INDIAN STATUS AND BAND MEMBERSHIP ISSUES

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INTRODUCTION

Historically, entitlement to Indian status and Indian band membership have been complex and controversial issues. The legal definition of the term "Indian" has brought with it certain benefits and eligibility for federal programs, as well as a history of limitations on rights.(1) Disputes over the definition of Indian status, the authority to determine band membership, and access to rights tied to status and membership have given rise to conflicts between Indian bands and governments, and within Indian communities.

In 1985, amendments to the *Indian Act* (Bill C-31) removed a number of discriminatory provisions from the Act. One result has been a significant increase in the size of the status Indian population. The changes also increased band control over membership and other aspects of community life. While eliminating some problems, in the ensuing decade the amendments introduced a number of new political, social and financial issues for Indian communities. In recent years, membership-related disputes, often tied directly to Bill C-31, have resulted in a number of significant court cases.

A consideration of these issues also raises broader questions about the changing nature of the Indian population in Canada, the rights of individuals and communities, and the power to determine membership under self-government arrangements.

This paper examines some of the current issues surrounding Indian band membership. It surveys *Indian Act* provisions regarding status and band membership and the changes introduced through Bill C-31. The paper then discusses some of the consequences of that bill and outlines subsequent court cases that focused on band membership and associated rights. The final section of the paper discusses the implications of the resulting judgments and comments on membership issues in the context of self-government for Indian communities.

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(1) For a review of legislation that has imposed limits on the rights of Indians, see W. Moss and E. Gardner O'Toole, *Aboriginal People: History of Discriminatory Laws*, Background Paper 175E, Parliamentary Research Branch, Library of Parliament, Ottawa, November 1991.

BACKGROUND

A. Registration and Band Membership Under the *Indian Act*

Legal definitions of the term "Indian" have existed since the introduction in 1850 of legislation governing Indians.(2) Early broad definitions generally 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.(3) In 1857, the concept of "enfranchisement" was introduced, whereby an Indian could give up legal status, with the families of males who did so also losing their status. Over time, the definition of Indian became narrower. Starting in 1869, women who married non-Indians lost their status and their children were not entitled to be registered as Indians.

The *Constitution Act*, *1867* gave the federal government jurisdiction over Indians and lands reserved for the Indians. Under this authority, Parliament consolidated existing legislation into the *Indian Act* of 1876. The definition of Indian in the 1876 Act emphasized male lineage. An Indian was defined as any male person of Indian blood reputed to belong to a particular band; any child of such a person; and any woman lawfully married to such a person. If an Indian woman married a non-Indian, she lost her status. The Act and subsequent amendments also continued and furthered the policy of enfranchisement. Various incentives to enfranchise existed, including access to voting rights. Enfranchisement became compulsory in a number of circumstances; for example, it was automatic if an Indian became a doctor, lawyer, Christian minister, or earned a university degree.

Amendments to the *Indian Act* in 1951 established a centralized register of all people registered under the Act.(4) Section 11 of the Act designated those people entitled to be registered, and section 12 those people not entitled. "Status" or "registered" Indians were also generally band members, with rights under the *Indian Act* to live on reserve, vote for band council and chief, share in band moneys, and own and inherit property on reserve.

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(2) The term "Indian" was first defined in *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c. 42, 13&14 Vic., s. 5.

(3) For an overview of early Indian legislation, see Indian and Northern Affairs Canada, *The Indian Act Past and Present: A Manual on Registration and Entitlement Legislation*, Indian Legislation and Band Lists Directorate, Ottawa, 1991; and Indian and Northern Affairs Canada, *Identification and Registration of Indian and Inuit People*, Ottawa, 1993.

(4) *Indian Act*, S.C. 1951, c. 29, 15 Geo. VI. A number of minor amendments were made prior to 1985. References here are to *Indian Act* R.S.C. 1970, C. I-6.

Section 12(1)(b) provided that a women who married a non-Indian was not entitled to be registered. In contrast, section 11(1)(f) stated that the wife or widow of any registered Indian man was entitled to status. Pursuant to section 109(1), if a male status Indian was enfranchised, his wife and children would also be enfranchised. Section 12(1)(a)(iv), known as the "double mother" clause, provided that a person whose parents married on or after 4 September 1951 and whose mother and paternal grandmother had not been recognized as Indians before their marriages, could be registered at birth, but would lose status and band membership on his or her 21st birthday.

The provisions that excluded women from legal Indian status and from residence on reserves prompted criticism from Indian women, and by the 1960s and 1970s, women's groups had been organized in opposition to section 12(1)(b) and other provisions that discriminated against women and their children.(5) Accompanying this campaign were legal challenges before the Supreme Court of Canada and the Human Rights Committee of the United Nations. In 1973, the issue of whether section 12(1)(b) violated the Canadian Bill of Rights came before the Supreme Court of Canada in the *Lavell* case.(6) While the Federal Court of Appeal concluded that the section did violate the right of an Indian woman as an individual to equality before the law, a decision handed down by the Supreme Court in 1973 reversed the Federal Court of Appeal's judgment. The Supreme Court held that section 12(1)(b) was not rendered inoperative by the Canadian Bill of Rights.

Opposition to the registration system also gained attention at the international level. Sandra Lovelace, a Maliseet who had lost her status through a marriage that later ended and wished to return to her reserve, took a complaint against Canada to the United Nations Human Rights Committee. In its 1981 ruling, the Committee found that, as she was barred from returning to her home community, her rights had been violated under Article 27 of the *International Covenant on Civil and Political Rights*, which guarantees that persons belonging to minorities may enjoy their own culture.(7)

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(5) J. Silman, ed., *Enough is Enough: Aboriginal Women Speak Out*, The Women's Press, Toronto, 1987, presents perspectives of Indian women.

(6) *A.G. Canada* v. *Lavell* [1974] S.C.R. 1349. Jeanette Corbiere Lavell, a woman whose name was deleted from her band list when she married a non-Indian man, appealed the decision arguing that section 12(1)(b) discriminated against Indian women, since Indian men did not lose their status upon marriage to non-Indians.

(7) Views of the Human Rights Committee under Article 5(9) of the *Optional Protocol of the International Covenant on Civil and Political Rights* Concerning Communication No. R. 6/2436, 166; [1982] 1 C.N.L.R. 1.

These findings and continued pressure from Indian women led to a variety of proposals for reform.(8) The debate also emphasized fractures within the Aboriginal community. Women's groups, led by the National Committee on Indian Rights for Indian Women and the Native Women's Association of Canada, advocated a quick legislative solution to the problem. Other Indian groups, in particular the National Indian Brotherhood/Assembly of First Nations (AFN), were hesitant about legislative changes. While the AFN expressed opposition to the discrimination in the Act, it argued that membership rights should be the prerogative of First Nations and opposed piecemeal changes to the *Indian Act* in the absence of constitutional reform.(9) This highly divisive conflict was often (and continues to be) posed in terms of women's rights versus Indian rights. Douglas Sanders, writing in 1984, described the debate over sexual discrimination in the *Indian Act* as the "single most contentious issue in Canadian Indian policy" at that time.(10)

B. Changes Introduced by Bill C-31

After an interim policy and an unsuccessful attempt at legislative change, Bill C-31, *An Act to amend the Indian Act*, was tabled in the House of Commons on 28 February 1985, passed on 17 June and given Royal Assent on 28 June 1985.(11) The bill was backdated to 17 April 1985 so that the *Indian Act* would conform to the equality provisions of the *Charter of Rights and Freedoms*. The amendments were intended to remove discrimination, restore status and membership rights, and increase control by bands over their affairs. The federal government continues to maintain control over who is registered as an Indian and the rights that flow from registration. The bill represented a compromise between the positions of Aboriginal women and non-status Indian groups, and the national status Indian organization, the AFN.(12)

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(8) For a review of some reform proposals, see D. Sanders, "Indian Status: A Women's Issue or an Indian Issue," *Canadian Native Law Reporter*, Vol. 3, 1984, pp. 30-39; and K. Dunkley, *Indian Women and the Indian Act*, Background Paper 16E, Parliamentary Research Branch, Library of Parliament, Ottawa, 1982.

(9) As described in Dunkley (1982), p. 18.

(10) Sanders (1984), p. 30.

(11) *Indian Act*, R.S.C. 1985, c. I-5. A detailed description of the complex changes can be found in Native Women's Association of Canada, *Guide to Bill C-31: Explanation of the 1985 Amendments to the Indian Act*, Ottawa, 1986.

(12) W. Moss, "Indigenous Self-Government in Canada and Sexual Equality under the Indian Act: Resolving Conflicts between Collective and Individual Rights," *Queen's Law Journal*, Vol. 15, 1990, p. 286.

1. Registration

Section 6(1) continues the entitlement of persons registered as Indians before 1985, and opens up the possibility of reinstatement of women who lost status through marriage, children enfranchised as a result of their mother's marriage, persons not included in the register under the "double mother" clause, and illegitimate children of Indian women born prior to 14 August 1956.[13] This section also provides an opportunity for first-time registration of people previously without Indian status, and abolishes enfranchisement.

Since marriage no longer affects status, the only registrants in the future will be children born into status. Under section 6(1)(f), a person with two parents who are or were entitled to be registered is eligible for registration.

Section 6(2) permits the registration of persons with only one parent entitled to be registered under section 6(1). The Act does not permit the registration of individuals with one non-status parent and one parent entitled to registration under section 6(2). As a result of this provision, known as the "second generation cut-off rule," status would be terminated after two successive generations of intermarriage between Indians and non-Indians.

2. Band Membership

Prior to 1985, automatic entitlement to band membership usually accompanied entitlement to Indian status. The 1985 amendments recognized the rights of bands to determine their own membership. As a result, persons may possess Indian status, but not be members of a band. Section 10 enables First Nations to enact their own membership or citizenship codes, according to procedures set out in the *Indian Act*. Bands must follow two principles: the majority of the band's electors must consent to the band's taking control of membership, and to the set of membership rules (which must include a review mechanism); and the membership rules cannot deprive a person of previously acquired rights to membership. Once the band controls its membership list, Indian and Northern Affairs Canada (INAC) has no power to make additions or deletions, and no further responsibilities regarding the band list.

As of 28 June 1987, bands that chose to leave control of membership with the department were subject to the provision that a person who has Indian status also has a right to band membership. Membership lists for these bands are maintained by the department. These bands may still go on to take control of their own membership registration, but the rights of those individuals already registered and added to the band list are protected.

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(13) Amendments to the Act in 1956 permitted the registration of illegitimate children without investigation into paternity; however, if a protest was made regarding the paternity of a registered child and non-Indian paternity was established, the child's name would be removed from the Indian register.

3. Band By-laws

Bill C-31 introduced several new by-law powers for bands. Included in these are the power to regulate which band members and other individuals live on reserve, the provision of benefits to non-member spouses and children of band members living on reserve, and the protection of dependent children's right to reside with their parents or guardians on reserve.

Because some people accepted into band membership under band rules may not be status Indians, the amendments also clarified which sections of the *Indian Act* would apply to such members. Various sections relating to community life apply, while others, affecting Indians as individuals, do not.

IMPACTS OF BILL C-31

While Bill C-31 served to eliminate some aspects of sexual discrimination in the *Indian Act* and to provide bands with greater control over elements of reserve life, it left several issues unresolved and introduced new problems. Some of these were anticipated prior to, or emerged soon after, the bill's passage, while others continue to become evident.

The amendments have been subject to several reviews. The legislation required that a progress report on Bill C-31's implementation be submitted to Parliament in 1987. The report provided an overview of impacts but stated that it was too early for an adequate assessment.(14) As a result, the Minister of Indian and Northern Affairs tabled a second study in 1990.(15)

The issues associated with Bill C-31 and, more broadly, with Indian status and band membership raise fundamental social and political questions about what it means to belong to a community and who has the right to determine membership. Conflicts between reinstated women and communities have highlighted these questions. Linked to status and membership are also practical issues regarding the provision of programs and services, and the additional costs created since those who attain status become eligible for federal programs and services.

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(14) INAC, *Report to Parliament: Implementation of the 1985 Changes to the Indian Act*, Ottawa, June 1987.

(15) INAC, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31)*, Minister of Supply and Services, Ottawa, 1990. The report consists of five volumes: 1) Aboriginal Inquiry; 2) Survey of Registrants; 3) Bands and Communities Studies; 4) Government Programs; and 5) Summary Report.

A. Changes in the Status Indian Population

Since Bill C-31 was passed, INAC has received approximately 232,928 requests for registration. By 31 December 2000, 114,512 people had gained Indian status based on Bill C-31 amendments, while 44,199 applications had been denied.(16)

In the first five years (1985-1990), the status Indian population rose by 19% as a result of the amendments. Women represented the majority of those who gained status, particularly of those who had status restored.(17) By 31 August 1995, the status Indian population had risen from its 1985 level of 360,241 to 586,580. This was an overall increase of 61.4%, 27% of which came from new registrations.(18) In 2000, registrants of Bill C-31 made up 17% of the Indian register.(19)

The number of registered Indians was originally expected to grow by some 56,800 as a direct result of Bill C-31.(20) The actual increase, therefore, has far exceeded that anticipated. In the years immediately after the amendments, Aboriginal groups criticized INAC for grossly underestimating the initial number of applicants, for having an inadequate and inefficient registration process, and for the complexity of the documentation required to apply for status.(21)

Although Bill C-31 registrants helped to increase the status Indian population significantly, by the early 1990s the percentage of change in the status Indian population began to return to levels observed before the 1985 amendments. Whereas Bill C-31 registrants had accounted for 48% of the growth in the status Indian population in 1988, they accounted for only 2% of the growth in that population in 2000.(22)

Because most Bill C-31 registrants live off reserve, the amendments have added substantially to the off-reserve status Indian population, which more than doubled between 1981 and 1991. INAC estimated that 10% of Bill C-31 registrants would reside on reserve.(23) Before

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(16) INAC, *Basic Departmental Data 2001*, Ottawa, 2002, p. 7. Jim West states that over 120,000 Aboriginal people have regained their status due to Bill C-31; see "Aboriginal Women at the Crossroads," *First Nations Drum*, Fall 2002, http://www.firstnationsdrum.com/Fall2002/PolWomen.htm (retrieved 9 December 2002).

(17) INAC (1990), *Impacts of the 1985 Amendments*, Vol. 5, *Summary Report*, p. 11.

(18) "Act Amendments Remove Discrimination," *Financial Post*, 7 October 1995 (letter from Gregor MacIntosh, Director General, Revenues and Band Governance Branch, INAC).

(19) INAC (2002), ***Basic Departmental Data 2001***, p. 7.

(20) INAC (1995), *1995-96 Estimates*, pp. 2-24.

(21) INAC (1990), *Impacts of the 1985 Amendments*, Vol. 5, *Summary Report*, p. 6.

(22) *Ibid.*

(23) INAC, *Growth in Federal Expenditures on Aboriginal People*, Ottawa, February 1993, p. 39.

the bill's introduction, seven out of ten status Indians lived on reserve. In 2000, fewer than six out of ten lived on reserve. The increase in the off-reserve population is largely attributed to the reinstatement of status under Bill C-31.(24)

Looking to the future, some fear that the general requirement for a child to have at least two grandparents who are entitled to be registered will lead to a decline in the status Indian population. This is of particular concern in areas where there is a high rate of intermarriage.(25) A 1992 report prepared for the Assembly of First Nations on the population impacts of Bill C-31 projected that the registered Indian population will rise to 786,140 by 2036, after which it will begin to fall, returning to the current level of approximately 600,000 by 2091.(26)

B. Continuing Inequities in Legislation

Despite efforts to eliminate inequities through the amendments, the effects of past discrimination remain and new forms of discrimination have been created. The amendments resulted in a complicated array of categories of Indians and restrictions on status, which have been significant sources of grievance.

The most important target of criticism is the "second generation cut-off rule" that results in the loss of Indian status after two successive generations of parenting by non-Indians. People registered under section 6(2) have fewer rights than those registered under section 6(1), because they cannot pass on status to their child unless the child's other parent is also a registered Indian. One criticism comes from women who, prior to 1985, lost status because of marriages to non-Indian men. These women are able to regain status under section 6(1); however, their children are entitled to registration only under section 6(2). In contrast, the children of Indian men who married non-Indian women, whose registration before 1985 was continued under section 6(1), are able to pass on status if they marry non-Indians.(27)

Children of unmarried non-Indian women and Indian men are also treated differently according to gender. Male lineage criteria in the legislation prior to 1985 permitted the registration of all such male children born before 1985. After the passage of Bill C-31,

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(24) *Ibid.*, p. 5.

(25) S. Imai, K. Logan and G. Stein, *Aboriginal Law Handbook*, Carswell, Scarborough, 1993, p. 125.

(26) Stewart Clatworthy and Anthony H. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report*, Prepared for the Assembly of First Nations, December 1992, p. 37. Moss (1990), p. 291, also comments on the potential for an ever-decreasing status Indian population as a result of section 6(2).

(27) Since 1985, a child with one parent registered under section 6(1) and one non-registered parent becomes registered under section 6(2). A child with one parent registered under section 6(2) and a non-registered parent is not entitled to registration.

however, female children born to Indian men and non-Indian women between 4 September 1951 and 17 April 1985 became eligible for registration only as the children of one Indian parent.

The application of the amendments has also led to a situation in which members of the same family may be registered in different categories. One example could occur in a family that enfranchised, and in which the mother is a non-Indian. Under Bill C-31, a child born prior to the family's enfranchisement is eligible for registration under section 6(1), while a child born after enfranchisement is eligible only under section 6(2), since one parent is not an Indian. This affects the ability to pass on status, because the latter child will be able to pass on status to his or her children only if their other parent is a status Indian.(28)

C. Band Membership and Band By-laws

Some Bill C-31 registrants have been granted automatic band membership, while others were granted conditional membership.(29) If a band decided to leave control over band membership lists with INAC, or had not assumed control over membership, individuals with conditional membership were placed on the band list by INAC. However, if the band decided to take control of membership by 28 June 1987, these people could be excluded by the band's membership code.

Membership is very important, because it may bring rights to live on reserve, participate in band elections and referendums, own property on reserve, and share in band assets. It also provides individuals with the opportunity to live near their families, within their own culture.

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(28) D. N. Sprague, "The New Math of the New Indian Act: 6(2)+6(2)=6(1)," *Native Studies Review*, Vol. 10, No. 1, 1995, pp. 47-60, discusses the issue of exclusion from status of persons of mixed parentage.

(29) Those granted automatic membership were:
- anyone on or entitled to be on a band list before Bill C-31 came into effect;
- anyone who had lost status through
  - Section 12(1)(b) – marriage to a man without Indian status
  - Section 12(1)(a)(iii) and Section 109(2) – involuntary enfranchisement of a woman upon marriage to a man without Indian status and the enfranchisement of any of her children born before her marriage
  - Section 12(1)(a)(iv) – loss of status upon reaching the age of 21, if mother and paternal grandmother gained status through marriage
  - Section 12(2) – children born to a status Indian woman, who lost status on protest because the alleged father was not a status Indian;
- children born after the 1985 amendments, both of whose parents were members of the same band.

Those granted conditional band membership were:
- women and men who were enfranchised under various sections of pre-1951 Indian Acts, both eligible under section 6(1);
- children whose parents belonged to different bands, eligible under section 6(1);
- children, only one of whose parents belonged to or was eligible to belong to a band. This category includes those eligible under section 6(1), such as children whose status was contested; and those eligible under section 6(2), such as children born to Indian women and their non-status husbands.

In 1999, of the 610 First Nations in Canada, 360 First Nations had determined their membership under the provisions of section 11 of the *Indian Act*. Another nine First Nations had developed their membership in accordance with the *Cree-Naskapi Act*. One First Nation had determined its membership according to the provisions of the *Sechelt Self-Government Act*, while the *Yukon Self-Government Act* had determined the membership of another six First Nations. The remaining 234 First Nations had chosen to determine their own membership under section 10 of the *Indian Act*.(30) Bands are free to develop membership codes with criteria very different from federal government rules for registration as a status Indian. Band codes vary; some bands have open policies, while others, reluctant to accept new members, have enacted restrictive codes. A review of the 236 codes adopted by First Nations from June 1985 to May 1992 identified four main types: 1) one-parent descent rules, whereby a person is eligible for membership based on the membership or eligibility of one parent; 2) two-parent descent rules, which declare that to become eligible, both of a person's parents must be members or eligible for membership; 3) blood quantum rules, which base eligibility on the amount of Indian blood a person possesses (typically 50%); and 4) *Indian Act* rules, that base membership on sections 6(1) and 6(2) of the *Indian Act*. Of these 236 codes, 38% used the one-parent rule, 28% had a two-parent requirement, 13% had blood quantum criteria, and 21% relied on the *Indian Act*. Rules under the *Indian Act* also pertained to the First Nations that had not adopted membership codes.(31)

Membership remains a politically contentious and sensitive issue. While the rights of bands to determine their own membership is generally supported as an important step toward self-government, some women have had difficulties in exercising their rights as reinstated band members or in receiving services and benefits from their bands.(32) Soon after the passage of Bill C-31, cases came to light where women already living on reserves lost some of their benefits because their bands refused to provide services to reinstated women and their children until their band membership codes were passed.(33) In June 1995, the Canadian Human Rights Commission ordered the Montagnais du Lac-Saint-Jean band council to pay damages to

(30) Information obtained from INAC, 23 September 1999.

(31) See Clatworthy and Smith (1992), p. iii.

(32) J. Holmes, *Bill C-31: Equality or Disparity? The Effects of the New Indian Act on Native Women*, Canadian Advisory Council on the Status of Women, Ottawa, 1987, p. 40.

(33) *Ibid*., pp. 20, 35.

four women who had regained their status under Bill C-31. Prior to the passage of the bill, the band council placed a moratorium on various rights and services for reinstated members until a membership code was in place. While the moratorium was later lifted, the Commission ruled that the women had been discriminated against.(34)

There are a variety of reasons for bands' reluctance to accept new members. Some bands are concerned about taking in new members without guarantees of increased funding from government. There is also a shortage of land, resources, housing, infrastructure, and other facilities on reserves. Band governments' concerns over sharing scarce resources have been a consistent issue in the debate over membership.(35) The Aboriginal Inquiry volume of INAC's 1990 report to Parliament stated that:

> Band councils and aboriginal service providers resented the actions of government in imposing more numbers on limited financial and human resources and often displayed this resentment through unfair treatment of Bill C-31 registrants. In some communities the treatment was overt and took the form of refusal to accommodate the needs of new registrants. In other communities more subtle actions made it apparent to the new registrant that he or she was simply not welcome. And in other communities bands welcomed the newly registered individuals but resented the imposition by government of new, more complicated processes.(36)

Some bands, though not all, have used their new by-law powers in a restrictive manner. Thus, while individuals may have been reinstated to status and qualified under membership codes, their rights may be limited through by-laws. In a number of cases, residency by-laws have, in effect, prohibited newly registered individuals from taking part in developing membership codes, as rights to vote can be contingent upon living on reserve.

D. Programs and Funding

The rapid growth in the status Indian population as a direct result of Bill C-31 had a major impact not only on federal programs and expenditures but also on Indian communities required to provide additional facilities and services.

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(34) "Human Rights Panel Rules Indian Band in Quebec Discriminated Against Women," *The Gazette* (Montréal), 28 June 1995.

(35) Moss (1990), p. 280.

(36) INAC, *Impacts of the 1985 Amendments*, Vol. 1, *Aboriginal Inquiry*, p. 3.

Status Indians living on or off reserve are eligible for non-insured health benefits and may apply for post-secondary assistance. For those living on reserve, the federal government provides funds for housing, elementary and secondary education, health services and social assistance.

Bill C-31 has resulted in a significant increase in post-secondary enrollment. INAC introduced a post-secondary education program that made financial and instructional assistance available to encourage and support the participation of eligible First Nations people in post-secondary courses of study. Between 1985-1986 and 1989-1990, the number of Bill C-31 students rose from 446 (4% of the program) to 3,562 (19% of the program). Over the same period, expenditures on Bill C-31 students increased from $0.9 million to $27.9 million.(37)

On reserve, the number of new residents compounded the already existing housing shortage. After 1985, additional funding was made available to serve Bill C-31 registrants. Between 1986 and 1990, 20% of funded housing units on reserves were built with supplementary funds for Bill C-31. In 1989-1990, $41 million in Bill C-31 supplements funded 1,353 new units, which represented 30% of the total on-reserve housing expenditures.

Social development program expenditures for Bill C-31 registrants were $27 million in 1989-1990, 7% of total expenditures in this field. Costs for non-insured health benefits for Bill C-31 registrants rose from $2.5 million in 1985-1986 to $39 million in 1989-1990, 15% of total expenditures for status Indians under the program.

As of June 1990, program expenditures for Bill C-31 registrants in key program areas had amounted to $338 million. In 1992-1993, INAC's expenditures related to Bill C-31 were budgeted at $206 million.(38) However, Aboriginal organizations stressed that these funds would not be adequate to meet the needs created by Bill C-31, as additional demands had been placed on already underfunded programs.

The growth in the number of status Indians living off reserve as a result of Bill C-31 has also increased the need to clarify the responsibilities of federal and provincial governments in providing and funding the services required. Problems have arisen, moreover, because many of the programs and funds for status Indians are available only to those who live on reserve. Some of those who wished to live on reserve could not, however, because of a lack of services, such as housing. Furthermore, despite the increase in services, many off-reserve Bill

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(37) Expenditure data are taken from INAC, *Identification and Registration of Indian and Inuit People* (1993), pp. 9-10.

(38) INAC, *Growth in Federal Expenditures on Aboriginal People*, Ottawa, 1993, p. 40.

C-31 registrants did not know how to access them and thus did not take advantage of them. INAC has been criticized for not making this information more readily available.(39)

CASES

A number of court cases illustrate some of the conflicts that have arisen in relation to band membership. Those described below address the rights of reinstated members, the rights of members living off reserve, the rights of non-members on reserve, and the rights of bands to determine membership.

A. *Courtois* v. *Canada*

Courtois v. *Canada*(40) illustrates some of the problems regarding Bill C-31 registrants and their access to band-provided services. In this case, the Canadian Human Rights Tribunal considered the claims of two women, reinstated as status Indians but not as band members, whose children were refused admission to a band-controlled school by a band moratorium. The moratorium suspended for two years the provision of services to reinstated women in all areas under the administrative responsibility of the band council. The complainants argued that this decision discriminated on the basis of sex and marital status.

The tribunal dismissed the claim of one woman because she did not reside on the reserve. However, in its February 1990 decision the tribunal upheld the claim of entitlement to services on reserve. It found that, while bands may deliver the service, INAC is the supplier of education under the *Indian Act* and is obligated to provide education to Indians and not just to band members. The Department had offered to provide the child with off-reserve schooling, which was refused by the mother. The tribunal supported her position, holding that different schools for reinstated children also amounted to discriminatory treatment.

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(39) Harry W. Daniels, *Bill C-31: The Abocide Bill*, http://www.abo-peoples.org/programs/dnlsc-31.html (retrieved 6 March 2001).

(40) *Courtois* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1991] 1 C.N.L.R. 40 [hereinafter *Courtois*].

B. *Corbiere* v. *Canada*

Corbiere v. *Canada*(41) addressed the rights of band members who reside off reserve. Some members of the Batchewana Band who lived away from the reserve challenged section 77(1) of the *Indian Act*, which requires band members to be "ordinarily resident" on reserve in order to participate in band elections. The plaintiffs argued that the provision violated section 15(1) of the *Canadian Charter of Rights and Freedoms*, because it prevented them from having a say in decisions related to the use of band moneys and lands.(42)

In this situation, the band had seen a substantial increase in its population as a result of Bill C-31. Band membership grew from 543 to 1,426 between 1985 and 1991, primarily due to Bill C-31 registrants. While 69% of band members lived on reserve in 1985, by 1991 the situation had reversed so that 68% of its members were residing off reserve. A lack of housing made it unfeasible for those who wished to live on the reserve to do so in the near future.

The court ruled that section 77(1), insofar as it prevents band members not ordinarily resident on reserve from participating in decisions affecting the disposition of reserve lands and Indian moneys, is invalid under section 15 of the Charter. The declaration of invalidity was suspended until 1 July 1994.

In 1997, the Federal Court of Appeal confirmed the ruling of the Trial Court, but for different reasons. Rather than "affirming the invalidity of s. 77(1) in its entirety" as the Trial Court did, the Court of Appeal severed the words "and is ordinarily resident on the reserve" from s. 77(1). The section now reads that a person aged 18 is able to vote for chief of the band, and for those nominated as councillors, as applicable.(43)

The Corbiere case is significant in relation to band membership codes. In many cases, First Nations communities have adopted their own membership codes, which must be voted on and approved by band electors. Under Corbiere, electors now include both resident and non-resident voters.(44)

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(41) *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)(1993)*, [1994] 1 F.C. 394, 107 D.L.R. (4th) 582, [1994] 1 C.N.L.R. 71, 18 C.R.R. (2nd) 354, 67 F.T.R. 81 (T.D.) [hereinafter *Corbiere*].

(42) For a discussion of the case, see Thomas Isaac, "Case Commentary: *Corbiere* v. *Canada*," *Canadian Native Law Reporter*, No. 1, 1994.

(43) Thomas Isaac, *Aboriginal Law: Cases, Materials, and Commentary,* 2nd ed., Purich Publishing, Saskatoon, 1999, p. 572.

(44) Assembly of First Nations, *The Corbiere Decision: What it Means for First Nations*, http://www.afn.ca/ (retrieved 12 December 2002).

In his decision, Justice Strayer distinguished between the right to participate in decisions regarding the disposition of Indian lands and moneys, and decisions regarding the ordinary governance of the reserve. While he concluded that non-residents could be justifiably limited in the entitlement to vote for band council as regards ordinary governance, the communal rights of non-resident members to vote directly or indirectly on matters related to the disposition of the reserve or Indian moneys should not be limited.

C. *Sawridge Band* v. *Canada*

Sawridge Band v. *Canada*(45) considers the rights of reinstated women and the rights of band councils to determine membership, and is the most significant decision to date on these issues.(46)

Three Alberta bands, Sawridge, Ermineskin and Sarcee, challenged sections 8 to 14.3 of the *Indian Act* on the grounds that these infringe upon the rights of Indian bands to determine their own membership, as protected by section 35 of the *Constitution Act*, *1982*. The bands also applied for a declaration stating that the imposition of additional members on the bands constituted an interference with the latter's rights under section 2(d) (freedom of association) of the Charter.

In a decision released on 7 July 1995, the court upheld the 1985 amendments, finding that there were no existing Aboriginal or treaty rights to First Nations control of membership under section 35(1) of the *Constitution Act*, *1982*. The decision stated that even if such rights had existed, they had been extinguished by section 35(4) of the *Constitution Act*, *1982*, which guarantees Aboriginal and treaty rights referred to in section 35(1) equally to Aboriginal men and women. In his comments, Federal Court Judge Frank Muldoon also condemned blood quantum as a means to determine who is, and is not, an Indian.

A notice of appeal to the Federal Court of Appeal was filed on 29 September 1995. Based on comments made by Justice Muldoon that "convey a very negative view of Aboriginal rights or special status for all or some Aboriginal peoples," an appeal was granted based on a reasonable apprehension of bias.(47) The outcome has yet to be determined, as the trial has encountered a number of delays.

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(45) *Sawridge Band* v. *Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.).

(46) For a discussion, see Thomas Isaac, "Case Commentary: Self-Government, Indian Women and Their Rights of Reinstatement under the Indian Act: A Comment on *Sawridge Band* v. *Canada*," *Canadian Native Law Reporter*, No. 4, 1995.

(47) *Sawridge Band* v. *Canada* (C.A.) [1997] 3 F.C. 580.

D. *Goodswimmer* v. *Canada*

This case considered whether someone who is not an elector of a band is eligible to be a candidate for, and may be elected as, chief of the band.(48) In March 1992, Darlene Desjarlais was elected chief of the Sturgeon Lake Indian Band, located in Alberta. While Ms. Desjarlais was married to a band member and living on reserve, she was neither a status Indian nor a member of the band and, as a result, was not eligible to be an elector in the band election. Appeals of the election of Ms. Desjarlais were filed, but were denied by the Minister of Indian Affairs and the Federal Court Trial Division.

In 1994, the Federal Court Trial Division held that a person who is not an elector of the Sturgeon Lake Indian Band is eligible to be a candidate for, and may be elected as, chief of the band. The court reviewed the history of legislative provisions governing election of a chief, and found that there is no requirement for the candidate to be an elector of the band. While section 75(1) of the *Indian Act* specifies that only band members may be elected as councillors, the *Indian Act* does not specify any eligibility requirements for the office of chief.

An appeal of the Trial Division decision was dismissed by the Federal Court of Appeal on 21 March 1995. Application for leave to appeal to the Supreme Court was granted 19 October 1995. The appeal was rejected by the Supreme Court in 1997.

DISCUSSION

The debate over membership is complex and multifaceted. A consideration of the issue leads to questions about what it means to belong to a community, about who has the right to define community membership, and about the changing nature of the Indian population. For many years, externally imposed rules for status and membership have produced internal divisions within Indian communities. The impacts of Bill C-31 have further emphasized political, social and financial concerns and introduced new problems.

Indian communities see control over membership as an essential component of the right of self-government. Communities have resisted externally imposed definitions of Indian status and rules for band membership, and emphasized the right of the group to define itself, while reinstated women and others whose membership has been limited have fought for their individual rights to be included in the group.(49)

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(48) *Goodswimmer* v. *Canada (Minister of Indian Affairs)*, [1995] 3 C.N.L.R. 72 (F.C.A.) [hereinafter *Goodswimmer*].

(49) The dual aspect of the debate is described in Moss (1990).

Resistance to externally imposed rules for membership is also tied to concerns over scarce resources and to the protection of cultural integrity. Because of their limited financial resources, some bands have had difficulty in accepting new members and providing their membership with an acceptable standard of living. As one author has commented, "with fewer financial resources to access as each year passes, the possibility of having to accept more members who have a right to basic services and to have their rights respected is not promising."(50)

In one community, Kahnawake, efforts to preserve cultural integrity over the past three decades have proved controversial. In 1981, the band adopted a membership code intended to preserve Mohawk culture and language and to discourage Mohawks from marrying non-Indians. The code, which called for a moratorium on mixed marriages and a blood quantum requirement for membership, has produced divisions in the community between those who see it as a means to prevent assimilation, and those who view it as a form of discrimination. It has led to several well-publicized disputes. In the spring of 1995, the band council moved to prevent children with less than 50% Mohawk blood from attending band schools.(51) Other conflicts have arisen over reserve residency and access to reserve employment and services.(52) In 1996, the band began community consultations on its code, in an attempt to draft a revised membership code for ratification by the community.(53) After an extensive consultation process undertaken from 1996 to 1999, the Mohawk Council of Kahnawake released the final draft of the proposed membership law in February 2003.(54)

The complexities of Indian status and band membership pose significant challenges for First Nations. The status rules introduced by Bill C-31, combined with band membership codes, have created different "classes" of Indians, a situation that is further complicated by residency on or off reserve. As Clatworthy and Smith discuss in their study of the population implications of Bill C-31, membership codes based on one-parent descent rules

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(50) Isaac (1994), p. 59.

(51) "School-Board Chairman Blasts Mohawk Council Over Bloodline Policy," *The Gazette* (Montréal), 9 May 1995.

(52) "Mohawk Bloodline Too Thin, Fired Peacekeeper Told," *The Gazette* (Montréal), 15 March 1995; "Couple Wants Rights Tribunal to Rule on Bloodlines," *The Gazette* (Montréal), 27 August 1995.

(53) "Kahnawake Band Bids to Clarify Membership Rules," *The Gazette* (Montréal), 9 February 1995.

(54) "MCK releases final draft of the Kahnawake Membership Law," www.kahnawake.com (retrieved 7 April 2003).

will create band members without status who may exercise political rights associated with membership, but lack rights tied to Indian status. Two-parent descent rules will lead to Indians registered under both sections 6(1) and 6(2), but without membership and associated political rights. The authors anticipate that within 50 years, two-parent codes may disenfranchise approximately half of those people with Indian status who are registered by First Nations with two-parent codes.(55) In their view, "First Nations' communities run the risk of encountering growing tensions and conflict around these inequalities. Distinctions between 'classes' are likely to become embedded in the social and political life of First Nations."(56)

On reserve, conflicts between reinstated Indians and bands, such as those illustrated in *Courtois*, will likely continue. With a large percentage of the status Indian population living off reserve, issues of the rights of off-reserve members, such as arose in *Corbiere*, will also continue to be significant. In addition, high rates of intermarriage, and the possibility of having people with family ties to bands but with no status or membership, force consideration of the position of non-band members on reserves. The *Corbiere* and *Goodswimmer* decisions place pressure on bands to recognize rights of non-resident band members, and to consider the rights of non-band members who live on reserves. In their work, Clatworthy and Smith describe a range of problems associated with status and membership inequalities that may arise in communities.(57)

This quagmire prompts questions about the adequacy of existing rules for defining members in self-governing First Nations communities and how self-governing First Nations will resolve conflicts over access to rights and services. The federal policy on self-government announced in the summer of 1995 includes membership and the establishment of governing structures, internal constitutions, elections, and leadership selection processes in a list of matters for self-government negotiations.(58) The policy also specifies that negotiations with groups residing on a land base must address the rights and interests of non-members residing on Aboriginal lands, and whether Aboriginal authority will be exercised over non-members. Isaac suggests that the *Sawridge* decision raises serious concerns regarding the claimed inherent right

(55) Clatworthy and Smith (1992), p. vii.

(56) *Ibid*.

(57) *Ibid*., pp. 56-65.

(58) INAC, *Federal Policy Guide: Aboriginal Self-Government*, Ottawa, 1995.

of self-government. While the federal policy recognizes the right of Aboriginal peoples to govern themselves in relation to matters internal to their cultures and identities, the decision concludes that the federal government has a right to regulate Indian control of band membership.(59) In April 2001, the federal government launched the First Nations Governance Initiative. The intention of the initiative is to provide First Nations governments with the tools needed to provide their communities with representative governments that are accountable to their people. While the initiative may resolve some self-government problems, it was not intended to address issues such as band membership and Aboriginal citizenship.(60)

Status and membership issues pose difficult challenges for First Nations, and for the federal government in defining its relationship with First Nations individuals and communities. Communities and governments will need to address both the internal conflicts and, over a longer term, the impacts of having an increasing number of Indians disenfranchised from the benefits associated with registration under the *Indian Act*.

(59) Isaac (1995), p. 11.

(60) Congress of Aboriginal Peoples, *The Federal First Nations Governance Initiative at CAP*, http://www.abo-peoples.org/Next/programs/Governance/Govaire1.html (retrieved 9 December 2002).