In Our Efforts to Escape: Improving Aboriginal Women’s Rights, Removing the *Indian Act*

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ABSTRACT

The Indian Act, though little different from its inception in 1876, has maintained its place for over one hundred years as a piece of legislation that encompasses all of Canada’s aboriginal policy. Whether it should or not is an enormous question. It is at once a remnant of Canada’s racist, colonial history—but also a method by which the government can be held accountable to the Aboriginals they once sought to eradicate. Solving the problem of the Indian Act will require group-specific accords and treaties. However, these treaties will only succeed if Aboriginal women—who have been barred from their traditional place in Aboriginal society for generations—are returned to decision-making roles. If Aboriginal women do not regain their equality, every new treaty will be little more than smaller manifestations of the Indian Act itself.

ESSAY

In Frances Abele’s paper, Like an Ill-Fitting Boot, she observes the unique circumstances Indian Act places on First Nations: “There are no other citizens of Canada for whom a specific piece of federal legislation regulates their social and political citizenship, and the most fundamental features of their social and economic lives”\(^1\). The Indian Act today is little different from the original. Nevertheless, it maintains its place as the legislation that encompasses all of Canada’s aboriginal policy. But should it? It is a remnant of a racist, patriarchal time in Canadian history that has somehow been dragged and maintained all the way into the present. But it is an Act that ensured the government could not fall back on their responsibilities to Aboriginals entirely. To solve the problem of the Indian Act, group-specific accords, treaties, or processes bode well for future success, as more communities look to achievements in Nunavut and with the Nisga’a. However, before these treaties and all others alike can take any real power from the Indian Act, one problem must be addressed: status Aboriginal women’s rights. Until these women are equal to Aboriginal men, and returned to equal footing in decision-making, these treaties will be little more than smaller versions of the Indian Act, built on a legacy of sexism and patriarchy created by the same bill these treaties seek to eradicate.

The Indian Act first passed in 1876, a consolidation of years of policies developed in the nineteenth century. Inspirations drawn from the mid-century Bagot and Pennefather Commissions created such Indian legislation as the Gradual Civilization Act, 1857 and the Gradual Enfranchisement Act, 1869, both pieces marking the adoption of assimilation policies, centralizing control of Aboriginals, and evolving the concept of “status”.\(^2\) The Indian Act, upon its passage, changed policy little from the years prior, but the Act was much more complex and detailed than the policies of before. Unlike previous legislation, the Indian Act covered and controlled nearly every important aspect of Aboriginals lives.\(^3\) The goal of the Indian Act was to bring up the child-like Aboriginals, as they explained:

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

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\(^3\) Report of the RCAP, Looking Forward: Looking Back, 278.
Red man in lifting himself out of his condition ... through education and every other means, to prepare him for higher civilization.4

The present day Indian Act is very similar to this original piece, a legislative fossil reflecting administrative and organizational practices characteristic of public institutions in the mid-twentieth century.5 This is the Act that controls Aboriginal lives in Canada.

The Indian Act is not gender neutral. In fact, in comparison to Aboriginal men, Aboriginal women are doubly disadvantaged by all the Indian Act does to their rights and status in Canada. Even before the 1876 Act, previous legislation laid the groundwork for sexism towards Aboriginal women. The Gradual Civilization Act first stripped Indian women of their status the moment their husband’s became enfranchised, and changed property rights so women could not receive land allotments.6 The Gradual Enfranchisement Act denied women the vote in band elections, allowed them to be ignored in wills, and imposed the well-known provision that stripped Indian women of status when they married a non-Indian.7 This provision would not be reversed until 1985.

In Jo-Anne Fiske’s article, Constitutionalizing the Space to be Aboriginal Women, she argues that from 1857 onward, the patriarchal and racist colonial powers put more and more authority and importance in the hands of the father and husband, and that by doing this made the definition of Indian narrower and privileged towards patrilineal descent.8 Women who lost their status after the inception of the Indian Act lost important parts of their culture: the right to live in their home community, share in the collective property of their bands, and even the right to burial on their reserve.9 Later in the 1970s, in what was supposed to be a temporary measure, the Indian Act was exempted from the Canadian Human Rights Act under section sixty-seven. This was to comply with the Canadian government’s commitment to avoid amending the Indian Act in any way before consultations with the then National Indian Brotherhood (today the Assembly of First Nations) and other Aboriginal organizations. However, this also shielded the government and the First Nations organizations from any complaint arising from discrimination in the Indian Act.10 Women who regained status in 1985 as part of Bill C-31—to be discussed further on—could not complain of discrimination in First Nations governance, they were dismissed because of the shield. Notably, all the Aboriginal women’s groups the Canadian Human Rights Review consulted strongly endorsed the repeal of section sixty-seven.11 The positions of First Nations governments and the Assembly of First Nations were mixed.

One of the first major victories made by Aboriginal women against the Indian Act was carried out by Sandra Lovelace in 1981, when the International Human Rights Committee upheld her

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9 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 311.
10 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 317.
11 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 317.
assertion that the Indian Act violated the International Covenant on Civil and Political Rights by forcibly stripping married-out women of status. This huge embarrassment for Canada led to a proclamation in the same year that permitted bands to remove themselves from the status section of the Indian Act.

Four years later came Bill C-31, ostensibly on the heels of these victories for Aboriginal women’s rights. The amendments in this bill to the Indian Act were meant to bring the latter into line with the equality provisions laid out in the Constitution Act, 1982. It safeguarded the status of all Aboriginal registered before 1985, and made it so status was not affected by marriage. As well, under s. 6(1) of the bill, women who had lost their status were entitled to reinstatement and automatically restored as members of their natal band. However, though women’s status as Aboriginals was protected again, the amendments did not eliminate sexual inequality entirely. Lineage through the male was still privileged: to determine an infant’s registration as status, the mother was forced to disclose the father’s name, and her own status was taken as secondary. As of today, the First Nations women in Canada face continuing discrimination at the hands of the Indian Act. But doing away with this legislation is not so easy to do.

A quote by Harold Cardinal, a Cree leader, perhaps puts it best:

We do not want the Indian Act retained because it is a good piece of legislation. It isn’t. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretentions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights.

For nearly all Aboriginals in Canada affected by the Indian Act, it is an embodiment of colonialism and paternalism that has no place in their modern lives. However, many still argue for its maintenance. When the White Paper was introduced in 1969, there was a wave of opposition from Aboriginals who did not want to see the Indian Act repealed. They feared, as Cardinal says, losing what little the Indian Act gives them. This is primarily the federal legal and fiduciary commitment to Aboriginals outlined in the Act. However, though many believe the Indian Act hinders Aboriginal progress, most Aboriginal governments are currently deriving power from the Indian Act, and Aboriginal communities have operated under the Act for generations. They are comfortable with the provisions, and familiar with the administrative and political structures. And then, there are those in the Aboriginal community that have, as John Borrows puts it, learned how to “dominate others by mastering its intricate rules”. The Indian Act controls such an astounding amount of Aboriginal life that there is a great deal of influence to be gained from knowing how to work the Act for certain means. And after the amendments in

12 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 312.
13 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 312.
14 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 313.
1985, the new equality provisions imposed on the *Indian Act* created a new conflict between individual and collective rights, with women becoming the victim and the villain in the disputes.

With the reintroduction of married-out women into reserves and band membership, there was an outcry from several First Nations arguing that this reinstatement in s. 6 of Bill C-31 infringed on First Nations rights to write their own membership codes. A year after the amendments went through three First Nations communities challenged it in *Sawridge Board v. Canada (T.D.)*. When their case was dismissed, the Chief of Sawridge denounced the decision as, “the most anti-Indian pronouncement of recent judicial history”. The communities argued they were not discriminating against the women who wanted to rejoin their community. Instead, they argued they were defending the rights of First Nations to determine citizenship and uphold “customary” practices of membership and identity—at the expense of women who did not ask to be enfranchised in the first place. The dominating legal debate that spanned the 1980s and 1990s pitted the status of these newly reinstated women against Aboriginal governments. These Aboriginals argued that these women, if they returned to their reserve communities:

[Would] have little, if any, appreciation of the concept of collective rights …. Crowding reserves with people who are unfamiliar with or not committed to collective rights will undoubtedly have a deleterious effect upon, if not destroy, our communal lifestyle. WE FEEL THREATENED.

This prediction is hyperbolic, but common. Native women fighting for full citizenship are faced with a community that enjoyed the *Indian Act’s* patriarchal structure enough to believe that fraternal nationhood is the traditional, sacred way of doing business. It is as if the *Indian Act* was their idea in the first place, or that its slow subordination of women is in line with Aboriginal tradition. It is not.

First Nations women’s rights are vulnerable under these stubborn insistences. Despite some attempts at making their position palatable to patriarchal male leaders by drawing from the importance of mothering in the communities, their claims for women-centred citizenship are constantly at risk of being attacked for being un-Aboriginal. And these women cannot, at the moment, look for help very far beyond Aboriginal women’s groups. Borrows argues that any talk of “positive” change in the *Indian Act* is still in a largely assimilative direction. As Fiske adds, under the Harper government, Status of Women Canada removed equality issues and support for social advocacy from their mandate, and funding was withdrawn from the Charter Challenges program, which helped ensure the rights of marginalized or vulnerable groups were protected by the Charter.

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20 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 319.
However, this is not where the train stops. The *Indian Act* does not need to remain a measure of subjugating women. But what must be done to the *Indian Act*, to remove it, and replace it with better, smaller agreements, has to be done in steps.

Firstly, as Borrows argues, there must be a focus on change and healing. He argues, under the Anishinabek gift of respect, that women’s rights must be addressed beyond the shifting of technical things such as land management. The depth of problems Aboriginal women face must be addressed and their eradication must be made a priority. Borrows puts an especial emphasis on the Aboriginal responsibility:

> The unwillingness of chiefs and councils to address the plight of women and children suffering at the hands of husbands and fathers is quite alarming …. We believe that there is a heavy responsibility of Aboriginal leaders to recognize the significance of the problem within their own communities.23

The issue of Aboriginal women’s rights must have attention and resources to even come close to being solved. In time, this attention may come, either as a ripple effect from an inquiry or media outlets, or perhaps a change in power in the House.

Aboriginal women are also taking matters into their own hands, with promising results. The *Sawridge* case was formally ended in 2003, when the federal court issued a mandatory order to restore band membership to the excluded women.24 In 2007 Sharon McIvor succeeded in her application to the British Columbia Supreme Court to have matrilineal descent recognized as a legitimate claim to Indian status.25 The court agreed with her, and rejected the legal definition in place as being discriminatory to Aboriginals who trace their roots through female relatives. Aboriginal women are fighting back against the patriarchal Indian system, and if they continue, they may return Aboriginal society to its former egalitarian state, as if the *Indian Act* and its predecessors never occurred.

But the *Indian Act* is an unfortunate reality in Canada, and it must be dealt with. Coates notes that most Aboriginals would be pleased to see the Act disappear, “but only after an appropriate Aboriginally-controlled system, with firm and ongoing financial and legal commitments by the federal government, is in place”.26 This is an ambitious goal, which may not be possible in the current system. Perhaps, then, one should look to smaller, though no less important, realities. The *Indian Act*’s power and authority is being eroded in Canada. The dominance of the Department of Aboriginal Affairs recedes each year, and over eighty percent of the funds it spends on status Indians are managed by band governments.27

The *Indian Act* is being replaced by modern treaties that are generating new, more appropriate approaches to Aboriginal policy on the basis of group-specific approaches to Aboriginal

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25 Fiske, “Constitutionalizing the Space to be Aboriginal Women,” 315.
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governance.28 These agreements also ensure the protections of the Indian Act are not eliminated. In these case-by-case, First Nation-by-First Nation agreement method, the fiduciary responsibility of the federal government remains in place. The assertions that such agreements, land claims or self-government processes, would bring chaos without the supervision of the Canadian government have been proven false. The treaties signed by the Nisga’a, in the Yukon, in the Nunavut have become models for future accords and represent a promising sign of how the Indian Act’s will continue to decline, until it can be done away with altogether.

To bring Aboriginal women into these agreements, on equal footing with their male counterparts, will ensure that not only will the Indian Act be less and less important in status Aboriginal lives, but that the equity Aboriginal women continue to fight for will be upheld without a fight. But these women have to first be given the space they deserve in these processes, or any changes will only create the Indian Act under a different disguise. Borrows warns against this in his section on the gift of humility, that, “sometimes in our efforts to escape that which harms us, we become the very thing we are trying to escape”.29 If the proper resources and attention is brought to Aboriginal women’s issues, they can finally take their place in decision-making. With Aboriginal women finally equal with Aboriginal men, the Indian Act can be repealed, and group-specific, gender equal agreements, uniquely tailored to different First Nations, can take its place as an example of proper Aboriginal policy: made by Aboriginals, for Aboriginals.

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BIBLIOGRAPHY


