GENDER DISCRIMINATION AND INDIAN STATUS: TWO WRONGS DON'T MAKE A RIGHT

A Review of the *McIvor* decision and Bill C-3

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I. INTRODUCTION

On March 11, 2010, Parliament gave first reading to Bill C-3, an Act to promote gender equality in Indian registration by responding to the Court of Appeal for British Columbia decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*.[1] This bill represents the first time in twenty-five years that Parliament has considered the registration provisions of the federal *Indian Act*.[2] The question is whether Bill C-3 actually promotes gender equality in Indian registration. The answer is sort of but not quite.

II. BACKGROUND TO BILL C-3

A. Bill C-31 and Sharon McIvor

In 1985, Bill C-31[3] amended the *Indian Act* to provide equal treatment of all male and female Indians prospectively respecting entitlement to registration as a status Indian. Bill C-31 was directed at removing discrimination against women in the *Indian Act* registration provisions. All registered Indians are now subject to the "second generation cut-off rule" as a result of two successive generations of parenting with non-Indians of either sex. However, some discrimination remains and was not fully removed by Bill C-31.

Ms. McIvor was born in 1948. She was not registered. She married a non-Indian, Charles Grismer, in 1970. Ms. McIvor did not believe that she was entitled to status under earlier legislation, because she understood that neither of her parents were entitled to status, both being children of non-Indian fathers. Ms. McIvor would, in any event, have lost her right to status under the former s. 12(1)(b) when she married a non-Indian.

Sections 6(1) and 6(2) were established by the enactment of Bill C-31, which came into force in 1985. In September 1985, Ms. McIvor applied under the amended legislation for Indian status on behalf of herself and her children. The application took years to resolve. Eventually, Sharon McIvor obtained her status under section 6(1)(c). Her son, Jacob Grismer, born before 1985, obtained Indian status under section 6(2). However, because Mr. Grismer's wife was not a status Indian, Mr. Grismer was unable to pass his status to his children.

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[1] *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153 ("*McIvor*"). The authors were counsel for the West Moberly First Nations as an intervener in the *McIvor* appeal.
[2] R.S.C. 1985 c. I-5 ("*Indian Act*")
[3] *An Act to Amend the Indian Act*, S.C. 1985, c. 27 ("Bill C-31")

Individuals like Ms. McIvor and Mr. Grismer face the "second generation cut-off" rule one generation sooner than male Indians who married and had children with non-Indians prior to 1985. Ms. McIvor and Mr. Grismer accordingly challenged the 1985 amendments to the *Indian Act*, specifically section 6 on the basis that the status provisions nevertheless contained residual discrimination on the basis of sex.

B. Trial Decision

In her Reasons for Judgment,[4] the trial judge held that section 6 of the *Indian Act* violated the equality rights of Sharon McIvor and Jacob Grismer under section 15 of the *Charter*. The benefit of law at issue is the right to transmit Indian status and cultural identity to future generations. The trial judge ruled those sections of the *Indian Act* unconstitutional. The trial judge made an order granting the right to Indian status to any person who had a female ancestor who had lost her status upon marriage to a non-Indian. The trial judge refused to grant a stay of her judgment to allow Parliament time to figure out what to do and instead fashioned a complex yet broad remedy to alleviate the sex discrimination.

C. Appeal Decision

Canada appealed the trial decision to the BC Court of Appeal. The appeal was allowed in part. Mr. Justice Groberman speaking for the court found that the trial judge erred in granting a remedy founded on discrimination on the basis of matrilineal descent. The BC Court of Appeal found that the proper ground for discrimination was sex because the 1985 amendments had the effect of granting some descendants of men ongoing advantages over descendants of women.

However, the BC Court of Appeal also found that the discrimination was on a much narrower basis than did the trial judge. Under s. 12(1)(a)(iv) of the former legislation, the grandchild of the hypothetical brother of Ms. McIvor would have lost its Indian status at age 21 (the "Double Mother Rule"). Under the 1985 legislation, the hypothetical brother's grandchildren have Indian status under s. 6(1)(c) or 6(2) and are able to transmit status to any children that they have with persons with status. Ms. McIvor's grandchildren, on the other hand, have no entitlement to Indian status. Thus, the BC Court of Appeal found that sections 6(1)(a) and 6(1)(c) of the *Indian Act* violate the *Charter* only to the extent that they grant individuals to

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[4] *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827

whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(a)(iv) of the former legislation. In essence, the court held that Bill C-31 effectively went beyond preserving rights by enhancing the right to transmit status to those who formerly lost status under the Double Mother Rule.

The BC Court of Appeal also held that the trial judge erred in defining the extent of the *Charter* violation and that the effect of the trial decision would be to apply s. 15 of the *Charter* retrospectively. According to Mr. Justice Groberman, the trial judge had considered it necessary to redress all discrimination that had occurred prior to 1985 and would have granted Indian status to all individuals who could show that somewhere in their ancestry there was a person who had lost Indian status by virtue of being a woman married to a non-Indian.

Notwithstanding that the BC Court of Appeal narrowed the degree to which there was a s. 15 infringement, the court nonetheless held that the infringement was not justified by s. 1 of the *Charter*. While the need to preserve vested rights of those who have status did constitute a pressing and substantial governmental objective justifying the legislation, Bill C-31 did not minimally impair the equality rights of the plaintiffs. Accordingly, it was not saved by s. 1 of the *Charter*.

As a result of this *Charter* violation, the BC Court of Appeal declared on April 9, 2009 that sections 6(1)(a) and 6(1)(c) of the *Indian Act* are of no force and effect. Significantly, the BC Court of Appeal refused to "read in" provisions to overcome the discrimination as the trial judge had done in the decision below. By doing so, the court eliminated not only s. 6(1)(c), the subsection by which many Aboriginal women regained their status as Indians (specifically, those who had married non-Indians before 1985) but also s. 6(1)(a), the subsection by which many Aboriginal men, women and children had their pre-1985 Indian status recognised and continued post-1985. The only Indians who appear to keep their status under the judgment are:

- members of new Indian bands since 1985 (s. 6(1)(b));
- Indian men, their wives and children, who were enfranchised by Minister's order before 1985 (s. 6(1)(d));
- the rare cases of those who lost status pre-1985 for becoming professionals or leaving the country (s. 6(1)(e)); and

- the children of one or two such individuals (s. 6(1)(f), s. 6(2)).

However, the BC Court of Appeal suspended the effect of its judgment for 12 months, to enable Parliament to respond to the declaration with a legislative remedy.

D. Supreme Court of Canada

On June 2, 2009, Canada announced that it would not seek leave to appeal to the Supreme Court of Canada. Instead, Canada decided to proceed with legislative amendments and indicated a willingness to work with First Nation organizations to facilitate the necessary legislation.

On June 4, 2009, Sharon McIvor filed an application seeking leave to appeal to the Supreme Court of Canada. On November 5, 2009, the Supreme Court of Canada denied leave to appeal to Sharon McIvor.

III. PARLIAMENT'S RESPONSE - *BILL C-3*

Parliament proceeded with crafting amendments to remedy the discrimination found by the BC Court of Appeal. After several engagement sessions with national and regional Aboriginal organizations and accepting written comments, Parliament announced its proposed amendments contained in Bill C-3, the *Gender Equity in Indian Registration Act*.

As a result of introducing Bill C-3, Canada brought a motion before the BC Court of Appeal to extend the April 5th deadline for re-enacting those provisions. On April 1, 2010, the court granted the motion, extending the suspension of the declaration to July 5, 2010.[5]

A. New Registration Provision

The main amendment contained in Bill C-3 is the addition of subsection 6(1)(c.1) to the *Indian Act* that would provide status to any individual:

- whose mother lost Indian status upon marrying a non-Indian man;
- whose father is a non-Indian;

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[5] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 168, paragraphs 11 and 19. Interestingly, the court did not grant immediate registration to Mr. Grismer's two children as a condition of the extension, as requested by the respondents. The court held that this was not a case which demanded "a special personalized order": paragraph 18.

- who was born after the mother lost Indian status but before April 17, 1985, unless the individual's parents married each other prior to that date; and
- who had a child with a non-Indian on or after September 4, 1951.

Subsection 6(1)(c.1) will apply to individuals currently registered, or entitled to be registered, under subsection 6(2) who meet the above criteria.[6] New registration will be available to the children of individuals covered by paragraph 6(1)(c.1) (whether born before, on, or after September 4, 1951) under subsection 6(2).

However, puzzling is the requirement under the proposed s. 6(1)(c.1)(iv) that one must have a child before one is eligible for registration under s. 6(1)(c.1).[7] A person should have status according to their ancestry rather than whether they themselves have parented a child. This will lead to administrative inefficiencies, as a person eligible for registration under s. 6(1)(c.1) will have to apply not only for registration of his or her child but also to change his or her own registration from s. 6(2) to 6(1)(c.1) in order that the child may be registered (especially in the case where the s. 6(1)(c.1) person has parented a child with a non-Indian).

New registration under s. 6(2) will be available to individuals meeting all of the following criteria:

- whose grandmother lost Indian status as a result of marrying a non-Indian;
- who has one parent currently registered, or entitled to be registered, under subsection 6(2) of the *Indian Act*; and
- who was born on or after September 4, 1951.

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[6] It should be noted that there are many people registered under s. 6(2) who were registered post-1985 because they were not registered pre-1985 for a number of reasons other than gender discrimination. One of those reasons had to do with adoption. In the 60s and 70s, numerous First Nation children were adopted out but were not registered as Indians. After 1985, they were registered as Indians but under s. 6(2). In many of those cases, their mothers still had status at the time of the children's birth and so after 1985 were reinstated because they were entitled to be registered at their birth but were not. However, they were given the same lesser status – namely s. 6(2). Bill C-3 will not provide any benefit to those people who were given s. 6(2) status for reasons different from the *McIvor* case. Unless a person meets all of the criteria, they are left out.

[7] This raises a potential concern respecting "family status" discrimination in that some people will only be "bumped up" from s. 6(2) to 6(1) status if they parent a child. This may affect people whose bands' membership codes deny membership to Indians registered under s. 6(2) and also in communities where there is a certain stigma associated with being a s. 6(2) rather than a s. 6(1).

B. Existing Registrants

The proposed amendments will also re-enact the provisions struck down by the decision of the Court of Appeal, i.e. paragraphs 6(1)(a) and 6(1)(c). The *Gender Equity in Indian Registration Act* will come into force, or will be deemed to come into force, on a day on or after April 5th, 2010, to be fixed by order of the Governor in Council. This is to protect the entitlement to registration of persons registered or entitled to be registered under those paragraphs so that no one will lose their registration as an Indian as a result of these amendments.

C. No Liability

Of concern is section 9, which would remove the right of anyone to sue Canada for not having provided them with status as a result of the gender discrimination addressed by this legislation.

The government was aware, or should be presumed to have been aware, that Bill C-31 was not *Charter* consistent as far back as 1985. The government then did nothing about it for over twenty years until the *McIvor* decision reached the BC Court of Appeal. It is difficult to understand the justice of this "no liability" provision. The inclusion of such a provision may be subject to a *Charter* challenge.

D. Band Membership

For bands whose membership is determined by Indian and Northern Affairs Canada in accordance with section 11 of the *Indian Act*, applicants will be added to the band list at the time of registration.

For bands that have assumed control of their own membership under section 10 of the *Indian Act*, their membership will be determined by the membership rules adopted by the band.

However, Bill C-3 fails to provide additional resources to First Nations to address an influx of persons with status, particularly section 11 bands. The absence of appropriate funding is regrettable, in light of the government's own estimates that up to 42,850 individuals may be able to change their status from s. 6(2) to s. 6(1), and up to 39,763 individuals will be newly entitled

to registration under s. 6(2).[8] This seems to be an invitation for some First Nations to adopt more restrictive membership codes, as was seen after the passage of Bill C-31 in 1985.

E. Continuing Discrimination

Unfortunately, Bill C-3 does <u>not</u> completely eliminate discrimination from the registration provisions of the *Indian Act*. The proposed amendments do not address the discriminatory aspects of the "second generation cut-off rule" enacted in 1985, something which the parties and the court studiously avoided in the *McIvor* case.

Perhaps more importantly, Bill C-3 does not sufficiently address the source of discrimination identified by the BC Court of Appeal: that sections 6(1)(a) and 6(1)(c) violate the *Charter* to the extent that they grant individuals to whom the "Double Mother Rule" applied greater rights than they would have had under the former legislation. The following chart shows how Double Mother reinstatees will still have "better status" than those in the comparator group even after Parliament's proposed amendments.

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[8] "*Estimates of Demographic Implications from Indian Registration Amendments: McIvor v. Canada*", Indian and Northern Affairs Canada (Minister of Public Works and Government Services Canada, March 2010)

Indian status inherited from a Female Grandparent (Sharon McIvor)		**Indian status inherited from a Male Grandparent (Hypothetical Brother)**	
Before 1985			
Sharon McIvor married non-Indian man	lost status	**Hypothetical Brother** married non-Indian woman	status
Jacob Grismer (son) married non-Indian woman	no status	Son married non-Indian woman	status
Grandchild	no status	Grandchild double mother rule	old s. 12(1)(a)(iv) status until 21 yrs
After 1985 (Bill C-31)			
Sharon McIvor married non-Indian man	6(1)(c) reinstated	**Hypothetical Brother** married non-Indian woman	6(1)(a) maintains status
Jacob Grismer (son) married non-Indian woman	6(2) second-gen. cut-off	Son married non-Indian woman	6(1)(a) maintains status
Grandchild born ***after*** 1985	no status	Grandchild born ***after*** 1985	6(2) second-gen. cut-off
(Alternative) Grandchild born ***before*** 1985	no status	(Alternative) Grandchild born ***before*** 1985	**6(1)(c)** **double mother reinstatee**
Parliament's proposed amendments (Bill C-3)			
Sharon McIvor married non-Indian man	6(1)(c)	**Hypothetical Brother** married non-Indian woman	6(1)(a)
Jacob Grismer (son) married non-Indian woman	6(1)(c.1)	Son married non-Indian woman	6(1)(a)
Grandchild born ***after*** 1985	6(2)	Grandchild born ***after*** 1985	6(2)
(Alternative) Grandchild born ***before*** 1985	6(2) **CONTINUING DISCRIMINATION**	(Alternative) Grandchild born ***before*** 1985	6(1)(c)

Bill C-3 will only eliminate gender discrimination for some individuals. As the above chart demonstrates, some individuals will continue to suffer discrimination by receiving lesser or no status because they had an Indian grandmother, instead of an Indian grandfather, in the sense that a grandchild born before 1985 descended from an Indian grandfather will be able to transmit status for one generation longer than those descended from an Indian grandmother.

Parliament should take the opportunity provided by the *McIvor* decision to eradicate gender inequality in the registration provisions of the *Indian Act*, rather than just to follow the letter of the law expressed in the decision. At a minimum, Bill C-3 should be amended so that a grandchild born before 1985 of a female grandparent would receive the same entitlement to status as a grandchild of a male grandparent.

IV. Issues Related to Treaty and Aboriginal Rights

The BC Court of Appeal declined to make any broad statements linking Indian status to Aboriginal or Treaty rights protected by section 35(1) of the *Constitution Act, 1982*. The court ruled that the case to date had not been presented by the parties in a manner that would allow it to consider section 35 arguments. However, the court did acknowledge that "arguments might be made to the effect that elements of Indian status should be viewed as aboriginal or treaty rights" and that "it seems likely that, at least for some purposes, Parliament's ability to determine who is and who is not an Indian" may be "circumscribed" by section 35.[9]

A. Treaty Rights

When one considers the potential impact on rights found in the *Indian Act* and on Treaty rights, the *McIvor* case and Bill C-3 take on added significance. Status as a Treaty Indian, i.e. an Aboriginal person who is a beneficiary of a Treaty with Canada, confers not only rights under the *Indian Act* such as education and health services, but also to Treaty entitlements such as annuity payments appropriated by Parliament under section 72 of the *Indian Act*. In addition, in order to exercise other rights generally conferred by Treaties (e.g. hunting, fishing and trapping), an Aboriginal person must have a sufficient connection to the Indian band that

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[9] *McIvor*, para. 66

signed the Treaty.[10] Proof of registration as a status Indian is a necessary pre-requisite for membership in the majority of Indian bands in Canada. Thus, status confers on a Treaty Indian a legal mechanism to access his or her entitlements under a particular Treaty.[11]

For descendants of Treaty signatories who are similarly situated to Ms. McIvor and Mr. Grismer, the result at trial represented a profound re-connection to the legacy of their ancestors who signed Treaties and to their present human dignity as Treaty Indians, by entitling them to transmit their Treaty identity and legal entitlements to subsequent generations to the same degree as male Treaty Indians who married and had children with non-Indians prior to 1985. Fewer people will experience this re-connection as a result of the BC Court of Appeal's decision and Bill C-3.

B. Second Generation Cut-Off Rule

Finally, the "elephant in the room" not addressed by *McIvor* or Bill C-3 is the "second generation cut-off rule" enacted through Bill C-31 in 1985.

There is a distinction between a status Indian and an Aboriginal person. The former is statutorily defined whereas the other is a broader concept, dependent on culture, anthropology, politics, linguistics, a common shared history and experience and so on.[12]

This difference between "Indian" and "Aboriginal" has legal significance. According to the definition of "band" under the *Indian Act*, a band is "a body of Indians". Thus, one interpretation of the *Indian Act* would suggest that there must be at least two Indians, i.e. two people entitled to be registered as status Indians for there to be a "band". Without any status Indians, a band technically ceases to exist as a matter of law.[13] The *Indian Act* defines a "reserve" principally as "a tract of land … that has been set apart by Her Majesty for the use

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[10] *Simon v. The Queen,* [1985] 23 C.C.C. (3d) 238. To see how the New Brunswick and Saskatchewan courts have grappled with this issue, see: *R. v. Fowler,* [1993] 3 C.N.L.R. 178; *R. v. Trotchie,* [2002] S.J. No. 589; *R. v. Acker,* [2004] N.B.J. No. 525

[11] *R. v. Badger,* [1996] 1 S.C.R. 771, paras. 41 and 47; *R. v. Marshall; R. v. Bernard,* [2005] 2 S.C.R. 220, para. 39

[12] *Powley v. Canada,* [2003] 2 S.C.R. 207, para. 34; *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, paras. 444-451, 455, 457, 469-470

[13] *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) "band"; *Papaschase Indian Band No. 136 v. Canada,* 2004 ABQB 655, paras. 188-192

and benefit of a band". Thus, if there is no band, i.e. "no body of Indians," then an Aboriginal community's right to possess a reserve is arguably placed in jeopardy.[14]

Under the status registration scheme in place since 1985, every Indian band now faces the statistical reality that it will cease to exist, due to the application of the second generation cut-off rule and the prevalent rates of exogamy, i.e. having children with non-status Indians. Canada knew this as far back as 1990.[15]

Stewart Clatworthy has published extensively on Aboriginal demography, including the effects of Bill C-31.[16] In a study of Indian population projections from 2002 to 2077, he noted the effects of the second generation cut-off rule on current rates of exogamy within status Indian populations in Canada:

> National level projection results for these First Nations are summarized in Figure 8 for the **combined population residing on and off reserve**. The total population of survivors and descendants for First Nations using this type of membership rule is projected to increase throughout the entire projection period reaching 969,000 within 75 years. The population eligible for Indian registration and First Nations membership is expected to increase for about 50 years and peak at about 706,800 (roughly 198,900 larger than in 2002). **During the remaining 25 years of the projection period, this population is expected to fall** to about 653,000 (in year 2077).
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> [*Figure 8 not reproduced here*]
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> **The number of survivors and descendants ineligible for registration and membership is expected to increase sharply throughout the period.** Within 25 years this population is expected to number about 89,300, representing about 1 in every 8 individuals. This population is projected to grow to about 207,600 (about 1 in every 5 individuals) within 50 years and to about 316,000 (about 1 in every 3 individuals) within 75 years.[17] [Emphasis added.]

The far-reaching consequences of the second-generation cut-off rule were known to the trial judge. Perhaps that explains why she framed the relief at trial as widely as she did. However,

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[14] *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) "reserve"

[15] "*Impacts of the 1985 Amendments to the Indian Act (Bill C-31)*" Report to Parliament by the Minister of Indian and Northern Affairs (1990), pages 409-410.

[16] He also provided written opinion evidence for the federal Department of Justice in the *McIvor* case: "*Analysis of Select Population Impacts of the 1985 Amendments to the Indian Act (Bill C-31)*" dated December 9, 2005 and "*Written Statement of the Opinion of Stewart Clatworthy*" dated August 31, 2006.

[17] "*Indian Registration, Membership and Population Change In First Nation Communities*" by Stewart Clatworthy, Four Directions Project Consultants for Indian and Northern Affairs Canada (Minister of Public Works and Government Services Canada, February 2005), pages 30-31

the BC Court of Appeal in *McIvor* and Parliament in Bill C-3 have ignored this "elephant in the room". First Nations which are Indian bands may be less than satisfied by this, given that their long-term viability may be at stake as a result.

V. Summary and Conclusion

The *McIvor* case litigated the issue of residual sex discrimination in the registration provisions of the *Indian Act* as a result of Bill C-31 in 1985. Parliament's response to *McIvor* is Bill C-3, which promotes gender equality in Indian registration. Sadly, at the time of writing, Bill C-3 does not achieve that goal. It continues to deny the same degree of Indian status to the grandchild born before 1985 to a grandmother who married a non-Indian man as it does to the grandchild before 1985 to a grandfather regardless of who he married.

In addition, Bill C-3 needlessly requires that the child of such a woman parent a child before that person is eligible to improve their status from s. 6(2) to 6(1). The proposed legislation also removes the right of people who should have been registered as Indians but for the residual sex discrimination in the 1985 amendments to sue Canada for compensation for that denial of registration. Finally, Bill C-3 does not provide any new funding to First Nations to address potential increases in their membership.

Stepping back to view the larger picture, the *McIvor* decision and Bill C-3 leave unanswered the effects that the status provisions have on Aboriginal and Treaty rights, including the long-term existence of First Nations as Indian bands. These questions, although troubling, remain live issues for future law reform or litigation.