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Social Affairs Division Parliamentary Information and Research Service

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Bill C-3, An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs) (short title: Gender Equity in Indian Registration Act), was introduced in the House of Commons by the Minister of Indian Affairs and Northern Development, the Honourable Chuck Strahl, on 11 March 2010. The bill modifies the *Indian Act* in order to comply with the British Columbia Court of Appeal's 2009 *McIvor* decision, which found aspects of the current registration provisions in violation of section 15 of the *Canadian Charter of Rights and Freedoms* on the basis of sex.

Bill C-3 was referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on 29 March 2010. Following clause-by-clause consideration, the bill was reported back to the House on 29 April 2010 with technical and substantive amendments. Notably, clause 2 was amended to provide that any person born prior to 17 April 1985 and is a direct descendant of a person registered or entitled to be registered under the *Indian Act* may also be so entitled. The proposed amendment was ruled inadmissible by the Committee Chair on the basis that it went beyond the scope of the bill as approved by the House at second reading stage. However, a majority of Committee members challenged, and subsequently overturned, the Chair's ruling. On 11 May 2010, the Speaker of the House of Commons ruled that the amendment to clause 2 exceeded the scope of the bill and was therefore inadmissible. In addition to this amendment, clause 9, limiting the liability of the Crown and band councils, was removed. The bill was also amended to include a provision requiring the Minister of Indian Affairs and Northern Development to report to Parliament on the provisions and implementation of the bill within two years of its coming into effect.

Background

The *Indian Act*[1] has been and remains the principal expression of Parliament's jurisdiction over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act*, 1867. From its inception, the Act has set out criteria defining Indian "status" for purposes of determining entitlement to a range of legislated rights as well as eligibility for federal programs and services. Status provisions have been an enduring

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source of grievance for First Nations people, who claim an inherent right to determine their own citizenship.[2]

This section outlines the evolution of and developments related to those aspects of Indian status that are directly relevant to the specific amendments proposed by Bill C-3 over three periods: from pre-Confederation through 1982; from 1982 through 2007; and from the 2007 *McIvor* decision to the present.

1850 TO 1982

Legislation[3]

Pre-Charter legislative measures effected a narrowing of access to Indian status for First Nations women. In 1850, the earliest statutory definition of "Indian" was inclusive; it did not differentiate between male and female entitlement.[4] An 1869 statute introduced the first provision under which marriage of an Indian woman to a non-Indian man meant loss of status for the woman and her children.[5] Indian men who "married out" did not lose status. Over the objections of First Nations groups, this exclusion was maintained in the 1876 *Indian Act*, a consolidation of previous laws related to Indians. The 1876 Act also explicitly emphasized male lineage, including in its definition of Indian "any woman," whether Indian or not, who was married to "any male person of Indian blood reputed to belong to a particular band."[6]

The 1951 *Indian Act*[7] repealed its predecessor and made significant changes to the previous regime, including the establishment of a centralized "Indian Register." Under the 1951 Act, entitlement to registration remained linked to band membership, continued to emphasize transmission of status through the male line, and extended as before to the wives and widows of status Indians, whether Indian or not (section 11). The 1951 Act maintained the loss of status for Indian women who married non-Indians (paragraph 12(1)(b))[8] and for enfranchised persons, a category that might also encompass women who married out (subparagraph 12(1)(a)(iii)).[9] In addition, the 1951 Act introduced the "double mother rule" under which a person registered at birth would lose status and band membership at age 21, if his/her parents had married after the coming into effect of the legislation in September 1951 and his/her mother and paternal grandmother had acquired status only through marriage (subparagraph 12(1)(a)(iv)).[10]

The 1970s[11]

Over this period of increased First Nations politicization, growing opposition to the *Indian Act*'s ongoing disentitlement of First Nations women under paragraph 12(1)(b) took various forms. In the judicial arena, individual First Nations women who had lost status at marriage challenged the provision as discriminatory under the *Canadian Bill of Rights*. In the 1973 *Lavell* decision, a divided Supreme Court of Canada ruled that the provision did not result in inequality under the law: Parliament was entitled to define the qualifications required to be an Indian, and all Indian women who married out weretreated equally.[12]

Calls for legislative reform by newly formed First Nations women's groups, human rights organizations[13] and other bodies[14] intensified throughout the 1970s. In the wake of the *Lavell* ruling, Indian Rights for Indian Women and the Native Women's Association of Canada were especially active advocates, lobbying parliamentarians and government for immediate and longer-term remedies.[15] The government acknowledged the need to eliminate gender discrimination under the Act, but considered that amendments should occur in the context of broader revision after consultation with First Nations people.

In 1981, a human rights ruling that influenced the push for reform involved the case of Sandra Lovelace, whose loss of status under paragraph 12(1)(b) prevented return to her home community as a band member when her marriage ended. The United Nations Human Rights Committee found that ongoing effects of loss of status were in breach of Article 27 of the *International Covenant on Civil and Political Rights*.[16] The decision was an embarrassment to Canada.

1982 TO 2007

1982 TO 1984[17]

The coming into force of the *Canadian Charter of Rights and Freedoms* in April 1982 compelled government action to repeal the *Indian Act*'s discriminatory provisions prior to April 1985, when the Charter's equality rights provisions would take effect.[18] Relevant initiatives in the intervening period include the 1982 study and report of the House Sub-Committee on Indian Women and the *Indian Act*[19] and introduction of government legislation in the form of Bill C-47, An Act to amend the *Indian Act*. The former recommended that Indian status not be lost or gained through marriage; that the first generation children of mixed marriages be entitled to status;[20] that women disentitled by paragraph 12(1)(b) and their first generation children be reinstated; and that acquired rights be preserved.[21] Bill C-47 reflected these recommendations, and would also have imposed a stricter 50% descent (status transmission) rule for the children of reinstated individuals than the 25% rule applicable to children of those with existing status, as a means of reducing the number of potential reinstatees and limiting costs.[22] Bill C-47 died on the *Order Paper* in July 1984.[23]

1985: BILL C-31

Enacted in June 1985 – retroactive to 17 April 1985 – Bill C-31, An Act to amend the *Indian Act*, aimed to remove discrimination from the Act, restore rights to those who had lost them and recognize First Nations control over band membership.[24] The bill echoed elements of the 1982 subcommittee report and Bill C-47.[25] In particular, subsections 6(1) and 6(2) of the Act,[26] which have governed entitlement to registration since 1985,[27] provided that:

- persons with acquired rights, i.e., entitled to registration prior to 1985, including non-Indian women married to Indian men and their children, retained full status (paragraph 6(1)(a));

- women who had lost status through the marrying-out provision or through an order of enfranchisement, and persons who had lost status at 21 through the double mother rule, regained status (paragraph 6(1)(c));[28] and
- persons with one parent entitled to registration under subsection 6(1) acquired status under subsection 6(2); persons with one parent registered under subsection 6(2) and one non-status parent were/are not entitled to registration.[29]

Bill C-31 amendments "resulted in a complicated array of categories of Indians and restrictions on status, which have been significant sources of grievance."[30] A primary target for criticism of distinctions between subsection 6(1) or 6(2) registration has been the "second generation cut-off" rule, signifying the loss of status after two successive generations of mixed Indian–non-Indian parentage. Although the rule is gender neutral for children born after 1985, it created a relative disadvantage for the descendants of First Nations women who had married out and regained status under subsection 6(1) because their children, born before 1985 and registered under subsection 6(2), were unable to transmit status onward if they married non-Indians (50% descent).[31] In contrast, the children of Indian men who had married non-Indian women before 1985 were registered under subsection 6(1) and, despite having the same degree of Indian ancestry as subsection 6(2) registrants, were able to transmit status to their offspring when they married out. Those offspring, registered under subsection 6(2), could in turn pass on status for at least an additional generation (25% descent).[32] A table illustrating the ongoing differential effects of registration under subsections 6(1) or 6(2) is found in Appendix C.

Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme, some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).

Responses To Bill C-31

Critical evaluations of Bill C-31 amendments and their impacts undertaken since 1988 by First Nations organizations, and by parliamentary, governmental and human rights bodies and other agencies and commissions[33] have generally acknowledged that the bill's hierarchical status provisions resulted in residual sex discrimination and created arbitrary divisions within First Nations families and communities.[34] Several called for the elimination of continuing discrimination against First Nations women in the transmission of status and removal of the second generation cut-off rule. In 2005, the Assembly of First Nations National Chief reiterated the call for First Nations control over citizenship, commenting that "[t]he bill has not resolved any of the problems it was intended to fix significant gender

discrimination still remains, control over Indian status is still held by the Crown, and the population of Indians is declining as a direct result of Bill C-31."[35]

The department estimates that since Bill C-31 came into force, over 117,000 persons who had lost status under discriminatory status provisions and their descendants have regained or acquired status, of whom 18% live on-reserve.[36] Projections prepared for the department suggest that

> [a]fter two generations, Bill C-31 inheritance [section 6] rules (in concert with out-marriage) are expected to result in a rapid decline in the population entitled to registration. Those non-entitled to registration are expected to begin to outnumber those entitled to registration in about three generations. Projection trends suggest that sometime around the end of the fifth generation, no further children will be born with entitlement to Indian registration.[37]

Recent departmental projections to 2029 show declines in the status population associated with Bill C-31 registration projections.

> Significant increases both on and off reserve are expected in the descendant population that does not qualify for registration. The on-reserve non-entitled descendant population is projected to rise from about 4,300 in 2004 to 93,800 in 2029. Off reserve, this population is projected to rise from about 61,500 to 144,800.
>
> [T]he on-reserve population share entitled to Indian registration is projected to decline from about 89% (2004) to about 78% (2029). The population share associated with non-registered groups is expected to rise from about 11% (2004) to about 22% (2029). Just about all of this increase is associated with the descendants who will not be entitled to registration under the 1985 amendments to the *Indian Act*.[38]

2007 to Present

The McIvor Case

From 1985 through 2007, Sharon McIvor, who had married a non-Indian prior to 1985, sought registration for herself under paragraph 6(1)(c) of the *Indian Act*, and for her son Jacob Grismer, born prior to 1985, under subsection 6(2). Ultimately the federal government agreed that she and her son were entitled to the status requested.[39] The children of Mr. Grismer, a 6(2) registrant who had married out, were not registered. From 1994, Ms. McIvor and her son challenged the Act's post–Bill C-31 registration provisions as discriminatory on the basis of sex and marital status under sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*, in that they continued to favour the male line in the transmission of status to descendants born before 1985.[40] In June 2007, the British Columbia Supreme Court agreed, and declared section 6 of no force and effect "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 status." [41]

The federal government appealed this ruling and, in April 2009, the British Columbia Court of Appeal varied its scope considerably.[42] It found that the challenged distinctions in the ability to transmit status, although discriminatory on the basis of sex, were largely justified. The sole exception concerned those who, prior to 1985, had been subject to loss of status at age 21 under the double mother rule: after Bill C-31, these individuals regained status for life through paragraph 6(1)(c), and were able to transmit statusto their children, an "enhanced status" that further disadvantaged Ms. McIvor's son.[43] Accordingly, the Court found paragraphs 6(1)(a) and 6(1)(c) in violation of the Charter "to the extent that they grant individuals to whom the Double Mother rule applied greater rights than they would have had" under the 1951 Act, and suspended its declaration of invalidity for a year to allow Parliament to amend the Act.

In June 2009, the government announced it would comply with the appellate court's ruling. In November, the Supreme Court of Canada denied Ms. McIvor's application for leave to appeal.[44]

Government Approach to Amendments

In August 2009, the department released a discussion paper outlining its preferred approach to amending the *Indian Act* in light of the *McIvor* decision[45] and, from August through 13 November, conducted a series of meetings with national and regional First Nations and other Aboriginal organizations to obtain input on that approach. The discussion paper acknowledged the difficulties of achieving consensus support for changes to the Act's controversial registration provisions, and proposed amendments tailored to remedy the specific discrimination highlighted by the British Columbia Court of Appeal. They would confer subsection 6(2) status on any grandchildren of women who lost status due to marrying out (e.g., Ms. 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.[46] The discussion paper suggested such an amendment would result in total new registrants of between 20,000 and 40,000, most residing off reserve,[47] 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.[48]

First Nations Responses

Ms. McIvor's October 2009 response to the government's proposed approach to amending the Act questions was critical on a number of grounds, including the proposal's restriction to subsection 6(2) status for newly registered grandchildren as well as its proposed cut-off, under which the amendment would only apply if grandchildren were born after September 1951, raising the prospect of new inequalities between siblings.[49] National and regional First Nations and other Aboriginal organizations expressed disappointment with the Supreme

Court of Canada's decision not to hear Ms. McIvor's appeal. They were generally critical of the absence of full consultation related to the federal government's proposed approach, as well as of the substance of that approach. It was viewed as inadequate redress to historic discrimination in the Act's registration scheme, as raising a number of implementation and resource issues and, in particular, as continued interference with and failure to acknowledge First Nations jurisdiction over citizenship matters.[50]

It is worth noting, finally, that a number of additional Charter challenges to the Act's registration provisions are currently active.[51]

Description and Analysis

As introduced, Bill C-3 consists of 10 clauses. The following review considers selected significant features of the legislation. Given the nature of the bill, the discussion is necessarily somewhat technical in nature.

For purposes of clarity, it is worth recalling key elements of the British Columbia Court of Appeal ruling that gave rise to Bill C-3. The decision dealt with the case of Sharon McIvor, who had lost status when she married a non–First Nations man and had been reinstated in 1985 under paragraph 6(1)(c) of the post–Bill C-31 *Indian Act*. Her son, Jacob Grismer, having only one First Nations parent, acquired status under subsection 6(2) but was unable to transmit that status to his children owing to his own marriage to a non–First Nations woman. In contrast, persons in the male line affected by the 1951 double mother rule, which legislated loss of status at age 21, had been reinstated for life under paragraph 6(1)(c) and were thus able to transmit status to their children whether or not they married out. The Court found that this circumstance placed persons in Jacob Grismer's position at a disadvantage amounting to an unjustified section 15 Charter violation, and issued a suspended declaration of invalidity of paragraphs 6(1)(a) and (c) of the Act to allow Parliament to amend the Act before 6 April 2010.

Re-Enactment (Clause 2)

Bill C-3 effects a re-enactment of paragraphs 6(1)(a) and (c) of the *Indian Act*, that is, those portions of the registration section that, under the *McIvor* decision, would be of no force and effect as of 6 April 2010 (clauses 2(2) and (3)). This device aims to ensure the validity and continuity of entitlement to registration under those paragraphs in British Columbia after Bill C-3 comes into force.

Clause 2 was amended by the Committee to provide that any person born prior to 17 April 1985 and is a direct descendant of a person registered or entitled to be registered under the *Indian Act*, may also be entitled to registration. This amendment was ruled inadmissible, first by the Committee Chair, and later by the Speaker of the House of Commons, and is accordingly not found in the bill.

New Registration Provision (Clause 2(3))

Clause 2(3) contains the government's core response to the *McIvor* decision; in it, Bill C-3 proposes a legislated solution tailored to the Court's specific finding of discrimination. The addition of a new paragraph 6(1)(c.1) entitlement to registration provides for status equivalent to that of double mother rule reinstatees, thus ensuring that persons to whom it applies are able to transmit subsection 6(2) status to their children. The new provision prescribes four cumulative criteria for entitlement that reflect the approach of the department's discussion paper described above; a person will be entitled to registration upon application if each of the following conditions in subparagraphs 6(1)(c.1)(i) through (iv) is satisfied.

> (i) Her/his mother lost status as a result of marriage under provisions related to marrying out dating from the 1951 Act through 1985,[52] or under former provisions of the Act related to the same subject matter.
>
> As the text suggests, this condition is not limited to the period between 1951 and 1985, when the double mother rule was in place, but extends to mothers who lost status at any time prior to the coming into force of Bill C-31 on 17 April 1985. It seems likely that most mothers described in subparagraph (i) will have lost status through a marriage post-1951.[53]
>
> (ii) Her/his father is or was, if deceased, not entitled to be registered under the Act in effect since the creation of the Indian Registry in the 1951 Act, or was not an Indian as defined in the pre-1951 Act.
>
> The *McIvor* decision dealt with discrimination arising under Bill C-31 against persons born to mothers who had lost status following marriage to their non-Indian fathers. Under new paragraph (c.1), that father may be, but is not necessarily, the person whose marriage to the mother caused her loss of status. That is, the person entitled to registration under the new provision may equally be born of a subsequent union, married or common law, between the mother and a non-Indian father, subject to the exception outlined in relation to subparagraph (iii).
>
> (iii) S/he was born after the marriage referred to in (i) and prior to 17 April 1985, when Bill C-31 came into force; persons born after that date are entitled to registration only if their parents married prior to it.
>
> Under subparagraph (iii), entitlement to registration requires in all cases that the person be born after the marriage that caused the mother's loss of status. For purposes of entitlement under this provision, persons born prior to 17 April 1985, when Bill C-31 came into force, may have been born of marriages or common-law unions. Persons born after that date may also be entitled to status under new paragraph (c.1), provided they are born of marriages that occurred prior to 17

April 1985. This requirement is concerned with ensuring that Bill C-3 does not, in establishing a new entitlement under subsection 6(1), also result in inequality for descendants in the male line. The concern is that conferring subsection 6(1) status on a person born after April 1985 of a post-1985 marriage between a First Nations woman and a non-First Nations man would disadvantage a person born after April 1985 of a post-April 1985 marriage between a First Nations man and his non–First Nations wife, who is entitled only to subsection 6(2) status under the Act's post–Bill C-31 registration provisions.

Persons born after 17 April 1985 of common-law unions between a First Nations woman and a non–First Nations man who might satisfy all other conditions are not covered by new paragraph 6(1)(c.1), but remain entitled to registration under subsection 6(2).

(iv) S/he had or adopted a child after 4 September 1951, when the double mother rule of the 1951 Act came into force, with a person not entitled to be registered.

Entitlement to registration under the new provision requires, finally, that the person have had at least one child after September 1951 with a non–First Nations person. If that requirement is met, all her/his other children will also be entitled to registration, whatever their date of birth. In most cases, the children's entitlement will be to subsection 6(2) status.[54] In contrast, any of the person's siblings who satisfy all other conditions of new paragraph (c.1) but whose children were all born before September 1951 will not be entitled to registration under the provision.

The department now estimates that approximately 45,000 persons, or 6% of the existing registered First Nations population, will be newly entitled to registration as an immediate result of clause 2(3), and that the majority live off reserve.[55]

Deemed Entitlement to Registration (Clause 2(4))

Subsection 6(3) of the Act currently provides that for purposes of establishing entitlement to registration under paragraph 6(1)(f) and subsection 6(2), persons entitled to be registered under section 6 but who predeceased its coming into force in April 1985 are deemed entitled to registration. Clause 2(4) amends subsection 6(3) to ensure that persons described in new paragraph 6(1)(c.1) but who predecease its coming into force are also deemed entitled to be registered.

Band Membership (Clause 3)

Section 11 of the Act sets out the conditions for entitlement to inclusion on Band Lists maintained by the department for First Nations communities that have not assumed control of their own membership under section 10 of the Act. New subsection 11(3.1) provides that a person entitled to status under paragraph 6(1)(c.1) whose mother lost her band membership after marrying out is entitled to be on the list maintained by the department for that band.

According to the department, more than 230 First Nations communities do currently control their membership through a variety of codes.[56] Entitlement to membership in those bands for persons "covered" by paragraph 6(1)(c.1) and their children with subsection 6(2) status will be determined according to the relevant bands' membership rules.

Report to Parliament (Clause 3.1)

A new clause 3.1 was added to the bill at Committee stage, requiring the Minister of Indian Affairs and Northern Development to report to Parliament on the provisions and implementation of the bill within two years of its coming into effect.

Related Provisions (Clauses 4 TO 9)

Bill C-3 sets out a number of "for greater certainty" provisions. These measures relate, in the main, to the appellate court's declaration of invalidity of paragraphs 6(1)(a) and (c) of the Act as of 6 April 2010, and are intended to eliminate any uncertainty with respect to the continuity of application of those provisions in respect of both entitlement to registration and acquired rights to band membership, subject to membership rules.

Accordingly, those registered or entitled to be so under paragraphs 6(1)(a) and (c) immediately prior to the coming into force of Bill C-3 remain registered (clause 5),[57] and the Registrar is obliged to recognize existing entitlements to be registered under those paragraphs for purposes of determining entitlement under paragraph 6(1)(f) and subsection 6(2) of the Act (clause 6). Persons entitled to be registered under paragraphs 6(1)(a) and (c) immediately before Bill C-3 takes effect and who had the right to be included on a membership list maintained by a band continue to have that right, subject to the band's membership rules (clause 7). Similarly, persons entitled to be registered under new paragraph 6(1)(c.1) who had a right to inclusion on a membership list maintained by a band continue to have that right, subject to membership rules established after Bill C-3 takes effect (clause 8).

In addition to ensuring continuity of application of registration and membership provisions, Bill C-3 stipulates that no claim for compensation lies against the Crown, her employees or band councils for anything done in the performance of their duties because a person whose parent is entitled to registration under new paragraph 6(1)(c.1) was not registered or included on a band list before the coming into force of Bill C-3 (clause 9). That is, no persons newly entitled to registration as of the coming into force of the legislation may claim damages because they were not registered immediately prior to that date.

Coming Into Force (Clause 10)

Should Bill C-3 not be enacted by the expiration of the British Columbia Court of Appeal's suspended declaration of invalidity on 6 April 2010, clause 10 authorizes the Governor in Council to bring Bill C-3 into force retroactively, but no earlier than 5 April 2010.

At the time of writing, the government has applied to the Court for an extension of the suspension.

Notes

1. R.S.C. 1985, c. I-6.

2. The term "Indian" which was long the descriptor by which First Nations people were known, is virtually no longer used for that purpose outside the *Indian Act*. Given its continued usage in the Act, this paper uses both designations interchangeably.

3. For a more complete historical overview of the *Indian Act*, see John Leslie and Ron Macguire, eds., *The Historical Development of the Indian Act*, 2nd ed., Department of Indian Affairs and Northern Development, 1983.

4. *An Act for the Better Protection of the Lands and Property of the Indians* in Lower Canada, S.C. 1850, c. 42, 13–14 Vict, s. 5, included any person of Indian birth or blood, any person reputed to belong to a particular group of Indians, and any person married to an Indian or adopted into an Indian family. See also ibid., p. 26.

5. *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, chapter 42*, S.C. 1869, c. 6, 32-33 Vict, s. 6. Section 6 further provided that an Indian woman marrying an Indian man from another Tribe or band would cease belonging to her own band and become a member of her husband's. The controversial concept of enfranchisement, referring to the voluntary or involuntary loss of status and developed as an assimilative tool, dates from 1857 legislation and was in place in various forms until its repeal in 1985.

6. *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, c. 18, 39 Vict., s. 3.

7. S.C. 1951, c. 29, 15 Geo. VI.

8.Section 14 of the 1951 Act further explicitly provided that a woman band member would lose her membership upon marriage to a non-band member, while maintaining the rule of transferred membership upon marriage to a member of a different band.

9. The 1951 Act authorized, but did not require, the Governor in Council to order the enfranchisement of an Indian woman as of the date of her marriage to a non-Indian (subsection 108(2)). This authority was subsequently expanded to include the woman's children. See subsection 109(2) of the *Indian Act*, R.S.C. 1970, c. I-6.

10. The text of section 12 of the 1951 Act may be consulted at Appendix A.

11. For a fuller examination of developments outlined under this heading, see Katharine Dunkley, *Indian Women and the Indian Act*, Publication no. BP-16E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1982.

12. *Attorney General of Canada v. Lavell*; Isaac v. Bédard, [1974] S.C.R. 1349.

13. In 1979, the Canadian Human Rights Commission recommended that a revised *Indian Act* make determinations of status and membership in a non-discriminatory manner, and reinstate women affected by paragraph 12(1)(b) and their children and grandchildren to full status. Canadian Human Rights Commission, *Annual Report* 1979, Ottawa, 1980, pp. 46–47.

14. In 1970, the Royal Commission on the Status of Women recommended "that the *Indian Act* be amended to allow an Indian woman upon marriage to a non-Indian to (a) retain her Indian status and (b) transmit her Indian status to her children." *Report of the Royal Commission on the Status of Women in Canada*, Information Canada, Ottawa, 1970, recommendation 106.

15. They appeared before the then House Standing Committee on Indian Affairs and Northern Development in 1976 to argue for the suspension of the marrying out provision as an interim measure and called for permanent change in a 1979 position paper. Subsection 4(2) of the 1951 Act authorized the Governor in Council to exempt any band from the application of most provisions of the Act, including those related to status. (A similar provision in the current Act removes that option for registration and membership provisions.) In 1980, women parliamentarians supported this approach, and the then Minister of Indian Affairs agreed that bands could apply for suspension of both the marrying out provision and the double mother rule. In the result, applications for exemption from the double mother rule far exceeded those sought for paragraph 12(1)(b). See Dunkley (1982), pp. 10–15.

16. *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40), p. 166 (1981). Section 27 of the covenant provides that persons "shall not be denied the right, in community with the other members of their [ethnic, religious or linguistic] group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." The committee did not rule directly on the covenant's anti-discrimination provisions, as Ms. Lovelace's original loss of status predated Canada's adherence to it in 1976.

17. For a fuller discussion of developments under this heading, see Douglas Sanders, "Indian Status: A Women's Issue or an Indian Issue?," *Canadian Native Law Reporter*, Vol. 3, 1984, p. 30.

18. The coming into force of section 15 of the Charter was delayed to allow comprehensive review of and removal of discriminatory provisions from federal and provincial statutes.

19. House of Commons, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 1st Session, 32nd Parliament,

20 September 1982,58:7. The subcommittee was mandated in August 1982 "to study the provisions of the *Indian Act* dealing with band membership and Indian status, with a view to recommending how the Act might be amended to remove those provisions that discriminate against women on the basis of sex," and to report by September 1982. Before the subcommittee, First Nations women's groups pushed for the introduction of legislation, while the Assembly of First Nations argued for First Nations determination of citizenship, and emphasized the importance of collective rights. The then Minister of Indian Affairs committed the government to ending discrimination in the Act, contingent on prior consultation with First Nations people, and tabled a document outlining issues and options related to eliminating the Act's discriminatory provisions. See Department of Indian Affairs and Northern Development, *The Elimination of Sex Discrimination from the Indian Act*, Ottawa, 1982.

20. The subcommittee recommended that the issue of status for descendants of children of mixed unions be given further consideration by the Sub-Committee on Indian Self-Government. The 1983 Penner report, *Indian Self-Government in Canada*, did not deal directly with the matter.

21. The report also called for additional federal resources to defray increased costs associated with an increase in the First Nations population.

22. See Sanders (1984), p. 33. Children of a first-generation child who gained status through his/her reinstated mother would not have status unless their other parent was able to transmit status.

23. Adjustments to the legislation to increase community control proposed jointly by the Assembly of First Nations and Native Women's Association of Canada were ultimately not included in the bill that passed the House in June 1984.

24. House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 1st Session, 33rd Parliament, 7 March 1985, 12:7 (Honourable David Crombie, Minister of Indian Affairs and Northern Development).

25. S.C. 1985, c. 27.

26. The text of subsections 6(1) and (2) of the Act may be consulted at Appendix B.

27. The scope and impact of this reform are discussed in *Report of the Royal Commission on Aboriginal Peoples*, Volume 4, *Perspectives and Realities*, Chapter 2, "Women's Perspectives," pp. 43–47. See also AFN-INAC Joint Technical Working Group, *First Nations Registration (Status) and Membership Research Report*, July 2008; Jill Wherrett and Megan Furi, *Indian Status and Band Membership Issues*,

Publication no. BP-410E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, February 2003, pp. 9–11.

28. Subsection 6(1) also encompasses additional classes of persons entitled to registration.

29. Under subsection 5(5) of the Act, registration is not automatic but is acquired through an application process.

30. Wherrett and Furi (2003), p. 8.

31. Subsection 6(2) registrants have been able to transmit status if they marry persons entitled to be registered under either of subsections 6(1) or (2) (see paragraph 6(1)(f)).

32. That is, for the descendants of First Nations men who had married out prior to 1985, the cut-off effect of inter-marriage would be postponed until at least the third generation, but not eliminated.

33. See House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Fifth Report of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to amend the "Indian Act" as passed by the House of Commons on June 12, 1985*, 1988; Department of Indian Affairs and Northern Development, *Impacts of the 1985 Amendments to the Indian Act* (Bill C-31), five-volume report, including the *National Aboriginal Inquiry* (Vol. 1) and *Summary Report* (Vol. 5), 1990; Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, The Queen's Printer, Winnipeg, 1991; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 4, Perspectives and Realities, Chapter 2, Minister of Supply and Services Canada, Ottawa, 1996; Native Women's Association of Canada, *Bill C-31: Unity for Our Grandchildren*, Conference proceedings, 1998; and concluding observations of various United Nations monitoring bodies on Canada's periodic reports under the *International Covenant on Civil and Political Rights* (1999, 2005);the *International Covenant on Economic, Social and Cultural Rights* (2006) and the *Convention on the Elimination of Discrimination against Women* (2008). Reports and reviews have, with some exceptions, not focused exclusively on status-related issues, touching on the unanticipated volume of new and reinstated registrants, shortfalls in resources, complexities of registration, access to land, housing and other government programs.

34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band

members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

35. Assembly of First Nations, "Bill C-31 Twenty Years Later: AFN National Chief Calls for First Nations Control of First Nations Citizenship," Ottawa, 28 June 2005. Resolutions of AFN assemblies have consistently maintained the claim to control matters of status or "citizenship"; recent citizenship initiatives by First Nations organizations include the Anishinabek Citizenship Law of the Anishinabek Nation in Ontario, which named its first Commissioner of Citizenship in 2008, and the treaty-based Citizenship Framework of the Federation of Saskatchewan Indian Nations.

36. Department of Indian Affairs and Northern Development [DIAND], "Discussion Paper: Changes to the *Indian Act* affecting Indian Registration and Band Membership – *McIvor v. Canada,*" Ottawa, August 2009, p. 6.

37. Stewart Clatworthy, *Re-assessing the Population Impacts of Bill C-31* (2001), Minister of Indian Affairs and Northern Development, Ottawa, 2004, p. ix. See also Stewart Clatworthy, *Registration and Membership: Implications for First Nations Communities*, Presentation to Aboriginal Policy Research Conference, March 2006.

38. DIAND Strategic Research and Analysis Directorate and Canada Mortgage and Housing Corporation Policy and Research Division, *Registered Indian Demography: Population, Household and Family Projections 2004–2029*, 2007.

39. *McIvor et al. v. The Registrar, Indian and Northern Affairs Canada et al.*, 2007 BCSC 26 (British Columbia Supreme Court). Prior to Bill C-31, Ms. McIvor had not sought registration, believing herself to be ineligible. The government conceded that her Indian ancestry had entitled her to registration under the 1951 Act, that she had then become disentitled upon marrying out under paragraph 12(1)(b) of that Act, making her eligible for registration under paragraph 6(1)(c).

40. They argued, more specifically, that the provisions continued to discriminate between matrilineal and patrilineal descendants born before 1985 in the transmission of status, and between descendants born before 1985 of Indian men who had married non-Indians and descendants of Indian women who had married out. Ms. McIvor and her son did not challenge the second generation cut-off per se, but rather its discriminatory effect for First Nations women who married out prior to 1985 and their children born before 1985.

41. *McIvor v. The Registrar*, Indian and Northern Affairs Canada , 2007 BCSC 827.

42. *McIvor v. Canada* (Registrar of Indian and Northern Affairs), BCCA 2009 153.

43. The Court acknowledged that the numbers of those affected might be low in light of exemptions from the double mother rule granted to a majority of First Nations communities. See note 14. It would appear that "only about 100 out of 2,000 individuals affected by the rule actually lost status" (David Schulze, "The *McIvor* Decision and Its Impact," Presentation to the Canadian Aboriginal Law 2009 Conference, 20 November 2009, p. 6).

44. *Sharon Donna McIvor, et al. v. Registrar, Indian and Northern Affairs Canada, et al.*, 5 November 2009, File No. 33201.

45. DIAND (August 2009).

46. Ibid., p. 7. According to the department, feedback obtained in meetings and written submissions touched on broader issues of registration, membership and citizenship, as well as the financial implications of increased numbers of status First Nations people. DIAND, *Report on the Engagement Process, August to November 2009: Changes to the Indian Act affecting Indian Registration and Band Membership – McIvor v. Canada*, Ottawa, December 2009.

47. DIAND (August 2009), p. 8.

48. Ibid., p. 10.

49. Sharon McIvor, "Sharon McIvor's Response to the August 2009 Proposal of Indian and Northern Affairs Canada to Amend the 1985 *Indian Act*," 6 October 2009.

50. See, for example, Native Women's Association of Canada, "Aboriginal Women Lose in Dismissal of *McIvor* Decision," News release, Ottawa, 6 November 2009; Assembly of First Nations, "What is the AFN doing?," Backgrounder, n.d.; Assembly of First Nations, "Assembly of First Nations says Citizenship Issue does not end with *McIvor* case," Ottawa, 5 November 2009; C*ongress of Aboriginal Peoples, The Congress of Aboriginal Peoples' Response to Canada's Engagement Process Affecting Indian Registration and Band Membership: (McIvor v. Canada)*, Ottawa, November 2009; Chiefs of Ontario, "Ontario Regional Chief Angus Toulouse Responds to the Supreme Court Decision to Dismiss Sharon McIvor's Appeal," News release, Toronto, 6 November 2009; Federation of Saskatchewan Indian Nations, "The FSIN Will Continue Its Work On First Nation Citizenship," News release, 5 November 2009; Assembly of Manitoba Chiefs, Letter to Prime Minister Stephen Harper, Winnipeg, 13 November 2009.

51. Information provided by DIAND in writing to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on 4 November 2009.

52. The provision refers explicitly to paragraph 12(1)(b) – marriage to a non-Indian – and subparagraph 12(1)(a)(iii) in conjunction with subsection 109(2) – enfranchisement order issued upon marrying out – of the 1951 Act, which remained in effect until Bill C-31.

53. The language concerning loss of status under former provisions of the Act echoes that of existing paragraph 6(1)(c). The extension past 1951 in new paragraph (c.1) is in consideration of the application of the double mother rule. Although the rule applied to children born to a marriage entered into after September 1951, the paternal grandfather's marriage to a non-Indian woman likely preceded that date.

54. Where the paragraph 6(1)(c.1) parent has had any children with a person entitled to be registered, those children will be entitled to paragraph 6(1)(f) status.

55. Department of Indian Affairs and Northern Development, *Explanatory Paper: Proposed Amendments to the Indian Act Affecting Indian Registration*, March 2010, p. 4.

56. Ibid., pp. 4–5.

57. The provision explicitly maintains the Registrar's authority to remove names from the Indian Register under subsection 5(3) of the Act.

Appendix A – *Indian Act*, S.C. 1951, C. 29, 15 GEO. VI

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip, (ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

(iv) *is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven*, [emphasis added]

unless, being a woman, that person is the wife or widow of a person described in section eleven, and

(b) *a woman who is married to a person who is not an Indian.* [emphasis added]

(2) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

Appendix B – *Indian Act*, R.S.C. 1985, C. I-5

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*; [emphasis added]

(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;* [emphasis added]

(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.

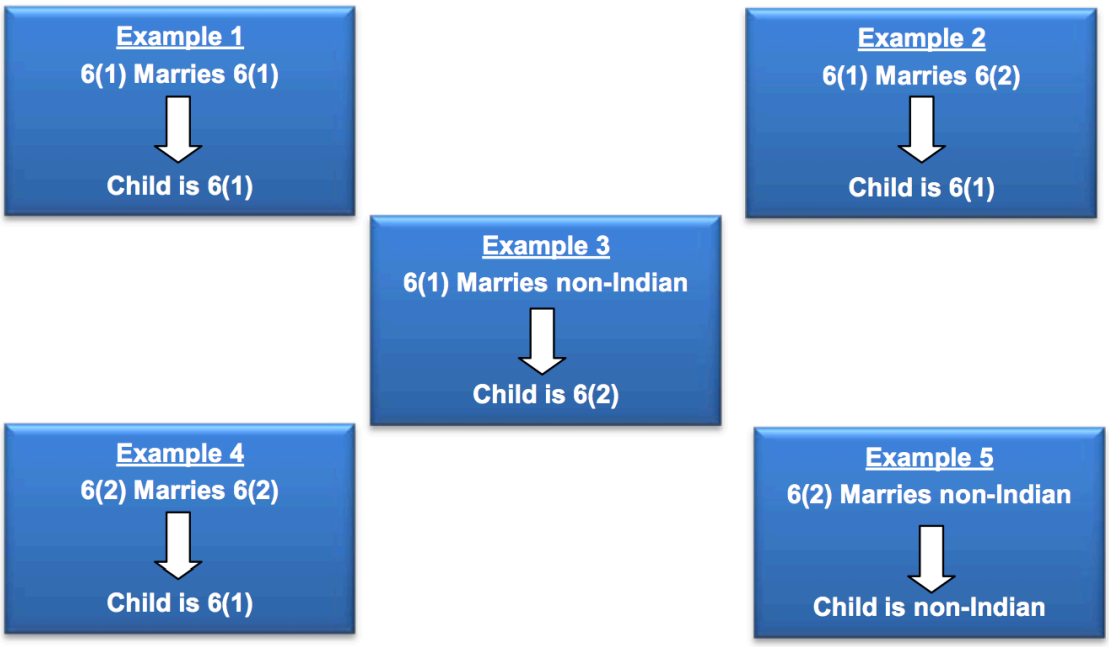
(2) Subject to section 7, *a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).* [emphasis added]

(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.

Appendix C – EFFECTS OF BILL C-31*



*Source: *Report of the Royal Commission on Aboriginal Peoples*, Volume 4, *Perspectives and Realities*, p. 41.