CASE COMMENT

McIvor: Justice Delayed—Again†

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† *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 and 2007 BCSC 1732, reversed in part by *McIvor v. Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153, leave to appeal denied 11.05.2009 (SCC); *Supplementary Reasons (Extension of Suspension of Declaration of Invalidity) to McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (April 1, 2010)

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*This comment considers the case of Sharon McIvor and her son Jacob Grismer ("*McIvor*"), attacking two aspects of the discrimination against women in the registration provisions of the Indian Act: (1) the long-standing rule that eligibility for Indian status descends only through the male line; and (2) the rule which takes status away from Indian women, but not Indian men, who marry non-Indians (the "marrying out" rule). After a review of these two strands of discrimination, the paper considers the decisions of Madam Justice Ross of the British Columbia Supreme Court, and Mr Justice Groberman on behalf of the Court of Appeal. The comment concludes with an account of the legislation which Canada has introduced to address the constitutional violation found by the Court of Appeal. It emerges clearly from this analysis that while the decision of Madam Justice Ross offered a real possibility of finally rooting out the longstanding discrimination against women in the registration provisions, the Court of Appeal and Canada's response to its decision, perpetuate and exacerbate the sorry legacy of misogyny deeply embedded in the Indian Act. Indeed Canada's response to the McIvor case underlines, once again and with even more force, how inappropriate it is for the state to be usurping the indigenous right to determine identity, membership and belonging.*

I Introduction

In addition to the *McIvor* case, there are two other landmark cases on discrimination against women in the registration provisions, those brought by Jeannette Corbière Lavell and Sandra Lovelace, but they differ from *McIvor* in that both cases challenged only the marrying out rule. Furthermore, the

Lavell[1] and *Lovelace*[2] cases deal with the pre-1985 *Indian Act*,[3] whereas *McIvor* impugns the validity of putative remedial legislation (still known colloquially as *Bill C-31*), which came into effect on the same day as s. 15 of the *Canadian Charter of Rights and Freedoms*, April 17, 1985, and added a problematic new s. 6 to the *Indian Act*.[4]

The *McIvor* case is the broadest court challenge to discrimination against women in the registration provisions, which has yet been heard. It is also the first case to be decided under the *Canadian Charter of Rights and Freedoms*.[5] The *McIvor* litigation is the first major case to illuminate clearly how the complex discrimination in the *Indian Act* registration provisions has disadvantaged Indian[6] women.

After an overview of the two main strands of discrimination against women which have operated together for over a century and a half, the Comment addresses the decisions of the British Columbia Supreme Court and Court of Appeal, and the government's response to the Court of Appeal decision.

II Descent of Status and Marrying Out: Over a Century of Double Discrimination Against Women

The Foundations

The *Indian Act* registration provisions have been shaped by two fundamental elements of government policy toward indigenous peoples. One is the desire to promote and hasten their assimilation into the dominant society. The first legislative expression of this policy occurred in *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, passed in 1857.[7] This legislation introduced the concept of

1 *A.G. Canada v. Lavell*, [1974] S.C.R. 1349.
2 *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981) (U.N. Human Rights Committee).
3 R.S.C. 1970, c. I-6.
4 *An Act to Amend the Indian Act*, S.C. 1985, c. 27, assented to 28 June 1985, in effect 17 April 1985.
5 *Canadian Charter of Rights and Freedoms*, Pt. I of *Constitution Act, l982*, being Schedule B to the Act, *Canada Act,1982* (U.K.) 1982, c. 11. *Lavell* was decided under the "equality before the law" provisions of the *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(b), and *Lovelace* invoked the *International Covenant on Civil and Political Rights* adopted 16 December 1966, entry into force 23 March 1976; G.A. Res. 2200A (XXI) (accession by Canada 19 May 1976) Can TS no. 47.
6 I use the term "Indian" in this comment where I am referring to persons registered or registrable under the *Indian Act*. I also use the term "Indian status" when referring to registration or registrability; although the *Indian Act* does not use the term "status," it has become widely used to identify those eligible for registration or who are registered (i.e., "status Indians").
7 20 Vict. (1857), c. XXVI (10 June 1857).

enfranchisement: an Indian male who could speak English or French, and was found by a panel of colonial administrators to be "of sober and industrious habits, free from debt and sufficiently intelligent to be capable of managing this own affairs"[8] could surrender his Indian identity and right to share in Indian common lands, and become "enfranchised." He would then have the right to vote in Canadian elections, and be in other respects the equal under civil law of his non-Indian counterpart. While the process of enfranchisement proved very unpopular,[9] the government remained committed to the policy of assimilation, and continued its efforts to reach that goal.

The second foundation for the registration provisions in the *Indian Act* was the colonizer's Victorian view of women and their proper place in family and society. Under Victorian law, a woman lost all her civil rights upon marriage; by the "common law fiction of marital unity,"[10] as Blackstone put it, "by marriage the husband and wife are one person in law."[11] Applying to indigenous women, the law of Victorian Canada ignored the vital role they played in numerous indigenous polities, but clearly furthered the government goal of assimilation. A registered Indian woman who married a non-registered male ceased to be a registered Indian. She was legally "assimilated" and off the government's rolls. The descent of status through the male line was also a function of applying to Indian women the inferior civil status then prevailing with respect to all women. It was not until 1997, for example, that female Canadian citizens gained fully equal rights to pass their Canadian citizenship on to their children.[12]

While the concepts underlying the *Indian Act* registration provisions are relatively straightforward, the statute itself is very complicated. To grasp the arguments and reasoning of the Courts in *McIvor*, it is necessary to come to grips with the complexities that have accumulated in the *Act* over time.

Descent of Status Through the Male

From Confederation to 1985, the *Indian Act* provided for descent of Indian status through one parent, but specified that this one parent must be male.

8 *Supra* note 7, s. IV.

9 Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women; Indian Rights for Indian Women, April 1978) at 63-65.

10 The point, and the quote, are from Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: Osgoode Society; University of Toronto Press, 1997) at 15.

11 *Blackstone's Commentaries*, Vol. 2, at 242, edition cited by Chambers, *supra* note 10, at 15, note 8.

12 See *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, and Mary Eberts, "Women as Full Citizens: Addressing the Barriers of Gender and Race in Canadian Constitution Development" in Irma Sulkunen *et al.*, eds., *Suffrage, Gender and Citizenship: International Perspectives on Parliamentary Reform* (Cambridge: Cambridge Scholars Publishing, 2009) 376, at 380-384.

For example, the *Indian Act* of 1876[13] provided that the term Indian means any male person of Indian blood reputed to belong to a particular Band, any child of such person, and any woman who is or was lawfully married to such person. The woman who acquired status through marriage to an Indian male would keep it even after his death, or their divorce, although women who acquired status in this way were unable to pass it to their children. As with all other Indian families, descent of status was through the father's line. This approach privileged the male in two ways: it enabled him to bestow status on his wife (thus allowing her to live on reserve with him and their children)[14] and it ensured descent of status through the male line.

A male Indian could give up status on behalf of his wife and children, as well as confer it on them. If a male Indian were to become enfranchised, the *Indian Act* provided that his spouse and minor children would be enfranchised with him, losing their Indian status whether they wanted to or not.[15] Because the *Indian Act* did not provide Indian women married to Indian men with any opportunity to initiate the enfranchisement process, Indian men were not exposed to loss of Indian status through the enfranchisement of their spouses.

Double Mother Rule

The "double mother" rule introduced in the *Indian Act* of 1951 was the first and only pre-1985 imposition on what had previously been the male progenitor's untrammelled ability to confer Indian status on children born inside marriage. This rule provided that persons born "of a marriage" entered into after the 1951 *Act* came into force lost Indian status upon attaining 21 years if both their mother and their paternal grandmother had acquired status through marriage to an Indian. Up until age 21, they were fully Indian. A "double mother" Indian male under 21 could confer status on any of his children born before he turned 21, and they would not lose it when their father lost his.[16] The operation of the double mother rule is shown in Figure 1.

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13 The first post-Confederation statute dealing with Indian matters, passed in 1868, defined "Indian" as including "all persons" of Indian blood and their descendants and "[a]ll women lawfully married to any of the persons …": An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42, s. 15. It is likely from the context and the historical period that "persons" in that 1868 *Act* meant male persons, although a specific reference to descent through only the male line did not enter the legislation until 1876: *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, c. 18, s. 3, item 3.

14 The *Indian Act* has always included a provision barring non-Indians from taking up residence on reserve lands. See ss. 18.1 and 30 of the *Indian Act*, R.S. 1985, c. I-5 for the current prohibition. Section 87 of the current *Act* also provides for Band passage of by-laws dealing with residency on reserve.

15 See, for an early example of this provision: S.C. 1869, c. 6, s. 16. The provision in effect immediately prior to the passage of *Bill C-31* is found in *Indian Act*, R.S.C. 1970, c. I-6, s. 109(1).

16 Enacted by *Indian Act*, S.C. 1951, c. 29, s. 12(1)(a)(iv).

Figure 1: Double mother rule under 1951 *Indian Act*

STATUS FATHER AND MOTHER

Brother #1	**Brother #2**
Marries status woman	Marries non-status woman, gives her status ("mother #1")
Son A derives status from father	Son B derives status from father
Son A marries non-status woman, gives her status	Son B marries non-status woman, gives her status ("mother #2")
Son of A derives status from father	Son of B has status only until 21 because of double mother rule
Son of A passes status to his children	Son of B can pass status only to children born before he is 21

Brother #2 and his descendants are affected by the double mother rule.

The double mother rule was short-lived. It began to affect the post-1951 generation of children when they turned 21, which would not have been before 1972. In 1980, the government offered to Bands the option of being exempted from the double mother rule by means of an Order-in-Council passed pursuant to s. 4(2) of the *Indian Act*, and 311 of 580 Bands took up this option.[17] The double mother rule was repealed in 1985. Evidence in the *McIvor* case suggested that in the 13 years it was in effect, the double mother rule affected only 2,000 people.[18]

Descent of Status from Unmarried Parent

A woman who derived status through her father, and was unmarried, could pass her status on to her child if certain conditions were met. Until the *Indian Act* of 1951, the main condition was that the Superintendent-General of Indian Affairs had not made an order excluding that child from sharing in the moneys of the Band; the Band could prevent such an order by agreeing that the child could share.[19] Section 12 of the 1951 *Act* provided that the child could be registered as an Indian unless the Registrar was satisfied that the father of the child was not an Indian, and declared that the child was not entitled to be

17 2007 BCSC 827 at paras 59-60.
18 *Ibid*. at para. 246.
19 See, for example, *Indian Act*, R.S.C. 1927, c. 98, s. 12.

registered.[20] In 1956, a change to this provision once again gave the Band a role to play. Within one year after it had occurred, the Band could protest the addition of the child's name to the Band list, forcing an adjudication by the Registrar on the question of whether the father of the child was a non-Indian. If no successful Band protest occurred, the child would be registered.[21]

Like the unmarried Indian woman, an unmarried Indian male could confer status. Section 11(c) of the 1951 *Act* provided that a person is entitled to be registered if he is "a male person who is a direct descendant in the male line of a male person" who is entitled to be registered. The Supreme Court held in 1983 that the out-of-wedlock son of an Indian male was entitled to registration under this provision.[22] Daughters born out of wedlock to a male Indian would not be registered, a situation not repaired until *Bill C-31*. That solution was a gendered one. A daughter was restored to status under s. 6(1)(c), whereas a son would have his full status confirmed by s. 6(1)(a).[23]

The Marrying Out Rule

An Indian woman lost her own status upon marriage to a non-Indian man. That deprivation of status was permanent, enduring beyond her divorce or widowhood. The only way she could regain Indian status was to marry an Indian man. A similar rule provided that where an Indian woman married an Indian man from a different Band, her membership was switched to her husband's Band and their children would be members of his Band. These marrying out rules were introduced in 1869,[24] and endured until 1985. There are no figures available in the public domain to illustrate how many people lost status because of the marrying out rules. However, we do know that over

20 *Indian Act*, S.C. 1951, c..29, s. 11(c).

21 *An Act to amend the Indian Act*, S.C. 1956, c. 40, s. 3, adding a new (1a) to s. 12 of the 1951 *Act*.

22 *Martin v. Chapman*, [1983] 1 S.C.R. 365. A 1977 decision of the Quebec Superior Court had held that a male descendant born out of wedlock to a male Indian could not be registered under s. 11: *Two-Axe v. Iroquois of Caughnawaga Band Council* (1977), online: University of Saskatchewan <http://library2.usask.ca/native/cnlc/vol09/786.html>.

23 Megan Furi & Jill Wherrett, *Indian Status and Band Membership Issues* (Ottawa: Library of Parliament, Parliamentary Information and Research Service, BP-410E, February 1996, revised February 2003) at 7, point out that when female children born out of wedlock to Indian men and non-Indian women between 4 September 1951 and 17 April 1985 became eligible for registration under *Bill C-31*, they received status under s. 6(2), as the child of one Indian parent. Their male siblings, on the other hand, would have had their full status confirmed by s. 6(1)(a). In the parliamentary hearings on *Bill C-3*, NDP MP Jean Crowder refers to this very issue being raised by the Wabenaki Nation, and an Indian Affairs official confirms that it is not dealt with by *Bill C-3*: Canada, House of Commons, 40th Parliament, 3rd Session, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence*, Number 7, April 1, 2010, at 11, 13 ["AANO *Hansard*"].

24 Added by S.C. 1869, c. 6, s. 6.

110,000 persons who had lost status under the former legislation regained eligibility for registration through *Bill C-31*.[25]

Exile of Women and Children

The exile of an Indian woman, and her children, from Indian identity, reserve life and registration under the *Indian Act* when the woman married a non-Indian came about through a combination of the two kinds of discrimination described above: the woman's own loss of status derived from the marrying out rules; however, it was their father's lack of status (not their mother's) which deprived the children of this mixed marriage of the entitlement to be registered under the *Act*. Even if an Indian woman had not lost her status upon marriage out, she still would not have been able to pass it along to her children because of the requirement that status pass through the male. In this respect, the woman who gained status through marriage to an Indian man, and the woman who acquired status through her Indian father, were similarly situated before 1985. The children of both of them were dependant for their status on the status of the husband and father.

After the passage of the 1951 *Indian Act*, a woman who lost her status upon marriage to a non-Indian was also liable to be involuntarily enfranchised by Order-in-Council issued under s. 109(2) of the *Indian Act*.[26] Her minor children would be enfranchised with her, even if they had been born prior to the marriage.[27] The leading study on implementation of s. 12(1)(b), done by Kathleen Jamieson for the organization Indian Rights for Indian Women, reports that 5,035 women and children were subject to involuntary enfranchisement between 1965 and 1975, compared with a total of 228 voluntary enfranchisements of both men and women.[28] Enfranchisement of children ceased in 1974, and of women in 1975.[29] However, women continued to lose status upon marrying out until 1985.

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25 Furi & Wherrett, *supra*, note 23, at 5-6 and endnote 16. Citing data from the Department of Indian and Northern Affairs, they report that by December 2000, Indian status based on *Bill C-31* amendments had been gained by 114,512 people.

26 *Indian Act*, S.C. 1951, c. 29, s. 109(2).

27 Jamieson, *supra* note 9 at 61-62. Jamieson points out that the *Act* was amended in 1956 to provide that enfranchisement of the woman's children would not be automatic upon her marriage; the Minister could recommend whether or not they should be enfranchised, and as of what date. See S.C. 1956, c. 40, s. 28. Jamieson observes that the practice of the Minister was to enfranchise the children who lived off-reserve with the woman and her non-Indian spouse (even if he was their stepfather), but not to enfranchise those who remained living on reserve: see at 62. She also notes, at 62, that in 1967, "after many complaints had been laid, those children who were erroneously enfranchised with their mothers between l951 and 1956 were reinstated when they could be traced."

28 *Ibid*. at 63-65.

29 *Ibid*. at 64 (note to Table II) and 65.

Bill C-31 Abolishes the Marrying Out Rule

In the years before the passage of *Bill C-31*, Indian women activists and their allies focused most of their attention on s. 12(1)(b) of the 1951 *Indian Act*, which contained the marrying out rules. Women did not challenge in court the preference for male-only descent which was, as of 1951, in s. 11 of the *Act*. However, it is clear from the jurisprudence on the *Indian Act* that this preference for male descent was no secret. Madame Justice Wilson declares in *Martin v. Chapman*, "the one thing which clearly emerges from ss. 11 and 12 of the *Act* is that Indian status depends on proof of descent through the male line."[30]

Bill C-31 abolished the influence of marriage upon status acquisition or loss. After its coming into force, no status Indian would lose status upon marriage to a non-Indian, and no status Indian could transmit status to a spouse. However, s. 6(1)(a) of *Bill C-31* ensured that everyone eligible for status before April 17, 1985, would remain eligible.[31] This category included women who had derived status from marriage to an Indian male before *Bill C-31* came into effect.

The New Two-Parent Rule

A major innovation effected by s. 6(1)(f) of *Bill C-31* was the change from a one-parent to a two-parent requirement for the acquisition of Indian status for all children born after April 17, 1985. Those who had acquired status through one parent before that date (primarily the descendants of male Indians) retained it, pursuant to s. 6(1)(a). Going from a one-parent to a two-parent rule added another barrier to registration. Now, to get "full" status a person must have two status parents, instead of only one. The child with only one status parent gets a "life interest" in status, being unable in his or her own right to pass it to a child. Introduction of a two-parent rule was not the only policy choice available for the amendment of the *Indian Act.* In contrast, the reform of Canadian citizenship law which came into effect in 1977 had retained the one-parent requirement, but broadened it so as to permit a female Canadian citizen, as well as a male, to transmit citizenship to a child born abroad.[32]

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30 [1983], 1 S.C.R. 365 at 370.

31 I refer to this as "full status," since a person with status under s. 6(1)(a) can pass status to his or her child as a sole status parent. A person, like Jacob Grismer, with status under s. 6(2), cannot do so.

32 *An Act Respecting Citizenship*, S.C. 1974-75-76, c. 108, and see *Benner v. Canada (Secretary of State)*, *supra* note 12.

Second-Generation Cut-Off

By reason of s. 6(2) of *Bill C-31*, a person may acquire status through one Indian parent, but that status cannot be further transmitted unless the person parents with another status Indian. It does not matter whether the lone status parent is a male or a female, the result is the same. The term "second-generation cut-off" arises from the fact that this truncation of the right to pass status was intended primarily to affect the second generation of a woman restored to status under s. 6(1)(c) after marrying out. It was a compromise intended to placate those opposed to the restoration of status.[33]

Restoration to Status

Sections 6(1)(c)(d) and (e) of *Bill C-31* restore eligibility for status to those who had lost it because of various provisions of the former legislation. Section 6(1)(d) abolishes enfranchisement, and ss. 6(1)(d) and (e) restore to status several classes of persons who had been affected by enfranchisement orders made with respect to their parents, or themselves. Section 6(1)(c) makes eligible for status persons deprived of it by reason of the double mother rule, women who had lost status by marrying out, women and their children enfranchised by Order-in-Council after the woman lost her status by marrying out and children born out of wedlock to Indian women before 1956.

Perpetuation of Sex Discrimination

The combination of the two-parent rule, the hierarchy of different types of status in s. 6(1) and the second-generation cut-off perpetuates the sex discrimination under the old *Act*. A woman who lost her status for marrying out will regain it under s. 6(1)(c) of *Bill C-31*. As her child's father does not have status, the child is registered under s. 6(2) of the new *Act* (even if born before 1985). This means that this child cannot on her own pass status on to her children; to do so she must be parenting with another status Indian, so as to comply with the two-parent rule. By contrast, the child of an Indian man who "married out" before 1985 would have acquired status through the father and keeps it by reason of s. 6(1)(a) of *Bill C-31*. That child can transmit status to a child under s. 6(2) whether or not the child's other parent has status. The effect on the prior *Act* of *Bill C-31*, is shown in Figure 2.

33 Statement of the Honourable David Crombie on second reading of *Bill C-31*, quoted at BSCS 2007 827, at paras 75-77.

Figure 2: Operation of Sex Discrimination in 1951 and 1985 (*Bill C-31*) Registration Provisions

STATUS FATHER AND MOTHER

Brother	**Sister**
1951	**1951**
Derives status from father	Derives status from father
Marries non-status woman, gives her status	Marries out, loses status; husband does not have status
Child derives status from father	Child has no status because father has no status
1985	**1985**
Brother's wife's status preserved by s. 6(1)(a)	Sister regains status by s. 6(1)(c)
Child status also preserved by s. 6(1)(a)	Child derives status from mother (one parent) s. 6(2)
Child can pass status on to grandchild by s. 6(2)	Child cannot pass status on to grandchild

Key: shaded area identifies those without status

The simplest way for Canada to have avoided continuing discrimination against the various classes of persons in s. 6(1) would have been to continue use of the single-parent rule for status transmission, but open up to women as well as men the ability to pass on status. By combining a two-parent rule with the hierarchy established by s. 6(1), *Bill C-31* has merely dropped down by a generation the discrimination against women embedded in the pre-1985 legislation.

New Rights for Non-Status Wives Under s. 6(1)(a)

Under *Bill C-31*, an Indian man and the formerly non-Indian wife he married before April 17, 1985, are both s. 6(1)(a) registrants, as are any of their children born before April 17, 1985. Significantly, a child born to an Indian man and his formerly non-Indian wife after 1985 will also have "full" status. As the child of two Indian parents, that child will be registered under s. 6(1)(f).

A non-Indian woman who acquired status through marriage to a status male before 1985 will retain that status after his death, or after divorce, and under *Bill C-31* she will now be able to pass that status on to a child born after April 17, 1985, even if the father of that child is a non-status man.

This example illuminates an important consequence of s. 6(1)(a). Before *Bill C-31*, the non-Indian wife of an Indian man could not transmit status at all. The couple's children derived their status from their father. Even though their mother had her own status, it was the inferior, non-transmittable kind of status possessed by all Indian women. After *Bill C-31*, the formerly non-Indian wife of an Indian man becomes able to transmit status. *Bill C-31*, then, does not just preserve her rights—it extends them; preserving her rights would have involved merely the retention of her own status. Enabling her to pass on status, which she could not do before *Bill C-31*, was an addition to her pre-existing rights.

In extending her rights, *Bill C-31* creates a privilege for those who trace status through the male line. It enables Indian men who married non-Indian women before April 17, 1985, to meet the new two-parent rule immediately upon the coming into effect of *Bill C-31*, with respect to all future-born children. They are thus able to maintain their position of privilege compared to their sisters who have married out, and are at a disadvantage under the new two-parent rule.

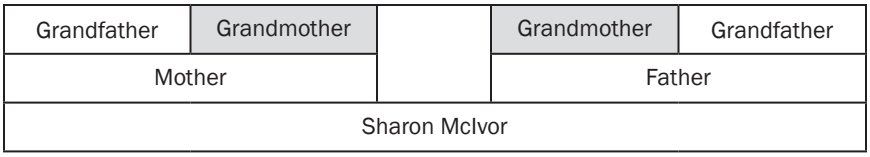
Band Membership

Another significant innovation of *Bill C-31* is the separation of Indian registration from Band membership. Under s. 10 of *Bill C-31*, a Band can create its own membership code. It can admit to membership those who are not status Indians under the *Act*. It can deny membership to any registered Indian except someone restored to Indian status under s. 6(1)(c). Canada continues to operate the Indian registry, and where a Band does not have its own membership code, Band membership accrues by reason of registration, as it did done under the 1951 *Act*. This separation of registration and membership created a situation where a person could be registered as an Indian, but excluded from Band membership. Where a Band admits to membership a person not eligible to be registered, the Band suffers financially: Canada's funding for Bands depends on the number the number of registered Indians they include. Similarly, the Band's ability to hold reserve lands under the *Indian Act* depends on the Band having registered Indians in its membership.

III The *McIvor* Case

Sharon McIvor's registration status under the 1951 legislation is shown in Figure 3.

Figure 3: Sharon McIvor's registration status under the *Indian Act* 1951



Key: shaded areas identify those with status

Both of her grandmothers were status Indians. They did not lose status through the marrying out rules because neither was married to her partner. However, each of these relationships was well known, and neither Sharon nor her mother had applied for registration prior to *Bill C-31*. Each was sure that registration would be refused because of the non-Indian status of her respective father.

Toward the end of the 25-year journey of Ms McIvor's case through the courts, the Department of Indian Affairs determined that she and her mother[34] were both eligible for registration on the ground that there had never been a determination or an order forbidding registration. No such order had been made because before *Bill C-31* neither of them had applied for registration. Justice Ross finds the Department's present position highly ironical, observing: "If they had applied prior to 1985, they almost certainly would have been refused."[35]

Notwithstanding this last-minute concession by the Department of Indian Affairs, Ms McIvor was still without status under the 1951 *Act* because she married a non-status male, Terry Grismer. Their son, Jacob, was also without status under the 1951 legislation, because his father was not a status Indian. Ms McIvor's status was restored under s. 6(1)(c) of *Bill C-31*. As Jacob had only one status parent, he was required to be registered under s. 6(2), and could not confer status in his own right upon his children, Ms McIvor's grandchildren.

Sharon McIvor and Jacob Grismer did not challenge the two-parent requirement for status after 1985. Rather, they sought in their case[36] a recali-

34 2007 BCSC 827 at paras 115-118, 121. The Department also conceded that Ms McIvor's father had been eligible for registration: paras 119-120. However, she would not have acquired status through him under the 1951 legislation because she was not his male child.

35 *Ibid*. at para. 122.

36 The *McIvor* case was actually the complex combination of their appeal from the decision of the Registrar concerning status, and an application under the *Charter*. The convoluted history of the proceeding, largely shaped by strategic considerations, is set out *ibid*. at paras 98-120.

bration of the status hierarchy established in s. 6(1) so as to eliminate the differential impact of the two-parent rule on those tracing their descent through the female line. In particular, they sought to have included in s. 6(1)(a) all of those born before April 17, 1985, who were descended in either the male or the female line from a status Indian. This result would have provided status to both Sharon McIvor and Jacob Grismer by way of s. 6(1)(a), and Jacob would then have been able to pass his status to his children, whether or not their other parent had status. Nor did they challenge the second-generation cut-off in s. 6(2).[37] This was a strategic decision. To achieve "full" status for Jacob Grismer, it was not necessary to challenge directly the second-generation cut-off rule in s. 6(2), if the plaintiffs' argument about the discriminatory hierarchy of rights under s. 6(1) were to succeed. The decision not to challenge s. 6(2) directly was an excellent strategic move, quite characteristic of experienced litigant and advocate Sharon McIvor. Adding a s. 6(2) challenge to their case would have increased the time required for the litigation, and provided the Crown with additional opportunities for procedural objections and delay.

The plaintiffs argued that *Bill C-31* was failed remedial legislation, which perpetuated the disadvantage of those claiming status through the female line and preserved the privilege of those whose status descended through the male line. Their emphasis was on how *Bill C-31* affected them in the present day, when they sought registration. They argued that registration under the *Indian Act* is a benefit of the law within the meaning of s. 15 of the *Charter*. They also maintained that the right to confer status on a child or grandchild is a "benefit of the law." They sought a declaration that s. 6, the new registration provisions enacted by *Bill C-31*, violates s. 15 of the *Charter* on two bases: it discriminates on the basis of sex between matrilineal descendants and patrilineal descendants born prior to April 17, 1985, when conferring Indian status and it discriminates on the basis of sex and marital status between the descendants born prior to April 17, 1985, of an Indian woman who married a non-Indian man and an Indian man who married a non-Indian woman.

Because *Bill C-31* is remedial legislation, McIvor and Grismer argued that it requires a comparison between the group privileged by the discrimination and the group denied equality. They argued that the appropriate comparator group for the s. 15 analysis is male Indians, including those who married out, and children of male Indians who claim entitlement to registration through the male line of descent and who are entitled to s. 6(1)(a) status under *Bill C-31*. They maintained that in every way relevant to the determination of Indian status, they are comparable to those who are favoured by s. 6(1)(a), except that Jacob is the descendant of an Indian woman and Sharon McIvor is an Indian

37 2009 BCCA 153 at para. 43.

mother rather than an Indian father.[38] The Crown contended that the proper comparison was between Sharon McIvor and others who became entitled to registration under s. 6(1)(c)(d) and (e),[39] and between Jacob Grismer and those who have one parent entitled to registration under s. 6(1)(c)(d)(e) and one parent not entitled.[40] To the Crown, the salient feature of this comparator group is that all share the critical characteristic of having been ineligible for registration before *Bill C-31*.[41]

The plaintiffs argued that there was no justification under s. 1 for the discrimination in s. 6. They asked the Court to "read up" s. 6(1)(a) by adding the italicized portion below to provide that a person is entitled to be registered if:

> (a) that person was registered or entitled to be registered immediately prior to April 17, 1985; *or was born prior to April 17, 1985 and was a direct descendant of such a person*.

This change, alone, would not have permitted the registration of Jacob Grismer because the marrying out rules under s. 12(1)(b) of the 1951 *Act* meant that Sharon McIvor was not a person entitled to be registered immediately prior to April 17, 1985. The plaintiffs therfore also requested an order from Justice Ross that for purposes of s. 6(1)(a) of the 1985 *Act* in force immediately prior to April 17, 1985, s. 12(1)(b) shall be read as if it had no force or effect. They sought a declaration that they were both eligible to be registered under s. 6(1)(a) of the 1985 *Act*.[42]

Judgment at Trial

By means of their focus on current legislation, the applicants were successful in defeating the Crown's argument that they were actually seeking retrospective application of the *Charter of Rights*.

In claiming that the plaintiffs sought retroactive or retrospective relief, the Crown had argued that they were, in effect, challenging the repealed registration provisions of the 1951 and 1970 *Indian Acts*.[43] The relief sought, argued the Crown, was tantamount to asking that the non-Indian husband of an Indian woman be given status under the previous *Act*, or that the Indian woman be enabled under the previous *Act* to pass status to her offspring. Only if this were done, ran the argument, could persons in the position of McIvor

38 2007 BCSC 827 at paras 202-204.
39 *Ibid*. at paras 210-211.
40 *Ibid*. at para. 214.
41 *Ibid*. at paras 211-212.
42 *Ibid*. at para. 5. In the alternative to "reading up" s. 6(1)(a), the plaintiffs asked for an order that for the purposes of s. 6(1)(a), the provisions of ss. 11(1)(c) and (d) of the 1951 *Act* be read so as to exclude the words "male" and "legitimate."
43 *Ibid*. at para. 144.

and Grismer say that they were entitled to registration under the *Act* as of April 17, 1985, and claim registration under s. 6(1)(a).[44] The Crown also contended that the plaintiffs' loss of status arose from discrete events happening before 1985, namely Ms McIvor's marriage and Jacob's birth. Accordingly, the Crown claimed that the plaintiffs could not bring themselves within the holding in *Benner*[45] that only ongoing discrimination, as distinct from the continuing effects of discrimination before 1985, can be challenged under s. 15.[46]

Ross J. of the British Columbia Supreme Court holds that the state became engaged with each plaintiff when an application was made for registration and the Registrar responded, both of which events took place after s. 15 came into effect.[47] She observes that the eligibility provisions of prior versions of the *Act* become engaged only because and to the extent that these provisions are continued or incorporated into the 1985 *Act*.[48] She disagrees that the plaintiffs are, in effect, asking for amendment of the previous legislation;[49] she characterizes their remedial request as asking for s. 6(1)(a) to be read in such a way as to allow them to be registered under it.[50] She also rejects the Crown's "discrete act" argument, reasoning that the act of marriage did not itself disentitle one to status; Indian men and women could marry one another, and an Indian man could marry any woman, without losing status. Rather, Sharon McIvor lost status because she was an Indian woman who married out, making her case one of gender discrimination.[51]

Justice Ross approaches the benefit of the law issue from a sweeping understanding of the nature of the *Indian Act*, and its role in shaping the identity of those subject to it. She appreciates that the legal identity or label "Indian" is a creation of statute,[52] superimposed upon First Nations' own, and often quite different, definitions of cultural identity.[53] She is clear that it is government that determines who is an Indian.[54] Despite the imposition of the *Indian Act* regime, First Nations' original concepts of identity have survived and remain a powerful source of cultural identity.[55] Nonetheless, she finds, the concept of Indian has come to exist as a cultural identity alongside traditional con-

44 *Ibid*. at para. 155.
45 *Benner*, *supra* note 12, at paras 42-46.
46 *Ibid*. at para. 153.
47 *Ibid*. at para. 158.
48 *Ibid*. at para. 154.
49 *Ibid*. at paras 196, 236.
50 *Ibid*. at para. 155.
51 *Ibid*. at para. 157.
52 *Ibid*. at para. 8.
53 *Ibid*. at paras 8, 9, 12.
54 *Ibid*. at para. 14.
55 *Ibid*. at para. 131.

cepts, and is imbued with significance extending far beyond entitlement to programs.[56]

Justice Ross holds that the concept of Indian has come to form an important part of cultural identity,[57] and goes on to observe, that "[i]t seems to me that it is one of our most basic expectations that we will acquire the cultural identity of our parents; and that as parents we will transmit our cultural identity to our children."[58] This approach reappears in Justice Ross's consideration of the defendant's argument (under the contextual factors element of the *Law*[59] test) that one's human dignity cannot be significantly hurt by the inability to transmit status to one's children and grandchildren.[60] She states: "The record in this case clearly supports the conclusion that registration as an Indian reinforces a sense of identity, cultural heritage and belonging. A key element in this sense of identity, heritage and belonging is the ability to pass this heritage to one's children."[61]

Likening status under the *Indian Act* to concepts of nationality and citizenship, Justice Ross holds that "… the eligibility of the child to registration as an Indian based upon the circumstances of the parent is a benefit of the law in which both the parent and the child have a legitimate interest."[62] She chastises the government for its contention that status is a personal right only, and there is no right to transmit it: "… having created and then imposed this identity upon First Nation peoples, with the result that it has become a central aspect of identity, the government cannot … [ignore] … the true significance of the concept."[63]

Justice Ross accepts the plaintiffs' choice of comparator. She takes a purposive approach to the selection of the appropriate comparator, tying her choice to the purposes of the legislation as enunciated by the Minister of Indian Affairs when he introduced *Bill C-31* into the House of Commons for second reading. The five purposes he identified were that discrimination based on sex should be removed from the *Indian Act*; status and Band membership should be restored to those who lost them; no one should gain or lose status as a result of marriage; persons who have acquired rights should not lose them; and First Nations who wish to do so will determine their own membership.[64]

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56 *Ibid*. at para. 133, and see generally paras 132-138.
57 *Ibid*. at para. 185.
58 *Ibid*. at para. 186.
59 *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497; the contextual factors are set out at paras 550-582.
60 2007 BCSC 827 at para. 284.
61 *Ibid*. at para. 286.
62 *Ibid*. at para. 192.
63 *Ibid*. at para. 193.
64 *Ibid*. at para. 74; 2009 BCCA 153 at paras 31, 123.

Relying on the first and third of these in particular, Madam Justice Ross decides that the appropriate comparator group for Sharon McIvor is males who at April 17, 1985, were registered or entitled to be registered as Indians and who were married to persons who were non-Indian and had children, and that Jacob's appropriate comparator group is the children of those men.[65] Her choice allows her reasons to encompass the full scope of the plaintiffs' claim of discrimination in favour of those deriving status along the male line.[66]

Justice Ross finds that the preference for descent of status through the male line is discrimination on the basis of sex and marital status,[67] thus agreeing with the plaintiffs.[68] To reach this conclusion, Justice Ross follows the Supreme Court's sophisticated jurisprudence on what is encompassed within the term sex discrimination, which began with its decision in *Andrews*.[69]

Justice McIntyre in *Andrews* had specifically rejected the holding in *Bliss*[70] that withholding regular unemployment insurance benefits from a woman at the time of childbirth is attributable to "nature" and not to law. The Supreme Court includes within sex discrimination both discrimination on the grounds of pregnancy and sexual harassment. That neither pregnancy nor sexual harassment will affect all women was held not to prevent them from being identified as sex discrimination.[71] Justice Ross's analysis of the preference for descent through the male line as sex discrimination relies on the post-*Andrews* jurisprudence of the Supreme Court of Canada,[72] thus making it unnecessary to consider lineage as a separate analogous ground. Her approach is also sensibly related to what actually happens when a person applies for registration as an Indian. The test is essentially a genealogical one. A person's ancestry for several generations back may have to be examined to determine if he or she meets the test for registration.

The Crown in *McIvor* had argued that under s. 1 of the *Charter* the package of amendments in *Bill C-31* is carefully balanced to take into account a range of competing interests, and is entitled to deference.[73] Justice Ross rejects the notion that the registration provisions engage competing interests, reasoning that they deal only with the relationship of the individual and the

65 2007 BCSC 827 at para. 217.
66 *Ibid*. at paras 217-218.
67 *Ibid*. at para. 250.
68 *Ibid*. at para. 221.
69 *Andrews v. Law Society of British Columbia* , [1989] 1 S.C.R. 143 at 167 [*Andrews*].
70 *Bliss v. Attorney-General*, [1979] 1 S.C.R. 183, at 190.
71 *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504.
72 2007 BCSC 827 at paras 223-224.
73 *Ibid*. at paras 294-295 is where the Crown's argument is described by Justice Ross.

state.[74] She finds significant that the plaintiffs do not challenge the provisions of *Bill C-31* under which Bands may formulate their own membership codes, and that the government framed *Bill C-31* so as to separate Band membership and registration.[75] The evidence about competing interests, she asserts, relates to Band membership, not registration.[76] Ross J. holds that the Crown has not identified any group or individual with an interest that conflicts with, or must be balanced with, the goal of adopting non-discriminatory criteria for registration, pointing out that three National Aboriginal Organizations support the McIvor claim;[77] nor would the creation of a regime without discrimination necessarily entail the removal of registration from anyone; the plaintiffs have not asked for it.[78]

Justice Ross declares s. 6 of the *Act* of no force and effect insofar as it discriminates on the grounds of sex and marital status against matrilineal descendants, and provides preferential treatment to patrilineal descendants, born before the coming into force of *Bill C-31*. She declares that s. 6(1)(a) of *Bill C-31* should be interpreted so as to permit registration of those born before April 17, 1985, and denied registration for these reasons, and she refuses the Crown's request to suspend the operation of the declaration. She does not grant any personal relief to the plaintiffs.[79]

When drafting her order, Justice Ross had to consider differing approaches put forth by the plaintiffs and defendants. The defendants' form of order adopted the approach of reading in, essentially redrafting the provisions of s. 6. The Crown contended that this approach was required in order to provide clarity in the administration of the registration provisions.[80] The plaintiffs' draft provided declaratory relief specifying the principles to be applied, without actually drafting any new language.[81] Justice Ross concludes that the plaintiffs' approach is more respectful of Parliament's legislative authority. A stay of the court's judgment, given by Madam Justice Newberry, had assuaged concerns that the order needed to provide for certainty in administration.[82]

Justice Ross ordered that s. 6(1)(a) is of no force or effect only insofar as it provides for the preferential treatment of Indian men over Indian women

74 *Ibid*. at paras 296-300.
75 *Ibid*. at paras 296-297, 327.
76 *Ibid*. at para. 298.
77 *Ibid*. at para. 299. There are five National Aboriginal Organizations: the Assembly of First Nations, the Native Womens' Association of Canada, the Congress of Aboriginal Peoples, Inuit Tapiriit Kanatami and the Métis National Council. The first three, whose members are directly affected by the registration provisions of the *Indian Act*, were the three organizations intervening in the case in support of the plaintiffs.
78 2007 BCSC 827 at para. 307.
79 2007 BCSC 1732, at paras 9-11.
80 *Ibid*. at para. 7. The reasons do not contain the specific language of the parties' proposals.
81 *Ibid*. at para 6.
82 *Ibid*. at para 8.

born prior to April 17, 1985, and the preferential treatment of patrilineal descendants over matrilineal descendants in the right to be registered as Indian.[83] She ordered that every person who was registered or entitled to be registered under s. 6(1)(a) shall keep that registration or entitlement. However, s. 6(1)(a) shall be interpreted so as to entitle persons to be registered under s. 6(1)(a) who had previously been precluded solely as a result of the preferential treatment accorded Indian males and the male line.[84]

Any application for Indian status in the present day involves a genealogical inquiry, as illustrated by Figures 1 through 3. The applicant must establish the eligibility for registration, or the registration, of a parent or parents. Establishing that eligibility may, in turn, require investigation of the registrability of the applicant's grandparents or even more remote forebears. Each new version of the *Indian Act* has grandfathered those eligible for registration under the previous version, creating in effect a chain of eligibility reaching back generations. A change in the eligibility for registration of an ancestor can thus have an impact on a contemporary application for registration, as illustrated by Sharon McIvor's own case. The department conceded her registrability after recharacterizing its position on her mother and grandmother. This interrelatedness of the generations, and the impact of ancestors' registrability on present-day applicants, was recognized by the Court's decision on retrospectivity.

That all generations are potentially relevant and under scrutiny in an application for registration means that the principles articulated in Justice Ross's order have a very far-reaching effect. They nullify the result of the marrying out rules on female Indians because these rules are an aspect of the preferential treatment accorded to Indian males before 1985. Thus, a population of status Indian women now able to confer status on their descendants has been brought into being.

There is no question that any process of legislative reform based on Justice Ross's order would have to address many contingencies. The politics of such a process would not be simple. The *Indian Act* review precipitated by Justice Ross's order would have to take into account legislative features not directly at issue in *McIvor*, and revisit the wisdom and desirability of both the two-parent rule and the second-generation cut-off. The distaste for such a complex process is evident in the reasons of Groberman J.A. in the Court of Appeal, and Minister Strahl before the Parliamentary Committee considering *Bill C-3*. In our democratic system, however, aversion to a robust parliamentary debate is no justification whatsoever a court to shirk its duty under the *Charter*.

83 *Ibid*. at para. 9(b).
84 *Ibid*. at para. 9(c).

Judgment on Appeal

The Court of Appeal is clearly disturbed by the potential scope of the remedy fashioned by Justice Ross. However, instead of joining issue with her decision at the level of remedy, which it could have done, the Court seeks to curtail the scope of the remedy by narrowly defining the extent of the wrongful discrimination. While agreeing with the trial judgment on the retroactivity argument,[85] agreeing that the right to transmit status to a child or grandchild is a "benefit of law"[86] and displaying some sensitivity in its treatment of the human dignity argument and the relationship between ss. 15 and 1 of the *Charter*,[87] its use of the comparator group analysis to engineer a narrow and technical finding of wrongful discrimination calls to mind the contortions of the Supreme Court in cases like *Auton*.[88]

Justice Groberman struggles to choose a comparator group that will permit the discrimination issue to be considered on a narrow basis. In his reasons dealing with the comparator, he does not mention Sharon McIvor at all.[89] Rather, he tightly focuses his analysis on the circumstances of Jacob Grismer, noting that as a person with status under s. 6(2) he cannot pass his status to the children he has parented with a non-Indian. Justice Groberman purports to be rejecting the Crown's argument that the comparator group must consist of only persons restored to status under s. 6(1)(c)(d) or (e)[90] and indeed finds correct the comparison proposed by the plaintiffs, that is, people born before April 17, 1985, of Indian women married to non-Indian men with people born prior to April 17, 1985, of Indian men married to non-Indian women.[91] He finds that Mr Grismer is treated less well than the comparator group, since he is unable to pass his status on to the children of his marriage to a non-Indian woman.[92]

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85 2009 BCCA 153 at paras 47-62, particularly para. 55.

86 *Ibid*. at paras 71-73 and see also para. 92 where he seems to be somewhat firmer in his assertion that transmitting status to one's grandchild is a benefit within the meaning of s. 15.

87 *Ibid*. at paras 109-117.

88 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657. The Chief Justice devised a new comparator group in this case where parents of children with autism were seeking government funding for intensive behavioural intervention, a therapy which, on the extensive record in the case, was the only effective, and quite well-established treatment for the condition. The Chief Justice drew the comparator group as "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy for his or her present and future health, which is emergent and only recently becoming recognized as medically required" (para. 55). To conceive of this as the comparator, the Court had to ignore the evidence about how well established the therapy had become.

89 2009 BCCA 153 at paras 75-82.

90 *Ibid*. at para. 81.

91 *Ibid*. at paras 77, 78, 82.

92 *Ibid*. at para. 83.

However, what he says he is doing is quite different from what he actually does. Groberman J.A. does not compare Jacob Grismer with all of those descended from men married to non-Indian women, but rather with only a small subset of them—those who had been affected by the double mother rule. Mr Grismer's notional double mother cousin had been able to pass status to children parented with a non-Indian only until he reached the age of 21; after that he lost the ability to do so. Once restored to status under s. 6(1)(c) of *Bill C-31*, however, he was able to pass status to his children both before and after he turned 21.[93] Groberman J.A. finds that s. 6(1)(c) thus gives the double mother cousin a benefit superior to that afforded to Mr Grismer, contrary to the Crown's argument that no one in the comparator group it proposes—those restored to status under 6(1)(c) or (d)—received a benefit superior to Mr Grismer.[94] In his reasons on s. 1, Justice Groberman also finds that s. 6(1)(c) did not merely preserve the rights of the double mother group. Rather, it enhanced their rights beyond their previous entitlement.[95]

Justice Groberman concludes by finding that ss. 6(1)(a) and (c) violate the *Charter* to the extent that they grant to 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. He declares ss. 6(1)(a) and (c) to be of no force or effect, and suspends the declaration for a year to allow Parliament the time to make the *Act* constitutional.[96]

Upon close analysis, then, we see that Groberman J.A. is reducing the plaintiffs' proposed comparator group, first of all by dropping all reference to Ms McIvor's generation and situation, and then by confining the Jacob Grismer comparison to a small subset of the comparator group proposed by the Crown, and asking the question whether any of them obtained, as a result of the 1985 amendments, a benefit superior to those afforded Mr Grismer.[97] He alludes to this collapsing of the comparator group in his reasons, by noting that even if the Court were to adopt the Crown's proposed test, Mr Grismer is able to demonstrate differential treatment.[98] In fact, what Groberman J.A. has done here is to accept the comparator group chosen by the Crown (in an even more restricted form than proposed by the Crown), even when he says that he is not doing so.

If we restore Ms McIvor to the picture, and apply to her situation the "superior benefit" test employed by Justice Groberman, it becomes apparent just how far the Court of Appeal analysis has strayed. Before *Bill C-31*, all

93 *Ibid*. at para. 85.
94 *Ibid*. at paras 84, 85.
95 *Ibid*. at para. 137.
96 *Ibid*. at para. 161.
97 *Ibid*. at para. 84.
98 *Ibid*. at para. 96.

married Indian women were unable to pass on Indian status to their children, whether they were married to Indian or non-Indian men. This disability is repaired by *Bill C-31*, but in a way that confers upon Indian men and the non-Indian wives they married before April 1985 a benefit superior to that conferred on Indian women who married non-Indian husbands before April 1985. This happens in two ways. First, the children of the Indian man and his wife born before April 17, 1985, are recognized as having status under s. 6(1)(a), whereas those from the Indian woman and non-Indian man have status under s. 6(2) only. The former, but not the latter, are able to pass their status on to the children they parent with a non-Indian person. Secondly, the non-Indian wife, newly able under *Bill C-31* to pass along her status, becomes one of a pair of two status Indians, conferring status, under the two-parent rule in s. 6(1)(f), on the couple's children born after April 17, 1985. The Indian wife of a non-status male, also newly able under *Bill C-31* to pass along her status, is a sole Indian parent, able to confer only s. 6(2) status. Indian women in Ms McIvor's generation who married out—and regained status under s. 6(1)(c)—are still disadvantaged by the preference for the Indian male which prevailed before 1985, which has been enhanced by the adoption of the two-parent rule in *Bill C-31*, and the fact that s. 6(1)(a) has made the non-Indian wife capable of passing along status in her own right, which she could not do before 1985.

I thus argue that even on the Court of Appeal's own narrow test of "superior benefit," the impact on Ms McIvor and her descendants of the preference for the Indian male which is carried over into the post-1985 determination of status should have been recognized.

Even at the first stage of the s. 15 analysis, then, the impact of the Court of Appeal's narrow-gauge approach is evident. So it is, too, in the Court of Appeal's analysis of whether the distinction in treatment occurs because of an enumerated or analogous ground. The Court of Appeal rejects Justice Ross's finding of discrimination based on preference for descent through the male line.[99] Its reasoning on this issue discloses most sharply the Court of Appeal's concern that Justice Ross's remedy is too broad.[100] Groberman J.A. seems to be at war with himself in his discussion of this ground of discrimination, with logic and reason pushing him to recognize the sense of the lineage argument, but anxiety about scope of remedy pulling him back.

Groberman J.A. does not doubt that in one sense discrimination on the basis of matrilineal or patrilineal descent is a species of sex discrimination: "if one sex is preferred over the other in terms of its ability to transmit legal status to the next generation, it is evident that equality rights are violated." [101]

99 *Ibid*. at paras 95-100.
100 *Ibid*. at paras 97-100.
101 *Ibid*. at para. 96.

He acknowledges that preference for the male line reflects stereotypical views of the role of women within a family.[102] He is uneasy, however, about reaching back into past generations, and allowing a present-day claimant to found a claim for discrimination on the treatment accorded an ancestor. In such a case, he argues, the claim is not based on sex, but on lineage, which should be considered an analogous ground under s. 15. He is not convinced that the evidentiary basis for such an analysis was laid in this case,[103] or that Justice Ross directed sufficient attention to the question of whether lineage or descent could be considered an analogous ground.[104]

Justice Groberman describes as dubious the proposition that s. 15 extends to all discrimination based on matrilineal descent or patrilineal descent because "[a]ll persons are persons of both matrilineal and patrilineal descent, in that we all have an equal number of male and female forebears."[105] He repeats this assertion later, in the course of his reasons on s. l: "All people have both male and female ancestors—there is no group of people that are the descendants of women as opposed to being the descendants of men."[106] Missing here is any appreciation of the role of the *Indian Act* in privileging the male source of DNA over the female source of DNA with respect to descent of Indian status. This privilege is conferred by statute, not by biology. Indeed, the privilege actually negates the biological reality that there are two parents, since only one of them is deemed legally capable of conferring Indian status.

The Court of Appeal emphasizes the fourth of the legislative purposes articulated by the Minister of Indian Affairs David Crombie—preservation of all rights acquired by persons under the former legislation[107]—as the foundation of its s. 1 analysis. Justice Groberman holds that preserving the status of the comparator group was a pressing and substantial objective for *Bill C-31*.[108] This is an odd choice. Given that the legislation was intended to remedy past discrimination, logic suggests that preserving past rights should not be identified as its pre-eminent purpose.

The reasons of Groberman J.A. reveal, however, that the Court of Appeal has accepted the government's arguments about the dislocation that would be caused by a considerable influx of new registered Indians, overwhelming resources available to Bands and diluting the cultural integrity of existing First Nations groups.[109] Although giving effect to these arguments, Justice Groberman unaccountably overlooks the effect of allowing a non-Indian

102 *Ibid*. at para. 111.
103 *Ibid*. at para. 87.
104 *Ibid*. at para. 98.
105 *Ibid*. at para. 99.
106 *Ibid*. at para. 149.
107 *Ibid*. at para. 133.
108 *Ibid*. at para. 128.
109 *Ibid*. at paras 27-31; 129; 157-159.

woman who acquired status through marriage to pass that status on to a child she parents with a non-Indian man, now possible as a result of s. 6(1)(a) of *Bill C-31*. Justice Ross had disposed of those arguments, noting that 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.[110] To the extent that these reinstatees may be culturally distant, she observes, it is because of the invidious effects of past discriminations; and Justice Ross rejects the proposition that government may rely on such effects to justify a limited approach to repairing it.[111] I would add that the simple answer to Justice Groberman's 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.

When analyzing the plaintiffs' claims and framing its remedy, the Court of Appeal is clearly concerned about the difficulties in amending the legislation to make it constitutional.[112] Groberman J.A. refers to *Bill C-31* itself as a compromise designed to bring the *Indian Act* into compliance with the *Charter* without causing turmoil for First Nations;[113] he portrays the First Nations as divided about what the appropriate solution should be, and making the government's task more difficult by their pressure for a higher degree of self-government.[114] The passage of 24 years since *Bill C-31* was enacted, he believes, has made the government's task even more difficult,[115] apparently not appreciating the irony that government resistance to the McIvor lawsuit was responsible for much of this delay. After such a long time, he says, the consequences of amendment might be more serious than they would have been in the few years after the legislation took effect. Figuratively, he throws up his hands: "I am even less certain of the options the government might choose today to make the legislation constitutional."[116] He is, perhaps, forgetting that the job of fashioning legislation belongs to Parliament, and not the Court of Appeal.

The Court of Appeal decision is a deep disappointment. The decision is badly reasoned, and fails even to apply successfully its own constricted comparator group test and standard for assessing whether discrimination has been

110 2007 BCSC 827 at para. 313.
111 *Ibid*. at para. 314.
112 2009 BCCA 153 at para. 159.
113 *Ibid*. at para. 31.
114 *Ibid*. at para. 27.
115 *Ibid*. at para. 157.
116 *Ibid*. at para. 159.

established. There can be no doubt that its errors in reasoning come from a panicky desire to achieve a narrow result that can be more easily managed by the government. The decision of the Court of Appeal is, in fact, almost a case-book example of judicial activism producing bad law; but here, the judicial activism is in favour of the government and pursues a conservative solution.

The Court of Appeal judgment is, then, a risk management device, presenting to the government a small and discrete task of legislative repair. The government has grasped the lifeline thrown to it by Justice Groberman, by introducing into the House of Commons *Bill C-3*, *The Gender Equity in Indian Registration Act*. It has also secured from the Court of Appeal an extension to July 5, 2010, of the suspension of its declaration.[117]

IV *The Gender Equity in Indian Registration Act*

Sharon McIvor and Jacob Grismer unsuccessfully sought leave to appeal to the Supreme Court of Canada from the Court of Appeal decision.[118]

When Sharon McIvor and Jacob Grismer filed their notice of application for leave to appeal in the Supreme Court of Canada, the government filed a response, as well as a conditional application for leave; if the plaintiffs were given leave to challenge the cutting back of the trial court decision, the Crown wanted leave to challenge the very finding of unconstitutionality.[119] While covering its options in this way, the government also embarked upon a "public engagement" process by issuing a discussion paper[120] and meeting with key Aboriginal organizations. The process was not a consultation; information was provided about the government's "amendment concept," but there was no invitation to come up with counter-proposals. The amendment concept was to provide Indian registration under s. 6(2) of the *Indian Act* to any grandchild of a woman who lost status due to marrying a non-Indian and whose children born of that marriage had the grandchild with a non-Indian after September 4, 1951, when the double mother rule was first enacted.[121]

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117 Through the Court of Appeal Supplemental Reasons issued on April 10, 2010. A further extension had been sought at the time of writing this Comment.

118 SCC Case Information, Docket 33201, 2009.11.05, online: Supreme Court of Canada <http://www.scc-csc.gc.ca>.

119 In the Crown's Response to the *McIvor/Grismer* application for leave to appeal to the Supreme Court of Canada, and Conditional Application for Leave to Cross-Appeal, the Crown wrote: "Should this Court grant leave, Canada asks that leave to cross-appeal be granted. If the constitutionality of s. 6 is to be addressed by this Court, it is important to ensure that all the issues and full argument are before the Court for ultimate disposition." Paragraph 59 in *Response of the Respondents to the Application for Leave to Appeal; Conditional Application of Leave to Cross-Appeal*, July 31, 2009.

120 Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, *Discussion Paper*, Ottawa, 2009.

121 *Supra* note 115, at 7.

In March 2010, the Canadian government introduced legislation to deal specifically with the narrow instance of sex discrimination identified by the Court of Appeal.[122] *Bill C-3*, introduced for first reading on March 11, 2010, would enact a new s. 6(1)(c.1) of the *Indian Act*, setting out four criteria which must be met before a person is eligible for registration under s. 6(1). Analogous to the Court of Appeal approach, the focus of the legislation is on the child and grandchild of the woman restored under s. 6(1)(c); indeed, it is the birth of a grandchild which triggers the operation of the proposed new section. Although the language of the bill is difficult to navigate, it eventually becomes apparent that persons in Jacob Grismer's position cannot actually invoke the new section to upgrade their registration status from s. 6(2) to s. 6(1) unless they have a child by birth or adoption. The government does not, apparently, want to waste the status upgrade on someone who has not demonstrated that he or she is able to produce grandchildren for the women restored under s. 6(1)(c). Those in Jacob Grismer's position are still not treated as favourably as their double mother cousins, who were restored to status under s. 6(1) whether they had produced children or not!

The language of the bill establishes four conditions for the registration under s. 6(1) of someone in Jacob Grismer's position: his or her mother lost status because of the old marrying out rules or through marrying out plus enfranchisement; his or her father was not an Indian under the 1951 *Act* or a predecessor *Act*; the person was born after the marriage which deprived his or her mother with status; and lastly, the person must have had or adopted a child after September 4, 1951, when the double mother rule came into force. A pamphlet produced to accompany the bill advises that the parent's status will automatically be upgraded when the parent applies for registration of the grandchild whose birth triggers eligibility.[123]

At Committee hearings following second reading of the bill, Minister of Indian Affairs Chuck Strahl frankly stated that its purpose was limited to offering a solution to the specific issues identified by the Court, in a tightly focused fashion in order to respect the deadline established by the Court.[124] He freely admitted that "there are many other issues out there," but said there is no consensus on those. "I'm afraid if we open that up in this bill, that it will be a nightmare. We won't have this bill solved in our lifetime, I don't think."[125]

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122 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)[Gender Equity in Indian Registration Act]*, Third Session, Fortieth Parliament, First Reading 11 March 2010, Second Reading 26 March 2010 [hereafter "*Bill C-3*"].

123 Indian and Northern Affairs Canada, *New Entitlement to Indian Registration: How Do the New Legislative Changes to the Indian Act Affect Me?* (March 2010), online: INAC <http://www.ainc-inac.gc.ca/br/is/neir-eng.asp> at 2.

124 AANO *Hansard*, 1 April 2010, at 2.

125 *Ibid*. at 4.

This response leaves untouched most of the discrimination against women challenged in *McIvor* and does not address other problems with *Bill C-31* and its administration which have been criticized since 1985, like the second-generation cut-off and the registration status of children with unstated or unacknowledged paternity.[126]

The Minister seemed to be under the impression that *Bill C-3*, in solving the narrow problem identified by the Court of Appeal, "will make it, for better or for worse, at least the same for men and women, which is at least something we can't say right now."[127] In this the Minister was wrong; *Bill C-3* does not even address all of the sex discrimination that can be discerned in *Bill C-31* using the extremely restrictive test developed by the Court of Appeal.

As for the rest of the outstanding gender inequality in the registration provisions, the Minister is proposing "an exploratory process" that would begin while *Bill C-3* is being debated and continue after it is passed. He is vague about the details. He tells the Parliamentary Committee: "we'll be undertaking a collaborative process with the national aboriginal organizations to plan, organize, and implement forums and activities that will focus on gathering information and identifying broader issues for discussion."[128] The exploratory process will be inclusive and will encourage the participation of Aboriginal organizations, groups, individuals and other interested parties at the national, regional and community levels. He envisions these exploratory meetings taking place "over the coming years," and providing an opportunity for a "comprehensive discussion and assessment of those broader issues."[129] One does not have to read too closely between the lines of the Minister's remarks to infer that he is hoping that this exploratory process will absorb the "nightmare" of issues on which there is no consensus, which might otherwise delay the passage of *Bill C-3* indefinitely.

Women have been working to secure equal rights in Indian registration provisions for over 50 years, beginning in the 1960s. Against heavy opposi-

126 A good review of this problem is presented in Michelle M. Mann, *Indian Registration: Unrecognized and Unstated Paternity* (Ottawa: Status of Women Canada, June 2005). Where a child is registered without his or her status Indian paternity being stated, or acknowledged, the registration is effected under s. 6(2). That child, in turn, cannot pass on status to a child she parents with a non-Indian (or another unstated or unacknowledged Indian parent). Tens of thousands of children born between 1995 and 1999 are affected by this problem. Unstated or unacknowledged paternity arises in two broad ways. The parents may have failed, inadvertently, to fulfill the documentary requirements of the Department for registration of the birth. Mann discusses the many ways in which this can happen, and recommends that the Department change its requirements to avoid the proliferation of such situations. Secondly, the mother may withhold the name of the father, because of incest, sexual assault or other cause that would make it unwise or dangerous for her to state the name. See executive summary, at pp. v-vii.

127 *Supra* note 124, at 3.

128 *Ibid*. at 5.

129 *Ibid*.

tion, Nellie Carlson, Jenny Margetts and Mary Two-Axe Early and their allies created the Indian Rights for Indian Women organization in those early days and began the long quest for equality. They have been joined not only by other organizations, like the Native Women's Association of Canada, but by other courageous people, like Jeanette Corbière Lavell, Sandra Lovelace and now Sharon McIvor and her son Jacob Grismer. Over the course of their long campaign, it has become apparent that the government's preference for descent of status through the male line, and its replacement with the two-parent requirement, are measures that will decrease the numbers of Registered Indians. They are, in other words, continuing elements of the policy of assimilation first installed in legislation in 1857.[130] Statistics are emerging to document the alarming decline in registrations brought about by the second-generation cut-off[131] and the effect of government administration of the two-parent rule in cases of unknown or unacknowledged paternity.[132] Recommendations for addressing the problems relating to unknown or unacknowledged paternity, while straightforward and designed for ease of implementation, have been ignored by the government.[133]

What, then, is one to make of this exploratory process? What is there left to explore? The main barrier to elimination of gender discrimination from the registration provisions is Canada's unwillingness to provide the resources for First Nations to deal with an influx of members. Canada fell short of adequate provision after *Bill C-31*, and much rancour ensued in communities already hard-pressed to provide even the basics of healthy living on reserves. First Nations that have admitted to membership those outside the strictures of *Bill C-31* have been penalized. Canada's per capita funding formula for Bands counts only Band members who are also Registered Indians. It thus ensures that each act of reconciliation and welcome toward a non-registered Indian

130 *Supra* note 7.

131 *Bill C-31* registrants initially helped to increase quite substantially the Registered Indian population; between 1985 and 1995, that population increased by 61.4%, of which 27% came from new registrations. In 2000, *Bill C-31* registrants made up 17% of the Indian register. However, that year, these registrants accounted for only 2% in the growth of the Registered Indian population. The two-parent rule, it is feared, will lead to a decline in registrations, especially in areas where there is a high rate of intermarriage with non-status people. Furi & Wherrett, *supra* note 29 at 6 and sources cited therein.

132 Mann, *supra* note 127, cites research by demographer Stewart Clatworthy analyzing the Indian Register for children born between April 17, 1985, and December 31, 1999, to women registered under s. 6(1). The study indicated roughly 37,300 children with unstated fathers, representing about 19% of all children born to s. 6(1) women during that period. She also refers to a study done by Clatworthy for the Manitoba Southern Chiefs Organization showing that s. 6(2) registrants form more than 48% of the population of children aged 0 to 17 years, a high concentration which results in part from application of the rules on unstated paternity. Clatworthy concluded, with respect to the SCO First Nations, that sometime in the fifth generation, no further descendants would be entitled to registration. See Mann, *supra* note 126, at 7.

133 Mann, *supra* note 126, summarizes her recommendations at 26.

which is undertaken by a First Nation will require that scarce resources be spread even more thinly. The large population of off-reserve and urban Indians, many *Bill C-31* reinstatees, lacks many essential services and supports because Canada's funding is keyed to the reserves.

Presenters at the Committee hearings after second reading of *Bill C-3* were strongly critical of the tight focus of the legislation, and urged the government to address all of the gender discrimination found by Justice Ross. Sharon McIvor and her counsel Gwen Brodsky attended the Committee hearings[134] and, while there, convinced Opposition members of the Committee to move amendments that would deliver the kind of change that Justice Ross had ordered.[135] The Committee reported the bill back out to the House of Commons on April 27, 2010,[136] and at that time it contained a new clause inserted by amendment. That clause would make eligible for registration a person born prior to April 17, 1985, who is a direct descendant of a person referred to in s. 6(1)(a) of *Bill C-31*, or of a person referred to in paragraph 11(1)(a)(b)(c)(d)(e) or (f) as they read immediately prior to April 17, 1985. By referring to the old s. 11(1)(e), this amendment would make eligible for registration under s. 6(1) persons born out-of-wedlock before April 17, 1985, to women who were registered, or eligible to be registered. This class of persons would include everyone in the situation of Sharon McIvor and her mother and father. By referring to the old s. 11(1)(d), however, it seems that the amendment fails to make registrable under s. 6(1) the children born of marriages between a Registered Indian woman and her non-status husband, that is those in Jacob Grismer's position. This is because s. 11(1)(d) refers to the legitimate child of a male status Indian.

On April 29, 2010, the Parliamentary Secretary to the Leader of the Government in the House of Commons raised a point of order about this amendment, submitting that it was out of order because it is beyond the scope of *Bill C-3* as approved at Second Reading. A similar objection at the Committee stage had been accepted by the Chair of the Committee, but that ruling was overturned on appeal by a majority of the Committee. On May 11, 2010, the Speaker of the House of Commons agreed with the Parliamentary Secretary's objection, and ruled the amendment out of order. The bill as it was initially passed at Second Reading was restored.[137]

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134 AANO *Hansard*, 13 April 2010, at 1-7.

135 This information comes from an oral presentation given by Ms McIvor on May 14, 2010, at the Conference on *Feminism at 50*, sponsored by the Shirley Greenberg Chair in Women and the Legal Profession at the Faculty of Law, University of Ottawa. (Eberts' personal notes of presentation).

136 Canada, House of Commons, 40th Parliament, 3rd Session, Standing Committee on Aboriginal Affairs and Northern Development, *First Report* (April 27, 2010) at 1-2.

137 Canada, House of Commons, 40th Parliament, 3rd Session, *Official Report of Debates*, 11 May 2010, starting at cue 1505.

V Conclusion

The British Columbia Supreme Court judgment of Madam Justice Ross presented an excellent opportunity for Parliament to take up in earnest the final eradication of discrimination against women from the *Indian Act* registration provisions. Overly empathetic to the challenges such a task would pose to the government of the day, the Court of Appeal judgment of Groberman J.A. does its utmost to offer the government a small and manageable job of legislative repair. Public and parliamentary reaction to this carefully staged rescue of the government bears witness to how sensible is the precept that the courts should not attempt to do government's job, but should stick to their own sphere of competence. Both the witnesses, and the majority, at the Parliamentary Committee resoundingly rejected the repair contrived by the Court of Appeal based on a transitory provision of the *Indian Act* affecting at most 2,000 people, in favour of addressing once and for all the discrimination that has blighted the lives of tens of thousands that we know of, and probably many tens of thousands more whose stories remain untold.

As I finish the writing of this case comment, my email is crowded with exhortations to write to MPs urging them to reject *Bill C-3*, and address the real discrimination in the registration provisions. Canada's minority Conservative government continues in office by reason of support provided by one or another of the opposition parties—Liberal, New Democratic Party or Bloc Quebecois—depending on the issue. Given the unwillingness of the opposition parties to force an election, they will probably permit the tiny imperfect repair of *Bill C-3* to be enacted. There remains the vague exploratory process about which Minister Strahl mused in the Parliamentary Committee.

First Nations and their regional associations would be better advised, I believe, to follow the path of the Federation of Saskatchewan Indian Nations, and the Chiefs of Ontario, and develop their own membership codes. Consultation processes at the grassroots level to arrive at the provisions of the codes, followed by further community-based processes for education and implementation, will likely be more constructive than decades of exploration at the federal table. The process conducted in Ontario by Citizenship Commissioner Jeanette Corbière Lavell, plaintiff in the first landmark Supreme Court case, is a good example of what can be done. Many First Nations, like the Eskasoni, the largest Mi'kmaq Nation in Canada, have undertaken this process already.

What Canada sees as a bedevilling lack of consensus among First Nations and the National Aboriginal Organizations is actually a healthy diversity, a welcome escape from the one-size-must-fit-all confines of the *Indian Act*. For its part, Canada should forget the exploratory process and explore instead the simple option of simply deferring to First Nations on the citizenship issue. Canada should ask them how it can assist by providing adequate resources

to support their choices and to ensure a life of dignity for all the members of First Nations, including those whom the Nations choose to welcome home. Strengthened by the determination and the talents of their own citizens, including women returned from exile, First Nations are better able to meet the challenges of the future, and will do this—if they do not have to explore the citizenship issue any further on Canada's nightmarish terms.

Article 33 of the UN *Declaration of the Rights of Indigenous Peoples* does, after all, provide that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions" and that "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.'[138]

138 *United Nations Declaration of the Rights of Indigenous Peoples*, United Nations, General Assembly, 61st session, A/61/L.67, 7 September 2007.