Legislated Oppression: Racism, Patriarchy and Colonialism in the Status Provisions of the *Indian Act*

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SUPERVISORY AND EXAMINING COMMITTEE

Michael James Burton, candidate for the degree of Master of Arts in Political Science, has presented a thesis titled, *Legislated Oppression: Racism, Patriarchy and Colonialism in the Status Provisions of the Indian Act*, in an oral examination held on June 4, 2012. The following committee members have found the thesis acceptable in form and content, and that the candidate demonstrated satisfactory knowledge of the subject material.

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*via teleconference*
ABSTRACT

The status provisions of the *Indian Act* have, since its passage in 1874, endeavoured to define who is and who is not an Indian. The foundation of this status regime has been based on European conceptions of racial and cultural superiority as well as patriarchy. By defining, through legislation, what qualifies people to be Indian the colonial state has caused divisions within First Nations communities and among First Nations people.

Through an examination of the different amendments to the status provisions and enfranchisement measures within the different iterations of the *Indian Act*, this paper makes the case that the current system, even following amendments in 1985 which were meant to bring the status regime in line with *The Charter of Rights and Freedoms*, maintains the patriarchal, racist and colonial foundation. Further examination of legal challenges to the status provisions of the *Indian Act* under both Canadian and international law will show that even following the 1985 amendments and the 2011 amendments, the status regime imposed via the Act remains foundationally discriminatory.

Using post-colonial theory this paper defines the imposition of the status regime as racist, sexist and Eurocentric and discusses the negative effects that regime has on the colonized peoples of Canada as well as on the colonizers who impose the regime. Finally, this paper will propose a process by which the status regime can be ended and replaced by system of First Nations citizenship that is determined by First Nations, is based on customs and traditions, but also lives up to internationally accepted human rights standards.
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DEDICATION

To all the women who have fought and continue to fight, in the streets and in the courts, for equal treatment and the end of the racist, sexist and colonial status regime.
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1. INTRODUCTION

Throughout Canada’s history, the Indian Act, originally passed in 1876, and its precursors, which predate Confederation, have legally defined who is and is not recognized as an Indian both for the distribution of benefits and for membership within Indian bands. The Act has accomplished the creation of a racist and patriarchal system of status provisions, which have furthered the goal of assimilation of Indian people into Canadian society and caused major damage to their families and communities. This thesis will discuss the history of the status provisions and propose an alternative system by which First Nations bands can have control over determining their membership while at the same time ensuring that the racist, sexist and Eurocentric ideals imposed by the Act are not replicated. Such replication could be avoided by proposing memberships codes that live up to internationally accepted human rights standards.

This thesis will show that the status provisions imposed through the Indian Act are racist, patriarchal and colonial. Evidence for this assertion is provided through historical analysis of the imposition and amending of the status and enfranchisement provisions of the Indian Act. Further evidence is provided by reviewing and analyzing legal challenges to historic and more recent status regimes. Theoretical analysis is combined with the evidence to make the case that not only is the Act racist, patriarchal and colonial but also that it is part of intertwining systems of racism, patriarchy and colonialism that privilege white male colonizers at the expense of all others but particularly, in this case, Indigenous women.
In making the case that the status provisions of the *Indian Act* are racist, sexist and Eurocentric, I am left wondering what I could recommend, if anything, as a correction to the current system. Originally, I believed all that would be required on my part was some thoughtful historical analysis from which a solution would be easily discernible and ready for me to conclude my thesis. During my research, I have found that this is far more problematic and not within the confines of how I was seeking to handle this issue. I do not want my work to be simply that of another settler colonialist telling First Nations how they should determine their own membership.

I began to consider what it says about settler colonialist society that we continue to feel the need to impose a racist, sexist and Eurocentric status regime on Indigenous peoples in Canada. My analysis includes the commonly held belief that, in the present, the reason for continuing to impose this system is all about money. For example, if First Nations are allowed to determine their own membership, then the government may be obligated to provide financial benefits to significantly more individuals than it currently does. Although this may be a factor, I will propose that in addition to financial concerns the government’s reticence is based on conceptions of white supremacy and the racial and cultural superiority that are necessitated by colonialism.

Beyond the factors of political economy, I will propose that the maintenance of the colonial order via the *Indian Act* and moreover the status provisions of the *Indian Act* are predicated on the maintenance of white supremacy within Canadian society. In order to maintain a system of white supremacy...
supremacy, settler colonialists need to exert their authority and privileged position over the 'other' within society. In the case of Canada, the continued presence of a controlling colonial legislation in the form of the Indian Act maintains settler colonialists' privileged position over Indigenous peoples. Real decolonization, I will argue, will only be possible if the status provisions are removed.

Throughout this thesis, the term 'Indian' is used when referring to those who are given status by said Act and therefore fall under the jurisdiction of the federal government as per Section 91(24) of the Constitution Act of 1982, originally the British North America Act of 1867 (Milloy, 2008: 1; Schouls, 2003: 156; Wotherspoon and Satzewich, 2000: 29). The term, ‘First Nation,’ is used when referring to both status and non-status aboriginal peoples, including people of First Nation descent who lost their status. The choice of these words is intentional, not accidental. The main focus of this thesis is the Indian Act and its effects on identity. The Indian Act continues to define who is and who is not an Indian along with controlling almost every aspect of the lives of those it deems to be Indian (Jamieson, 1978: 5; Russell, 2006: 103; Singh Bolaria and Li, 1988: 76). In order to effectively problematize how this process has affected Indigenous people, the legal term ‘Indian,’ must be used. This is in comparison to the generic term ‘Aboriginal,’ which is used in the Canadian context to describe First Nations (both status and non-status), Métis and Inuit people.

For the purposes of this thesis, the definitions for the terms 'racism,' 'patriarchy' and 'colonialism' also require clarification. ‘Racism’ generally refers to
discrimination on the basis of race, and contains both an ideological and structural component. ‘Racism’ in this thesis goes beyond this elementary definition. For example, in its colonial form, Sherene Razack defines ‘Racism’ as “the condition that enables the story of Western civil progress to be told, the bedrock upon which the emergence of bourgeois society is found” (1999:4). This thesis shows that the Indian Act is racist in both of the above referenced definitions of the term.

‘Patriarchy’ is defined by Lorraine Code as “hierarchical relations between men and women, manifested in familial and social structures alike, in a descending order from an authoritarian – if oftentimes benevolent – male head, to male dominance in personal, political, cultural and social life and to patriarchal families where the law of the father prevails” (Code, 2000: 378). Joyce Green defines patriarchy as “the male preferential hierarchy resting on women’s subordination” (2001: 724), which is “submerged in a culture of masculinism: still male preferential and often misogynist, but diffused throughout civil society and popular culture rather than resting exclusively in the patriarchal family” (Green, 2001: 725). In short, masculinism conforms, through a process of discipline, to the idea of male dominance and female subordination (Green, 2001: 725). It is important to note, as Green does, that “the reality of gender role distinction and especially imposition of…patriarchy has constructed Indigenous women’s specific experiences with colonialism” (Green, 2007:144). The discrimination of Indigenous women through the Indian Act and within their own communities is
based on the patriarchal idea of dominance of the closest male relative, either husband or father.

‘Colonialism’ is defined by Joyce Green as:

an always exploitative relationship in which the sovereignty, political autonomy, resources and social capacity of the one (nation, state) is seized by the other (the colonizer) for the benefit of the latter. The relationship is maintained by coercion and is sustained by racist myths of inevitability, development, and the deficiency of the colonized that required effectively the intervention of the colonizer, so as to normalize the relationship. Those myths are transmitted intergenerationally. (Green, 2009)

The reason this definition of ‘colonialism’ is utilized in this thesis is because it encapsulates the process and power relations within the colonial system that exist between the colonizer and colonized. With this definition, the reader understands who benefits (the colonizer) at whose expense (the colonized), and how that system is maintained through unequal power.

Chapter One is an introductory Chapter. It outlines, in broad terms, what arguments will be furthered in later Chapters. It is also instructive in defining important terms that will be used throughout this thesis. It is important both to outline the arguments that will be made and to define the terms that will be used so that the reader is able to understand what is meant by the terms settler colonialist, racism, colonialism and patriarchy.

Chapter Two investigates the historical development of the status provisions within the Act and its precursors. Included in this exercise is a discussion of the work of Kathleen Jamieson and the Royal Commission on Aboriginal Peoples (RCAP), both of whom have done significant work outlining

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1 This quote was given in conversation between Dr. Green and myself, and formal permission to use the quote was granted via email titled “Colonialism” and responded to on November 4th, 2009.
the racist, patriarchal and Eurocentric foundations of the status provisions of the Act. While RCAP provides significant information on the history of the Act, Jamieson brings a feminist analysis to her study which is extremely important in any discussion of this topic. This chapter also looks at amendments to the Act affecting status provisions including voluntary and forced enfranchisement.

Chapter Three examines legal challenges and legislative changes to the Indian Act. It includes different activist attempts to challenge status provisions and looks at Canadian and international court challenges. It goes on to examine the 1985 amendments to the Act through Bill C-31 and how the debate about amending the status provisions of the Act unfolded. This chapter also looks at two court cases that have risen as a result of Bill C-31 amendments, including McIvor v. The Registrar, Indian and Northern Affairs Canada, and Sawridge v. Canada.²

The Fourth Chapter is both theoretical and practical in nature. It relies on noted post-colonial theorists such as Sherene Razack, Taiaiake Alfred, Edward Said, Frantz Fanon and Albert Memmi. After outlining some of the theoretical constructs, the chapter utilizes those theoretical tools to address the specific nature of status provisions in the Indian Act, and consider what it says about settler colonialists that they continue to impose said provisions on Indigenous peoples through bureaucratic and legislative means.

² Both cases were heard in multiple courts. McIvor v. Canada began in the British Columbia Supreme Court and was also heard at the British Columbia Court of Appeal. The Supreme Court of Canada refused to hear the McIvor Case. Sawridge Band v. Canada began in Federal Trial Court and has also been heard in the Federal Court of Appeal.
The final chapter of this thesis looks at what should be done now to address the wrongs outlined in the previous chapters. “Indigenous peoples in Canada are culturally, historically, geographically and politically diverse, though all share the experience of colonial domination” (Green, 2005: 346). For too long and in too many ways, settler colonialists have imposed European racist and sexist definitions of status upon First Nation peoples. Although any changes will need to be passed by the Government of Canada, it is important that the process of creating revisions is initiated and controlled by Indigenous peoples.
2. THE HISTORY OF THE STATUS AND ENFRANCHISEMENT PROVISIONS OF THE INDIAN ACT

This chapter will concentrate on the imposition of status and enfranchisement provisions as part of the Indian Act regime. The history of those provisions actually predates the original incarnation of the Indian Act and this chapter will trace the changes made in both the status and enfranchisement regime prior to the overhaul of the status provisions and removal of the enfranchisement provisions in the 1985 Indian Act. This chapter will also analyze the rationale and reasoning for the imposition of the status regime as well as changes that were made.

The first attempt at defining who was and was not an Indian was An Act for the better protection of Land and Property of Indians in Lower Canada of 1850 which served to legislate who could reside on a reserve. This act created a broad definition of who was an Indian, including all persons of “Indian Blood” who belonged to a particular tribe; all persons who intermarried with the first group, and who resided among them; any child adopted at infancy by such Indians; and all of the first three groups’ descendants, including someone with one parent who was among the first group. This definition was quickly amended to exclude those adopted at infancy and non-Indian men who married Indian women (Bourassa and Peach, 2009: 3; Jamieson, 1978: 26).

An Act to encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians 1857 (Gradual Civilization Act) was the first piece of legislation that attempted to comprehensively define
Indian status, which is an important event in the evolution of Canada’s Indian policy. The title of this legislation is a particularly good example of how Indian people were viewed: in a racist fashion, as needing civilization (Wotherspoon and Satzewich, 2000: 16). The basis of this piece of legislation was the idea of enfranchisement (Jamieson, 1978: 27). More importantly for the sake of this thesis was the Gradual Civilization Act’s use of enfranchisement as the mechanism through which status could be removed even from those of legitimate Indian descent; in this way, the Gradual Civilization Act implicated itself in the definition of who was and who was not an Indian.

Although this definition of Indian seems broad, there are still two major problems with its original version and an additional problem with the amended definition. Firstly, that the conception that the definition of Indian can be decided by an external body, in this case the legislature of Lower Canada, is extremely problematic (Jamieson, 1978: 4). It is based on the assumption that the legislature of Lower Canada is more qualified then the Aboriginal nation to decide who can or cannot identify themselves as belonging to said nation.

Secondly, it is important to problematize the term “Indian blood” because it is incorrect to assume that race can be construed by blood type, although this would not have been known at the time this law was passed. Also, the use of such a term could refer to blood as a metaphor describing relatedness determined by lineal descent (Goldberg, 1993: 68). It should be noted that “racial membership determined by near ancestry is a central part of the racist arrangement” although “determination of racial membership by ancestry is not
necessarily racist in conception” if it does not involve socially biased implications which cause discrimination (Goldberg, 1993: 124-125).

Finally, the foundation for the sexist provisions in the Indian Act was laid out in the amendments to the *Gradual Civilization Act*. The exclusion of non-Indian men who married Indian women from being defined as Indian marked the beginning of the sexist and patriarchal treatment that Indian women would face under the *Indian Act* and its predecessors (Jamieson, 1978: 25). Like many policies of this period, the provisions of this amendment were not enforced equally between men and women (Jamieson, 1978: 25; Wotherspoon and Satzewich, 2000: 31). Instead, non-Indian women who married Indian men were considered Indian but the reverse was not true. This is because “women’s status in relation to the state was derivative of their most proximate patriarch: husband, father or nearest male relative” (Green, 2001: 721).

In the lead up to Confederation, a change in the relationship between Indian tribes and the British Crown occurred. This took the form of the transfer of responsibility for Indians and Indian lands from the British Crown to the colonial legislature (Canada, 1996a: 273). This departure broke the direct nation to nation aspect previously indicative of this relationship since before the *Royal Proclamation of 1763*. Upon Confederation, responsibility for Indians and land reserved for Indians was invested in the federal government under Section 91(24) of the *British North America Act* of 1867; as Tim Schouls put it, “The BNA Act of 1867 gave the Canadian government the juridical means to dominate in its relations with Aboriginal peoples” (2003:41).
A year after Confederation, legislation consolidating much of the previous laws including *An Act for the better protection of Land and Property of Indians in Lower Canada of 1850* came into effect. This is important because the new Dominion of Canada created the definition of Indian on a patrilineal model that gave status to non-Indian women who married Indian men but excluded Indian women who married non-Indian men (Jamieson, 1978: 25). This patriarchal provision led not only to the loss of status for a great number of women and children of Indian descent, but also to the granting of status to an equally great number of women of non-Indian descent. The removal of status from women of Indian descent and granting of status women of non-Indian descent later contributed to countless legal challenges and several amendments to the *Indian Act*.

In 1868, *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs and to extend the provisions Act 31st Victoria Chapter 12 (Gradual Enfranchisement Act)* marked Canadian Parliament’s adoption of the formal goal of assimilation (Jamieson, 1978: 32). Integral to the *Gradual Enfranchisement Act* was the idea of status being the difference in legal treatment between Indian men who married non-Indian women and Indian women who married non-Indian men (Green, 2007: 145; Singh Bolaria and Li, 1988: 76). It is important to recognize that this concept is derived from European patriarchal understandings of the wife being subject to the husband (Asch, 1984: 3; Green, 2001: 723; Green, 2007: 145; Jamieson, 1978: 31; Schouls, 2003: 89). Since non-Indian women who married Indian men became the property of an
Indian, they gained Indian status. Similarly, since Indian women who married non-Indian men became the property of a non-Indian, they lost their status (Green, 2001: 723). This is a strong example, but not the only one, of the patriarchy inherent within the Indian Act.

Of further importance is the fact that this patriarchal concept is neither created by nor traditionally a part of Indian culture (Jamieson, 1978: 30). This is evident by the complaints from the Grand Councils of Ontario and Quebec at the time of the passage of the Gradual Enfranchisement Act. They proposed that the act be amended to give Indian women the privilege of marrying whomever they chose without losing their tribal membership (Jamieson, 1978: 30). This proposed amendment was not included in the legislation.

In 1876, the Indian Act was passed by the Parliament of Canada in order to consolidate previous legislation regarding “Indians and land reserved for Indians” (Jamieson, 1978: 43; Wotherspoon and Satzewich, 2000: 29). The passage of the Act happened in the midst of the signing of the numbered treaties in Western Canada. The Indian Act and, for that matter, all Indian policy, was based on the idea of settlers’ cultural and racial superiority. The Indian Act was a paternalistic attempt to treat Indian people as children who required the government, through the regulation of almost every aspect of the lives of Indians on reserves, to act as a parent would to a dependant ward (Miller, 2001: 45). The government’s hope for the Indian Act was that the process of enfranchisement would lead to the destruction of the protected reserve land base or Indian land
and the responsibility for enfranchised Indians would thus fall under provincial jurisdiction (Canada, 1996a: 282).

The *Indian Act* also created bands, band councils and band membership. Tribal nations were no longer recognized under the *Indian Act* and instead would be replaced by band councils and Indian agents (Russell, 2006: 103). In 1880, *The Indian Act* was amended to include the creation of the Department of Indian Affairs (Schouls, 2003: 41). Although the *Indian Act* would be amended many times afterwards, the 1880 version would remain mostly intact until 1951. In fact, the 1876 *Indian Act* is very similar to the one that remains Canadian law to this day (Singh Bolaria and Li, 1988: 76). It is important to note for this discussion that the status provisions under the 1876 *Indian Act* remained the same as under the *Gradual Enfranchisement Act* and were based on the racist, sexist and Eurocentric ideals of “Indian blood,” patriarchy, and cultural superiority.

Although the status provisions of the 1876 *Indian Act* created additional difficulties for both sexes, they were especially discriminatory against Indian women. In 1887, the Superintendent General of Indian Affairs was given power to determine who was and was not a band member (Canada, 1996a: 303; Jamieson, 1978: 46). Persons who were determined by the Superintendent General to not have band membership were removed from reserves. The only appeals process on this matter was to have the decision overturned by Governor in Council (Canada, 1996a: 303).

This power remained until the passage of the *Indian Act* of 1951, at which point the power to determine Indian band membership was granted to the newly
created Indian Registrar (Canada, 1996a: 311; Milloy, 2008: 10). The 1951 *Indian Act* marked a movement away from the system of “Indian Blood” which had been an important aspect of the *Indian Act* up until 1951 (Jamieson, 1978: 60). Membership based on blood was replaced with a bureaucratic registry run by the Indian Registrar located in Ottawa. The creation of the registry made Indian status hard to attain. This was mainly done for financial reasons, to limit the number of persons entitled to federal benefits under the *Indian Act* (Francis, 1992: 205).

The transition to the new registration system led to the denial of status to some status Indians. The new registry was based on existing band membership lists which were often kept informally, and many Indians entitled to status under the *Indian Act* were found to be missing from these lists (Canada, 1996a: 304). There was a small grace period of six months during which additions or deletions could be made to an existing list. If a band member was away, unable to find the list, or unable to read the list to find their own name, they, their children and their grandchildren were often permanently denied status (Canada, 1996a: 304).

Although it is hard to imagine, the 1951 amendments actually made gender based discrimination even worse than it had been previously. Under subsection 12(1)(a)(iv), children lost their Indian status at the age of 21 if both their mother and grandmother had obtained status only through marriage (Jamieson, 1978: 60). The “double mother rule”, as this became known, would remove status from a person who was raised on a reserve and whose father and grandfather were both status Indians (Canada, 1996a: 312). When their status
was removed, they also lost their band membership and were not allowed to remain living on a reserve with their family and community. In 1920, the Superintendent General was given the authority to determine whether Indian women who had lost their status due to their marriage were eligible for an annuity or lump sum settlement in the same manner received by Indian men who were enfranchised (Canada, 1996a: 301). The change was made, ostensibly because Indian women who lost their status but were then widowed or deserted were left in legal limbo. They were no longer Indians but were also not considered non-Indians under Canadian law.

The previously aforementioned patriarchal provisions of the Indian Act of 1876 were maintained until the passage of Bill C-31 amendments in 1985 (Canada, 1996a: 304). Even with the 1985 amendments and their attempts to bring the Act in line with the newly passed Charter of Rights and Freedoms, Indian women and their children who had lost status were treated differently under the law (Schouls, 2003: 91). This has led to court challenges, most notably the McIvor case which will be covered below.

With the passage of the Gradual Civilization Act in 1857, the process of voluntary ‘enfranchisement’ was enshrined into Canadian law (Jamieson, 1978: 31). The concept of enfranchisement remained in the Indian Act until 1985. As a policy, enfranchisement fulfilled the federal government’s goal of assimilation (Wotherspoon and Satzewich, 2000: 81). The Indian Act has, from its inception, purported to create a Canada where Indigenous peoples are assimilated through a process of aggressive colonization; as a policy, "assimilation…intended to
preserve Indians as individuals by destroying them as people” (Francis, 1992: 201). The assimilation of Aboriginal peoples was the core feature of Canada’s approach to its First Nations (Borrows, 2002: 128; Francis, 1992: 200). Under the provisions of the *Gradual Civilization Act*, status Indians could voluntarily revoke their Indian status, gain 50 acres of reserve land and their share of future treaty payments and band monies (Jamieson, 1978: 27). The voluntary provisions were not well utilized; in fact, from 1857 to 1876 only one Indian utilized the enfranchisement provisions of the *Gradual Civilization Act* and later the *Gradual Enfranchisement Act* (Canada, 1996a: 287).

Enfranchisement, based on the notion of European racial and cultural superiority, was seen as a privilege, such that there was a penalty of six months in jail for an Indian falsely claiming to be enfranchised (Canada, 1996a: 287). At its creation, law makers and bureaucrats believed that Indians would gladly revoke their special status in order to become members of the colonial society. Since Indians did not voluntarily give up their status, upon passage of the *Indian Act*, several mandatory enfranchisement provisions were created. Enfranchisement was also a sexist process in that if a male Indian chose to enfranchise, his wife and minor children would also be enfranchised (Asch, 1984: 3; Jamieson, 1978: 29).

The belief that the colonizer is racially and culturally superior is necessary if one is to create and enforce a colonial enterprise (Said, 1994: 10). Europeans, as colonizers, often convinced themselves that what they were doing was for the good of the Indian, and that Indians resisted only because they did not know any
better and were not capable of coming to the correct conclusion on their own (Said, 1979: 35). This conception of superiority is derived from what Edward Said described as Europeans’ “overwhelming urge to dominate inferior people” (Said, 1994: 10). The Indian Act as a whole and its enfranchisement provisions are clearly a manifestation of the above noted “overwhelming urge.”

Enfranchisement was not utilized prior to the creation of the Indian Act in 1876. In fact, the Royal Commission on Aboriginal Peoples put it this way: “...[enfranchisement] was not a realistic or popular policy among Indians, most of whom had no intention of renouncing their personal and group identity by assimilating into non-Aboriginal society” (Canada, 1996a: 287). In order to encourage more utilization of the enfranchisement provisions, the 1876 Act included compulsory enfranchisement for Indians who obtained higher education, who left the country for over five years or who entered professions (Jamieson, 1978: 44; Wotherspoon and Satzewich, 2000: 30). The compulsory nature of these provisions was amended in 1880, giving Indians who obtained higher education or joined a profession the choice of whether or not to become enfranchised (Canada, 1996a: 288).

One of the more ironic provisions of enfranchisement in the 1876 Indian Act was the fact that enfranchisement was equally granted to both men and single women. As discussed above, the Indian Act was based on sexist and patriarchal views of women and their relative position in society, but when it came to enfranchisement, unmarried Indian women were allowed to obtain it (Jamieson, 1978: 44). These provisions were not provided to married Indian
women, who were forced to enfranchise if their husbands chose to (Jamieson, 1978: 29). It seems that the goal of enfranchisement was so important that it even outweighed the need to discriminate against Indian women based on their sex.

The 1876 *Indian Act* also allowed for the enfranchisement of entire bands (Jamieson, 1978: 44). Only two bands ever took advantage of the band enfranchisement clause prior to its removal in 1985: one in Ontario and one in Alberta. The first of these took place in 1881 and greatly encouraged the enfranchisement efforts by the Indian Affairs officials (Canada, 1996a: 287). These officials saw the process as having the desired effect: to civilize and assimilate Indians. In 1918, the *Indian Act* was amended to expand enfranchisement provisions to status Indians living off reserves. Included in this group were widows and children who were over the age of twenty one (Jamieson, 1978: 50). Following the passage of this amendment the Department of Indian Affairs noted a spike in the number of enfranchisements. In fact, there were more cases of enfranchisement in the two years following this amendment than there had been in the previous 60 years (Canada, 1996a: 287).

In 1920, the *Indian Act* was again amended to allow for compulsory enfranchisement (Jamieson, 1978: 50; Wotherspoon and Satzewich, 2000: 30). A process was put in place whereby the Superintendent General could appoint an examiner who would determine the fitness of any Indian to be enfranchised. Upon recommendation of the examiner, the Superintendent General could have the Governor in Council enfranchise any male or female Indian over 21 years of
age within two years (Canada, 1996a: 288). After 1920, the new provision was used to threaten Indian activists who spoke out against their treatment by Canada. This provision was removed in 1922 but reintroduced in 1933, remaining in the Act and its major revisions in 1951 (Jamieson, 1978: 52).

In 1951, the Act was revised to allow for the forced enfranchisement of Indian women who “married out.” This provision was not removed until 1985 (Jamieson, 1978: 62; Wotherspoon and Satzewich, 2000: 32). Forced enfranchisement of women who married out often had devastating effects on not only the women, but also their children. They would lose status and with it their ability to live on reserve, their benefits under the treaties and the Indian Act and their right to inherit property. This new provision led to a massive increase in the number of enfranchisements after 1951 (Jamieson, 1978: 62).

This chapter has shown that both the status and enfranchisement provisions of the Indian Act regime, based on European notions of racial and cultural superiority, have been instrumental in forcibly or voluntarily denying Indian people their ability to identify as Indian. The history clearly shows that this had been done with the goal of assimilating Indian people into the dominant culture. The enfranchisement provisions have worked with the status provisions to cause great damage to Indian people, communities and their identities. It is now time to summarize and analyze judicial and legislative challenges to the status regime.
3. LEGISLATIVE CHANGES AND JUDICIAL CHALLENGES

This chapter will look at legal and political challenges to the status provisions of the Indian Act by women who lost their status under the racist and sexist provisions of the Act. This chapter will summarize the court cases in both Canadian and international courts and will also discuss significant amendments made to the status provisions of the Indian Act in 1985 and 2010.

The first two challenges to the discriminatory provisions of the Indian Act were filed by two women, Jeannette Lavell (nee Corbiere) and Yvonne Bedard, who lost their status under those provisions (Green, 1985: 83). Jeannette Vivian Corbiere was born a member of the Wikwemikong Unceded Indian Reserve in North Eastern Ontario (Blair, 2005: 5). After marrying David Lavell on April 11, 1970, Lavell was provided notice by the Department of Indian Affairs that, because of her marriage to a person not registered as an Indian, she no longer qualified for status under the Act (Blair, 2005:5). Later in 1970, Lavell’s name was deleted from the registry in accordance with Section 12(1)(b) (Blair, 2005:5).

Lavell challenged the registrar’s ruling, claiming that Section 12(1)(b) was inoperative because it abridged her right to equality under the law that was guaranteed by the 1960 Bill of Rights (Green, 1985: 83; Blair, 2005: 5). Lavell’s specific point was that the Indian Act discriminated against Indian women because they were not treated equally to Indian men, who were able to marry whomever they wanted to without the possibility of losing their status (Green, 1985: 83). The case was argued in front of Justice Grossberg of the Ontario County Court (Blair, 2005: 6). The Attorney General of Canada argued that
Lavell’s situation needed to be decided on the comparison between her and married Canadian women, and not how that treatment was compared to Indian men. Thus, Justice Grossberg upheld the Registrar’s decision (Blair, 2005; 6). The ruling went on to assert that the removal of her status should be considered a laudable point in Canadian history because she was given the same rights as all women in Canada (Blair, 2005: 6). It is interesting to note that even in 1971, Canadian judges still maintained the position that enfranchisement, and the removal of Indian status was ‘laudable.’

Lavell appealed Justice Grossberg’s ruling that Section 12(1)(b) did not violate her rights to equal treatment under the law guaranteed in the Bill of Rights to the Federal Court of Appeal, and her appeal was unanimously upheld (Blair, 2005: 6). The judgement stated:

The Indian Act, however, which is a law made by the Parliament of Canada for Indians, prescribes a different result with respect to the rights of an Indian woman who marries a person other than an Indian, or an Indian of another band, from that which is to obtain when a male Indian marries a person other than an Indian, or an Indian who is a member of another band.” (Federal Court of Appeal, Lavell v. Attorney General of Canada, 1972: 191)

Further, the Court of Appeal ruled Section 12(1)(b) inoperative, in favour of Lavell (Blair, 2005: 6).

Yvonne Bédard was born a member of the Iroquois Nation on the Six Nations Reserve in South Western Ontario. In 1964, Yvonne Bédard married a non-Indian and had two children with him. Bédard lived with her husband and children off reserve until they separated in 1970, at which point Bédard moved with her children to the house bequeathed to her by her mother on the Six
Nations Reserve (Blair. 2005: 6). The Six Nations Band Council passed several resolutions ordering Bédard to dispose of the home she was in possession of because she did not have status and therefore did not qualify to hold property on the reserve. After 14 months, Bédard transferred ownership of the house to her brother, who remained a member of the Six Nations Indian Band, and in return her brother allowed her to live with her children in the home. The band council passed a further resolution requiring Bédard to leave the reserve and also asked the Brampton District Supervisor to evict Bédard from her residence (Blair, 2005: 6).

Bédard filed an injunction to prevent her expulsion. The injunction argued that the resolution passed by the band council, and her removal from the Registry discriminated against her rights as outlined in the 1960 Bill of Rights (Blair 2006:6). Bédard argued that her removal from the Registry discriminated against her on the basis of sex and that the band council’s resolution discriminated against her right to enjoyment of property and her right not to be deprived of that right without due process of law.

The case was heard by the Ontario Supreme Court, which ruled that Section 12(1)(b) was inoperative on the basis that it violated the Bill of Rights. Justice Osler ruled that Section 12(1)(b) was clearly adverse towards Bédard and constituted discrimination. Justice Osler wrote, "it is perfectly apparent that the loss of status as an Indian and the loss of the right to be registered and to occupy property upon a reserve is discrimination which is adverse to the interest of Indian women" (Supreme Court of Ontario, Bédard v. Isaac, 1971, 557). In
declaring Section 12(1)(b) inoperative, Justice Osler overturned the band council resolution due to it being based on the inoperative provision (Blair, 2005: 6).

Both Ms. Lavell and Ms Bédard’s cases were appealed to the Supreme Court of Canada, at which point the two cases were heard together. The court was split 5-4 in favour of overturning the decisions made by the Court of Appeal and the Ontario Supreme Court in the cases of Lavell and Bédard. Justice Ritchie, writing for the plurality stated that the Canadian Bill of Rights since power over “Indians and lands reserve for Indians,” under Section 91(24) of the British North America Act, permits the federal government to determine who is and is not an Indian and who is entitled to the use benefits and crown lands reserved for Indians (Supreme Court of Canada, Attorney General of Canada v. Lavell, 1974: 1372). Second, “that the Bill of Rights does not require federal legislation to be declared inoperative unless it offends against one of the rights specifically guaranteed by section 1, but where legislation is found to be discriminatory, this affords an added reason for rendering it ineffective” (Supreme Court of Canada, Attorney General of Canada v. Lavell, 1974: 1372). Third, and most importantly, “that equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada…and no such inequality is necessarily entailed in the construction and application of s. 12(1)(b).” (Supreme Court of Canada, Attorney General of Canada v. Lavell, 1974:1373). In this case, the court ruled that the Indian Act was allowed to discriminate against Indian women, as long as it discriminated against all Indian women equally (Green, 1985: 83).
The Supreme Court’s decision in the Lavell and Bédard cases left Indian women and their children who had their status removed because of the discriminatory provisions of Section 12(1)(b) with little recourse. Patricia Montour-Angus argued that when hearing these cases the Supreme Court failed to understand the concept of “Double Discrimination.” Montour-Angus stated:

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. (Blair, 2005: 6; Monture-Angus, 1995, supra note 15, at 136)

Indian women were left to attempt to exert political pressure on both the Government of Canada and status Indian organizations, which “used the Act as a lever to gain governmental concessions on other important Indian issues” (Green, 1985, 85).

Another Indian woman who was active in the campaign against Section 12(1)(b) was Mary Two Axe Early. Early, a Mohawk born on Kahnawake in 1911, moved to New York in 1928 and married Edward Early a non-Indian American male (Blair, 2005: 6). Early was enfranchised and was only able to move back to her reserve upon her husband’s death because her daughter had regained status by marrying a Mohawk man. In 1966, Early entered the activist arena after the Kahnawake Band Council refused to allow her friend to be buried on reserve because that friend had been enfranchised based on Section 12(1)(b) (Blair,
In 1975, while Early was attending an international women’s conference in Mexico, she received notice from the band council that she had been evicted from the reserve. She announced this to the conference attendees and the resulting public outcry and publicity forced the band council to withdraw their eviction order (Blair, 2005: 6).

Having exhausted the legal remedies within Canada and lacking the political support to change the discriminatory status provisions of the Indian Act, activists turned their attention to remedies offered by international law (Green, 1985: 84). In 1975, Sandra Lovlace, a Maliseet Indian who lost her status because of Section 12(1)(b), took the issue to the United Nations Human Rights Commission. As a signatory to the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and to the optional Protocol involved with these documents, Canada had agreed to allow its citizens the option of appealing any decision made by their court of last resort (Green, 1985, 85).

Lovelace argued that Section 12(1)(b) discriminated against Indians in contravention of the International Covenant on Civil and Political Rights which Canada had signed (Green, 1985: 84). In response, the Government of Canada argued that the Indian Act, including Section 12(1)(b), was allowed under the Covenant because the Act was designed in order to protect the Indian minority in Canada (Blair, 2005: 9). Section 27 of the Covenant allowed for minority rights protection. Canada also argued that a status regime was necessary because a definition of ‘Indian’ was required to ensure only those entitled to ‘special rights’
received them. Finally, Canada, addressing Section 12(1)(b), claimed that in 1869 enfranchisement provisions were necessary because there was a greater threat to reserve land from non-Indian men than there was from non-Indian women (Blair, 2005: 8).

During the process of Lovelace’s United Nations hearing, it was revealed by the Government of Canada that 510 Indian women married non-Indian men each year. It was also stated that 590 Indian women married Indian men and 422 Indian men married non-Indian women (Blair, 2005: 8). These statistics revealed the scope of the damage being caused to Indian women losing their status under Section 12(1)(b). Nearly one third of the Indian marriages each year were resulting in the loss of status by Indian women (Blair, 2005: 8). Further, Lovelace argued that she had lost all of her political rights, even after her marriage had ended, and was only able to live on reserve with the help of a dissident member. She also argued that her loss of status made her ineligible for benefits offered by the Department of Indian Affairs, including the benefits for education, housing and social assistance (Blair, 2005: 8).

Since Lovelace had been discriminated against prior to Canada signing on to the International Bill of Human Rights, the United Nations Human Rights Commission was not able to find Canada guilty of sexual discrimination. They did, however, find that Section 12(1)(b) violated Lovelace’s right to enjoy her culture in her community because her loss of status had barred her from living on reserve. The UNHRC stated, “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” (Blair, 2005: 9). The Lovelace case would become the first in a series of victories for those wishing to end gender discrimination within the *Indian Act*. The Lovelace decision also led to the international censure of Canada because of the discriminatory provisions of the *Indian Act* (Green, 1985:85).

Following the ruling, women directly affected by the discriminatory provisions along with their allies in the women`s movement and amongst equal right proponents, including the National Action Committee on the Status of Women and the Voice of Women, began significant efforts including marches, sit-ins and court actions to remove Section 12(1)(b) from the Act and pushed for the reinstatement of status for those women and their children who lost their status because of those discriminatory provisions (Blair, 2005, 8). These included the creation of Indian Rights for Indian Women by Mary Two Axe Early, which worked in conjunction with the National Native Women’s Association in order to repeal Section 12(1)(b). There was also a march from the Oka Reserve in Quebec to Ottawa by the Tobique Nation, which raised the issue to national attention (Blair, 2005: 9). They were opposed by many of the malestream status Indian organizations and there was not significant movement on the file until after the patriation of the Canadian Constitution and the enshrinement of *The Canadian Charter of Rights and Freedoms* into the newly patriated *Constitution Act* of 1982. In effect, the *Charter*, combined with domestic and international political pressure, forced the Government of Canada to finally address the
discriminatory provisions within Section 12(1)(b) of the Indian Act (Green, 1985: 85).

Following their election in 1984, Brian Mulroney’s Conservative Government attempted to bring the Indian Act in line with the Charter by introducing Bill C-31, An Act to Amend the Indian Act. The Indian Act amendments were introduced purportedly to address the gender discrimination existing in the status provisions of the Act (Mann, 2005: 7) and to bring the Act in line with the constitutionally enshrined Canadian Charter of Rights and Freedom. At the time of the passage, David Crombie, the Minister of Indian and Northern Affairs, outlined five principles on which Bill C-31 was based:

The legislation is based on certain principles, which are the cornerstones that John Diefenbaker identified. The first principle is that discrimination based on sex should be removed from the Indian Act. The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act. The third principle is that no one should gain or lose their status as a result of marriage. The fourth principle is that persons who have acquired rights should not lose those rights. The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership. (British Columbia Court of Appeal. McIvor v. Canada, 2009: 29)

Bill C-31 amendments were given royal assent on June 28, 1985, and the amendments which it made were retroactively effective to April 17, 1985 (Furi and Wherrett, 2003). Mary Two Axe Early was the first women to officially have her status reinstated by the 1985 Indian Act (Blair, 2005: 9). Bill C-31 amended the Indian Act for three major goals: the first was to end discrimination on the grounds of sex, clearly evident in the status provisions of the Indian Act (Furi and Wherrett, 2003); the second was that the amendments went about restoring
status and membership to some of those who had been affected by the discriminatory provisions of the *Indian Act* (Furi and Wherrett, 2003); and finally, Bill C-31 amendments, granted band councils control over their band membership (Furi and Wherrett, 2003).

The specific amendments made to the *Indian Act* in 1985 were meant to treat men and women equally for the purpose of status under the *Indian Act* (Blair, 2005: 10). Secondly, their children were to be treated equally whether they were born in or out of wedlock and whether they were adopted or not (Blair, 2005: 10). Further, the 1985 *Indian Act* prevented any person with status from losing their status because they got married (Blair, 2005: 10). The 1985 Act restored status to those who had lost it either through the discriminatory provisions of the *Indian Act* or through enfranchisement provisions of the act (Blair, 2005: 10). The amendments also allowed for the first time registration of children and in some cases other descendants of those who were eligible to have their status restored (Blair, 2005: 10). Finally, the 1985 Act allowed for the registration of children who were born out of wedlock if either of their parents had status. Bill C-31 amends the *Indian Act* to state:

6(1) Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read
immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision. (BC Court of Appeal, McIvor v. Canada, 2009 at 31)

The changes to the status provisions made in 1985 exacerbated the process of assimilation through complicated rules, which included the creation of two different categories of status Indians. The Royal Commission on Aboriginal Peoples describes the 1985 amendments as follows:
The bill created two main categories of status Indians. Under subsection 6(1), legal status is assigned to all those who have status before 17 April 1985, all persons who are members of any new bands created since 17 April 1985 (none have been created), and all individuals who lost status through discriminatory sections of *The Indian Act*. Subsection 6(2) covers people with only one parent who is or was a status Indian under any parts of section 6(1). It must be stressed that the one parent rule in subsection 6(2) applies only if that parent is entitled to status under subsection 6(1). Thus, if an individual has one parent covered by subsection 6(2) and one who is non-Indian, the individual is not entitled to status. The children or other descendants of Indian women who lost status under the discriminatory provisions described earlier will generally gain status under subsection 6(2), not subsection 6(1), since the reason their mothers lost status in the first place was their fathers did not have Indian status when their parents were married. (Canada, 1996b: 39-40)

Discrimination based on sex, which was supposed to have been addressed by the 1985 changes, has been perpetuated on to future generations since 1985 amendments to the Act are based on the previous sexist provisions regarding status (Canada, 1996b: 37).

The amendments also maintained the Indian Registry. They maintained all names that were in the registry at the time of the amendments but required those eligible for reinstatement to apply to have their names added to the registry. The 1985 Act also ended all of the enfranchisement provisions of the *Indian Act* (Furi and Wherrett, 2003). It allowed band councils the ability to write their own memberships codes. Further to this, it allowed for those who wished to be reinstated to apply for membership in a given band (Furi and Wherrett, 2003). Band membership rules were to be based on two principles: firstly, that a majority of band members consented, through referendum, to their band taking control of their membership code, and also a majority had to approve the membership code
that was proposed by the band council (Furi and Wherrett, 2003); secondly, the new membership codes could not retroactively remove membership from either current members or persons who were eligible for reinstatement of their membership (Furi and Wherrett, 2003). Bands also had the option to continue with the *Indian Act* provisions as their membership codes (Furi and Wherrett, 2003). Finally, a woman who married someone from another band was no longer automatically eligible for membership in her spouse's band, but transfers between bands were still possible if the receiving band agreed to that transfer or the concept of transfers in general (Furi and Wherrett, 2003). Although bands were granted the authority to determine their own membership, the federal government remains the only authority able to grant Indian status (Dick, 2006: 98; Wotherspoon and Satzewich, 2000: 32). The authority granted to bands to determine their own membership has been problematic as some bands have continued to use the sexist and racist provisions of the *Indian Act* in determining their new band membership codes (Green, 2001: 717). Some bands have refused to accept the status of women and their children that was reinstated through the 1985 amendments (Green, 2001: 723).

Under the 1985 amendments, bands were given powers to create and enforce bylaws in areas other than membership (Furi and Wherrett, 2003). There was also recognition of the differentiation between status as defined by the *Indian Act* and band membership that may be determined by the band council (Furi and Wherrett, 2003). Importantly, 1985 amendments excluded reinstatement for two groups: first, woman who had gained status only through
marriage to a status Indian man and later lost it through a second marriage to a non-status man; and secondly, children whose mothers gained status through marriage and whose father was a non-Indian (Blair, 2005: 10).

As mentioned earlier, the 1985 amendments created differentiated categories of status. Under subsection 6(1)(a), status would be granted to all Indians who had status before April 17, 1985; furthermore, all individuals who lost their status based on either the enfranchisement provisions or the discriminatory provisions that 1985 Act was meant to address would be granted status under subsection 6(1)(c) (Blair, 2005: 10). Subsection 6(2) covered anyone who had only one parent eligible for status under subsection 6(1). Importantly, Subsection 6(2) required that one parent is eligible for status under Subsection 6(1), and therefore any child born to a person eligible for status under Subsection 6(2) and someone who is non-status, is not eligible for status. All of the children or further descendants of Indian women who lost status under the discriminatory provisions of the Indian Act would be reinstated under Section 6(2) because the reason their mother lost their status was in most cases because of a marriage to a man without status (Canada, 1996b: 39-40). However, discrimination remained because the children of those women who were reinstated under Section 6(1)(c) would gain status under Section 6(2) because their father was not eligible for status, while children born before the 1985 Act to a father who was eligible for status but whose mother was not born with status would be considered under Section 6(1)(a) (Blair, 2005: 10).
Further to this, status was only available upon application instead of being automatically reinstated, so a woman or any of her children who were eligible for reinstatement but did not go through the bureaucratic application process would not have their status restored (Blair, 2005: 10). Importantly, there was differentiation of status between the grandchildren of a woman who married out and lost her status under the discriminatory provisions and the grandchildren of status Indian men who had married non-status women (Blair, 2005: 10). In simple terms, instead of ending discrimination in the provision of status through the *Indian* Act, the 1985 amendments further enshrined the former discriminatory provisions and led to Sharon McIvor’s challenge to the 1985 Act, which will be covered later in this thesis. Those who were reinstated under Section 6(2) had fewer rights than those who had status under Subsection 6(1) because they could not guarantee that they could pass that status on to their children (Blair, 2005: 10).

In summary, the 1985 amendments to the *Indian Act* excluded women who had gained status through their marriage to a status Indian but who later lost their status, and children whose mothers had gained status through marriage but whose fathers were not status Indians. It also created different classes of status and, perversely, in some cases, two children born to the same parents, one before 1985 and one after, would be categorized differently under the amended provisions of the *Indian Act*. Also, it continued discrimination against the women who had been discriminated against under the previous status provisions when it came to the transmission of their status to their grandchildren. Lastly, the 1985
amendments created several different classes of Indians, not just Section 6(1) and Section 6(2), but status Indians who had band membership, status Indians who did not have band membership and non-status Indians who had band membership. Instead of ending discrimination against women, the 1985 amendments created significant new issues that would have to be addressed in the courts. Simply put, the 1985 *Indian Act* privileged male status Indian ancestry over female Indian ancestry.

To quantify the effects of the 1985 amendments, it should be noted that as of the year 2000, nearly 250,000 applications had been received by persons wishing to gain or have status reinstated under the amended law (Furi and Wherrett, 2003). As of the end of 2000, 114,512 persons had gained status under the 1985 amendments, and 41,199 had their applications denied (Blair, 2005: 11; Furi and Wherrett, 2003). Small numbers of people continue to use the provisions of 1985 Act to gain status but the pace of growth has slowed to the point that by 2005 about 118,000 people had gained status via the amendments (Blair, 2005: 11). These significant increases in status Indians did not come with commensurate increases in funding for bands to provide benefits to the newly reinstated persons. In part because of lack of funding, and also because of acceptance of the discriminatory rules that were apparent in the *Indian Act*, many bands have resisted the implementiong of the 1985 amendments. They have done this by refusing to accept as members, people who either gained or regained status through the 1985 Act. Some band councils even insisted on maintaining the discriminatory status regime imposed by the *Indian Act*, which led to
challenges to those membership codes by women eligible to have their status reinstated based on the provisions of 1985 Act.

Some cases involving the above noted issues include Courtios v. Canada, which was brought to the Canadian Human Rights Tribunal by two women who had been reinstated by 1985 Act but not granted band membership and who wanted to send their children to a band controlled school (Furi and Wherrett, 2003). The Tribunal ruled that Indian and Northern Affairs Canada (INAC), the supplier of education, was required to provide education to Indians and not just those who had band membership (Furi and Wherrett, 2003). Further, the Tribunal ruled that INAC funding for reinstated children to attend non-band schools was discriminatory (Furi and Wherrett, 2003).

The case of Corbiere v. Canada addressed the rights of band members who did not ordinarily reside on their reserve (Furi and Wherrett, 2003). In 1994, the trial court ruled in favour of some members of the Batchewana Indian Band in Northern Ontario who claimed that the requirement to be an “ordinary resident” of a reserve in order to participate in band elections violated those members’ rights under Section 15(1) of The Canadian Charter of Rights and Freedoms (Furi and Wherrett, 2003). The appeal court struck down the “ordinary resident” clause of Section 77(1) of the Indian Act allowing off-reserve members to participate in band elections (Furi and Wherrett, 2003). Since new band membership codes required the approval of a majority of band members, the decision in the case of Corbiere v. Canada changed the way that band membership codes are developed (Furi and Wherrett, 2003). Corbiere v. Canada is also important
because many of those who had their status reinstated under the 1985 Act lived off reserve. According to INAC, only 10% of the 1985 amendment registrants would reside on reserve (Furi and Wherrett, 2003, 39). Prior to the 1985 amendments 70% of status Indians lived on reserve, by 2000 less than 60% did (Furi and Wherrett, 2003). There are many reasons for this demographic transitions but the reinstatement of thousands of women and their children who had previously lost their status and were forced to leave their reserves has certainly played a role in this transition.

The Sawridge First Nation located in northern Alberta, the T'Suu T'ina First Nation (also known as the Sarcee Indian Band) located outside of Calgary and the Ermineskin First Nation of Hobbema immediately challenged Sections 8 and 14.3 of the Indian Act, claiming that reinstatement of women who had lost their status violated Section 35(1) of the Constitution Act of 1982, which enshrined all treaty rights into the Constitution (Blair, 2005: 11; Dick, 2006: 98; Furi and Wherrett, 2003; Green, 2001: 723-724). As part of their claim, the three First Nations also asserted that new provisions of the 1985 Act interfered with their right to freedom of association, which is protected by Section 2(d) of The Canadian Charter of Rights and Freedoms (Furi and Wherrett, 2003). As part of their challenge, the three First Nations claimed that traditionally they had a custom that involved women following men when they were married and joining the band (or community) of the men they married (Dick, 2006: 99). Therefore, they felt that based on that tradition, they should be allowed to exclude those
who regained their status based on 1985 amendments from gaining band membership.

*Sawridge* illustrates a cross-section of the colonial state cooperating with male-dominated and patriarchal band councils to subordinate First Nations women (Green, 2001: 729). This case further shows the power dynamic at work by which the women seeking reinstatement of their band membership are doubly oppressed, first by the patriarchal provisions of the *Indian Act* and the enforcement of same by the Government of Canada and then by their own band councils. Finally, this case exemplifies the illegitimate use of “tradition” as an instrument of patriarchal domination (Green, 2001: 729); “[w]omen in many different cultures contest tradition and cultural practices because they are instruments of their subordination” (Green, 2001: 732).

Although three First Nations originally brought this suit, the Ermineskin band was removed from the case when it was learned that the individual representing them in the case did not have authority to represent the band (Dick, 2006: End note 2: 114). Further, the cases of the Sarcee and Sawridge First Nations were separated because, although they were similar, the two bands were signatories to different treaties, which makes it necessary for them to submit separate claims (Dick, 2006: End note 2: 114). In their submission, the Sawridge First Nation claimed that 1985 amendments contravened their rights under Section 35(1), which enshrines existing Aboriginal and treaty rights, specifically the rights to control their own band membership (Dick, 2006: 99). They posited that it was custom in their community for “women to follow men”
meaning that when a woman was married to a man she followed him to his band (Dick, 2006:99). Interveners presented evidence that contradicted this claim, stating that the practice of “woman follow man” had actually been introduced by the imposition of the *Indian Act* (Dick, 2006: 100).

On July 7, 1995 the federal court upheld Bill C-31 (Furi and Wherrett, 2003). In his decision, Justice Muldoon found that there was no existing Aboriginal or treaty right to control of membership, and therefore Section 35(1) cannot be used to overturn the Bill C-31 amendments (Dick, 2006: 99). Further, Justice Muldoon ruled that even if there were existing rights to control the membership, then they were extinguished by Section 35(4) which ensures that all Aboriginal and treaty rights be equally applied to both men and women (Dick, 2006: 100). He stated that any right that previously would have existed was of “no force and effect” (Dick, 2006: 99). The ruling also criticized the use of blood quantum as a system of determining band membership (Furi and Wherrett, 2003).

The Sawridge First Nation challenged Justice Muldoon’s ruling to the Federal Court of Appeal. Their stated rationale for appeal was that Justice Muldoon “convey[ed] a very negative view of Aboriginal rights or special status for all or some Aboriginal peoples” (Federal Court of Appeal, *Sawridge v. Canada*, 1997: 5; Furi and Wherrett, 2003). They argued that Justice Muldoon’s ruling contained a reasonable apprehension of bias. Caroline Dick points out that, “for an allegation of judicial bias to succeed, the party alleging bias must establish that a person, who was reasonably well informed, upon viewing the
situation in a realistic and practical manner, might conclude that the judge did not act impartially” (2006: supra note 3: 114). In 1997, the Court of Appeal threw out Justice Muldoon’s ruling and ordered a retrial in the Federal Court (Federal Court of Appeal, Sawridge v. Canada, 1997: 10). The Federal Court of Appeal court found that Justice Muldoon’s decision “convey[ed] a very negative view of Aboriginal rights or special status for all or some Aboriginal peoples” (Federal Court of Appeal, Sawridge v. Canada, 1997: 5) and also that he had made a number of comments which the Court of Appeal ruled Aboriginal peoples. The Federal Court of Appeal stated,

We believe the foregoing would indeed create in the mind of a fair-minded and reasonably well-informed observer the belief that the trial judge held certain views during the trial, which were confirmed in his reasons, that aboriginal rights are "racist" and a form of "apartheid". Having ascribed these pejorative terms to a system which is recognized in the history, the common law, and the constitution of Canada, he might well be expected to give the narrowest possible interpretation to, or reject, any newly claimed aboriginal right asserted by the plaintiffs to have existed in 1982. He might also be taken to assume that this alleged right ‘the right of bands to control their own membership’ would be used to promote racism and apartheid and should therefore not be recognized. (Federal Court of Appeal, Sawridge v. Canada, 1997: 9)

Going further, the Court of Appeal found that “the trial record was replete with references supporting the claim that Muldoon J. believed the group-specific rights enjoyed by Indigenous peoples were racist and a form of apartheid. As a consequence, it was reasonable to conclude that Muldoon J. likely would reject Indigenous rights claims, or construe them as narrowly as possible” (Dick, 2006: 100).

In court filings by the Sawridge First Nation in preparation for the second trial their legal argument changed. The Sawridge First Nation was no longer
arguing that “woman follow man” is traditional custom of their First Nation (Dick, 2006: 100). Instead, Sawridge argued that generally First Nations are “distinct polities” that governed themselves prior to contact with Europeans and governed their own band membership (Dick, 2006: 100). Further to this, the Sawridge First Nation claim that band membership will have a significant effect on all of their other treaty rights and therefore “constitutes a core and even essential component of these rights” (Dick, 2006: 100). Finally, the Sawridge First Nation asserted that Bill C-31 amendments were too inclusive and reinstated status, and in some cases band membership, to persons who had never before been members and had very little or no connection, in fact or in law, to the bands they were applying for membership within (Dick, 2006: 100).

This later point is an important component with regard to the discussion surrounding Bill C-31 amendments and more generally the status provisions of the Indian Act. During the movement to change Section 12(1)(b) malestream Aboriginal organizations fought against the reinstatement of women and their descendents who had lost their status because of discriminatory provisions in the Indian Act. Those who were enfranchised, either through marriage or other enfranchisement provisions, are seen as not having the same connection to their communities as those who maintained their status and band membership for their entire lives (Dick, 2006: 101). The claim is that they do not have an understanding of the community and its social and economic needs. Instead, they are seen as agents of the dominant society where many of them have lived for a large part of their lives (Dick, 2006: 102). This perception is supposedly
proven by their adoption of the principles of gender equality and their use of the dominant society’s judicial system in order move their claims forward. In essence, the argument is based on the fact that, although they may have been born Indian, their life experience and who they have chosen to marry and where they have been forced to live via their enfranchisement, they are less Indian then their brothers and sisters who have lived within the community for their entire lives. As an aside, and importantly, non-Indian women who received status for marrying Indian men were not seen as threats from the dominant society and continued to be granted status and band membership even though they had little to no understanding of the community where they were about to live.

In 2001, as the second trial neared, there were two issues which needed to be decided by Federal Appeal Court. The first was an appeal by the Sawridge First Nation about the admissibility of testimony and evidence from the original trial in the new trial (Federal Appeal Court, Sawridge v. Canada, 2001). The case management judge, Justice Hugessen, had ruled that in order to reduce costs and speed up the second trial that testimony from the first trial could be used at the second trial. The Court of Appeal did not agree with the Sawridge First Nation argument that since Justice Muldoon’s ruling was thrown out because of a reasonable apprehension of bias that somehow the testimony from the first trial was biased (FCA, 2001).

In March of 2003, Justice Hugessen also granted a request by the Government of Canada to force the Sawridge First Nation to grant status to the eleven women whom they had been fighting in court from adding to their list
These eleven women were given all of the rights and privileges that are accorded persons appearing on the membership list (FCA, 2004). This decision was also appealed by the Sawridge First Nation because they believed that they had lived up to the changes made to the Indian Act and also that the Government of Canada did not have the standing in order to seek the injunction that they were granted. Justice Hugessen found that these eleven women had reacquired their rights via Bill C-31 and regardless of the fact that the Sawridge First Nation membership code required reapplication, that reapplication process was in fact in contravention of the Bill C-31 changes since the new memberships regulations could not be made retroactively and since all eleven women automatically regained their membership as of April 1985 in accordance with the passage of Bill C-31 (FCA, 2004). Secondly, Justice Hugessen also found that the Government of Canada was able to apply for an interlocutory injunction because they were the defendants in this case and also because they had the ‘public interest’ in mind in ensuring that unless and until the Bill C-31 changes were ruled unconstitutional then they would be enacted, including for the eleven women who were denied reinstated membership in the Sawridge First Nation (FCA, 2004).

In Sawridge v. Canada, several groups intervened, including the Native Women’s Association of Canada (NWAC) and the Native Council of Canada (Alberta) (NCC(A). NWAC intervention was clearly in favour of the Government of Canada’s attempt to restore status and band membership to those who had

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3 Although this case was brought by Bertha L’Hirondelle the Office of the Commissioner for Federal and Judicial Affairs defines the citation as “Sawridge Band v. Canada (F.C.A.)”
lost both through Section 12(1)(b). The NWAC recognized the importance of taking into account traditional practices and Indigenous customs when looking at issues of gender equality (Dick, 2006: 109). The NCC(A), which represents non-status Indians in Alberta, argued that women and their children who had been enfranchised under Section 12(1)(b) had their Aboriginal and treaty rights violated by that process (Dick, 2006: 110). The NCC (A), therefore, supported Bill C-31 being upheld because it was meant to repair a violation of the same Aboriginal rights that the Sawridge First Nation claimed gave it the right to withhold band membership from those reinstated under Bill C-31. It is interesting to note that although the NCC (A) intervened in favour of upholding Bill C-31, they do support the Sawridge First Nations’ claim that control of band membership is an inextinguishable Aboriginal right (Dick, 2006: 110).

As Caroline Dick points out, the Sawridge case operates on three distinct but intertwined levels (2006: 97). The first level is between the Government of Canada and three of its First Nations; the second is between those First Nations and their own internal minority – in this case, people who regained their status through Bill C-31 and who wanted to have their band membership reinstated. The third level is the relationship between the Canadian state and those people who, by legislation, were stripped of their status and band membership and who now, also by legislation, had regained their status and were attempting to regain their band membership (Dick, 2006: 97). These intragroup differences are important to note because, “while Aboriginal communities possess less power than the dominant society and the state that represents it, they have
considerable influence over the lives of reacquired-rights women…Thus the power relations that structure First Nations communities must also be assessed” (Dick, 2006: 108).

The Sawridge case poses challenges because any analysis of it must deal with all three levels, including the difference between First Nations and their own internal minority. Dick goes on to use her approach of intra group difference to suggest that there are two ways in which the Sawridge First Nation rules can be objected to. First, women who had regained their status through Bill C-31 were already Aboriginal, and therefore were already beneficiaries of Section 35 of the Constitution Act (2006: 111). The second is the selective application of the band’s new membership code. The Sawridge First Nation claimed that women who reacquired their status under Bill C-31 did not have knowledge of Sawridge and were somehow a threat to it. Dick asserts correctly that this argument breaks down when it is pointed out that the Sawridge First Nation does not apply anything close to a similar standard to its current members (2006: 110). They are members, regardless of their knowledge of the Sawridge First Nation, cultural, traditions and values. Under the Sawridge band’s membership code, the spouse of a member is eligible for membership (Dick, 2006: 111). This is regardless of the spouse’s connection to the community or knowledge of the Sawridge First Nation’s culture and values. Therefore, the membership rights of women, of any background, in the Sawridge membership code, are based on how they stand in relation to male, status Indian band members and not their knowledge or connection to the community (Dick, 2006: 112).
The Sawridge First Nation’s arguments, when analyzed through the framework of intra group difference are “suspect” (Dick, 2006: 112). Women who reacquired their rights via Bill C-31 are excluded not because they lack a connection to the community or have insufficient knowledge of it but instead because they lack a husband who is a status male band member (Dick, 2006: 112). In this way, the Sawridge First Nation’s membership rules simply carry on the sexist and discriminatory practices that originated with the imposition of the Indian Act. This shows a powerful example of the internal process of colonization within a First Nation. Eventually, when suffering under the burdens of a colonial regime for as long as the Sawridge First Nation has been, those who hold power within the community will begin to assume the tools of the colonizers and use them against those who are less powerful within their own communities. First Nations, like the bands involved in Sawridge v. Canada, insist on clinging to definitions of Indianness created by the federal government as an expression of their sovereignty, not only because the divisions empower them at the expense of other Native people, but also because changes to government definitions of Indianness violate deeply internalized ways of understanding Native identity. (Lawrence, 2003: 12-13)

It should be noted here that if a First Nation wishes to hold all of its members and potential members to a standard of understanding of their community, values, traditions and language that it may be possible that some women who reacquired rights under the Bill C-31 amendments would lose those rights but so would some members of the community who do not have an understanding of their community, values, traditions and language (Dick, 2006: 112). That is to say that if First Nations bands are going to have control over their
own membership rules, then they have a right to obligate members to meet a certain standard of knowledge in the same way that the Government of Canada asks potential citizens to take a test about Canada before they are granted their citizenship. The importance of the politics of intra group difference and Dick’s analysis of the Sawridge case is that those standards cannot be arbitrarily applied only to those persons wishing to have their membership reinstated and who have already suffered an infringement of the Aboriginal rights at the hands of the Government of Canada and the discriminatory provisions of the Indian Act. This would only serve to magnify their suffering since the community in which they were born was also attempting to exclude them on the basis of their original exclusion from their own First Nation, the latter of which had somehow made them less Indian than even the non-Indian wives of their brothers.

Another major case resulting from the Bill C-31 amendments was case of McIvor v. Canada. The case was filed by Sharon McIvor and her son, Charles Grismer, both of whom had been granted status under the Bill C-31 amendments. McIvor was born the descendent of members of the Lower Nicola Valley First Nation. McIvor was born without status because both of her grandmothers had lost their Indian status by virtue of Section 12(1)(b) by marrying non-Indian men (McIvor, 2009: 3). Following the passage of Bill C-31, McIvor was told that she qualified only for status under provision 6(2) of the 1985 Indian Act (McIvor, 2009: 4). This was because she was not able to establish Indian paternity. That being said, McIvor was able to establish Indian maternity, via her mother, but that did not qualify her for status under provision 6(1)(a) of
the 1985 Act (McIvor, 2009: 4). McIvor’s mother was posthumously assigned status under section 6(1)(c) of the 1985 Act, which entitled McIvor to status under Section 6(2) but which left her children without recourse to gain status because their father was a non-Indian (McIvor, 2009: 4).

Sharon McIvor was later granted status under Section 6(1)(c) based on a reinterpretation of her case by the Department of Indian and Northern Affairs (McIvor, 2009: 4). This is because, firstly, her mother should have been eligible for status on two fronts: because she had been excluded based on Section 12(1)(a) when in actual fact her father should have been eligible for status based on both genealogical evidence and analysis provided by the Registrar of Indian Affairs (McIvor, 2009: 4); in addition, McIvor’s improved status was based on a technicality because “there had never been a declaration of paternity in the case of either Susan Blakinship [Sharon’s mother] or Sharon McIvor” (McIvor, 2009: 4). Had there been such a declaration at the time of their births, it is almost certain that they would have been excluded from status under Section 12(1)(b) and the discriminatory provisions of the 1951 Act. This change from status under Section 6(2) to section 6(1)(c) for Mrs McIvor did entitle her children to status under Section 6(2) of the 1985 Act (McIvor, 2009: 4).

The case brought by Sharon McIvor and her son, Charles Grismer, was based on the realization that sex discrimination remained in the 1985 Act in that it created different classes of status depending on whether status was transmitted through the maternal or paternal lines. The example they used was between the treatment of McIvor, her son, Charles, her grandchildren and her brother, Ernie,
his children and grandchildren (McIvor, 2009: 3). Interestingly, there was different treatment for future generations based on whether the status was transmitted from one’s father as opposed to one’s mother. The 1985 Act determined that Sharon was not eligible for status after marrying a non-status man. She was eligible to reapply for status under Section 6(1)(a). Her son, therefore, received status under Section 6(2) because one of his parents was eligible for status. Charles married a non-status woman and therefore his children, Sharon’s grandchildren, were not eligible for status. Ernie on the other hand was eligible for status prior to Bill C-31 because he was a man. Ernie’s son therefore had status under Section 6(1) and even though he married a non-status person, Ernie’s grandson was eligible for status under Section 6(2). This means that the “second generation cut off” provided for in Section 6(2) of the 1985 Act would be postponed at least one generation in Ernie’s case for no other reason than because he was male and his sister Sharon was female (McIvor, 2009: 3).

In contrast to the Sawridge v. Canada case, the McIvor case does not deal with band membership at all. According to McIvor herself, her case is based on the status provisions of the Act, and does not challenge the 1985 Act provisions with regards to band membership (McIvor, 2009: 5). McIvor also points out that because of the 1985 Act, there are persons who have status but do not have band membership and there are persons who have band membership but do not have status. This is because under Bill C-31, band membership and status were severed, meaning that band councils had control
over who is and is not a band member, while the Registrar of Indian Affairs was in control of status.

*McIvor v. Canada* went to trial at the British Columbia Supreme Court (BCSC). In 2007, the BCSC ruled that

the sex based hierarchy contained in the status registration provisions of the 1985 *Act* discriminate against matrilineal descendents, born prior to April 17, 1985, and Indian women born prior to April 17, 1985 who married non-Indian men, with respect to the entitlement to be registered as Indians, contrary to the *Charter*’s equality guarantees. (BC Court of Appeal, *McIvor v. Canada*, 2009 at 6)

Justice Ross of the BCSC ruled that this discrimination is not justified under Section 1 of the *Charter*. In effect, the 2007 ruling by the BCSC is meant to change the status provisions of the 1985 *Act* so that equal treatment is provided to those who registered under Section 6(1)(c) and any person who traces their Indigenous descent via matrilineal means; and the same rights apply to those who registered under Section 6(1)(a) or who trace their Indigenous descent via patrilineal means. As remedy to this discrimination Justice Ross wrote,

> It is the intention of these reasons to declare that s. 6 of the 1985 *Act* is of no force and effect insofar, and only insofar, as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status. (BC Supreme Court, *McIvor v. Canada*, 2007)

This remedy was applied immediately because Justice Ross was not convinced by the Government of Canada’s request for twenty-four months of leeway.

Justice Ross was not convinced because Sharon McIvor and her son and others in their position had waited since at least the 1970s, at which point it had become clear to the Government of Canada that the status regime of the *Indian Act* was,
in fact, discriminatory to Indian women and those who traced their Indian status matrilineally.

The decision by the BCSC, that Section 6 of the 1985 Indian Act was in contravention of subsections 15 and 28 of The Canadian Charter of Rights and Freedoms, was appealed to the British Columbia Appeal Court (BCCA) in 2009 by the Government of Canada. The Appeal was allowed on the basis that it was not appropriate for the BCSC to “augment Grismer’s Indian status, or to grant such status to his children; there was no obligation on the government to grant such status” (BC Appeal Court, McIvor v. Canada, 2009 at 3). Further, the Government of Canada argued that it would be entirely unfair for the Government of Canada to change the status of people who had received it based on the 1985 amendments. This is because, the 1985 Indian Act would have been found constitutional if it had preserved the status that children such as Grismer had prior to 1985. By offering enhanced to status to children like Grismer the government created new inequalities which violated the Charter. In the end, the Government of Canada contended that only Parliament could decide how to deal with the issue. Therefore the Government of Canada asked to have the declaration that Section 6(1)(a) and 6(1)(c) were of no force and effect stayed for one year so that Parliament would have time to amend the 1985 Act.

The BCCA found that

There is little doubt that the provisions of the Indian Act that existed prior to the 1985 amendments would have violated s. 15 of the Charter had they remained in effect after April 17, 1985. Equally, it is clear that if the current provisions had always been in existence, there could be no claim that the regime discriminates on the basis of sex. The difficulty lies in the
transition between a regime that discriminated on the basis of sex and one that does not. (BCCA, 2009 at 9)

The plaintiff, Sharon McIvor, argued that using the 1951 Act as a starting point ensured that the resulting legislation would maintain the discriminatory results of the original legislation. In response to this, the Government of Canada claimed

that the Charter cannot be applied retrospectively, and that it was therefore sufficient for Parliament to enact a regime that was non-discriminatory going forward. They claim that the government was not required to enact legislation that sought to undo all of the effects of legislation that had been in place for over one hundred years. Indeed, they say, the new legislation is generous in reinstating the right to Indian status to certain groups of people; it goes further than necessary in trying to redress past wrongs. (BCCA, 2009 at 12)

It is interesting to note that the Government of Canada continued to maintain that the passage of Bill C-31 was “generous” and that the legislation itself “goes further than necessary.”

In both the case before the BCCA and the BCSC, McIvor and Grishmer used the example of McIvor’s hypothetical brother to show the differentiation in treatment. In its ruling, the BCCA stated,

The old legislation treated the hypothetical brother’s grandchildren somewhat better than those of McIvor; the hypothetical brother’s grandchildren would have enjoyed status up until the age of 21. It is, however, the overlay of the 1985 amendments on the previous legislation that accounts for the bulk of the differential treatment that the plaintiffs complain about. Under the 1985 legislation, the hypothetical brother’s grandchildren have Indian status. They are also able to transmit status to any children that they have with persons who have status under ss. 6(1) or 6(2). McIvor’s grandchildren, on the other hand, have no claim to Indian status. (BCCA, 2009 at 60)

It is clear with this example that it is actually the 1985 Indian Act that causes the different treatment under the law for McIvor and her descendants and therefore
the Government of Canada’s claim that the Charter cannot be applied retroactively is not an appropriate defense for continuing discriminatory provisions of the Act.

An important aspect of the plaintiffs’ case was the claim that Indian status was a benefit. To this point, both the trial judge and the appellate judged concurred that

The plaintiffs have adduced significant evidence demonstrating that Indian status is a benefit. Under the terms of the Indian Act and other legislation, persons who have Indian status are entitled to tangible benefits beyond those that accrue to other Canadians. These include extended health benefits, financial assistance with post-secondary education and extracurricular programs, and exemption from certain taxes. The trial judge also accepted that certain intangible benefits arise from Indian status, in that it results in acceptance within the aboriginal community. While some of the evidence of such acceptance may be overstated, in that it fails to distinguish between Indian status and membership in a band, I am of the view that the trial judge was correct in accepting that intangible benefits do flow from the right to Indian status. (BCCA, 2009 at 70)

The plaintiffs successfully argued that the ability to transmit status to one’s children should also be seen as a benefit. The appeals court judge agreed with this assertion based on the fact that some of the financial benefits that are evident in the above passage will relieve certain burdens on a parent. Further to this, the ability to transmit Indian status to a child can be seen as a sense of “comfort and pride” (BCCA, 2009 at 70).

The ruling also states,

It is apparent that the Indian Act treats Mr. Grismer’s group less well than the comparator group. Unlike those in the comparator group, Mr. Grismer is unable to transmit Indian status to the children of his marriage to a non-Indian woman. (BCCA, 2009 at 83)
The BCCA also found that the Government of Canada was incorrect in its assertion about the effects of Bill C-31. The Government of Canada mischaracterized the effects on Grismer and the difference between him and his hypothetical cousin who would have a greater form of status than he did under the 1985 Act.

The BCCA ruling also found that there is discrimination against both Grismer and McIvor contrary to Section 15 of the Charter on the grounds of sex. This is based on the fact that the court found that the transmission of status is a benefit to a parent, and even though Grismer is a male, he is unable to transmit status to his children simply because his parent was female rather than a male. In this sense, Grismer, his children and even McIvor are all victims of sex discrimination, based on the fact that McIvor is treated differently under the 1985 Act provisions than her brother would have been. The ruling states,

…it would not be in keeping with the purpose of s. 15 of the Charter to hold that sex discrimination directed at one of those three generations was inconsequential so long as the disadvantageous treatment accrued only to another of them. (BCCA, 2009 at 93)

This is an important point because it shows that discrimination on the grounds of sex does not have to occur against the person but can be based on previous discrimination against someone's ancestors if it has a specific current effect on the person claiming to be discriminated against.

Although the BCCA found that McIvor and Grismer were discriminated against based on the 1985 Indian Act, it did disagree with the contention of the BCSC ruling that the discrimination was based on whether individuals trace their
right to status through their matrilineal or patrilineal lines. On this the BCCA stated,

The trial judge did not undertake any analysis to determine whether this broadly interpreted ground of “matrilineal or patrilineal descent” qualifies as an analogous ground under s. 15 of the Charter. I regard the proposition that s. 15 extends to all discrimination based on pre-Charter matrilineal or patrilineal descent to be a dubious one. All persons are persons of both matrilineal and patrilineal descent, in that we all have an equal number of male and female forebears. The usual indicators of an analogous ground of discrimination – historic disadvantage of a particular group, stereotyping, insularity, etc. – cannot be sensibly applied when everyone partakes of the characteristic allegedly forming the basis of discrimination. (2009 at 99)

This portion of the discussion, although possibly unimportant to the specific decision in this case, is important in the general context of discussing the Indian Act and how it has manifested itself in a discriminatory fashion to both Indian women and those persons who trace their Indian status through their matrilineal line. If, as the judge ruled, Indian status is a benefit to both the person holding it, and it is also a benefit to those who pass it on to their children, then for over one hundred years the Government of Canada has removed that benefit from women and other Indigenous persons who were enfranchised under different provisions of the Indian Act.

In discussing the discriminatory nature of the Indian Act prior to 1985 the BCCA ruling states,

The impugned legislation in this case is, in my opinion, discriminatory as that concept is used in s. 15 of the Charter. The historical reliance on patrilineal descent to determine Indian status was based on stereotypical views of the role of a woman within a family. It had (in the words of Law) “the effect of perpetuating or promoting the view that [women were] ... less ... worthy of recognition or value as a human being[s] or as a member[s] of Canadian society, equally deserving of concern, respect, and consideration”. The impugned legislation in this case is the echo of historic
discrimination. As such, it serves to perpetuate, at least in a small way, the discriminatory attitudes of the past. (2009 at 111)

This is worth quoting because it discusses the historical structural discrimination against women that existed in both Canada at large, and more so as part of the Indian Act status regime.

In McIvor v. Canada, the Government of Canada argued that although there was discrimination based on sex in the previous incarnations of the Indian Act, the government needed to be granted considerable leeway to deal with the transition from a discriminatory framework of the previous Act and the non-discriminatory framework of the 1985 Indian Act. In response to this argument the BCCA points out that it is incumbent on the Government to prove the need for the leeway it feels necessary:

It should not be for the claimants to prove that prima facie discriminatory legislation cannot be justified – rather, it should be for the government to show that its own pressing and substantial objectives justify the discrimination. (2009 at 114)

Section 1 of the Charter states that “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (Canada, 1982). Therefore, in order to justify the discrimination existent in the 1985 Indian Act, it is incumbent on the Government of Canada to show that the discrimination is justifiable.

The BCCA’s ruling provides a four part test:

(1) Is the objective of the legislation pressing and substantial?
(2) Is there a rational connection between the government’s legislation and its objective?
Does the government’s legislation minimally impair the *Charter* right or freedom at stake? (4) Is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation? (2009 at 119)

Based on these four points the court is required to test whether Section 1 allows the government to discriminate against persons in Grismer’s position.

In testing whether or not the Government of Canada had met the reasonable limit test, the BCCA points out that the government was attempting to end sex discrimination within the *Indian Act* with the passage of Bill C-31, and those objectives need to be found pressing and substantial. Therefore, the BCCA was interested in the reasoning behind the decision not to extend status to persons in Grismer’s position. That reasoning, as stated in the ruling was,

The legislation resulted in a significant increase in the number of people entitled to Indian status in Canada. There were widespread concerns that the influx might overwhelm the resources available to bands, and that it might serve to dilute the cultural integrity of existing First Nations groups. The goal of the legislation, therefore, was not to expand the right to Indian status *per se*, but rather to create a new, non-discriminatory regime which recognized the importance of Indian ancestry to Indian status. (2009 at 129)

The court also recognized that, in part, the reasoning for not wishing to extend status was based on long-term consultations with mainstream Aboriginal groups.

Based on these consultations, the Government of Canada was of the opinion that having a single Indian grandparent should not be enough of a connection to the community, its traditions, customs and values in order to warrant being granted Indian status. This ruling points out that this line of reasoning aligns with the thinking behind the Double Mother rule:

Given that there is a clear pressing and substantial objective in preserving the status of those who had Indian status prior to 1985, and given that it
would be anomalous and not in keeping with the post-1985 regime to extend status to people in Mr. Grismer’s situation, I am of the view that the first part of the s. 1 test is satisfied in this case. The legislative regime is premised on a pressing and substantial governmental objective. (BCCA, 2009 at 133)

Based on this finding, the 1985 Indian Act meets the first test of being based on a pressing and substantial governmental objective. The ruling also found that there is also a connection between the legislation and the government’s objective.

On the third point, whether Grismer’s rights were minimally impaired by the amendments made under Bill C-31, the ruling points out that the Government of Canada [has] not presented evidence or argument attempting to justify the 1985 legislation on any basis other than that it preserved existing rights. When pressed, they acknowledge that the situation of persons in what I have found to be the appropriate comparator group was ameliorated by the 1985 legislation. They say, however, that there is an important difference between the comparator group and Grismer’s group. They note that members of the comparator group have two Indian parents – a father who is of Indian heritage, and a mother who became Indian by virtue of marriage. In contrast, Grismer has only one parent of Indian heritage – his mother. (BCCA, 2009 at 141)

The government’s rationale is “unconvincing” because it foundationally privileges those who trace their Indian status through their male ancestors. The ruling goes on to find that Bill C-31 does not minimally impair Grismer’s rights under Section 15 of The Canadian Charter of Rights and Freedoms (BCCA, 2009 at 145)

Finally, on the issue of ancestral gender proportionality, the BC Court of Appeal ruling states:

All people have both male and female ancestors – there is no identifiable group of people that are the descendants of women as opposed to being the descendants of men. While the 1985 legislation, for reasons of preserving existing rights, postpones the second generation cut-off by one generation for those who had Indian status at the date of its enactment, it
does not have permanently discriminatory effects against an identifiable group. (BCCA, 2009 at 150)

The Appeal court, therefore, ruled that Bill C-31 met three out of the four tests required to uphold it under Section 1 of the Charter. That being said, the court found that the legislation was not saved by Section 1 because it more than minimally impaired Grismer’s rights under Section 15.

Under the heading of the “remedy” the BCCA found that the BCSC ruling had erred in two specific contexts. Firstly, “in defining the extent of the Charter violation” and secondly, “in the remedy that she granted” (BCCA, 2009 at 152 and 153). The BCSC had, according to the BCCA, granted a remedy that allowed for reinstatement of 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” (BCCA, 2009 at 152). Further, the BCCA disagreed with the BCSC ruling that changes to the legislation take effect immediately. The BCSC ruling had done this because of the length of time that the plaintiffs had waited to receive remedy for the discrimination that they had faced.

On appeal, the BCCA found a narrower conception of discrimination than the BCSC because the Charter was not meant to be applied retroactively; the BCCA’s ruling states, “The legislation would have been constitutional if it had preserved only the status that such children had before 1985. By according them enhanced status, it created new inequalities, and violated the Charter” (2009 at 155). Therefore, the BCCA focuses the suggested redress on the specific inequalities created by the 1985 amendments and, unlike the BCSC and Justice
Ross, decides not to provide a remedy for those who were discriminated against prior to 1985.

The BCCA remedy is extremely narrow, and although it may be correct in terms of the law, it fails to account for the damage that has been caused by the discriminatory foundation of the 1985 status provisions. The BCCA ruling is rich with proof of historical and present discrimination within the status provisions of the Indian Act. In a real sense, its decision to overturn the more substantial BCSC ruling and replace it with a much more narrow ruling helps normalize the discrimination which they outline and erases the injustices suffered by Indian women who lost their status and those who trace their Indian status matrilineally.

The BCCA points out,

There are two obvious ways in which the violation of s. 15 might have been avoided. The 1985 legislation could have given status under an equivalent of s. 6(1) to people in Grismer’s situation. Equally, it could have preserved only the existing rights of those in the comparator group. While these are the obvious ways of avoiding a violation of s. 15, other, more complicated, solutions might also have been found. (2009 at 156)

Yet, this is somewhat problematic because the choice is to treat descendants of those who were discriminated against in the same as those who benefited under the previous discriminatory regime or to ignore previous discrimination and simply stop discriminating from now into the future. Ignoring historical discrimination has the effect of erasing historical discrimination and maintain the current effects of historical discrimination.

In attempting to find a remedy based on the above reasoning, the BCCA found that the time passed since the 1985 Indian Act made reaching a decision difficult. The BCCA was unsure of how the Government of Canada could amend
the 1985 Act in order to make it constitutional. The BCCA’s ruling states that the court is hesitant to read additional entitlements into Section 6 of the Indian Act, but is even more reluctant to reduce the status provided by the current legislation to those who have benefited by tracing their status via patrilineal means. The BCCA states,

It would not be appropriate for the Court to augment Grismer’s Indian status, or grant such status to his children; there is no obligation on government to grant such status. On the other hand, it would be entirely unfair for this Court to instantaneously deprive persons who have had status since 1985 of that status as a result of a dispute between the government and the plaintiffs. In the end, the decision as to how the inequality should be remedied is one for Parliament. (2009 at 160)

In essence, based on this quandary and based on the length of time that had passed since the passage of the 1985 Act, the BCCA decides to punt the decision back to parliament in order for them to make changes that address the ruling. Those issues are,

Sections 6(1)(a) and 6(1)(c) of the Indian Act 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 s. 12(1)(a)(iv) of the former legislation. Accordingly, I would declare ss. 6(1)(a) and 6(1)(c) to be of no force and effect, pursuant to s. 52 of the Constitution Act, 1982. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional. (BCCA, 2009 at 161)

Based on this ruling, the Government of Canada was again forced to amend the status regime within the Indian Act.

The result of the BCCA ruling is, according to Ebert’s an illogical judgment, which not only fails to grasp the larger picture, but also fails by its own lights. Applying its own test of whether section 6 merely preserved the rights of those claiming in the male line, or added to them, the Court of Appeal missed a significant addition to rights by Bill C-31, the result on the appeal. (2010: 18)
The BCCA rule strays from the mark by limiting Grismer’s comparator group to those who lost their status because of the double mother rule and who regained status under provision 6(1) instead of all of those who had lost status because of discriminatory provisions as the BCSC had ruled (Ebert, 2010: 30).

Ebert also points out that the BCCA and the BCSC differ on whether or not to accept the government’s claim that an influx of reinstated people would overtax band councils’ limited resources. The BCSC found “there was no evidence that removing discrimination would permit an influx of persons with a more remote cultural proximity to the original population of Indigenous persons” (Ebert, 2010: 36), and that any cultural dislocation was based on the “invidious” effects of the discrimination they had suffered (Ebert, 2010: 36). On the other hand, the BCCA accepted the government’s argument while overlooking the fact that band councils did not feel that their resources were overextended when non-status women gained status by marrying status men (Ebert, 2010: 35). Finally, as Ebert so concisely points out, the simplest way to address concerns about overburdening the resources of First Nations communities is for the government to provide adequate resources to deal with the new registrants. Withholding such resources is bound to cause concern, and opposition to reform; it is totally within the government’s power to deal with such concern and opposition by providing an adequate funding base to support its legislative changes. (2010: 36)

McIvor, for her part, sought leave to appeal to the BCCA’s decision to the Supreme Court of Canada. Her reasoning was based on the fact that she found the BC Court of Appeal “took a much narrower characterization of why the 1985 Act was not justified” (McIvor, 2009: 6). This was, in McIvor’s opinion, based on
the different treatment of the reasonable limits claim by the government. McIvor points out, as has been noted earlier, that the BC Court of Appeal actually allows for discrimination that was existent prior to 1985 and the continued discrimination based on how the transition was handled would be allowable if the 1985 Act had not improved the status given to those who trace their Indian status patrilineally (McIvor, 2009: 7). According to McIvor, “the Court of Appeal found that this, and only this aspect of the discrimination, was unjustified because it did not simply preserve existing rights acquired under the former discriminatory regime, but went further and enhanced them” (McIvor, 2009: 7).

Sharon McIvor did not agree with the BC Court of Appeal ruling because it allowed the Government of Canada to deal with only the issue of enhanced status given to those who would have lost status under the so called double mother rule when they turn the age of 21. As well, based on the BC Court of Appeal ruling, Sharon McIvor and her son were not eligible for any remedy from the Government of Canada even though, according to the Court of Appeal, they had been victims of discrimination and were being treated differently than the close comparator group. McIvor argues that based on the historical discrimination that Indigenous women have faced because of the sexist status provisions of the Indian Act and because of the criticism that Canada has received both nationally and internationally, it was incumbent upon the Supreme Court of Canada to hear her request for an appeal of the BC Court of Appeal decisions (McIvor, 2009: 7).
Sharon McIvor points out that there are four reasons why the BC Court of Appeal's decisions should be reviewed by the Supreme Court of Canada:

1) thousands of Indigenous women and their descendents are affected by this decision; 2) it is a long-standing issue of discrimination in Canada and correcting it appropriately is a matter of national importance; 3) the reasoning of the British Columbia Court of Appeal will have a negative impact on other equality cases; and 4) the remedial analysis of the British Columbia Court of Appeal is inconsistent with established precedent and incapable of leading to a proper remedy. (McIvor, 2009: 7)

The Government of Canada opposed McIvor’s request for Appeal. Although the BC Court of Appeal had ruled in favour of Sharon McIvor’s claim that the status provisions of the 1985 Indian Act were discriminatory, the BCCA’s narrower reading of the case compared to the BCSC was not the desired remedy that McIvor sought. The BCCA ruling made no effort to end sex discrimination within the Indian Act.

It should be noted at this point that it took Sharon McIvor and her son 24 years in order to go through the court system which at both the BC Supreme Court and Appeal Court levels found that their claim of discrimination on the grounds of sex was valid. The amount of time and resources required to make these sorts of challenges shows a major issue that First Nations, Métis and Inuit peoples in Canada have when litigating their rights claims. It is not only exceptionally time-consuming for someone to bring suit against the government in order to uphold rights enshrined in the Charter, but it is also more expensive than most individuals without backing can afford. This is especially true now because the government has ended the program which provided financial
support to individuals and groups making Charter challenges (BCCCAA, 2006: 6).

The government decided not to appeal the BC Court of Appeal decision on June 2, 2009. Sharon McIvor’s appeal to the Supreme Court of Canada was rejected on November 5, 2009 (Canada, 2010: 4), leaving the government to address the issues brought forward by the BC Court of Appeal but without having to address the concerns of McIvor and her son. Having exhausted her final recourse under the Canadian legal system, Sharon McIvor decided to follow in the footsteps of Sandra Lovelace by taking her case before the United Nations Human Rights Tribunal (McIvor, 2010). Like Lovelace before her, McIvor’s argument is that the discriminatory foundation of the 1985 status provisions and the differential treatment of those who trace their Indian status through their maternal line violate the *International Covenant on Civil and Political Rights*.

In August of 2009, the Government of Canada released a discussion paper purportedly to begin the process of consulting with First Nation and other Aboriginal groups about the changes required by the BC Court of Appeal ruling. The discussion paper outlined the governments preferred resolution to the ruling: confer subsection 6(2) status on any grandchildren of women who lost status due to marrying out (e.g., McIvor) and whose child of that marriage (e.g., Jacob Grismer) had the grandchild with a non-Indian after September 1951, when the double mother rule took effect; this result would be effected by amending subsection 6(1) to include persons in Jacob Grismer’s position. The discussion paper suggested such an amendment would result in total new registrants of between 20,000 and 40,000, most residing off reserve, and that failure to amend the Act by 6 April 2010, when suspension of the BC court’s decision ends, would cause uncertainty for First Nations communities in that province. (Canada, 2010: 6)
Both First Nations and other Aboriginal groups were critical of the government’s response and the Supreme Court of Canada’s unwillingness to hear McIvor’s appeal (Canada, 2010: 6). The government was criticized for not having substantive consultation with First Nations and other Aboriginal groups before deciding exactly how they would precede (Canada, 2010:6).

McIvor also responded to the government’s official response, outlining four major concerns. Firstly, the Government of Canada proposal focuses on children of women who had lost their status by “marrying out,” which fails to deal with the issue of children who do not have status because they trace their right to Indian status through matrilineal descent (McIvor, 2009: 8). An example of those who would not receive status based on this approach are “the previously disentitled grandchildren of Indigenous grandmothers who co-parented in common law relationships with non-status men” (McIvor, 2009: 9). For these grandchildren, sex discrimination would still prevent them from getting status.

Secondly, the Government of Canada’s response to that ruling was limited to reinstating status for those who had lost it after September 4, 1951, the date at which the Double Mother rule was added to the Indian Act. McIvor points out that this is problematic because “Sex discrimination is sex discrimination regardless of the age of the applicant” (McIvor, 2009:9). It is, as McIvor points out, faulty to declare that sex discrimination under the Indian Act only began with the Double Mother rule. In fact, the Double Mother rule is the only instance by which a descendant who traces their right to Indian status patrilineally was deprived of status. Two siblings with the same parents could find themselves in the position
in which the younger of the two was eligible for reinstatement while the older of the two, if born before Sept 4, 1951, would not be eligible (McIvor, 2009: 9).

Thirdly, McIvor is opposed to the government’s plans to apply a generational cutoff to its proposal. The government’s discussion paper would reinstate grandchildren but would leave further generations victim to the previous discriminatory regime (McIvor, 2009: 10). This is discriminatory in the sense that the under Section 6(1)(a) of the 1985 Indian Act, those who trace their Indian status through their male line are not subject to a cutoff at their grandfather. It should be noted that, although they would be reinstated under 6(1)(a), based on the 1985 Indian Act, if they married a person who was not eligible for status, their descendants would eventually lose that status in two generations.

Finally, McIvor is critical of the fact that the government’s proposal only grants status under Section 6(2) to those persons that it reinstates. McIvor contends that Section 6(1)(a) status is a superior form of status to Section 6(2) (McIvor, 2009: 10). This is because, under the 1985 Indian Act, the generational cutoff is postponed one generation for those who have status under the provisions of Section 6(1). In real terms, what this means is that if the ability to pass on status is a benefit, which was clearly stated in the BC Court of Appeal’s ruling, then those who are reinstated under the government proposal would have less ability to transmit this benefit to their children. The only way someone who receives status under Section 6(2) can pass on that status to their children is if they have children with someone who is also eligible for status under either Section 6(1) or Section 6(2).
In 2009, the government introduced Bill C-3, ironically titled, “Gender Equity in Indian Registration.” Bill C-3 contains 10 clauses, the first of which reinstated Section 6(1)(a) and 6(1)(c) of the 1985 Indian Act (Canada, 2010: 7). This was required because those two clauses had been ruled to be of no force and effect by the BC Court of Appeal. Clause 2.3 of Bill C-3 deals with new categories of registrants that will come into existence under Bill C-3 (Canada, 2010:7). These are based on the premise that in order to live up to the BC Court of Appeal ruling, the government was required to provide equal status to those who lost their status under the Double Mother rule and those who lost their status because they traced their Indian status through their matrilineal line. Clauses 2.4 made people who predeceased the coming into effect of Bill C-3 eligible for status (Canada, 2010: 9). This was the same in the 1985 Indian Act, so this clause simply expanded that provision to those new classes of registrants under Bill C-3. Clause 3 dealt with band membership (Canada, 2010: 9). It proposed, in the same manner that the 1985 Indian Act did, that those who were reinstated under new provisions who traced their status through their matrilineal line were eligible for band membership. By 2009, over 230 First Nations in Canada had their own band membership codes (Canada, 2010: 9). New registrants would have to live up to the membership code of the First Nation that they were applying for band membership in. Clause 4-9 provided greater certainty and continuity to reinstated and newly determine registration criteria (Canada, 2010: 9). Finally, Clause 10 proposed that the new regime will come into effect April 6, 2010 (Canada, 2010: 10).
Clause 2.3 created four new registration classes added to the 1985 *Indian Act* status regime. New registrants became eligible for status under Section 6(1)(c1) if clauses (i) to (iv) were met. Section 6(1)(c1)(i) required that potential new registrant’s parents lost status based on the marrying out provisions of the 1951 *Indian Act* or any marry out provisions that existed in any version of the Act (Canada, 2010: 7). Section 6(1)(c1)(ii) required that a potential new registrants father did not have status, was not eligible for status, or not an Indian based on the provisions of the *Indian Act* from before 1985 (Canada, 2010: 7). Section 6(1)(c1)(iii) provided that a potential new registrant must be born after the marriage by which one’s mother lost her status, and that this marriage must have occurred before the establishment of the 1985 *Indian Act* (Canada, 2010: 8). The point of this subsection, according to the government, is to ensure that persons tracing their Indian status through their male line are not discriminated against based on the new provisions. Finally, Section 6(1)(c1)(iv) required that potential new registrants have had or adopted children since the 1951 *Indian Act* instated the Double Mother rule (Canada, 2010: 8). This limited the eligibility of potential new registrants to those who had children to pass that status onto because that is what the BC Court of Appeal ruled was the benefit that was lost by Grismer in the *McIvor v. Canada* case.

During the Committee stages of the hearings into Bill C-3, opposition Members of Parliament who held a majority on the committee introduced an amendment which would have made anyone who was born before the 1985 *Indian Act*, and who was the descendent of a person who was registered or
entitled to be registered under the changes in the 1985 *Indian Act*, eligible for status under Section 6(1) of the 1985 Act (Ebert, 2010: 44). This amendment was ruled inadmissible first by the chairperson of the committee and later by the Speaker of the House of Commons based on the grounds that it changed the specific function of Bill C-3 (Canada, 2010: 7; Ebert, 2010: 44). That function was seen as ensuring the *Indian Act* was amended in order to live up to the BC Court of Appeal ruling, instead of living up to the BC Supreme Court ruling and the title of the legislation, which was to bring about equity in the process of the *Indian Act* registration. On December 15, 2010, Bill C-3 received royal assent. According to government estimates, 45,000 people became eligible to register for status based on the 2010 *Indian Act*. That constituted about 6% of total status Indian population in Canada (Canada, 2010: 8).

Bill C-3 still discriminated and maintained a weaker version of status for those who it reinstates (Day and Green, 2010). It maintained a process by which descendents of status Indian women were treated differently than the descendents of status Indian males for the purpose of the transmission of status to future generations. Further to this, those seeking status that were born before September 4, 1951 were treated differently based on the sex of their Indian ancestors’ lineage. Also, C-3 does not apply to children or grandchildren who were parented in a common law union by a status Indian mother and a non-status Indian father (Day and Green, 2010). Clearly, Bill C-3 does not fix all the

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4 Since the passages of Bill C-31, in cases were a child was born to a status mother and where the paternity of the child was undeclared the government has assumed that the child’s father was non-status. If the mother had status under 6(1) her child with unstated paternity would have status under 6(2). If the mother had status under 6(2), her children are not eligible for status. According to Michelle Mann, 50 percent of
issues that it purports to; instead, it continues the long history of sex discrimination via the *Indian Act*, and if passed it will force even further legal action. It should be remembered that Sharon McIvor spent over 20 years in litigation in order to have Bill C-31 overturned.

Interestingly, Bill C-3 proposes that following its passage, wide ranging consultations will be held between the Government of Canada and First Nations bands and organizations. To this Shelagh Day and Joyce Green respond:

Genuine consultation by governments with Aboriginal peoples on self-government, land claims, environmental law, resources, and child welfare is urgently needed. But consultation, and the urgent Aboriginal policy agenda must not obscure the need to eliminate sex discrimination from *The Indian Act*. Aboriginal peoples wish to find strategies now for exiting from colonialism. But the descendants of Aboriginal women are entitled to exit now from legislated patriarchy, so that they too can exit colonialism as equal partners. (2010)

It would seem that Government of Canada was attempting to win support for the problematic Bill C-3 by inducing First Nations bands and organizations to support its passage in order to begin the consultation process that First Nations are entitled to.

This thesis has provided critiques of Bill C-3 from Sharon McIvor as well as Mary Eberts, Joyce Green and Shelagh Day, which can be found in the introduction. One critique which is missing from McIvor’s, Green’s and Day’s analyses is the necessity for a person to have had or adopted children in order to be eligible for registration under Bill C-3. This requirement, based on the findings of the BC Court of Appeal, is instructive of how flaws can exist in legislation when cases of unstated paternity are accidently. Between 1985 and 1999, 37,300 children were born to women with 6(1) status but had unstated paternity. In the same period 13,000 children were born to women with 6(2) status and unstated paternity, all of those children were not eligible for status. (Mann 2005: 5)
they are designed simply to live up to a court ruling. Bill C-3 also, as McIvor, Green and Day point out, continues the sex discrimination based on whether someone traces their Indian status through their mother or their father. It also fails to be inclusive by only addressing the issues of unequal treatment that arise from the implementation of the ‘Double Mother rule’ in the 1951 Indian Act, as if there was no discrimination prior to that rule being put into place. Those who have read this far will know that is simply not the case. It is very unfortunate that the government did not take the opportunity of the McIvor ruling to end the differential treatment of persons who benefited from the marrying out provisions of the Indian Act and those who were victims of it. Instead, the Government, supported by all parties in the House of Commons, decided to simply address the specific issues brought up by the BC Court of Appeal ruling and ensured that the foundation of the status provisions of the 2010 Indian Act are based on the same discriminatory ground as all previous iterations.

This chapter has dealt with activist, legal and legislative attempts to end the discrimination within the status regime of the Indian Act. It has shown that, even when different levels of the judicial system recognize the discriminatory foundations of the status regime, there has yet to be a successful legislative strategy to destroy that discriminatory foundation. It has also shown how the judicial branch is an expensive and time consuming route to seeking equality. Finally, this review has shown that the Courts have been faced with important questions based on both the status regime and the band membership provisions which were amended in 1985. Although Bill C-31 and Bill C-3 were purported
attempts to end discrimination based on the grounds of sex within the *Indian Act*, they failed in that endeavour. And even though Bill C-31 took an important step by giving control of band membership to the band councils, as the Sawridge Case proved, it is not insurance that band membership regimes will be non-discriminatory.

All aboriginal people, both men and women, have been the victims of the racial and colonial supremacy that is active in the administration of the Indian Act and the bureaucratization of that administration through the federal department of Indian and Northern Affairs. In the larger picture, all non-Indigenous Canadians have benefited from the colonial regime which privileges them over Indigenous Canadians. This is evident not just by the difference in standards of living between non-Indigenous Canadians and Indigenous Canadians but also how the structures of the Canadian government treat the non-Indigenous differently than they treat Indigenous Canadians.

What I mean by this is Canada does not have a Department of Settler Colonialist Affairs to administer the lives of non-Indigenous Canadians. It does not have a Settler Colonialist Act to govern minute aspects of settler colonialists lives, and it never has had either of these kinds of administration. It would be fair to argue that the entire Government of Canada, including the executive, legislative and judicial branches of government, as well as both federal and provincial governments, work in concert to administer and support the lives of settler colonialists. The difference is that these institutions do not place significant emphasis on micromanaging the lives of settler colonists as they do on governing the lives of Indigenous Canadians. Where responsibilities for settler colonialists are both literally and functionally divided amongst the different orders of government, the administration of colonialism in Canada is arguably granted to
the federal government. Section 91(24) of the Constitution Act of 1982 gives the federal government the responsibility for “Indians and lands reserved for Indians” (Canada, 1982). It should be noted that no other categories of people are mentioned in Section 91-95 of the Constitution. Indians stand alone as being the only people that are monitored.

Indigenous peoples in Canada are seen this way in large part because of the conceptions of racial and cultural superiority that have been discussed in this Chapter. They are treated as “wards of the Crown” needing special provisions and a separate bureaucracy to take care of them. This is not done because of special rights that they are entitled to under Section 35 of the 1982 Constitution Act, but rather because they are seen as being inferior, referred to often as child-like, in need of the care of the state. While Section 35 enshrines existing Aboriginal and treaty rights to the benefit of Aboriginal peoples, Section 91(24) gives responsibility for the administration of Indians and their lands to the federal government. Section 91(24) is not only illustrative of the structural discrimination that Aboriginal people face in Canada, but is also instructive of the racial and cultural superiority assumptions in Canada that have functioned and continue to function to this day.

Often, non-Indigenous Canadians frame racism, patriarchy and colonization as relics of our collective past. In this sense, they erase how structures of racism, patriarchy and colonization continue to perform at present. They also erase the negative results of those structural interactions in the lives of women, people of colour and Aboriginal Canadians. This erasure serves not only
to blind many to structural discrimination but has the effect of denying the significant benefits that those who are privileged under the current discriminatory system gain. This silencing also serves to ignore the privilege that is granted to males, white people and non-Indigenous Canadians under the current structures in place. The process of denial and erasure refuses to take discourses regarding racism, patriarchy and colonization seriously. It also makes it difficult for groups or individuals to raise objections and mount legitimate complaints against these systems.

When I embarked on writing this thesis, I hoped that through my research I would be able not only to expose the problems of the status provisions of the Indian Act but also propose some kind of way forward, a solution, if you will. During my research, what I realized was that for literally hundreds of years, white male settler colonial have been, sometimes with good and sometimes with bad intentions, trying to civilize Indigenous “savages” through an aggressive colonial regime. That is to say, I initially thought that the answer to these problems could come from the same flawed regime that created the Indian Act. The conclusion that I have come to is that my idea when I started this project is based on the same racist, patriarchal and colonial assumptions that I have set out to critique in this thesis.

As was mentioned earlier, Edward Said posited that there was a requirement of settler colonialists to believe that they were racially and culturally superior in order to impose a colonial enterprise (Said, 1994: 10). The Indian Act, through all of its iterations, is a perfect example of this belief. There is no other
way to look at a regime that has attempted to control and manipulate every aspect of Indigenous peoples' lives, including in this specific case their ability to identify themselves as part of their own communities, without seeing the belief of racial and cultural superiority at work. “The lingering of this presumption of cultural superiority remains the major barrier in moving towards a truly post colonial position for Indigenous peoples” (Russell, 2006: 31). That same racially and culturally superior mindset brought this author, with what seemed at the time to be good intentions, to the project of solving the problems that existed within the status provisions of the Indian Act.

Racism is a significant aspect of colonialism throughout the world (Memmi, 1967: 70). In fact, “racism sums up and symbolizes the fundamental relation which unites colonialists and colonizer” (Memmi, 1967: 70). The three major ideological components of this racism are the cultural difference between colonizer and the colonized, the exploitation of these differences to the benefit of the colonizer and imposition of these supposed differences as absolute fact (Memmi, 1967: 71). The relationship between racism and colonialism is not “an incidental detail but a … consubstantial part of colonialism” (Memmi, 1967: 74).

Under colonialism, the economic substructure is also an economic superstructure (Fanon, 1963: 31). Colonizers are rich because they are white and colonizers and they are colonizers and white because they are rich (Fanon, 1963: 31).

Sherene Razack states that "racism complicates a long standing sexism whereby violence against women is condoned because women are regarded as the property of their men and families" (2008: 142). In the case of the status
provisions of the *Indian Act*, the racially and culturally superior mindset that Said talked about is fused with a patriarchal view of women as the property of husbands. This fusion causes systemic violence, loss of identity and second class treatment upon reinstatement to become acceptable. Women, and their children, who lost their status via the many discriminatory provisions and iterations of the Act are forced out of their communities, denied access to the places and spaces that they grew up in, and forced to launch expensive legal challenges in order to be reinstated as members of their communities of birth. In these and other ways, they experience systemic violence as well as loss of identity and second class treatment.

Governments in Canada imposed a colonial administration, including the *Indian Act* status provisions, because they continuously viewed Indigenous peoples as inferior and therefore in need of such administration. Opposition to the *Indian Act* regime by Indian people is seen by Canadian governments as resistance only because Indian people do not know any better and are not capable of coming to the correct conclusion on their own (Said, 1979: 35). As I mentioned in my introduction, the belief in racial and cultural superiority is based on what Edward Said described as Europeans’ “overwhelming urge to dominate inferior people” (Said, 1994: 10). That urge, which was quite evident in the early history of *Indian Act* is still evident through current government actions including the imposition of status regime on First Nations. The conception of racial and cultural superiority is necessary in order to maintain the *Indian Act* regime. It is also a requirement of a government that finds it acceptable to simply tinker with
the discriminatory foundation of the status provisions instead of eliminating that foundation altogether.

Canadian governments also defined Indians because

European settlements that developed on other peoples’ lands have been obsessed with ways of maintaining colonial control, and of rigidly asserting differences between “Europeans” and “Natives” to develop and maintain white social solidarity and cohesion. The very existence of settler societies is therefore predicated on maintaining racial apartheid, on emphasizing racial difference, white superiority, and “Native” inferiority. (Lawrence, 2003: 8)

Many white settlements in Canada began with marginalized and displaced white men whose very survival in the colonial was based “on their ability to insinuate themselves into Indigenous societies through intermarriage” (Lawrence, 2003: 8).

Settler colonialists “have always seen indigenous people in problematic terms: as obstacles to the progress of civilization, wards of the Crown, relics of savagery and drags on modern society, criminals and terrorists” (Alfred, 1999: 3). It is little surprise, then, that settler colonial governments would use administrative and legislative tools, such as the Indian Act generally and the status regime in particular, to divide Indigenous communities, pit them against each other and commit both physical and structural violence against their communities. By defining who is Indian and who is not, the colonial government takes the power of identity away from the communities and individuals. Based on European patriarchal norms, it benefits male Indians and those who trace their Indian identity through their male line to the detriment of female Indians and those who trace their Indian identity through their female line.
Patricia Monture-Angus and Bonita Lawrence both argue that “patriarchy” is, on its own, insufficient to describe band councils’ unwillingness to prioritize the issues, including “the many levels of violence that Native women face within their communities” (Lawrence, 2003: 5). Lawrence argues that, when it comes to the sexist provisions of the Indian, “to simply regard this issue as one of sexism ignores how constant colonial incursions into Native spaces generate almost unimaginable levels of violence, which includes, but is not restricted to, sexist oppression” (2003: 5).

All three forms of privilege, white, male and colonial, are very important to the discussion about the Indian Act in general but also to the status provisions of the Act. The status provisions of the Indian Act were put in place and remain in place as a form of colonial control. That is, colonial privilege not only benefits colonizers, it also allows them to exert power and control over those whom they colonize. This is done in many ways, but importantly to this thesis, it is done through legislative and administrative means. The control of the status provisions of the Indian Act, and by extension those who are and are not eligible to refer to themselves as Indians maintains colonial privilege over the Indigenous peoples of Canada. Insisting that this kind of colonial control is firmly in our past ignores the damage that it continues to have on First Nations communities and peoples today, while at the same time absolving the settler colonial government of responsibility. Further to this, the erasure of the present day’s effects of the status provisions allows the government and settler colonialists to benefit not only by maintaining their dominance of Indigenous communities and people but
also by excluding thousands of Indigenous people who trace their aboriginality matrilineally. These excluded people have no access to the small amounts of benefits that they are supposed to be eligible for and that BC Court of Appeal affirmed in *McIvor v. Canada*, but they lose their ability to reside and participate in their ancestral communities.

The colonial enterprise in Canada, including the *Indian Act* and its status provisions, has also been based on the European concept of patriarchy: “Empire is a gendered project not only in the sense that what happens to colonized men often differs from what happens to colonized women, but because the work that the ruling race does is also stratified along gender lines” (Razack, 2008: 16).

Colonization and the *Indian Act* have significantly negative effects but differing effects on Indian men and women. Some Indian women have been excluded from their ancestral homes and stripped of the legal ability to recognize themselves and their children as Indian.

All women are imperilled by patriarchy (Razack, 2008: 16). This is not to say that because of race, class or other privilege, some women are not more privileged than others, but it is to say that all women are treated as lesser humans under the European patriarchal model. In fact, beneath this system, and apparent in “the marrying in and marrying out” provisions of the status regime, is the fundamental belief that women are the property of men. Firstly, they are the property of their fathers, and at some point they become the property of their husbands. This is why, if a non-Indian woman married an Indian man, she and
her children gained status because they were the property of a status Indian and, as such, were eligible for his status.

And although all women are oppressed by patriarchy, women who are also subordinated by their race and their class are subject to a multiplier effect in their oppression. This is truly the case of Indigenous women in Canada. They are oppressed by virtue of being women in Canada. They are also oppressed by being Indigenous in a country that privileges being both white and settler. As we have seen in *Sawridge v. Canada*, they are also oppressed internally within their First Nations or ancestral communities. There are multiple levels on which Indigenous women in Canada are oppressed and subordinated by patriarchy, racism and colonialism. This is not some historical function that has simply gone away with the coming into effect of human rights legislation or the enshrinement of *The Canadian Charter of Rights and Freedoms* into the Canadian Constitution. These structures and practices of oppression are certainly historical, in that imposition of patriarchy, racism and colonialism can all be traced back to specific historical events: to contact between European settlers and the Indigenous peoples of North America or Turtle Island. Simply seeing them as historical facts is not enough, as they continue to operate, privileging some while subordinating others, namely, for the purpose of this thesis, Aboriginal women.

When discussing the status provisions of the *Indian Act*, it is not sufficient to simply say that the “marrying out” provisions within the Act were based on patriarchy so thank goodness they were removed by Bill C-31, because in a real sense their patriarchal legacy continues to this very day. This is not only evident
by the case of *McIvor v. Canada* but also by Sharon McIvor’s response to the government’s proposal under Bill C-3. By this I mean that, by maintaining the patriarchal and discriminatory foundation of the “marrying out” rules, the amendments made in both 1985 and 2010 maintain a discriminatory framework based on a patriarchal legacy. This is to say that, women who lost their status because of the sexist provisions of the Act and those who trace their Indian status through matrilineally are still treated differently under the amended status provisions from those who trace their Indian status patrilineally. Especially in the case of Bill C-3, when the government had the benefit of both the BC Supreme Court and the BC Court of Appeal’s ruling in the McIvor case, if the government had truly wanted to create equality in the status provisions, they could have done so. Instead, they chose to make the most narrow changes possible based on the BC Court of Appeal ruling.

It is important to critique, at this juncture, the BC Court of Appeal’s comments regarding the retroactivity when applying *The Canadian Charter of Rights and Freedoms*. To be clear this critique is not to question whether the BC Court of Appeal erred in law. My critique addresses whether it is ethically acceptable for the judicial and legislative branches of the government not to deal with the patriarchal and discriminatory foundation of the historical status regime in the subsequent amendments.

In dwelling on the basic presumption of imperialism, the point is not to judge the past by the standards of today. Rather, it is to understand how, despite the moral and legal evolution that has gone on since the dawn of the imperial age… this fundamental presumption continues to permeate the treatment of Indigenous peoples. (Russell, 2006: 31)
The BC Court of Appeal found a much narrower form of discrimination within the 1985 *Indian Act* than both McIvor was seeking and that the BC Supreme Court had found in their decision. The House of Commons went on, with support from all parties, to pass legislation that addressed that narrow form of discrimination. As McIvor argues, both the BC Court of Appeal ruling and Bill C-3 continue to discriminate against the descendants of women who lost their status for marrying non-status Indian men. Hence, the foundation of discrimination remains in place, even in the status provisions of the 2010 *Indian Act*. If someone were to again challenge the new provisions, it would take years and significant amounts of both legal expertise and financial support to get a binding decision and perhaps remedy.

It is ironic that Sharon McIvor, Sandra Lovelace, Jeanette Lavell and so many others have been forced to bring their rights claims forward to the dominant society’s courts, a dominant society that was responsible not only for the erasure of their status but also for the entire colonial enterprise that deprived them and their communities of any form of self determination. As Peter Russell notes, it must not be forgotten that it is men and women who identify and interpret the laws that are binding and that, in the case of the laws governing Aboriginal peoples – laws backed up by overwhelming coercive force – it is non-Aboriginals who have monopolized the making of the laws. (2006: 32)

Not only was the *Indian Act*, in all of its amended iterations, passed by the legislature that was almost entirely made up of non-Aboriginal people but the only way to challenge it was in the courts, set up by the system of colonization,
that were dominated by legal conceptions the settler colonialists inherited from
the colonial empire of Great Britain.

As we saw in the successful appeal in the Sawridge case, some judges
are openly hostile not only to the idea that “Indigenous peoples have had their
laws and their law-makers” (Russell, 2006:31) but also to the entire conception of
the existing Aboriginal and treaty rights. Justice Muldoon criticised the inclusion
of the Métis in the Constitution Act of 1982 and did not show respect for the oral
histories which are “an essential component of most aboriginal and treaty rights
claims” (Green, 1997: 149). In the Sawridge case, it is striking that the first
decision in the case needed to be overturned by a higher court because there
was a reasonable apprehension of bias by the trial judge. This colonial judicial
system is often times the only recourse that Indigenous people in Canada have
both to uphold and affirm their existing rights and to challenge the colonial
administration that they are left under the control of. “It is Europeans -- heir
authorities, their judges and their jurists -- who get to make the law that counts. It
counts because it is backed up by superior military power” (Russell, 2006: 31).

Taking this argument a step further, Taiaiake Alfred contends that the
greatest myth involved in our system of colonialism in Canada is “the idea that
Indigenous peoples can find justice within the colonial legal system” (1999: 83).
This myth, Alfred claims, “is designed to induce tranquility even in the face of
blatant injustice” (1999: 83). Based on this, Alfred proposes that Indigenous
peoples “force turmoil, force the law to change, create new parameters, and
make Indigenous goals an integral part of the new reality” (1999: 83). Although,
in essence, Alfred’s conception of turmoil initially makes one think of revolution and violence, it is necessary to discuss radical methods of change when faced with structures of racism, patriarchy and colonialism that are backed up, not only by the massive coercive force that Russell mentions, but also by the colonial legal system with its “legal magic” (2006: 30). This “legal magic” has been used throughout history to treat Indigenous peoples as the “other” and impose Eurocentric conceptions, including patriarchy, property rights and the rules of law, on them.

John Borrows argues that Canada can and should recognize Indigenous legal traditions. According to Borrows,

The implementation of Indigenous laws is more a matter of moving away from domination and inappropriate control of Indigenous peoples based on presumptions that their laws and governing capacities are inferior. In this light, Canada and Indigenous peoples can create discrete yet interlocking laws consistent with our federal principles and our equality jurisprudence. (2010: 154).

This is a call for a decolonization of the legal system to include Indigenous laws in the larger Canadian legal system. This action would be, in real terms, a first step in the decolonization of the Canadian legal system.

Decolonization is meant to bring a new order to the world and is “a programme of complete disorder” (Fanon, 1963: 27). For the colonized, decolonization is a process that is demanded and that takes their “minimum demands” in account for the very first time (Fanon, 1963: 27). The possibility of decolonization for the colonizer is “experienced in the terrifying future in [their] consciousness” (Fanon, 1963: 27). In simple terms, decolonization is the putting
into practice of the idea that “the last shall become first and the first shall become last” (Fanon, 1963: 28).

Real decolonization, it seems, would require a structural change so massive that it would certainly be unprecedented. Where decolonization has happened following the Second World War, it has happened in countries where the majority of the population has been colonized by the minority. As Russell points out, Canada, the United States, Australia and New Zealand, are in a different situation because the majority population in those countries is made up of settler colonialists (2006: 10). For decolonization to happen in a settler colonialist country, it will require a rethinking of all three aspects of government, including the way the executive branch administers Indigenous peoples and their lives, the way the legislature regulates First Nations, Métis and Inuit people and Canada and the way the judicial systems is informed by Indigenous laws, traditions and custom.

According to Memmi, “the colonial situation is irremediable and will remain in state of inertia” (1967: 75). The colonized are envious of the colonizer and the colonizer knows that the colonized wants to reclaim his land by taking the colonizer’s place (Fanon, 1963: 30). Therefore, the colonizer has to live in fear and anxiety over the coming attempts at decolonization by the colonized (Fanon, 1963: 31-33). If a settler colonialist attempts to avoid the privileges and benefits of the colonial order, they have only two choices, to withdraw from colony altogether, or fight and change them (Memmi, 1967: 20). If the settler colonialist makes the decision to stay and fight the racist system of colonialism, “he is
launching into an undeclared conflict with his own people which will always remain alive, unless he returns to the colonialist fold or is defeated” (Memmi, 1967: 21). The colonizer who chooses to fight colonialism on the side of the colonized is left without a community. Such people are at conflict with the dominant stream of their own society but they will also not be a part of the colonized; instead, they are left alone in the middle of the colonial enterprise. Even those who choose to accept the role of the colonizer are in a very real sense “agreeing to be a non-legitimate privileged person, that is, a usurper” (Memmi, 1967: 52). This role as a usurper will leave the colonizer with feelings of guilt and self-condemnation (Memmi, 1967: 53). The colonizer who accepts must “approved discrimination and the codification of injustice” (Memmi, 1967: 53). This is required because both the colonizer and the colonized are manufactured by the colonial system.

Fanon and Memmi’s conception of colonialism and, the colonizer and the colonized is important to the Canadian context of colonialism. It shows that settler colonialists, like myself, who have benefited massively in real and material terms from Canada’s colonial present and past are negatively affected by the colonial relationship that is existent today. Our colonial legacy means that we are conditioned to accept and perpetuate discrimination against Indigenous peoples while codifying the injustice that is evident in the status provisions of the Indian Act. Even those settler colonialists who choose to subvert the current system benefit from the privilege that it offers us. In real terms, settler colonialists have
an obligation to work to decolonize our country because that is the only way to end discrimination and have justice.

This chapter shows that the status provisions of the Indian Act are a small part of a larger system of colonialism which is predicated on racism and patriarchy, and which benefits the settler colonialists of Canada at the expense of Indigenous Canadians. It has shown that patriarchy, racism and colonialism intertwine to oppress Indigenous Canadians who are left with only the colonizers’ justice system as a means of addressing this oppression. The Indian Act status regime which has been detailed in great lengths in Chapters 2 and 3 of this thesis is one example of patriarchy, racism and colonialism intertwining to oppress Indigenous Canadians. Only by dismantling the structures of patriarchy, racism, and colonialism (in this case, the status regime) will real decolonization be possible. The final chapter of this thesis will briefly outline how that process should take place and attempt to address some legitimate concerns that may arise during that process.
5. Moving Forward...

This thesis has been an historical and theoretical analysis of the status regime provided for the *Indian Act* and its predecessors. Historically, status and the removal of status through enfranchisement have been used as tools of the federal government to quicken the process of assimilation. Although the status provisions of the Act have been changed on several different occasions, they are foundationally built on a European patriarchal model and, as importantly, a colonial conception of cultural and racial superiority. This chapter will provide a framework for moving forward to address the problems with that status regime that have been outlined above.

Many First Nations women, and their supporters in the women`s movement, have been important in challenging both the racist and sexist provisions of the *Indian Act* regime. First Nations women who have challenged or continue to challenge the status provisions include Mary Two-Axe Early, Jeanette Lavell, Yvonne Bédard, Sandra Lovelace and Sharon McIvor. Through their activism and the judicial system they fought in order to bring a semblance of equality to the *Indian Act* status regime, against not only an obstinate government but also in opposition to the malestream Aboriginal organizations who fought for the maintenance of the discriminatory status provision. These women have won small victories through their activism and court actions but their overall goal is still unfinished.

Assembly of First Nations Chief Shawn Atleo said, “the Government of Canada should not be able to decide who is and who is not a First Nation citizen.”
It is the right of any nation to identify its citizens and First Nations are no exception" (AFN Press Release, March 12, 2010). I concur with Chief Atleo that (a) the Government of Canada should not be able to decide who is and who is not a First Nation citizen; and (b) that First Nations have the right to determine who can identify as citizens. Further, "self-determination arguably includes the right of self definition or citizenship – citizenship in the Canadian state but also in a pre- or postcolonial Indigenous political entity" (Green, 2005: 347). The right of self-determination is a fundamental human right recognized in international law and arguably, in the Canadian Constitution (Green, 2005: 349). First Nations should be granted power to determine who is a citizen or member of any specific band. This membership will be accepted by the federal government as legitimate for the purposes of the disbursement of benefits. This new system should be designed and controlled by First Nations with very few limitations. Because of the diverse nature of First Nations in Canada, there may be different systems created in different parts of the country based on different ideas of membership or citizenship within a given community. But the single most important part of this process is that the Canadian state will relinquish control over the determination of status, and instead this power will be held by First Nation peoples.

Although under this proposed system First Nations will determine their own citizenship policies, it is fundamentally important that those policies live up to international human rights laws, especially the United Nations Declaration on the Rights of Indigenous Peoples, which is an aspirational document written by Indigenous peoples from around the world and is generally accepted by the
international community. Having proposed citizenship policies live up to international human rights laws is not uncontested space, as some Indigenous nationalists and the Assembly of First Nations contend that First Nations “governments [should] not be subject to the universalizing and arguably colonial norms in the Canadian Charter of Rights and Freedoms” (Green, 2001: 727). On this, I share Joyce Green’s contention that “surely, Aboriginal rights are in addition to fundamental human rights, not a replacement of human rights” (Green, 2001: 731). It should be noted that First Nations bands and organizations consistently and properly refer to Section 35 of the Constitution Act of 1982 in order to defend their rights and guarantee “existing Aboriginal and treaty rights” (Canada, 1982). Section 35(4) ensures that “Aboriginal and treaty rights…are guaranteed equally to men and women” (Canada, 1982). It seems appropriate that if Section 35 can be used to defend Aboriginal rights, it should also be applied to First Nations governments.

Joyce Green defines “citizenship as an evolving relationship of individuals with state and community, and as an aspect of political solidarity” (1997: 197). As defined by international law,

Citizenship is vested in a rights and duties-bearing individual located in a state, equal to all other citizens in respect of those rights and duties. This conception of citizenship is neutral in the sense that it is undifferentiated and unmediated and so is experienced and expressed in the same way by all citizens. (Green, 1997: 200)

Green goes on to assert that, in the case of First Nations, citizenship should be attached to the nation, rather than a band that is created and controlled by the Indian Act (1997: 219). Bands may administer that right, “[b]ut the location of the
right is significant, not least because it avoids trivialisation of the right (Green, 1997: 219). John Borrows contends that

First Nations should terminate definitions of citizenship that are based on the Indian Act. It is contrary to Indigenous constitutional values. Citizenship should be extended more broadly. Indian Act criteria for citizenship are flawed because they too often have reference to and incorporate racialized standards for membership. (2010: 157)

Using a conception of citizenship would allow First Nations to move beyond racialized conceptions of memberships. Citizenship would be extended to any person who regularly resides on reserve and dual citizenship could be held by those with connections to reserve communities (Borrows, 2010: 157). The requirement for citizenship would then be extended to all people who “are willing to abide by First Nations citizenships laws and be fully participating members in [First Nations] communities” (Borrows, 2010: 157).

Finally, the right to self-determination is asserted internationally by the United Nations; first in its Declaration of Human Rights, second in both its Covenant on Civil and Political Rights and its Covenant on Economic, Social and Cultural Rights and in its Declaration on the Rights of Indigenous Peoples (DRIP). Although Canada finally endorsed the DRIP in November of 2010, it has avoided implementing it based on the argument that it should not apply in Canada because Canada voted against it (Benjamin and Neve, 2011: 1). This argument is destructive and a debilitating decision not only for the DRIP but for the authority the United Nations (Benjamin and Neve, 2011: 3). Canada has also publically declared that the DRIP is only an aspirational document which is of no effect and is not binding in Canada (Benjamin and Neve, 2011:3).
It is important to note that Canada’s opposition to the DRIP is unprecedented in Canada’s history with regional and international human rights bodies (Benjamin and Neve, 2011:3). Alex Neve and Craig Benjamin contend that Canada’s opposition to implementing the DRIP is based on Articles 10, 19 and 32, which enshrine the concept of free and prior informed consent for Indigenous peoples into international law (2011: 4). This is despite the fact that the Supreme Court of Canada confirmed the duty to consult Indigenous peoples on all issues that may affect their rights and often involve consent (Benjamin and Neve, 2011: 4).

In regards to the status provisions or as I have proposed, band control of First Nations citizenship, Articles 1, 9 and 33 are instructive: “Article 1 invokes all internationally recognized human rights and fundamental freedoms for Indigenous peoples, which includes protection from sex discrimination and racism” (Green, 2001: 732; United Nations, 2007). This would mean that any proposed citizenship code would need to be free of discrimination on the basis of sex as well as ensuring it falls in line with international law. Also, Article 9 of DRIP states, “Indigenous peoples have the right to belong to an indigenous community or nation in accordance with traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right” (United Nations, 2007). Article 9, like Article 1, prevents discrimination and also protects the rights of Indigenous peoples to belong to their communities. Finally, Article 33 (1) states, “Indigenous peoples have the right to determine their own identity or membership in accordance with their
customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live” (United Nations, 2007). These provisions empower First Nations to determine their own citizenship codes based on their customs and traditions and also protects their rights to citizenship in Canada.

Based on these general principles, First Nations should be able to determine their own membership. This membership should be seen as a form of citizenship within each specific First Nation. Those with citizenship status should have all the benefits that are entailed and should be eligible for programs and protected by Section 35 of the Constitution Act of 1982. Only by making these changes will Canada move beyond the conception that non-Aboriginals are somehow racially and culturally superior to first peoples whose lands the population of all other settlers currently occupy.
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