of the *Indian Act*, Indians were not “persons” and therefore could not vote.

Indians would be prohibited from voting in provincial elections until 1949, and would be excluded from voting in federal elections until 1960.

### **Residency**

Also, the *Indian Act* also confirmed earlier legislation that permitted only Band members to live on a Band’s reserve.<sup>43</sup> This enabled the Canadian government to remove a large number of Native people from the land, and by the time the *Indian Act* was amended in 1985, that legislation had resulted in two-thirds of all Native people in Canada being landless.<sup>44</sup> This meant that about 25,000 Indians who lost status and had to leave their communities.<sup>45</sup> Loss of Status effected generations of children who had non-Indian

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<sup>43</sup> *Indian Act, 1876*, s. 11.

<sup>44</sup> Joan Holmes, *Bill C-3— -equality or disparity? The effects of the new Indian Act on Native women.* (1987) Background Paper, Canadian Advisory Council on the Status of Women as cited in Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), 6.

<sup>45</sup> Joan Holmes, *Bill C-3— -equality or disparity? The effects of the new Indian Act on Native women.* (1987) Background Paper, Canadian Advisory Council on the Status of Women as cited in Bonita

fathers. The specific impact on women of the codification regarding who was a “Status Indian” will be explored later.

The habitation choices available to Indians were severely limited. Indians were not allowed to acquire homestead or pre-emption rights.<sup>46</sup>

### *Election of Chiefs*

The *Indian Act* introduced a foreign form of government to oversee First Nations people: band councils. Prior to the *Indian Act*, First Nations’ leadership had been provided by hereditary chiefs who inherited their positions, often matrilineally (through the mother’s side). This was only one of many factors that diminished the role and respect for women in their own communities. This new Euro-centric view of politics continued the patriarchal system of governance well-established in Europe and which was imposed on First Nations egalitarian societies. Also, the three-year terms for elected Chiefs ran counter to the traditional lineage systems.<sup>47</sup>

### *Intoxicants*

Indians were banned from possessing, making or selling intoxicants—with the punishment for those offences being imprisonment for one to six months.<sup>48</sup> No such law existed for non-Indians.

The punishment for an Indian deemed intoxicated was jail time up to a period of one month; refusal to reveal the seller could have resulted in an additional 14 days in jail.<sup>49</sup> This law was not challenged until the case of *Drybones* in 1970. The accused in that case challenging the validity of a provision of the *Indian Act* which made it an offence for an Indian to be intoxicated off reserve. The Supreme Court of Canada held that that law violated the *Bill of Rights*—which guaranteed “equality before the law” and was therefore inoperative.<sup>50</sup> Thus, Indians were banned from being intoxicated off-reserve until 1970.

### *Enfranchisement*

Enfranchisement was the loss of Indian Status, and was either voluntary or involuntary.

Voluntary enfranchisement occurred when a Status Indian, “of good moral character” could apply to give up their Indian rights and subsume the identity of a “person” under the law with all the attenuating rights.

However, this legislated abandonment of Indian identity was largely unsuccessful. By 1918, only 102 Indians in all of Canada had chosen to renounce their Indian Status. So in that same year, the *Indian Act* was amended so that the Band did not have to agree—the applicant would only have to tell the Superintendent-General that he did not follow “the

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Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), 9.

<sup>46</sup> *Indian Act, 1876*, s. 70.

<sup>47</sup> *Indian Act, 1876*, s. 62.

<sup>48</sup> *Indian Act, 1876*, s. 79.

<sup>49</sup> *Indian Act, 1876*, s. 83.

<sup>50</sup> [1970] S.C.R. 282.

Indian mode of life.” Women could also apply, though married women had to rely on their husbands’ approval of their application.

The earlier *Gradual Civilisation Act* had stated that involuntary enfranchisement would occur when an Indian obtained a university degree, performed military service, lived in a foreign country for five years, or a Status woman married a Status man who voluntarily or involuntarily enfranchised.

It was in the *Indian Act, 1876* that the basis for involuntary enfranchisement became even broader. Enfranchisement became automatic for doctors, lawyers, notary publics, ministers of Christianity or holders of any university degree.<sup>51</sup> It appeared that being educated was incongruent with being Indian, or that, at least, once educated, an Indian was too *civilized* to be an Indian. Another interpretation is that education was merely an excuse to take away educated Indians from their communities—to assimilate, or to keep the on-reserve Indians in the most desperate conditions as possible. This final perspective would be in keeping with the prohibition on Indians hiring lawyers.

The 1876 process for voluntary enfranchisement was rather arduous. An adult of at least 21 years had to obtain consent of his or her band, the band would determine an assigned allotment of reserve land to give to the applicant and the local Indian agent would report the proposed allotment to the Superintendent-General. Upon approval from the Superintendent-General about the size of the allotment, the Indian agent would then report whether the “degree of civilization to which he or she has attained, and the character for integrity, morality and sobriety which he or she bears, appears to be qualified to become a proprietor of land in fee simple.”<sup>52</sup> After at least a 3-year probation period, the Superintendent could then grant enfranchisement, and fee simple land, to the applicant.<sup>53</sup>

Again, as seen in the earlier *Gradual Civilisation Act*, once an Indian husband enfranchised, his wife and minor children were involuntarily enfranchised.<sup>54</sup>

### **Potlaching Outlawed**

Amendments to the *Indian Act* in 1884 outlawed the potlatch. The potlatch was a central community event in Northwest Coast communities. The punishment for practicing the potlatch was two to six months in jail.<sup>55</sup> Most notably, in 1922 forty-five people were arrested and jailed for participating in a potlatch in the Kwakwaka’wakw village. All of their ceremonial objects were seized and handed over to museum collections throughout North America or sold to private collectors. It was not until 1979 that many of the illegally confiscated coppers, masks, rattles and whistles were returned to their rightful communities.

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<sup>51</sup> *Indian Act, 1876*, s. 86

<sup>52</sup> *Indian Act, 1876*, s. 86.

<sup>53</sup> *Indian Act, 1876*, s. 87.

<sup>54</sup> *Indian Act, 1876*, s. 88.

<sup>55</sup> *Indian Act, 1884*, s. 3.

This banning of ceremonial practice was in keeping with the governments insistence on forcing Indians to adopt Christianity and as a means of undermining the prominent status of Indian women in their communities.

### **Illegal to hire lawyers**

The *Indian Act*, 1927 included changes that were meant to counteract the growing movement among First Nations to organize land claims against the government. Meetings and fundraising activities were begun in order to raise money to hire lawyers to assist First Nations in taking their land claims cases to court. As a result, the *Indian Act* introduced a section making it illegal “to receive, obtain, solicit or request from any Indian any payment for the purpose of raising a fund or providing money for the prosecution of any “claim” without the consent of the superintendent General of Indian Affairs”. This law would not be undone until 1951.

### **Mandatory attendance at Indian Residential Schools**

It was not possible for Indians to attend public schools until 1951.

### **Excluded from commercial ventures**

In order to keep Indians dependant, the *Indian Act* prohibited Indians from selling agricultural products off reserve.

Indians were not permitted to use mechanized farm equipment or iron implements.

Indians were also banned from slaughtering livestock for sustenance.<sup>56</sup>

All of these laws were formed with the intention of oppressing Indians, reducing their independence and attempting to control their lives. The *Indian Act* was not created to benefit Indians, only to benefit from their oppression.

## **IX. *Indian Act* discrimination specific to Status Indian women**

### **Why make government policies that created discrimination against Aboriginal women?**

The gender-based discrimination of the *Indian Act* was carried out under the policy of the Department of Indian Affairs. The Deputy Superintendent General wrote to the Superintendent General in 1920:

When an Indian woman marries outside the band, whether a non-treaty Indian or a white man, it is in the interest of the Department, and in her interest as well, to sever her connection wholly with the reserve and the Indian mode of life, and the purpose of this section was to enable us to commute her financial interests. The words “with the consent of the band” have in many cases been effectual in preventing this severance...The amendment makes in the same direction as the proposed Enfranchisement Clauses, that is it takes away the power from

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<sup>56</sup> See Almighty Voice: Hero or Outlaw?. *The CBC Digital Archives Website*.  
[http://archives.cbc.ca/society/crime\\_justice/clips/12547/](http://archives.cbc.ca/society/crime_justice/clips/12547/)

unprogressive bands of preventing their members from advancing to full citizenship.<sup>57</sup>

The government was attempting to enfranchise Indian women in order to reduce Indian populations. The fact that women and their children suffered was of no concern to the government, and continued to be a non-issue for the government over the course of generations of Indians to come.

### **Certificate of Possession and Matrimonial Real Property Issues**

The *Indian Act, 1876* encouraged property rights by providing “location tickets.” A location ticket was the first “Certificate of Possession” and entitled a band member to hold land (though not in fee simple). This foreign system of individual property holding was biased against women, as concluded by the Royal Commission on Aboriginal Peoples:

There is no prohibition against women owning property through a certificate of possession. But the cumulative effect of a history of legislation that has excluded women and denied them property and inheritance rights, together with the sexist language embedded in the legislation before the 1985 amendments, has created a perception that women are not entitled to hold a CP [Certificate of Possession].<sup>58</sup>

Indian agents preferred to assign “location tickets” or CPs to the male partner only. And the “imposition of non-Aboriginal concepts of private or individual property rights combined with numerous forms of patriarchal bias have led to First Nation men being the primary holders of Certificates of Possession on reserve.” This created a built-in bias that:

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<sup>57</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vo. 4, Chapter 2, RCAP CD ROM, Seven Generations, Record 19104) citing Letter from Deputy Superintendent General Scott to Arthur Meighen Superintendent General of Indian Affairs, (12 January 1920) reprinted in NAC RG 10, Vol 6810, file 470-2-3, vol. 7. Other sources include Kathleen Jamison, *Indian Women and the law: Citizens Minus* (Ottawa: Supply and Services, 1978); John Leslie and Ron Maguire, *The Historical Development of the Indian Act* (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Center, 1978); John L. Tobias, Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy, (1976) 6 *Western Canadian Journal of Anthropology* 13; John Giokas, *The Indian Act: Evolution, Overview and Options for Amendment and Transition*, Research Paper prepared for the Royal Commission on Aboriginal Peoples, and in Wendy Cornet and Allison Lendor, Discussion Paper: Matrimonial real Property on Reserve (2002), p. 9.

<sup>58</sup> See for example, Kathleen Jamieson, *Indian Women and the Law: Citizens Minus* (Ottawa: Supply and Services, 1978); Martha Montour, “Iroquois Women’s Rights with respect to matrimonial property on Indian Reserves” [1987] 4 *Canadian Native Law Reporter* 1; Mary Ellen Turpel “Home/Land” in (1991) 18 *Canadian Journal of Family Law* 17; Robert A. Williams, “Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian cultural context” (1990) 4 *Georgia Law Review* 1019, as cited in Wendy Cornet and Allison Lendor, Discussion Paper: Matrimonial real Property on Reserve (2002).

contributed to the displacement of many First Nation women from their traditional roles as women, negatively affected their gender relations with men and the relationship of First Nation women to First Nations land. With respect to matrimonial real property, the collective impacts of colonialism (e.g. the displacement or suppression of First Nation cultural values combined with gender bias) have resulted in many women finding themselves in a disadvantageous legal position when their marriage or common law relationship breaks down.<sup>59</sup>

The decision making of band councils has been gender-biased, and the entrenched discrimination is still present today. Upon discussing this matter with a friend of mine, he was mistakenly under the belief that it was “traditional” for the man to acquire a Certificate of Possession. I was shocked that he had not questioned the origin of his belief, let alone the origin of the Certificate of Possession.

The result of this displacement can be felt acutely in situations where the woman automatically lost her own band membership and was added to her Indian husband’s band list.

Upon dissolution of her marriage, the case of Mrs. George was described by Justice Coultas of the B.C. Supreme Court:

Mrs. George was born into the Squamish Indian Band. Her husband is a member of the Burrard Indian Band. When they married, by the terms of the Indian Act of that day, Mrs. George was compelled to relinquish her membership in her own band to become a member of her husband’s band. At the moment she is a “stateless person,” for after the divorce she applied to rejoin the Squamish Band. Her application has not yet been considered by the chief and council. By applying, she has lost her membership in the Burrard Band.<sup>60</sup>

Cornet and Lendor rely on the *Aboriginal Women’s Roundtable on Gender Equality*, and state that the First Nations women recognize that “the sexual discrimination that women face on a day-to-day basis cannot be separated from the twin legacies of colonialism and racism, which continue to marginalize Aboriginal peoples and devalue their cultures and traditions.”<sup>61</sup>

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<sup>59</sup> Wendy Cornet and Allison Lendor, Discussion Paper: Matrimonial real Property on Reserve (2002), p. 19.

<sup>60</sup> *George v. George* [1993] 2 *Canadian Native Law Reporter* 112 (B.C.S.C.) aff’d, [1997] 2 *Canadian Native Law Reporter* 62; (1996). 24 *Reports of Family law* (4<sup>th</sup>) 155; 139 *Dominion law Reports* (4<sup>th</sup>) 53; 81 B.C.A.C. 62; 132 W.A.C. 63 (B.C.C.A.); additional reasons at (1997), 30 *British Columbia Law Reports* (3D) 107; 27 *Reports of Family Law* (4<sup>th</sup>) 81; 91 B.C.A.C. 163; 148 W.A.C. 163 (B.C.C.A), as cited in Wendy Cornet and Allison Lendor, “Discussion Paper: Matrimonial real Property on Reserve” (2002).

<sup>61</sup> Status of Women Canada, *Aboriginal Women’s Roundtable on Gender Equality*, March 30-April 1, 2000, p.4, as cited in Wendy Cornet and Allison Lendor, “Discussion Paper: Matrimonial real Property on Reserve” (2002).

There is a very slowly evolving body of case law surrounding the division of matrimonial property on reserve upon dissolution of marriage. As well, the federal government recently introduced legislation to parliament, entitled *Family Homes on Reserve and Matrimonial Interests or Rights Act*, to address this issue.

#### **Automatic transfer to husband's band upon marriage**

Band membership followed Status Indian men. This further complicated the matrimonial property issues because a woman, upon marriage, was not permitted to live on her natal reserve under the *Indian Act*, which specified that only band members could live on reserve. She would therefore have to uproot herself from her community and transplant herself onto another reserve. The social implications of this were exhausting given the importance of social ties in native communities. This loss of social support was crucial to undermining the status of Aboriginal women whose kinship ties added a strength and support in difficult times. Those strong ties helped guard women from violence and discrimination, and helped protect children as well.

This loss of her home band membership also meant she lost income from annuities from her former band, thereby reducing her independence even more.

#### **Loss of Indian Status upon marriage to any non-Status man**

An Indian woman would lose her Indian status if she married anyone not considered an Indian.<sup>62</sup> This codification occurred because it then made it possible for the government “to make it a category that could be granted or withheld, according to the needs of the settler society,”<sup>63</sup> a necessary tool for the goal of colonization as a way of developing and maintaining settler “solidarity and cohesion.”<sup>64</sup>

Between 1876 and 1985 approximately 25,000 Indian women lost Status and had to leave their communities. In 1985 there were 350,000 status Indians in Canada. Ten years after Bill C-31 was passed, about 100,000 individuals had re-gained their status.<sup>65</sup>

The loss of Indian Status through marriage to a non-Status man also resulted in loss of income from annuities from her former band, again affecting her independence.

#### **Loss of Indian Status because of husband's enfranchisement**

If an Indian man voluntarily enfranchised, his wife and children were automatically enfranchised. If her enfranchised husband died, a widowed enfranchised woman was

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<sup>62</sup> *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42.* S.C. 1869, c. 6 (32-33 Vict.), s. 6.

<sup>63</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), 7.

<sup>64</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 8, citing Ann Stoler, “Carnal knowledge and imperial power: Gender, race and morality in colonial Asia. In *Gender at the crossroads: Feminist anthropology in the post-modern era*, ed. Micaela di Leonardo. Berkeley: University of California Press.

<sup>65</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), 9.

permitted to live on her husband's land so long as, in the opinion of the Superintendent general, "she lives respectably."<sup>66</sup>

This automatic enfranchisement also applied to women whose husband's were involuntarily enfranchised.

### **Exclusion from participation in band elections**

The *Indian Act, 1876* continued the same sexist laws already established with earlier legislation—only males aged 21 and older could vote for a Chief. Status women were unable to vote in band elections until the *Indian Act* of 1951.

### **Had to be approved to receive an inheritance**

As another example of the patriarchal lens through which Aboriginal women were viewed, Indian women had to prove they were of good "moral" character before they were entitled to receive an inheritance

So Aboriginal women could lose their Indian Status through several methods:

- By marrying a non-Status man
- By marrying an Indian who became enfranchised—either voluntarily or involuntarily
- Her own involuntary enfranchisement

The loss of Indian Status meant that an Aboriginal woman would lose:

- the right to hold or inherit property on reserves,
- shares in band funds, health benefits and educational grants
- band membership (upon marriage and divorce)
- Access to band housing
- Participation in self-government or governance-related measures such as development of band membership codes, access to programs and resources controlled by band council governments on reserve (housing, Band-run social programs)
- matrimonial property on reserve

Even when a woman lost her band membership because she married a Status Indian man and was automatically transferred to his band, or she lost her Status through any of the methods listed above, but regained it following Bill C-31, she could still be denied band membership which would also result in loss of all of the benefits listed above.

## **X. Case law**

***A.G. Canada v. Lavell*** [1973] S.C.R. 282.

*Lavell* was a case, in 1970, challenging the validity of the *Indian Act* with regard to its "marrying out" provision—where a woman would lose her Status upon marriage to a non-Status man. *Lavell* lost her status in 1970 upon marriage to a non-Indian man.

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<sup>66</sup> *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42.* S.C. 1869, c. 6 (32-33 Vict.), s. 18.

Another woman, Bedard would later join Lavell's case. Bedard had married her non-Indian husband and lost her Status in 1964. She divorced in 1970 and returned to her natal reserve with her children where the band council permitted her to live in a house (willed to her by her mother) for one year—until she began supporting a political candidate unpopular with the band council, whereupon she was evicted. The federal government argued that the provision was created in order to present the loss of Indian land to non-Indian men. However, it was clear that the mind-set of the federal government at the time of the creation of the *Indian Act* predecessor in 1869 was to assimilate Indians into settler society (as described earlier in this paper).<sup>67</sup>

Jean Chretien, who was then the Minister of the Indian and Northern Affairs, offered to financially support any bands wanting to intervene against Lavell and Bedard.<sup>68</sup> Many, many organizations representing Status Indians did.

The Native Women's Association had this statement to release in response to the organizations who intervened against Lavell:

The Indian Act has imposed upon us a patriarchal system and patriarchal laws which favour men. Only men could give Indian status and band membership. At one time, only men could vote in band elections. By 1971, this patriarchal system was so ingrained with[in] our communities, that "patriarchy" was seen as a "traditional trait"...even the memory of our matriarchal forms of government, and our matrilineal forms of descent were forgotten or unacknowledged. Some legal writers argue that it was the federal government along, and not Aboriginal governments, which discriminated against women. In fact, the Aboriginal male governments and organizations were part of the wall of resistance encountered by Aboriginal woman in their struggle to return to their communities.

Lavell and Bedard would lose their case at the Supreme Court of Canada based on the finding, by a narrow 5-4 majority, that the *Bill of Rights* did not apply to the *Indian Act*, thus quickly ending the argument before the sexual discrimination of the *Indian Act* was evaluated.<sup>69</sup>

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<sup>67</sup> *A.G. Canada v. Lavell* [1973] S.C.R. 282.

<sup>68</sup> Elizabeth Jordan, "Residual Sex Discrimination in the Indian Act: Constitutional Remedies." (1995) 11 *Journal of Law and Social Policy*, p. 213 citing B.J. McCourt, "Case Comment—Civil Rights: Loss of Indian Status By Indian Women Marrying Non-Indian Under Indian Act (Can.), s. 12(1)(b)" Whether Provision Inoperative Under Canadian bill of Rights as Discrimination By Reason of Sex and Denial of Equality Before the Law: *Re Lavell and Attorney-General of Canada*, 38 D.L.R. 3d 481 (Sup. Ct. 1973)" (1974) 6 Ottawa L.R. 635 at 637. McCourt notes that the National Indian Brotherhood, the Native Council of Canada, the Indian Association of Alberta, the Union of British Columbia Indian Chiefs, the Manitoba Indian Brotherhood Inc., the union of New Brunswick Indians, the Indian brotherhood of the Northwest Territories, the Union of Nova Scotia Indians, the Union of Ontario Indians, the Federation of Saskatchewan Indians, the Indian Association of Quebec, the Yukon Native Brotherhood and the Six Nations of the Grand River band Council all intervened on behalf of the Attorney General, to defend s. 12(1)(b). With the exception of the Native Council of Canada, all of these groups represented status Indians. A much smaller number of groups intervened on behalf of Lavell and Bedard.

<sup>69</sup> *A.G. Canada v. Lavell* [1970] S.C.R. 282.

*Lovelace v. Canada*, 36 U.N. GOAR Supp. (No. 40) Annex XVIII and Bill C-31  
Next, in 1981 Sandra Lovelace brought her case to the United Nations Human Rights Committee. She also lost her Status upon marriage to a non-Indian man in 1970, and subsequently returned to her home reserve upon the breakdown of her marriage. In 1981 the U.N. Human Rights Committee found the Canadian government discriminated against Lovelace by denying her band membership and the right to return to her reserve—they found she was ethnically an Indian because she had been “born and brought up on a reserve...[and has] kept ties with [her] community.”<sup>70</sup>

However, the U.N.’s decision did not deal with the sex discrimination of the *Indian Act* because Canada had not ratified the *International Covenant on Civil and Political Rights* until 1976 and Lovelace had lost her Status in 1970.<sup>71</sup> However, Canada’s political embarrassment helped drive the *Indian Act* amendments of 1985.

## **XI. After the Bill C-31 Indian Act amendment in 1985**

The new *Indian Act*, 1985 made four major changes to the lives of Indians:

1. it rescinded the "enfranchisement" provisions of the Old Indian Act, and provided for the "reinstatement" of persons who had lost their Status as a result of those provisions;
2. it did away with the "patrilineal" definition of eligibility for Indian Status and replaced it with new gender neutral eligibility rules;
3. it enabled Bands to assume control of their Band membership list on condition that they adopt a Membership Code that conforms to the Bill;
4. it allowed Bands to deny membership to certain classes of Status Indians who would otherwise be entitled to membership if control of the Band List had continued to reside with the Department of Indian Affairs.<sup>72</sup>

Even though the *Indian Act* was amended in 1985, the residual sex discrimination is and will be felt for successive generations of native people. The amended *Indian Act* reinstated Indian women who lost their Status as a result of marrying out. However, under section 11 of the new *Indian Act*, bands could determine their own membership rules and could, therefore, continue to exclude those women from their band lists. This resulted in many Indian women finally regaining their Indian Status, only to have no band or reserve to call home. This meant no access to the band-run social programs, housing, land or other advantages considered a right to most Status Indians.

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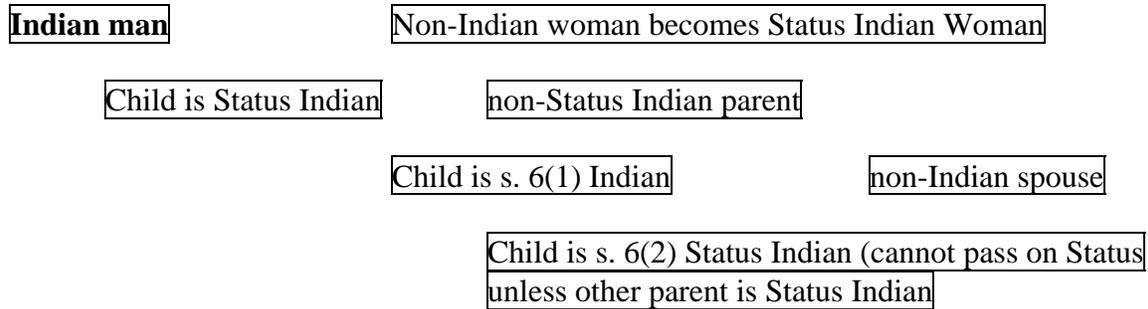
<sup>70</sup> *Lovelace v. Canada*, 36 U.N. GOAR Supp. (No. 40) Annex XVIII; U.N. Doc. A/36/40 (1981) at 12 as cited by Elizabeth Jordan, “Residual Sex Discrimination in the Indian Act: Constitutional Remedies”, 11 *Journal of Law and Social Policy*, (1995) at 220.

<sup>71</sup> Elizabeth Jordan, “Residual Sex Discrimination in the Indian Act: Constitutional Remedies”, 11 *Journal of Law and Social Policy*, (1995) at 220.

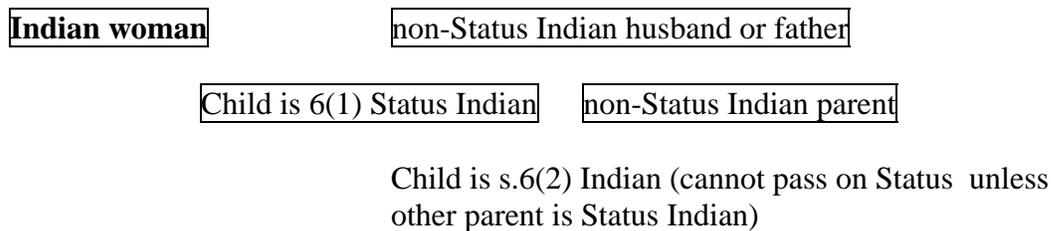
<sup>72</sup> Harry W. Daniels, *Bill C-31: The Abocide Bill Overview of Bill C-31* at <http://www.abo-peoples.org/programs/C-31/Abocide/Abocide-2.htm#Overview>

Furthermore, prior to the amendments in 1985, Indian men conferred Indian Status on their non-Indian wives. With two parents being “Status Indians,” their children would be granted Indian Status meaning that their grandchildren could pass on their status to their children as s. 6(1) Indians, regardless of their grandchildren other parents ethnicity.

The following is a schematic of how the two different levels of “Status” could be passed on to children, depending on whether, pre-1985, the Indian parent was a man or a woman.



Compared it with this scenario:



Clearly the provisions of the *Indian Act, 1985* have deferred the discriminatory effect of the male lineage model of conferring Indian Status.

Almost incomprehensibly, if a non-native woman married a Status Indian man before the amendments in 1985, she became a Status Indian. However, if she divorced her Status Indian husband and subsequently had children with another non-Native man, she could pass on her Indian Status even though her children would have no native ancestry. This example shows the fictitious construct of being “Status Indian.”

In 2004, INAC hired a statistician, Stewart Clatworthy. He wrote a report, “Reassessing the Population Impacts of Bill C-31.” In it he examined how the Status classification would effect future generation of Indians, and determined that by 2049, less than half of children born to a Status Indian parent will be Status Indian, and that by 2124, no more children will be born eligible for Indian Status.<sup>73</sup>

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<sup>73</sup> Canada, Minister of Indian and Northern Development, *Regarding-assessing the Population Impacts of Bill C-31* (Ottawa: Minister of Public Works and Government Services Canada, 2004), as cited by Rosalie Wilson in “The Colonial Concubine: Canadian Federal Policy on Indian Status and the First Nations Women, December 2006, Faculty of Law.

So though there is a “general disgust” among Aboriginal organizations about the effects of the *Indian Acts*, and some recognition on INACs part, there are few solutions agreed upon to remedy the problems created by the sexist legislation.<sup>74</sup>

### **Sharon McIvor**

The 1985 amendments to the *Indian Act* opened the door for women and their children to apply for Indian Status after over 100 years of rejection by the federal government. Sharon McIvor applied to regain her Indian Status after the changes to the *Indian Act*. She was permitted to be a registered Status Indian, but her children were not. In 1987 McIvor wrote a letter asking for a review of her case, and waited for 21 months before being denied Status for her children again. In 1987, she filed a lawsuit to challenge the decision. Her case was not heard until October 2006—17 years later.

In June 2007 B.C. Supreme Court Justice Carol Ross held that the 1985 *Indian Act* amendment was in contravention of the *Charter of Rights and Freedoms*, and international conventions on human rights, women’s rights and children’s rights. The Crown (or government) went on to appeal the case, which went on to be argued at the B.C. Court of Appeal in October 2008. Should McIvor succeed in making her case, it could result in Status being granted to more than 30,000 First Nations women and children. The judgment remains to be released. However, it is anticipated that McIvor’s case will ultimately proceed to the Supreme Court of Canada.

In her case, McIvor testified that “[i]t was lonely and painful to be excluded from the Indian community. My family and I suffered various forms of hurt and stigmatization because we did not have status cards.”

Many significant cultural practices had to be abandoned by McIvor—like traditional hunting, gathering, and fishing, and traditional marriage, funeral and healing ceremonies.<sup>75</sup> Additionally, she and her children were unable to access other on-reserve services like housing, the band-run school, and did not qualify for health and dental benefits or post-secondary funding.<sup>76</sup>

## **XII. Aboriginal women’s rights: rights as women and separate rights as a racialized group**

It is important to recognize that there are several different perspectives on how Aboriginal women’s issues are framed. There is no requirement that all Aboriginal women have the same values, assumptions, and perspectives. For example, one highly reputed Aboriginal scholar, Patrice Monure-Angus holds that “feminism as an ideology

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<sup>74</sup> Elizabeth Jordan, "Residual Sex Discrimination in the Indian Act: Constitutional Remedies." (1995) 11 *Journal of Law and Social Policy*, p. 223.

<sup>75</sup> Daphne Bramham, *The long, hard road of Sharon McIvor*, Vancouver Sun, November 9, 2007.

<sup>76</sup> Daphne Bramham, *The long, hard road of Sharon McIvor*, Vancouver Sun, November 9, 2007.

remains colonial.”<sup>77</sup> As Bonita Lawrence explains in “Gender, Race, and the Regulation of Native Identity in Canada and the United States,” Monture-Angus has noted that “‘patriarchy’ alone is inadequate for explaining the many levels of violence that Native women face within their communities, and the apparent inability or unwillingness of band governments to make their circumstances a priority.”<sup>78</sup>

Lawrence believes that it is not only sexism that creates sexist oppression. She also points to Paula Gunn Allen and Janice Acoose who argue that colonization has always been a gendered process—that the church has, historically, specifically attacked the social status of Native women in order to undermine Native societies.<sup>79</sup> The complex nature of colonial pressures have created, and compounded problems of, Native women. Just as no one factor accounts for the disparate situation faced by Native women, no one factor be eliminated to improve the position of Native women in Canadian society.

### **XIII. Social consequences of the *Indian Act*’s discrimination against Status Indian women**

#### **Identity**

During the days when a woman would *have* to join her husband’s band, though she may have obtained band membership in his band, she would still face difficulty in feeling comfortable on her marital reserve because she felt like an outsider. This was especially true if her marriage broke down and she was left to seek temporary, or sometimes long-term, living arrangements with in-laws if they would take her in. Limited living arrangements were also a result of the fact that a Certificate of Possession could not have been held jointly, and, as explained earlier, was usually held in the husband’s name. The home would have been built by or for the husband, and often the land had been traditionally used by his family. This left a woman and her children without any claim to a home. One woman described her limited childcare options when her marriage dissolved, and explained why she might leave her children with their father:

I want them to have a home, a real house, not like some old two-room place like some of our people live in. I didn’t want them to be like my brothers who don’t own any land or a house, because they grew up off the reserve. I want my kids to have something when they grow up. There is nothing I can give them. I’m nobody here on my husband’s reserve, because I don’t come from around here, and I’m nobody any more on my mum’s reserve because I can’t get a house there.<sup>80</sup>

This painful admission was played out thousands of times over since the first *Indian Act* in 1876.

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<sup>77</sup> Patricia Monture-Angus, *Thunder in my Soul : a Mohawk Woman Speaks*, Halifax, Nova Scotia : Fernwood, 1995, p. 171.

<sup>78</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 5.

<sup>79</sup> Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, published in *Hypatia* 182, (2003), p. 5.

<sup>80</sup> Marjorie Mitchell, “The Indian Act: Social and Cultural Consequences for Native Indian Women on a British Columbia Reserve,” *Atlantis* 4, 2 (Spring 1979), p. 187.

### Statistics

In the Aboriginal population the number of single mother families has been rising over time, just as it has been in the general population. The following statistics are based on the 1996 Census.

Single mother families, among Registered Indians, was 20% in 1981 and in 1996 it was 23%. Amongst other Canadian families, the percentage of single mother was 9% in 1981<sup>81</sup> and was 12% in 1996.

The highest percentage of single mother families is found within families with children 0-15 years of age. In families with children aged 0-15 years, about 28% of these families are headed by single mothers.

However, the numbers are significantly higher when the location of residence is taken into account. In urban areas, 38% of Registered Indian mothers were single parents, compared to 29% of other Aboriginal families, and 18% of other Canadian families.

Basically, employment, health and other social obstacles faced by single mother families, and the reduction of social support—from on-reserve extended family, and the unavailability of other community resources available through band-run programs—further compounds the negative situation faced by Aboriginal women and their children.

### Conclusion

The legacy of the *Indian Act* has permanently disfigured the possibility of an equal landscape between Aboriginal women and men, between Aboriginal woman and their communities, and between Aboriginal women and Canadian society. It is impossible that the wrongs done unto Aboriginal women ever be undone.

However, by recognizing and advancing the cause of Aboriginal women—as meaningful, respected and equal members of society—we can hope to elevate their status and effect change.

Communities, government and the public must advocate for equality for Aboriginal women. Aboriginal women will continue as warriors, but even the strongest warriors need allies, and empathy, too.

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<sup>81</sup> Jeremy Hull, *Aboriginal Single Mothers in Canada, 1996: A Statistical Profile*, June 2001.