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When Legislators Make Bad Law: Bill C-3's Assault on Democracy

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The *Bill C-3* amendment to the *Indian Act, 1985* entitled *Gender Equity in Indian Registration Act* was a highly controversial bill against which the majority of Aboriginal witnesses testified against before the House and Senate. There were many problems noted with the bill, the most significant of which was the fact that Canada has assumed the jurisdiction to determine who individual Indians are and, as a result, determine the cultural, political, social and legal make-up of individual First Nation communities. Most of the witnesses testified that Indigenous Nations are sovereign nations whose rights to be self-determining are inherent and protected in section 35 of the *Constitution Act, 1982*. Thus, of all the rights which might be held by First Nations under the right to be self-determining, the right to choose their own cultural, legal, social and political identities is the most fundamental. The second and no less significant issue was that of the failure of Canada, through *Bill C-3,* to fully remedy gender discrimination in the registration provisions of the *Indian Act*. There was near unanimity in the positions of all witnesses that *Bill C-3* did not fully address ongoing gender discrimination in the *Act*. Most testified that the Bill did not even address the limited gender discrimination found in the British Columbia Court of Appeal decision in *McIvor* – which was the reason for the legislative amendment in the first place.[1] The question that continues to be asked, post-implementation of *Bill C-3,* is what happened in Parliament? Did the legislators forget their obligations to only enact laws which are compliant with the *Canadian Charter of Rights and Freedoms*, or did they *de facto* pass this bill notwithstanding gender equality?[2]

In Canada, our form of government is what is known as a constitutional democracy. This means that we are governed by a form of representative democracy, which entails that the citizens of Canada must "consent" to be governed. Practically speaking, this consent takes the form of free and fair elections and a form of universal suffrage where all Canadian citizens who are adults can vote regardless of race, gender, or property status. It also means that we have a kind of political pluralism where we can vote for any number of competing political parties. Democracies are also characterized by their systems of checks and balances to keep governments transparent and accountable. Even though governments in Canada have the consent of its citizens to govern (at least theoretically), there are still limits on governmental power that act as a safeguard against its arbitrary interference into the lives of its citizens. Our *Constitution Act, 1867* sets out the powers of federal and provincial governments and schedule B to our *Constitution Act, 1982* contains the *Charter of Rights and Freedoms*,which further sets out some of the individual rights and freedoms afforded to Canadian citizens. These rights, including the right to gender quality pursuant to section 15 of the *Charter*, are to be enforced through the courts as per section 24. Further, section 52 provides that the *Constitution Act, 1982* is the supreme law of the land and any legislation that is inconsistent with it will be of no force or effect.[3]

The rights protected in the *Charter* are so fundamental to Canada as a democratic society that some have argued that the protection of our individual rights and freedoms acts as a pre-condition to democracy. These important democratic rights include the rights to free speech, life and liberty, and the right to equality before the law. However, just as there are limits on governmental powers, there are also limits on our rights and freedoms in order to maintain a "civil society". Some of these limits include laws protecting copyright, human rights, and laws which prohibit defamation and terrorist acts. There will always be a difference of opinion as to how far both the rights of its citizens and the powers of governments can be stretched; so Canadians often turn to an independent judiciary to resolve those legal disputes. Barring a specific legal dispute or question of interpretation, it is the responsibility of our legislators to enact, amend, and repeal the laws which govern us in accordance with these rights, freedoms, and limits. Proposed bills generally start in the House of Commons, go through three readings and are studied in committee before going through the same process all over again in the Senate. Only once it has passed through the House and Senate will a bill receive Royal Assent and then become law. Our legislators have a significant responsibility to only draft, propose, and enact legislation that properly balances the government's responsibility to maintain peace, order and good government, with the obligation to ensure that all laws are made within the confines of constitutional limits and therefore that respect our rights and freedoms.

While some might consider this brief civics lesson unnecessary, it seems to me that the recent passing of *Bill C-3* is an indication that our legislators need to be reminded about the fundamentals of our democracy and their obligations to uphold its core principles. Important legislative initiatives are often affiliated with one political party's election platform or policy agenda, such that they run the risk of being politicized at the expense of the legal and democratic context from which they originate. In my opinion, Canada's legislators dropped the ball in responding to the *McIvor* decision and enacted legislation, which not only failed address the gender discrimination found in court, but in fact created new discrimination which violates the *Charter* and thus jeopardizes our most fundamental democratic principles – gender equality. Gender equality for Indian women and their descendants is just as

fundamental to our democracy as is the right to life, liberty or free speech is for any other citizen. Yet, despite Sandra Lovelace's victory at the United Nations and Sharon McIvor's win at the Court of Appeal, Indian women and their descendants are arguably no further ahead because of *Bill C-3*.[4]

From the time Sharon McIvor first raised the issue of continuing gender discrimination after the *Bill C-31* amendments to the *Indian Act* in 1985, it took more than 25 years for Canada to provide only a limited remedy to the gender inequality contained in the section 6 registration (Indian status) provisions. It is fairly safe to say that Canada would not have amended the *Indian Act* at all were it not for the sustained efforts of Sharon McIvor. But the issue of gender inequality in the *Indian Act* did not start with Sharon nor will it end with *Bill C-3*. In fact, there were other Indigenous women who tried to address this century-old problem and there are just as many Indigenous women following Sharon to address the ongoing gender discrimination in the *Act*. There is a shameful pattern noted even by the international community, of ongoing, blatant, gender discrimination against Indigenous women and their descendants that continues to have a negative impact on First Nations communities and individuals for which full redress has yet to be made. This represents a failure by our legislators to ensure that all laws in Canada are consistent with constitutional laws, (let alone Indigenous laws), prior to enactment. In a constitutional democracy such as Canada, gender inequality should not be remedied in small increments once every 25 years.

Prior to 1985, many Indigenous women like Jeanette Corbiere-Lavell, an Anishinabek from Wikwemikong, and Yvonne Bédard, a Mohawk from Six Nations, lost their Indian status when they married non-Indian men as per section 12(1)(b) of the *Indian Act, 1951*.[5] This resulted in the automatic loss of Indian status for their children as well. Indian men on the other hand, did not lose their Indian status and their non-Indian wives and children gained status. This legislation served to create a preference in the law which made male Indian blood more "Indian" than female Indian blood. The underlying policy objective of this law, and the *Indian Act* in general, was to assimilate Indians who were considered impediments to the full settlement of Canada. This ideology was best described by the former deputy superintendent of Indian Affairs, Duncan Campbell Scott.

> ***" I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone… Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.[6] "***

However, official Canadian Indian policy has changed - at least in theory. On June 11, 2008, Prime Minister Stephen Harper apologized on behalf of all Canadians for the harm suffered by Indigenous peoples in Indian Residential Schools, and the assimilatory foundations upon which past federal laws and policies were based.

> ***" Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.[7] "***

However, neither the residential school laws, nor the assimilatory status provisions in the *Indian Act* have been amended to ensure that the law and policy match the government's official political position. Indigenous peoples will therefore continue to be legislatively assimilated if the status provisions are not amended and since Indigenous women and their descendants are assimilated at a much faster rate, gender discrimination also continues to be an issue.

Lavell and Bédard litigated the gender equality issue all the way to the Supreme Court of Canada (SCC) and lost. At the time, they challenged the gender discrimination on the basis of section 1.(b) of the *Bill of Rights* which guaranteed equality under the law. Amazingly, the SCC found that there was no intention by legislators that the *Bill of Rights* and its equality provision would actually alter legislation. This meant that gender equality was more of an ideal than a legal right, but this case did not stop the advocacy efforts of Indigenous women to end gender discrimination. As a result, of Lavell and Bédard's efforts, Sandra Lovelace was able to take her human rights case directly to the United Nations Human Rights Committee. The Committee found that the denial of Indian status to Indian women prevented her from participating in her culture contrary to Article 27 of the *International Covenant on Civil and Political Rights.*[8] This was the impetus for the 1985 amendments to the *Indian Act* referred to as the *Bill C-31* amendments. When Canada amended the *Indian Act* in 1985 to address gender inequality, it had five main objectives which not only included the reinstatement of Indian women, but also that all discrimination based on sex be removed from the *Act*. However, the amendment did not reinstate Indigenous women to the same kind of status as Indian men.

Indian men, their wives, and children were all registered under section 6(1)(a) whereas Indian women were reinstated under section 6(1)(c). This does not matter as far as federal benefits go, but it can and does matter with regards to community divisions based on "original" Indians [s.6(1)(a)] versus "new" Indians [s.6(1)(c)] and entitlements to band membership. Similarly, the children of Indian women were registered as lesser Indians under section 6(2), which preserved the preferential treatment of those descended from male Indians. Section 6(2) is known as "half-status" because Indians cannot transmit their status to their children in their own right, like section 6(1) Indians can. The *Bill C-31* amendment also snuck in new forms of discrimination like: the section 6(2) second generation cut-off rule; the repeal of the presumption of Indian paternity for unwed mothers; unequal status between cousins and siblings based on gender; and preferential treatment for non-Indian women over Indian women, to name a few.

It was because of these gender inequality issues that Sharon McIvor launched her own court case. She had applied for Indian status in 1985, as soon as the amendments were made, and was initially refused. She therefore filed an appeal with the Registrar at Indian and Northern Affairs Canada (INAC) and later added a constitutional challenge to section 6 of the *Indian Act* based on the section 15 equality provision of the *Charter*. While she won her appeal and was registered under section 6(1)(c), this meant that her son Jacob could only be registered under section 6(2), which in turn meant that her grandchildren could not be registered at all. Her brother, on the other hand, was registered under section 6(1)(a), as were his children. McIvor argued that this was clearly gender discrimination and both the trial and appeal courts in British Columbia agreed. Unfortunately, the Court of Appeal essentially changed the comparator groups from Indian women and men who married out (ex. Sharon and her brother) to a comparison of the different reinstatees under section 6(1)(c) (ex. Sharon and her brother's grandchildren). This resulted in an extremely limited finding of discrimination based on comparison with what is referred to as double mother clause reinstatees – Indian men who were not part of Lovelace's claim in the 80's, nor part of McIvor's case in 2009. It seems an absurd result that non-claimants (only 200 Indian men) would receive a legislative remedy that is greater than the actual claimants (16,800 Indian women).[9] Not only did Indian women not receive a full remedy for gender discrimination, but Indian men were privileged once again.

Some commentators have suggested that if there were no federal benefits attached to status, this would not even be an issue. Aside from the fact that there should be no discrimination in the receipt of federal benefits by Indian men and women, a lack of status includes both tangible and intangible interests like equal access to status and band membership; citizenship in self-government agreements; beneficiary status under treaties and land claims; political voice in their communities; and equal access to elders, mentors, and leaders. Being arbitrarily cut off from one's identity, culture, family and community is just the sort of arbitrary government interference from which liberal democracies through laws like the *Charter,* were designed to protect its citizens. The failure of legislators to address this undemocratic interference in the lives of Indigenous peoples and the additional denial of equality to Indigenous women not only impacts First Nations negatively, but is a matter which should concern all Canadians. The effect of legislation like the *Indian Act* and its subsequent amendments cannot be underestimated as it often represents the final say on how rights will be balanced. The *Charter* has arguably changed the political landscape in Canada such that there is more pressure on legislators to consider rights and freedoms prior to enacting legislation.

However, some argue that there is a corresponding reluctance on the part of legislators to make difficult decisions and tend to wait for the courts to do so.

> ***" "Elected representatives can insulate themselves from criticism, and political parties can avoid risking party cohesion, by ignoring controversial issues and claiming that fundamental issues of rights should first be resolved by the courts before political decisions are taken."[10] "***

This type of political inaction results in "an abrogation of political responsibility to make policy decisions in the public interest".[11] Other commentators have argued that that this inaction "weakens the fabric of democratic decision-making" with the danger being that "questions of social and political justice will be transformed into technical legal questions".[12] If the converse is true and legislators are having fulsome, informed debates about gender equality before enacting legislation, through Justice and committee reviews, the current "Cabinet secrecy" and confidential nature of the Minister of Justice's reviews and assessments of bills, prevents citizens from knowing the difference.[13] This seems to be the case with gender and other discrimination in the *Indian Act*, where legislators have consistently failed to address the issue without specific legal direction. Canada's answer to ongoing gender discrimination against Indian women and their descendants was to once again defer the issue for "dialogue" in an undefined "joint process" which is not mandated to audit the *Indian Act* for *Charter* violations.

With both bills *C-31* and *C-3*, legislators, in trying to reduce costs to Canada as much as possible, ended up creating just as many problems as they resolved. What makes the legislators particularly culpable is that they were fully aware of the problems that both bills would create. For *Bill C-31*, they nevertheless made the decision to limit reinstatements and create a second generation cut-off rule that would lead to the eventual legislative extinction of Indians based primarily on costs.[14] Legislators further created a new form of discrimination in the *Indian Act* via section 3 of *Bill C-3*. This section adds additional criteria for eligibility under section 6(1)(c.1)(iv). It requires the child of an Indian woman who married out to have non-status Indian children in order to qualify for the gender discrimination remedy and have his/her status bumped up from section 6(2) to section 6(1)(c.1). This is clearly discrimination based on disability and/or family status as between those descendants of Indian women who married out [currently registered under section 6(2)] with non-status Indian children, and those with status Indian children or without children at all. Imagine a woman who, due to disease, injury, or birth cannot have children. She has suffered the denial of full Indian status because of the gender of her mother, but she will be denied a remedy through no "fault" of her own, i.e., due to an immutable characteristic. This new, discriminatory criterion only applies to the descendants of Indian women who married out – yet another legal hurdle through which they must jump to prove they are just as "Indian" as their male counterparts.

It was unnecessary for legislators to create a new form of discrimination in order to address *McIvor*. Canada had no problem paying the costs associated with protecting the Indian status of 16,000 non-Indian women and all their descendants, but for some reason cannot find enough funds to extend equal status to 16,800 Indian women and their descendants. Status has never been determined based on the status or lack thereof of one's children and the only conceivable reason to do this is to limit numbers of registrations and therefore limit costs. Canada defended it position before the House arguing that once registered, all status Indians are the same. We know that this is not true from the *Bill C-31* experience where legislators enacted a provision to allow bands to exclude the section 6(2) children of reinstated women. While it is true that some programs and services are based on status, regardless of section 6(1) or (2), the fact remains that there are practical differences between the two. For example, some band membership codes exclude section 6(2) Indians or their equivalent, and thus exclude them from band programs, services, housing and political participation. Additionally, section 6(2) Indians can't transmit their status to their children in their own right; and therefore section 6(2)

status is associated with being "half" status and somehow lesser than section 6(1) Indians. Similar to status, many of these Indian women and their descendants will erroneously be considered "new" members despite the fact that they would have been band members but for the gender discrimination imposed on their communities through the *Indian Act*. Denying a remedy to some because they cannot or do not have children is simply not in keeping with Canada's democratic principles of equality. Legislators knew that this was a new form of discrimination as it was brought to their attention by various witnesses and some Members of Parliament questioned whether they would be knowingly legislating discriminatory provisions.[15] Legislators have an obligation to ensure that the laws they enact are consistent with the supreme law of Canada; the *Constitution Act, 1982* – the very foundation upon which Canada's democracy rests.

So, at the end of the day, can one say with any degree of confidence that the legislators exercised their duties with the utmost attention to the democratic principles of Canadian society when they enacted *Bill C-3*? They certainly did not do so when they enacted *Bill C-31* - as the *McIvor* case illustrates. The additional litigation following *McIvor*, which also challenges discrimination in section 6, tends to suggest the legislators all but forgot their obligations. In fairness, the Bill did provide a partial remedy for one aspect of gender discrimination in the *Act*, but how many more problems were created? To my mind, the long list of problems far outweighs any limited benefit that was provided by the bill. Delayed equality is not full equality and the undefined joint process that was promised to National Aboriginal organizations does not provide any real comfort that gender discrimination in the *Act* will be addressed any time soon. Equality before the law and right of individuals to seek out the good life as they see fit are core elements of democratic life in Canada. The fact that our legislators overlooked Canada's *Constitution*, *Charter*, domestic and international human rights laws, and Indigenous laws, means all Canadians' rights have been violated. Moreover, it is an attack on the most vulnerable people in our society, Indigenous women and their descendants. I would argue that our legislators have allowed political agendas and dollar figures to override one of the fundamental aspects of a liberal democracy – that all individuals are equal before the law – a right that has not been enjoyed by Indigenous women for over 150 years. It is time that our legislators went back to the drawing board and remedied gender inequality for Indigenous women and their descendants before Canada is shamed on the international stage - again.[16]

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FOOTNOTES

[1] *McIvor v. Canada*, [2009] S.C.C.A. No. 234 (SCC), [2009] 2 C.N.L.R. 236 (BCCA), [2007] 2 C.N.L.R. 72 (BSSC). See also: McIvor v. Canada (2007) No. A941142 Order of Justice Ross dated June 8th, 2007.

[2] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c.11 [*Constitution Act, 1982*].

[4] *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) [*Lovelace*].

[5] *Lavell v. Canada (Attorney General); Isaac v. Bedard* (1974), S.C.R. 1349.

[6] National Archives of Canada, Record Group 10, vol. 6810, file 470-2-2, col.7, pp.55 (L-3) and 63 (N-3) and as cited in Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Minister of Supply and Services Canada, 1996) [*RCAP*] at vol.1, 183. (emphasis added).

[7] Right Honourable Prime Minister Stephen Harper, "Statements by Ministers: Statement of Apology to Former Students of Indian Residential Schools" (11 June 2008), online: INAC (emphasis added).

[8] *International Covenant on Civil and Political Rights*, 16 December 1966, CAN. T.S. 1976 No. 47 (entry into force 23 March 1976; in force for Canada, 19 August 1976) at Article 27.

[9] Statistical information obtained via *Access to Information and Privacy* request made to Indian and Northern Affairs Canada's registration department in 2011.

[10] J. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" (1999) 5 IRPP no.3 at 3 [*Wrestling with Rights*].

[11] *Ibid.*

[12] P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) Can. Bar Rev. 61:1 52 as cited in *Wrestling with Rights, supra* note 10 at 5.

[13] *Wrestling with Rights, supra* note 10 at 6. See also: Standing Senate Committee on Human Rights, "Promises to Keep: Implementing Canada's Human Rights Obligations" (Ottawa: Senate Standing Committee on Human Rights, 2001), online. G. O'Brien, "Legislative Scrutiny and the Charter of Rights: A Review of Senate Practices and Procedures" (2005) Can. Parl. Rev. 28:1 40.

[14] Canada, *Memorandum to Cabinet*, 10 May 1984, Record of Cabinet decision, 29 May 1984, *Memorandum to Cabinet*, 9 February 1984, Canada, Note to Minister, 11 January 1985. See also: *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Interveners). For a fuller discussion, see: P. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011) [*Beyond Blood*].

[15] *Beyond Blood, supra* note 14. See also: Standing Senate Committee on Aboriginal Peoples, "Proceedings of the Standing Senate Committee on Aboriginal Peoples", Issue 3, Evidence (March 2009), online. Standing Committee on Aboriginal Peoples, "Evidence of Meeting of Standing Committee on Aboriginal Peoples and Northern Affairs (AAON) re: Bill C-3" (April 2010, No. 7, 3rd sess. 40th Parliament).

[16] *Lovelace, supra* note 4. See also: *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 62nd Sess. UN Doc. A/RES/61/295 (13 September 2007). *United Nations Declaration on Human Rights*, UNGA Res 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [*UNDRIP*]. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entry into force 3 September 1981; in force for Canada 10 January 1982). *Convention on the Elimination of Racial Discrimination*, 7 March 1966, Can. T.S. 1970 No.28 (entry into force for Canada, 13 November 1970). *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Ca. T.S. 1976 No.46 (entry into force 3 January 1976; in force for Canada 19 August 1976). *International Convention on the Rights of the Child*, 20 November 1989, A/RES/44/25, entry into force 2 September 1990, signed by Canada 28 May 1990, ratified by Canada 13 December 1991. Canada's position may be that *UNDRIP* does not have any legal effect, but it is a signatory to many other international instruments that all protect gender equality.