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Rights Of Aboriginal Women On- And Off-Reserve

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Introduction

The English common law system is the root of Euro-Canadian legal concepts; its application to women in North America is particularly significant. When Europeans arrived in North America, they brought with them historic and legal views of women developed during feudal times, and imposed them on Aboriginal women.

English common law introduced into North America excluded women from property ownership and from holding positions of power. This discrimination has been particularly profound with respect to Aboriginal cultures subjected to English common law and statutes. These indigenous peoples held very different views of women and their roles in society.

This paper describes Aboriginal women's right within their own societies and the discrimination they have suffered both on- and off-reserve as a result of Canadian laws. It describes the manner in which they have been discriminated against by the *Indian Act* and other Canadian laws such as the *Canadian Human Rights Act*.

A. Differing Views of Women's Rights

Rights of Women Under English Common Law

At the time of the first European settlements in North America, under English common law the legal status of women was the same as that of minors and wards. Women were perceived as property, owned first by their fathers and later by their husbands. The feudal system excluded widows and daughters from land ownership, as women were unable to bear arms. As Sinclair writes, under English common law, 'the married woman was one with idiots and children; she was not thought competent to manage the wealth, the land'.¹ As a result of women's legal 'infirmities', land could be left by its (male) owners only to their legal heirs, which excluded their daughters.

The system was 'patrilineal'; land was passed from father to eldest son, and in turn from eldest son to his eldest son. Women were considered legal 'non-persons'. They were unable to own land or vote, to enter into contracts, to stand for office, to enter the professions or, following separation or divorce, to have custody of their own children.

By the late 1800s, while some laws enacted in British North America allowed married women to own property², Euro-Canadian women were denied most rights available to men until the early 1900s.

¹ A.M. Sinclair, *Introduction to Real Property Law*, 3rd ed. (Toronto and Vancouver: Butterworths, 1987) at 21.

² The passing of the British 1893 *Married Women's Property Act* gave married women full legal control of all the property of every kind which they had owned at marriage or which they acquired after marriage either by

They took on the status of fully independent 'persons' recognized by law in Canada in 1930, with the Privy Council's ruling in the famous *Persons* case in which the appellate court ruled that the exclusion of women from public office, due to their legal incapacities, was a 'relic of times more barbarous than ours'.³

Aboriginal Women's Roles and Rights within Aboriginal Societies

At the time of first contact, Aboriginal women's roles within their own societies were markedly different from those of European women. For example, many Aboriginal cultures, if not the majority, were originally matriarchal or semi-matriarchal and matrilineal.⁴ A group of families often shared a common female ancestry, and lineage descended through the mother, not the father. Thus in the Mohawk tribe, children inherited the clan of their mother. For example, if a Mohawk woman of the Wolf Clan were to marry a Tuscarora man of the Beaver Clan, their children would follow the mother's clan and be Mohawks of the Wolf Clan. Due to its matrilineal nature, if an Iroquois man married a non-Indian woman, his children lost their Iroquois status among Iroquois society.

The rights and privileges of the men and women of the Iroquois clans were described in 1918 by J.N.B. Hewitt, a Tuscarora scholar. These included the equal right of each member of the clan, regardless of gender, to have political representation in councils, to have an equitable share in community property of the tribe, and to be buried in a common burial ground. Clan mothers in the Iroquois nations had many important powers, including the power to choose and impeach clan chiefs.

The Iroquois elder, Chief Jake Thomas, explained, '[a]ll the clan mothers are equal. Nobody has more power, no matter what nation. And same way with all the Chiefs you elevated; nobody will ever have any more power ... The Chief cannot tell another Chief what to do because he has a Clanmother'.⁵

While their lack of legal status prevented European women from owning property, many First Nations women held rights equal to men. Among the Kootenay tribe of British Columbia, it was women who owned property rather than men.⁶ Among the Chippewa, '[t]hough the women are as much in the power of the men, as any other articles of their property, they are always consulted, and possess a very considerable influence in the traffic with Europeans, and other important concerns'.⁷

inheritance or by their own earnings. Previously, this would have automatically become the property of their husbands.

³ Reference to Meaning of Word 'Persons' in Section 24 of British North America Act, 1867, sub nom *Edwards v. A.G. of Canada* [1930] A.C. 124 (J.C.P.C.).

⁴ Emma D. LaRocque, *Violence in Aboriginal Communities*, Health Canada (March, 1994), www.phac-aspc.gc.ca/ncfv-cnivf/family_violence.pdf at 71 [accessed 1 March 2005].

⁵ 'Chief Jake Thomas speaks of the Clan Mother's Role', http://tuscaroras.com/jtlc/The_Great_Law/chief_jake_thomas_clanmothers_role_pg1.html [accessed 1 March 2005].

⁶ A.F. Chamberlain, *Eighth Report on the North-Western Tribes of Canada for the British Association for the Advancement of Science: Committee on North-Western Tribes of the Dominion of Canada* (London: The Association, 1892) at 14.

⁷ Alexander Mackenzie, *Voyages from Montreal Through to the Continent of North America*, (S.I.: s.n 1801) at 150.

While European women could not have custody of children in the event of divorce or separation, George Henry Loskiel reported in 1838, without specifying which First Nation(s) he referred to, that Aboriginal 'children are always considered as the property of the wife. If a divorce takes place, they all follow her'.⁸ In the Heiltsuk people of British Columbia, it was said that '[t]he children may stay with either parent, or part of them may go with the mother and part with the father. The decision is left to the parents and children'.⁹

Aboriginal women, then, had many more rights than European women of the time. Aboriginal women selected chiefs, owned property and held genuine influence in tribal affairs. As the Aboriginal Justice Inquiry in Manitoba noted, '[w]omen were never considered inferior in Aboriginal society until Europeans arrived'.¹⁰

B. The 1876 Indian Act

Under the first *Indian Act*, Indian men and women were deemed to be 'minors' and 'wards' of the government. They were unable to enter into contracts, vote, or enter the professions. However, in other respects the *Act* recognized the rights of men, but not of women, such as the right of male band members over the age of 18 to make decisions about land through surrenders. In 1906, the *Indian Act* was amended to expressly state that both Indian men and women were 'non-persons' under law, by defining a 'person' as an individual *other* than an Indian. In this way, Aboriginal men and women were excluded from the professions, from holding office, from voting, and from entering into contracts, even though non-Aboriginal women had been defined legislatively as 'persons' in some provinces by this time.

Before European contact, Aboriginal women had traditionally played a prominent role in the consensual decision-making process of their communities. However, the *Indian Act* created the chief and council system of local government, thus removing women's powers since only men could stand for election as chief or councilor. 'The local Indian agent chaired the meetings of the chief and council, and had the power to remove them from office. Aboriginal women were denied any vote in the new system imposed by the Indian Affairs administration. As a result, they were stripped of any formal involvement in the political process'.¹¹

The 1876 *Indian Act* again emphasized male lineage, defining an Indian as any 'male person' of Indian blood and 'any woman lawfully married to such a person'. As a result, the rights of women as 'Indians' under the *Indian Act* were defined by their fathers and their marriages. Shin Imai points out, 'because of the dual policy of paternalism and assimilation, the *Indian Act* status provisions were a mishmash of nonsensical, ethnocentric and sexist rules. For example, Eurocentric patrilineal

⁸ George Henry Loskiel, *The History of the Moravian Mission Among the Indians of North America: from its Commencement to the Present Time, with a Preliminary Account of the Indians* (London: T. Allman, 1838) at 29.

⁹ 'Customs regarding Birth, Puberty, Marriage and Death', Franz Boas and Sir Daniel Wilson, Committee on North-Western Tribes of the Dominion of Canada, *Seventh Report on the North-Western Tribes of Canada*. (London: British Association for the Advancement of Science, 1891) at 12-13.

¹⁰ *Report of the Aboriginal Justice Inquiry in Manitoba*, vol. 1, 'The Justice System and Aboriginal People', The Aboriginal Justice Implementation Commission, November, 1999 Chapter 13 - Aboriginal Women, <http://www.ajic.mb.ca/volume.html> [accessed 2 March 2005].

¹¹ *Ibid.*

rules on family lineage were imposed on all First Nations ... [even] the Mohawks, which were matrilineal'.¹²

The *Indian Act* removed this status from women who married white men. Similar provisions had appeared as early as 1857 when legislation had been passed which contained enfranchisement provisions to 'civilize' Indians. The wife, widow, and lineal descendants of those Indians who voluntarily enfranchised [gave up their Indian status] were deemed themselves to be enfranchised and were no longer considered members of their former tribes, unless the widow or female lineal descendant married a non-enfranchised [status] Indian, in which case status was restored.¹³

Provision for the loss of status by women who marry non-Indians was first introduced in 1869:

Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of another tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.¹⁴

With the passage of the *Indian Act*, these provisions affected all Indian women who married non-Aboriginal men, and their children. By determining registration based on marriage, the *Indian Act* again treated women and their children as if they were the property of men.¹⁵

Women were also affected by other enfranchisement provisions of the act. It removed status from people in treaty and their children who took 'scrip' - a process whereby status was exchanged for money or land - and people who gave up their status in order to vote, to own property or to enter into the professions. The act also removed Indian status from children who were illegitimate and from Indians who served in the Armed Forces.

However Indian women were by far the largest group of Indians to lose their status as a result of these provisions. Most were 'de-registered' as a result of Section 12 of the *Indian Act*, introduced in 1951¹⁶, which established a centralized register of all registered Indians. 'Status' or 'registered' Indians had the right under the *Indian Act* to live on-reserve, to vote for chief and council, to share in band monies, and to own and inherit property on-reserve.

But non-status Indians had none of these rights. Under Section 12(1)(b), a woman who married a non-Indian was not entitled to be registered, and thus lost her status. Section 12(1)(a)(iv) removed status from a person whose parents married on or after September 4, 1951 and whose mother and paternal grandmother had not been status Indians before their marriages. These persons could be

¹² Shin Imai, Katherine Logan and Gary Stein, *Aboriginal Law Handbook* (Toronto: Carswell, 1995) at 123.

¹³ *An Act Respecting Civilization and Enfranchisement of Certain Indians* (1859) 22 Vic. c-29 s. 11.

¹⁴ *An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, (1868) S.C. c. 42 am. (1869), s. 6.

¹⁵ Patricia Montour-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 178.

¹⁶ Imai, Logan and Stein, *supra* note 12, at 5.

registered but they lost their Indian status as soon as they turned 21.¹⁷

Between 1958 and 1968, an estimated 4,605 Indian women lost their Indian status as a result of these provisions. As John Borrows and Leonard Rotman observe, the result of the *Indian Act* was that,

‘Aboriginal women ... have not only been disadvantaged because of their race, but have also been discriminated against because of their gender. This discrimination is often contrary to the traditional values of many communities which were matrilineal or matrilineal in nature, or which enjoyed a greater degree of equality between the sexes than was the case in many non-native societies.’¹⁸

C. Aboriginal Activists

Activists within the Aboriginal community who opposed Section 12 of the *Indian Act* included Sandra Lovelace, Mary Two Axe Early, and Jeannette Corbiere Lavell.

Born in 1942 at Wikwemikong on Manitoulin Island, Ontario, Jeannette Vivian Corbiere was an Anishnabe who worked for a variety of Aboriginal organizations including the Native Canadian Centre in Toronto. In 1965 she was chosen as Indian Princess of Canada.¹⁹

In 1970, when she married David Lavell, a white man, she soon received a letter from the Department of Indian Affairs advising her that she was no longer considered to be an Indian since ‘the following persons are not entitled to be registered, namely ... a woman who married a person who is not an Indian...’²⁰ This loss of status meant that her children were also deemed to be white, removing their rights to live on the reserve, to inherit family property on the reserve, to receive treaty benefits or to participate in band or social or political affairs on the reserve. As the wife of a white man, Mrs. Lavell even lost the right to be buried with her ancestors.

In 1960, the *Canadian Bill of Rights* had been passed. Section 1 of the *Bill of Rights* stated that,

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ... (b) the right of the individual to equality before the law and the protection of the law.

This prohibited discrimination on a number of grounds, including on the basis of sex. After her marriage broke up, Mrs. Lavell relied on the *Canadian Bill of Rights* to challenge Section 12 of the *Indian Act* in the courts on the grounds that it was discriminatory. Her case, which complained

¹⁷ Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues*, Library of Parliament, BP-410E, (Ottawa: 1996, revised 2003) <http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm#4tx> [accessed 1 March 2005].

¹⁸ John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Material and Commentary* (Toronto & Vancouver: Butterworths, 1998) at 595.

¹⁹ Jeannette Vivian Corbiere Lavell, *Celebrating Women’s Achievements: Changing Women, Changing History: Canadian Women Activists*, National Library of Canada, <http://www.nlc-bnc.ca/2/12/h12-302-3.html> [accessed 1 March 2005].

²⁰ *Ibid.*

of discrimination on the basis of sex, was the first launched under the *Bill of Rights*.

In June 1971, the Ontario courts ruled against her. Judge Grossberg of the Ontario County Court found that Mrs. Lavell had equal rights with all other married Canadian women and that, if anything, her status had been 'elevated' by no longer being an Indian, as she no longer occupied an 'inferior' position in Canada. The value of Mrs. Lavell's family ties to the reserve, her cultural identity as an Indian, and the rights to which she had become entitled through the many treaties signed by her ancestors were not considered by the court.²¹

Mrs. Lavell's appeal to the Federal Court of Appeal was unanimously upheld. However, the Canadian government appealed to the Supreme Court of Canada. The *Lavell* case was heard concurrently with that of Yvonne Bedard, who had been born on the Six Nations reserve. She had married a non-Indian and lived off-reserve until their separation, when she returned to the reserve. She lived in a house held by her mother, under a certificate of possession issued by the band council bequeathed to her in her mother's will. The terms of the will had been approved by both the council and the Minister of Indian Affairs, as required by the *Indian Act*. The Six Nations Council ordered Bedard and her two infant children to leave the reserve and dispose of the house. She transferred the certificate to her brother, who then received a certificate of possession from the band council for the house. However, the council again ordered Mrs. Bedard to leave. She obtained a judgment from the Supreme Court of Ontario declaring that Section 12(1)(b) of the *Indian Act* was inoperative and that the order was of no force or effect.

On August 27, 1973, a five-four majority held that the *Bill of Rights* did not protect Mrs. Lavell or Mrs. Bedard from discrimination as registration was a pre-requisite to Indian status and there was no inequality of treatment between Indian men and women due to the application of Section 12(1)(b) of the *Indian Act*.²²

As Patricia Montour-Angus argues, the Supreme Court did not seem to understand the concept of 'double' discrimination - that an Indian woman could face discrimination both as a woman and as an Indian. However 'white' the court deemed Mrs. Lavell to be, she was an Aboriginal woman already facing profound discrimination because of her race. The additional discrimination was the fact that under the *Indian Act* the same treatment was not given to Indian men:

The best I can do at explaining what the Chief Justice [Ritchie] said was to direct you to look at who is being discriminated against. Look at all Indians. All Indians are not being discriminated against. The men are not being discriminated against. Therefore there is no discrimination based on race. Look at the women. All women are not being discriminated against because this does not happen to White women. Therefore, there is no gender discrimination. The court could not understand that this pile of discrimination (race) and that pile of discrimination (gender) amount to more than nothing. The court could not understand the idea of double discrimination.²³

Another early activist who lobbied against Section 12 was Mary Two Axe Early who died in August, 2003 at the age of 84. She had become another leader in the campaign to repeal the Sections of the *Indian Act* that discriminated against women who 'married out'. Born in 1911 on Kahnawake, another Iroquois reserve, Mrs. Early moved to Brooklyn, New York in 1929 where she

²¹ *Lavell v. Canada* (1971) 22 DLR (3d) 182 (Ont. Co. Ct.).

²² *A.G. Canada v. Lavell; Isaac v. Bernard* (1973) 39 DLR (3d) 481 (S.C.C.).

²³ Montour-Angus, *supra* note 15, at 136.

married Edward Early, an Irish-American engineer.²⁴ Because she was enfranchised as a result of her marriage, she was only able to move back onto her reserve when her husband died because her daughter, with whom she lived, had regained Indian status by marrying a Mohawk man.²⁵

Mrs. Early entered politics at 55 on the death of a friend who had been ordered off the reserve after marrying a white man, and the Band Council refused permission for her burial on-reserve. In 1975, while attending an international women's conference in Mexico, Mrs. Early received word that she had been evicted from the reserve by the Kahnawake Band Council. The public outrage which followed her announcement of this during the conference resulted in the eviction order being withdrawn by council.²⁶

Another important Aboriginal activist was Sandra Lovelace, a Maliseet woman born in 1947 on the Tobique reserve in New Brunswick. In 1970 she married an American and moved with him to California where the marriage ended a few years later. On her return to her reserve, she learned that she and her children were denied housing, education and health care benefits provided to status Indians.²⁷

The *Lovelace* Case at the United Nations

On December 29, 1977, Mrs. Lovelace launched a legal challenge to Section 12 of the *Indian Act*. Unlike her predecessors, she went to the United Nations for help, claiming the *Indian Act* was discriminatory because it was contrary to the *Optional Protocol to the International Covenant on Civil and Political Rights* which Canada has signed.

In challenging Section 12 before the U.N. Committee on Human Rights, Mrs. Lovelace argued that while she had lost her status for marrying a white man, an Indian man who married a white woman did not.²⁸ Canada responded to her petition by responding that the *Indian Act* was designed to protect the Indian 'minority' (allowed under Section 27 of the *International Covenant*), and that a definition of 'Indian' was needed because of their special rights.

Canada also argued that:

Traditionally patrilineal [sic] family relationships were taken into account for determining legal claims. Since additionally, in the farming communities of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than non-Indian women, legal enactments from 1869 provided that an Indian woman who married a non-Indian man would lose her status as Indian. These reasons were still valid.²⁹

In response, Mrs. Lovelace argued that legal relationships within Indian families were traditionally

²⁴ 'Mary Two Axe Early', <http://www.ammsa.com/classroom/CLASS22WOMAN.html> [accessed 1 March 2005].

²⁵ *Ibid.*

²⁶ *Supra* note 24.

²⁷ *Sandra Lovelace, 1947* --...www.mta.ca/faculty/arts/canadian_studies/english/about/study_guide/famous_women, at 1 [accessed 1 March 2005].

²⁸ *Views of the Human Rights Committee under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 24/1977 (1) and (2), para. 1.

²⁹ *Ibid.* at para. 5.

patrilineal, and that this would justify discrimination in any event.³⁰ She concluded by asking the Human Rights Committee to recommend that Canada amend the provisions of the *Indian Act*.

In an interim decision, the United Nations Human Rights Committee recognized that the section created serious disadvantages for Indian women. Those who wanted to marry a non-Indian man might be discouraged from marrying at all, itself a breach of the international covenant designed to protect the family. Moreover, since only Indian women and not Indian men were affected, the committee noted its concern about Canada's commitments to secure human rights without discrimination. The committee also recognized the balancing act involved because the covenant required protection to be given to ethnic and linguistic minorities, which Canada had purported to do. A final problem was that the covenant had only been signed by Canada in 1976, several years after Mrs. Lovelace had married.

In order to have jurisdiction over Lovelace's complaint, the committee asked if Mrs. Lovelace had any additional problems after the date of marriage as a result of her change in status, and requested statistics on how many Indian women had in fact 'married out.' Finally, it asked Canada to clarify why Indian women marrying white men should lose their rights to residence, and when new legislation would be introduced.³¹

Canada's answers revealed the scope of displacement caused to Indian women by the *Indian Act* as a result of Section 12. An average of 510 Indian women married white men each year, compared to 590 Indian-Indian marriages and 422 Indian men marrying non-Indian women.³² Roughly one-third of all Indian women who married, and their children, were losing their Indian status by marrying white men.

Canada explained that Indian women lost their right to live on-reserve because the right to reside was part of the treaty obligations Canada owed status Indians. Canada also indicated that it planned to introduce new legislation to address the issue by 1981.³³

Mrs. Lovelace outlined to the committee other problems she had encountered as a result of section 12. After her marriage broke up, her status had not been restored. Although she was living on-reserve, she had no right to benefits and was only able to continue to live on the reserve due to the support of dissident members. Because of her loss of Indian status, she had lost all access to federal government programs including education, housing, and social assistance.³⁴

While the Lovelace matter was pending, campaigns were initiated by Aboriginal women's organizations. Mary Two Axe Early founded Equal Rights for Indian Women. This organization worked with the National Native Women's Associations to build public support for the repeal of Section 12. With the help of non-Aboriginal groups such as the National Action Committee on the Status of Women, and the Voice of Women, they began to conduct sit-ins, marches and court actions.³⁵ A huge march was organized by the women of the Tobique reserve in July, 1979; the Aboriginal Women's Walk from Oka to Ottawa brought the issue to national attention.³⁶

³⁰ Ibid. at para. 6.

³¹ Supra note 28, at para. 8.

³² Ibid. at para. 9.2.

³³ Ibid. at para. 9.3 - 9.5.

³⁴ Ibid. at para. 9.6 - 9.7.

³⁵ Supra note 28, at para. 13.1.

³⁶ Ibid.

In 1980, the United Nations Human Rights Committee released its decision. It found that as Mrs. Lovelace had married in 1970, it could not comment on the original cause of her loss of status. But it did describe the essence of her complaint as the fact that she had no legal right to reside on her reserve. A significant matter to the committee was her claim that 'the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the ties to home, family, friends and neighbours, and the loss of identity'.³⁷

Under Article 27, the committee noted that 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

Since Mrs. Lovelace was a member of a minority, the committee held that her rights were interfered with because of Section 12. The only Maliseet community she belonged to was her own, but she could no longer legally reside on the Tobique reserve. In Mrs. Lovelace's case, the committee found it natural that she would want to return to her reserve once her marriage broke up, as her main cultural attachment was to the Maliseet Band. As a result, 'whatever may be the merits of the *Indian Act*, it does not seem to the committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable or necessary to preserve the identity of the Band'. Section 12 was therefore an unjustifiable denial of her human rights.³⁸

Shortly after the United Nations Committee released its findings, the Canadian Constitution was amended; in 1982, the Canadian *Charter of Rights and Freedoms* became part of Canadian constitutional law. Section 15 of the *Charter* prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, or mental or physical disability.

However, the application of Section 15 was delayed for three years until April 1985. Just as it was to take effect, changes were made to the *Indian Act* to repeal Section 12 which would have been unconstitutional under Section 15 of the *Charter* as it violated the right to equality. These changes were contained in Bill C-31, which restored some of the rights taken away from Indian women.

D. Bill C-31

Bill C-31, *An Act to Amend the Indian Act*, was passed on June 17, 1985 and given Royal Assent on June 28, 1985. It was backdated to April 17, 1985, the date that the equality provisions of Section 15 of the *Charter of Rights and Freedoms* came into effect. With the passage of Bill C-31, Mary Two Axe Early became the first woman to have her status officially restored. When she died in 2003, she was buried at Kahnawake. This would not have been possible had she not regained her Indian status.

The Bill amended the *Indian Act* by restoring the status and membership rights of women who had lost their status under the old laws. The amendments did not change the role of the federal government in maintaining the Indian Register.

A complicated framework determines who may and may not apply for registration under the new

³⁷ *Views of the Human Rights Committee Under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 24/1977 (1) and (2) at para. 13.1.

³⁸ *Ibid.* at paras. 17-19.

provisions. Section 6(1) allows the possibility of reinstatement for women who lost status because they 'married out', and their children among others, including the illegitimate children of Indian women born prior to 14 August, 1956.

Under Section 6(1)(f), a person with two parents who are or were entitled to be registered is eligible for registration; Section 6(2) permits the registration of persons with only one parent entitled to be registered. However, the *Act* does not permit the registration of individuals with one non-status parent and one parent entitled to registration under Section 6(2). As well, status is only restored on application, and is not automatic. In addition, the grandchildren of a woman who marries out are not eligible for reinstatement, but the grandchildren of men who marries out are eligible.³⁹

Those people registered under Section 6(2) have fewer rights than those registered under Section 6(1) because they cannot pass on status to their child unless the child's other parent is also a registered Indian. This excludes the children of women who, prior to 1985, lost status because of their marriages to non-Indian men. While their mothers are entitled to regain status under Section 6(1), the children can only register under Section 6(2).

By contrast, the children of Indian men who married non-Indian women, and whose registration before 1985 was continued under Section 6(1), are able to pass on status if they marry non-Indians.⁴⁰ Thus, the *Act* again imposes patrilineal thinking on Aboriginal peoples. And as Patricia Montour-Angus points out, the effect of these provisions is again to treat men and women differently.⁴¹

Section 6 excludes children of two successive generations of Indian and non-Indian parents from registration. This is known as the 'second generation cut-off rule'. Given the high rate of intermarriage in some areas, this provision is controversial, and causes a concern that it will lead to the decline of the Indian population.⁴²

To summarize, the legislation excludes two categories of women from its provisions: those who had gained status by marrying a status Indian and then lost it (for example by later marrying a non-Indian), and children whose mothers had gained Indian status through marriage but whose fathers were not Indian.⁴³ As a result, the *Indian Act* now creates different classes of Indians: status, non-status, band members with Indian status, and band members without Indian status. And it again discriminates between men and women as it applies to their grandchildren, since children will not be registered under the *Act* unless they have two registered grandparents.

As Megan Furi and Jill Wherrett observe, the amendments have led to the rather absurd situation in which members of the same family can be registered in different categories. Under Bill C-31, a child born prior to the family's enfranchisement is eligible for registration under Section 6(1); a child born after enfranchisement is eligible only under Section 6(2). This affects the ability to pass on status, because the latter child will be able to pass on status to their children only if they marry a status Indian.⁴⁴ These provisions, however, cannot be challenged under human rights legislation

³⁹ Furi and Wherrett, *supra* note 17.

⁴⁰ *Ibid.*

⁴¹ Montour-Angus, *supra* note 23, at 183.

⁴² Imai, Logan and Stein, *supra* note 12, at 125.

⁴³ *Information Sheet*, Communications Branch, Department of Indian Affairs and Northern Development.

⁴⁴ Furi and Wherrett, *supra* note 17.

because of an *Human Rights Act* exemption which allows the *Indian Act* to discriminate.

Since Bill C-31 was passed, there have been almost a quarter million requests for registration. As of December 31, 2000, 114,512 people had gained Indian status based on Bill C-31 amendments, while 44,199 applications had been denied.⁴⁵ At the time of writing, Bill C-31 has restored Indian status to roughly 118,000 Indians.

With these enormous increases in the number of Indians restored to the registry, but with no commensurate increase in federal funding, many bands have resisted the application of Bill C-31. For example, this bill was immediately challenged by three Alberta First Nations - the Sawridge First Nation in northern Alberta led by Chief Walter Twinn, the Tsuu T'ina First Nation (located outside Calgary), and the Ermineskin First Nation of Hobbema. The Ermineskin Band claimed that it had a 'woman follows man' custom that meant that women who married non-band members left the reserve. It argued that Bill C-31 infringed on this custom.⁴⁶ Chief Walter Twinn insists their opposition is not about gender issues but rather about who controls band membership and assets.⁴⁷

In its decision released on 7 July 1995, the Federal Court upheld the 1985 amendments. It found that there were no existing Aboriginal or treaty rights to First Nations' control of membership under Section 35(1) of the *Constitution Act, 1982*. Or if there were, that these had been extinguished by changes to the *Constitution Act, 1982*.⁴⁸ The plaintiffs filed a notice of appeal to the Federal Court of Appeal on 29 September 1995. However, the original court decision was overturned by the Federal Court in 1997 on the grounds of a reasonable apprehension of bias by the trial judge. The Court of Appeal held that Justice Muldoon had made a number of comments critical and pejorative of Indians, and 'convey[ed] a very negative view of Aboriginal rights or special status for all or some Aboriginal peoples'.⁴⁹

Issues posed by the enfranchisement of Indian women and children into Canadian society, and their disenfranchisement from their own, continue to occupy the courts. A survey of actions underway in the Federal Court reveals that challenges to rulings by the registrar and complaints of discrimination under the *Indian Act* far outnumber all other cases involving Aboriginal issues. As the Library of Parliament observed, '[i]n recent years, membership-related disputes, often tied directly to Bill C-31, have resulted in a number of significant court cases'.⁵⁰

E. Rights of Registered Indians Living On- and Off-Reserve

Under the *Indian Act*, the rights of Indian women living on and off the reserve are generally the same as those of Indian men. Registered Indians living on-reserve can stand for election as councilors and vote in elections. They can receive treaty benefits such as annuities, are entitled to Canadian government tax exemptions and health and education programs, as well as other economic benefits. However, band members of one First Nation living on the reserve of another

⁴⁵ Ibid.

⁴⁶ *Sawridge Band v. Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.).

⁴⁷ Native Council of Canada Commentary: *Background and Community Options: Sawridge Band v. Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.). <http://www.ammsa.com/classroom/CLASSIC-31.html> [accessed 1 March 2005].

⁴⁸ *Supra* note 46.

⁴⁹ *Sawridge Band v. Canada* [1997] 3 F.C. 580 (F.C.C.A.).

⁵⁰ Furi and Wherrett, *supra* note 17.

First Nation are not entitled to participate in political affairs of the band, although they can run for Chief. But they may enjoy most of the benefits provided by the federal government.⁵¹

Registered Indians living off-reserve cannot stand for election as councilors, but can run for Chief. Before the Supreme Court of Canada's *Corbiere* decision, they were unable to vote. However, that decision extending voting rights to off-reserve members concluded that such band members have important interests in band governance. By denying them the right to vote and participate in their band's governance, the *Indian Act* perpetuated the historic disadvantage experienced by off-reserve members, and treated them as less worthy simply because they lived off the reserve.⁵²

Off-reserve band members have only partial tax exemptions and may not be exempt from provincial tax laws.⁵³ Since *Corbiere*, the extent to which men and women who live off-reserve may be entitled to program benefits is unclear. However, since only women had lost status before Bill C-31, Aboriginal women are more likely to live off-reserve than men. Thus, access to programs and other benefits are important, and the denial of them affects non-status Indian women more than men.

The rights of non-status Indians living on-reserve are limited. As they are not band members, they do not have a right to vote, do not enjoy treaty benefits, and are ineligible for tax exemptions. In many cases, their ability to gain access to benefits such as housing and education is decided by band council. In particular, separated or divorced Aboriginal women can be excluded from such benefits due to discrimination by band councils. Where discrimination occurs on the basis of gender however, the *Canadian Human Rights Act* does not always provide protection. This is in part because Section 67 of that act removes from review certain actions taken under the *Indian Act*. However, the courts have also ruled that an *Indian Act* by-law prohibiting non-Indian spouses from residing on reserve may contravene Section 15(1) of the Charter, but is justified in light of the socio-economic circumstances faced by the band.⁵⁴

F. *Canadian Human Rights Act*

The *Canadian Human Rights Act* was first enacted in 1978, long before the *Charter of Rights and Freedoms*. Although Section 3(1) of the *Act* prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for which a pardon has been entered, Section 67 of the *Act* states 'Nothing in this Act affects any provision of the *Indian Act* or any provision made or pursuant to that Act'.

Designed to be a temporary measure, Section 67 is still on the books despite the enactment of the *Charter of Rights and Freedoms*.⁵⁵ In 1989, the Federal Court of Appeal held that Section 67 of the *Indian Act* 'immunizes' actions of the Minister and the Department of Indian and Northern Affairs from court scrutiny, even if such actions are in violation of human rights laws.⁵⁶ Because of its effect, the Human Rights Tribunal has very narrowly interpreted the section. In *Gordon Band Council v. Laslo*, the tribunal held it had jurisdiction to entertain a claim of

⁵¹ Imai, Logan and Stein, supra note 12, at 127.

⁵² *Corbiere v. Canada* [1999] 2 S.C.R. 203 (S.C.C.).

⁵³ Imai, Logan and Stein, supra note 12, at 128.

⁵⁴ *Six Nations of the Grand River Band v. Henderson* [1997] 1 C.N.L.R. 202 (Ont. Gen. Div.).

⁵⁵ Interestingly, no one has challenged s. 67 of the *Human Rights Act* as being inconsistent with the later *Charter of Rights and Freedoms*, and thus unenforceable under s. 52 of the *Constitution Act, 1982*.

⁵⁶ *Re Desjarlais*, [1989] 3 F.C. 605 (C.A.).

discrimination where the complainant was a Bill C-31 Indian, a decision upheld by the Federal Court.⁵⁷

An attempt by a band to suspend the operation of Bill C-31 was rejected by the tribunal on the basis that band powers under the *Indian Act* do not include the power to impose a moratorium.⁵⁸

Similarly, in *Courtois*, the Human Rights Tribunal held that it had jurisdiction where a band council had imposed a two-year moratorium on providing services to women reinstated under Bill C-31, and excluded their children from attending a reserve school. The tribunal ruled that since only the Department of Indian and Northern Affairs - and not the band - had the authority to supply education, the band could not rely on the exemption. The tribunal also concluded that a fear of insufficient resources did not justify discrimination.⁵⁹

However, the tribunal was found to have properly decided to refuse jurisdiction where the Department of Indian Affairs had refused to pay for the education of a status Indian girl who wished to study and live away from home. In this instance, the tribunal held that the policy was within the department's authority and thus was not reviewable by the Human Rights Tribunal because of Section 67.

The application of the *Canadian Human Rights Act* basically turns on whether *The Indian Act* explicitly provides authority to band council or the Department of Indian Affairs to undertake the action complained of. If the answer is 'yes', Section 67 exempts any further review by the tribunal. This results in some odd situations. For example, while an allegation of denial of education services to children can be dealt with by the tribunal because of *Courtois*, an allegation of the discriminatory denial of on-reserve housing by their mothers cannot, since that falls within the authority given to band councils under the *Indian Act*. In many cases it also leaves Indian women with little remedy except to go to court when facing discrimination. This can be very expensive, particularly when compared to the Human Rights Commission processes in which commission counsel represent the claimant during tribunal hearings without charge.

Justice LaForest, a retired judge of the Supreme Court of Canada, carried out a review of the *Canadian Human Rights Act* and recommended that Section 67 of the *Canadian Human Rights Act* be removed so that the act would apply to all federal government and band council decisions. He also recommended that a provision be inserted to help with its interpretation in a First Nation context. However, while other sections of the act have since been amended, Section 67 remains in place.

As a result, where Section 67 applies, Indian women must take their cases to the Federal Court. As legal aid is not available for most civil cases, this is impossible for most women.

Rights to Own Land On Reserve

Under *The Constitution Act, 1867*, 'Indians, and Lands reserved for the Indians' falls purely within federal jurisdiction. Thus, Indian reserve lands are held by the federal government in trust for bands, and cannot be owned by Aboriginal people individually. Section 20(1) of the *Indian Act* allows band councils to allot lands to band members by issuing certificates of possession.

⁵⁷ *Gordon Band Council v. Laslo* [1996] F.C.J. No. 327 (T.D.).

⁵⁸ *Raphael v. Montagnais du Lac Saint-Jean Council* (June 9, 1995, unreported) Can. Human Rights Tribunal.

⁵⁹ *Courtois v. Canada (Minister of Indian Affairs and Northern Development)*, [1991] 1 C.N.L.R. 40.

Most certificates are issued in the husband's name. As Indian lands fall exclusively within federal jurisdiction, Aboriginal women are unable to take advantage of provincial matrimonial property laws that prescribe equal division of property. An Aboriginal woman who separates or divorces cannot get possession of the matrimonial home under matrimonial property laws as these are provincial laws and only the federal government has the jurisdiction to pass law affecting the ownership and possession of Indian lands.⁶⁰

A court cannot decide who has the right to live in a house on-reserve as this can only be determined by a band council under the *Indian Act*. The court can, however, order the husband to pay his wife compensation for her share of the property.

While Section 6 of *The Canadian Human Rights Act* prohibits discrimination in the provision of residential accommodation, its provisions are not applicable to an Indian women discriminated against in this manner because of Section 67. And depending on the policies, a husband can return the land to the band without his wife's consent.⁶¹

The inability to own land on-reserve has implications beyond property issues. Aboriginal women are more likely to face domestic abuse than other women in Canada. According to the Manitoba Aboriginal Justice Inquiry, while one in ten women in Canada is abused by her partner, almost one in three Aboriginal women is abused. The inquiry writes:

In northern, isolated reserve communities, the abused woman is placed in a more difficult situation when the question of calling the police arises. If she calls the police, it may take a day or longer for them to arrive. If they arrive while a party is going on, they may refuse to remove the offender or may simply drive him down the road, from where he can return again, only angrier. There is a lack of housing for families in isolated communities and no 'safe house' available for women and children trying to escape an abusive man. They may be forced to spend the night in the bush, or be forced to leave the reserve entirely.⁶²

If an Aboriginal woman leaves the reserve to escape domestic abuse, she can lose her home altogether. There is often a long waiting list for reserve housing, with a great deal of pressure on band councils to re-allocate housing as soon as possible. As Christine Goodwin reports, in some extreme cases, 'a band council will confiscate a house, if it is vacant, after only ten days. Generally, when Aboriginal women go to a shelter, their spouses also leave for a number of reasons. For a brief period, the houses appear to be abandoned. In rare instances, a woman will have been given notice by the band council that she has to give up possession of her house, but in the majority of cases, no notice is given'.⁶³ As most chiefs and council members are male, they will sometimes show bias in favour of the husband in a domestic abuse situation, and '[t]his can effectively chase the woman from her home and community'.⁶⁴

⁶⁰ Provincial laws of general application apply on reserves because of Section 88 of the Indian Act. However the Supreme Court of Canada, in *Derrickson v. Derrickson* [1986] 1 S.C.R. 285, held that only the federal government can pass laws affecting the ownership and possession of Indian lands.

⁶¹ Christine M. Goodwin, 'Human Rights Women's Rights, Aboriginal Rights: Indivisible and Guaranteed?' (2002), *Newsletter of the Alberta Civil Liberties Research Centre*, vol. 8, no. 2, <http://www.aclrc.com/Newsletter/centrepiece8no2.html> [accessed 1 March 2005].

⁶² *Supra* note 10.

⁶³ Goodwin, *supra* note 61.

⁶⁴ *Supra* note 10.

Right to Stand for Office

Prior to 1951, Indian women were eligible for election to band councils. But the passage of the *Charter of Rights and Freedoms* removed this right. Under Section 75(1) of the *Indian Act*, only band members can be elected as councilors. Because of the discrimination outlined earlier, non-status Indian women cannot stand for election as band councilors. The recent case of *Goodswimmer*, however, discussed below, indicates that this restriction does not apply to those who run for the position of Chief.⁶⁵

In March 1992, Darlene Desjarlais was elected Chief of Alberta's Sturgeon Lake Indian Band. Although Mrs. Desjarlais was married to a band member and lived on-reserve, she was not a band member and could not vote in the election. Her status was neither that of a status Indian nor a band member. As a result, she was not eligible to vote. An appeal of her election was filed but denied by the Minister of Indian Affairs and the Federal Court Trial Division. The Federal Court of Appeal held in *Goodswimmer* that a Chief did not need to be a member of the Band as Section 75(1) of the *Indian Act* specifies that only band members may be elected as councilors; it did not specify any eligibility requirements for the position of Chief.⁶⁶ An appeal of the Trial Division decision was dismissed by the Federal Court of Appeal and a further appeal to the Supreme Court of Canada was rejected on the basis that the issue was moot.⁶⁷

Conclusion

Patricia Monture-Angus has argued that the 'civilization' process forced Indian people to accept a patriarchal style of government, and that Iroquois women, given their cultural status and importance as women, were disproportionately and adversely affected by Canadian laws. She points out that the loss of the right to vote, which Iroquois women had traditionally held, was not restored until 1960. To Montour, the loss of status included the loss of the honour and prestige Iroquois women had held within their society. The same may be said of women from other First Nation cultures.

While changes in the Constitution have resulted in progress in recent years, the rights of Aboriginal women are still not equal to those of Aboriginal men. Section 35 of the *Constitution Act, 1982*, recognized and affirmed existing Aboriginal and treaty rights and Section 35(4) guaranteed those rights equally to both sexes. However, many of the problems facing Aboriginal women are not rooted in Aboriginal or treaty rights but in jurisdictional issues and inappropriate laws. While Section 15 of the *Charter of Rights and Freedoms* guarantees individuals equality before and under the law, other legislative provisions, such as Section 67 of the *Canadian Human Rights Act*, expressly permit discrimination against Aboriginal women.

The Native Women's Association's attempt to get funding to enable them to participate in the 1992 Charlottetown Accord negotiations was unsuccessful. The federal government argued that they were adequately represented by other organizations such as the Assembly of First Nations, which had received funding. The Supreme Court of Canada agreed. It ruled that Aboriginal women's

⁶⁵ *Goodswimmer v. Canada* (Minister of Indian Affairs), [1995] 3 C.N.L.R. 72 (F.C.A.).

⁶⁶ *Ibid.*

⁶⁷ *Goodswimmer v. Canada*. [1997] 1 S.C.R. 309 (S.C.C.).

equality rights under both Section 15 and Section 35(4) had not been violated.⁶⁸

The Charlottetown Accord would have likely guaranteed Aboriginal women's equality rights under the proposed sections dealing with self-government. However, the Accord was not ratified. Current federal government policy ensures that a gender equality analysis is undertaken when Indian Affairs' policies, programs, regulations and legislation are developed but this applies only to new legislation, and policies and not those that are currently in place.⁶⁹ In the meantime, restrictive and discriminatory legislative provisions continue to apply.

The growth in the number of status Indians living off-reserve since the passage of Bill C-31 has caused problems for many Aboriginal women. Many programs are available only to status Indians who live on-reserve. Many Aboriginal women who wish to live on-reserve cannot do so, due to lack of housing. Those who do live on-reserve often lack protection from a system that leaves the allocation of housing to the discretion of band councils.

Indian women face other problems as well. Because of jurisdictional issues, they lack legal rights to possession of the matrimonial home if it is located on-reserve. The Native Women's Association has unsuccessfully tried to have matrimonial property rights addressed through legislation. They continue to have concerns about the status of women under the *Indian Act*, as well as their access to band membership, participation in self-government, and access to programs controlled by band councils.

Indian women do not have the same human rights or protection for their rights as other Canadian women. They continue to face discrimination both on- and off-reserve.

While Canadian women have long secured equality in legislation with regards to property, voting and custody, Aboriginal women still lag behind. More significantly, the common law and statutes such as the *Indian Act* have forced Aboriginal men and women to conform to views of women inconsistent with their own laws and with the prestige historically accorded Aboriginal women in their own communities. This has resulted in a long and troubling history of double discrimination.

About the Scow Institute

The Scow Institute is a non-partisan organization dedicated to addressing public misconceptions about issues relating to Aboriginal people and Aboriginal rights. For more information, please visit our website at www.scowinstitute.ca.

⁶⁸ *Native Women's Association of Canada v. R.* [1994] 3 S.C.R. 627.

⁶⁹ *Diversity and Justice: Gender Perspectives: A Guide to Gender Equality Analysis*, Department of Justice Canada, <http://canada.justice.gc.ca/en/dept/pub/guide/intro.htm> [accessed 16 July 2003].

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