# THE SEARCH FOR CONSENSUS:
# A LEGISLATIVE HISTORY OF BILL C-31, 1969-1985

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## Table of Contents

*Introduction* ........................................................................................................ *-i-*

*Chapter I. Lavell-Bedard Case:*
*the Origins of the 12(1)(b) Debate, 1969-1973* ................................................. *-1-*

*Chapter II. Initial Attempts to Find an*
*"Indian Act Consensus", 1974-1977* .......................................................... *-12-*

*Chapter III. DIAND Brings Forward its own Indian Act Proposal, 1978* ............. *-23-*

*Chapter IV. The 12(1)(b) Problem Becomes a National Debate,*
*1979-1980* ......................................................................................................... *-31-*

*Chapter V. Solving the 12(1)(b) Problem Becomes DIAND's Top Priority,*
*1981-1983* ......................................................................................................... *-37-*

*Chapter VI. Bill C-47: Canada's First Attempt to Implement*
*a Non-discriminatory Membership Policy, 1984* ............................................. *-51-*

*Chapter VII. Bill C-31: Canada Adopts a New Indian Act Policy, 1985* .............. *-63-*

*Chapter VIII. Aboriginal Viewpoints on Bill C-31, 1985* ..................................... *-73-*

*Chapter IX. The Enactment of Bill C-31, June 1985* ......................................... *-83-*

*Conclusion* ........................................................................................................ *-86-*

## *Introduction*[1]

Bill C-31 was intended to eliminate discrimination against Indian women by creating a non-discriminatory legal criteria for defining "Indian" under the Indian Act. Before 1985, Indian status under the Indian Act was based on a patrilineal system in which an Indian woman's status was dependent on her father and/or husband's status. Indian women who married Indian men retained their legal status whereas Indian women who married non-Indian men lost their legal status and their ability to transmit status to their children.

The pre-1985 Indian Act provision that removed status from Indian women who "married out" is known as section 12(1)(b). Although section 12(1)(b) affected only the status of Indian women, sections 10 and 14 of the 1951 (and 1970) Indian Act stipulated that these women also lose band membership. Therefore, they lost the right to reside, own land, or inherit property in their reserve communities; vote in band elections or referendums; collect annuities or treaty payments; or even to be buried on reserve.

Indian men who married non-Indian women, on the other hand, were not subjected to the same treatment as Indian women who had "married out." They not only retained status and membership, they also transmitted it to their wives and children.

Many native women viewed the Indian Act's membership provisions[2] as a blatant form of discrimination against Indian women. However, when native women's groups began their long campaign in the early 1970s to pressure the government to amend the Indian Act, Canadians were generally unaware and uninterested in their plight. But by the early 1980s, the problem of discrimination against Indian women was condemned widely in Canada and considered no longer acceptable in a society that values equal rights and equal treatment for everyone.

This paper examines the legislative history of the 1985 Indian Act amendment known as Bill C-31 and describes the social and political context in which federal Indian Act policy developed during the period 1969 to 1985. It begins with an examination of the origins of the debate in the early 1970s over native women's rights in Canada. It traces the

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[1] This paper was contracted by Erik Anderson of the Research and Analysis Directorate of the Department of Indian Affairs and Northern Development (DIAND).

[2] Prior to the 1985 Indian Act amendment, the term "membership provisions" meant registration under the Indian Act as well as membership in an Indian band. Most registered Indians were also members of an Indian band prior to Bill C-31, therefore, "membership provisions" was a generic term that referred to all the pre-1985 Indian Act provisions that deal with Indian status and band membership.

emergence of competing viewpoints within the Aboriginal community on "membership issues", the evolution of government thinking on Indian Act policy, and the influence of Aboriginal viewpoints on federal policy considerations. It also examines the rationale for Bill C-31 and Aboriginal views of the bill.

During the 1970s and early 1980s, the federal government resisted pressure to amend the Indian Act's discriminatory provisions, arguing that its policy was to reach a consensus in the Aboriginal community before amending the Indian Act. Consultation and consensus had become priorities following the almost universally negative reaction from Aboriginal peoples to the government's 1969 White Paper, which proposed repealing the Indian Act and terminating special rights for Indians.

The federal government's fundamental challenge to amending the Indian Act was finding a policy solution that could accommodate the concerns and priorities of non-status Indian and native women's groups and status Indian associations. These Aboriginal organizations were divided over the question of whether those affected by past discrimination should be automatically reinstated to band membership under an amended Indian Act. Native women's groups, for example, believed that reinstatement to band membership should occur before bands gained control of membership while Indian associations viewed automatic reinstatement to band membership as a violation of the Aboriginal right to determine citizenship. The debate over the membership issue is characterized in the historical record as both an equality versus Indian rights issue and as an individual versus collective rights issue. In hopes of achieving a balance between these competing interests, federal officials consulted with Aboriginal organizations across Canada with the objective of finding a consensus on an Indian Act policy that would end discrimination against Indian women.

After years of consulting with Aboriginal leaders on how to amend the Indian Act, however, the federal government passed Bill C-31 in 1985 without the consent of these leaders. This paper examines the reasons why the federal government failed to achieve a consensus in the Aboriginal community on how to eliminate discrimination against Indian women from the Indian Act and why Aboriginal groups opposed Bill C-31. It argues that the primary impetus to Bill C-31 was the creation of an equality provision in the Canadian Charter of Rights and Freedoms and a United Nation's ruling in 1981 in favour of Sandra Lovelace, a native woman who had lost status under section 12(1)(b).

The source material consulted for this paper includes newspaper articles and secondary sources; DIAND discussion papers, briefing notes, press releases, and speaking notes; position papers, reports, and correspondence prepared by Aboriginal groups; and parliamentary debates and committee minutes (Hansard).

These sources reveal a great deal about the legislative history of Bill C-31. The newspaper articles and secondary sources consulted for this project provide valuable social and political context to key events such as the 1969 White Paper, the 1973 Lavell-Bedard cases, the emergence of native women's groups and Indian associations during this period, and the Sandra Lovelace complaint to the United Nations Human Rights Committee regarding Canada's treatment of native women.

The papers written by Aboriginal groups document their views on issues relating to Indian status and band membership, native women's rights, and Aboriginal self-government. These sources also describe Aboriginal positions in relation to federal Indian Act policy. The DIAND policy material, on the other hand, describes the federal government's response to Aboriginal pressures on how to approach changing the Indian Act, the policy thinking underlying various federal proposals to amend the Indian Act, and the rationale for Bill C-31.

The Hansard material on Bill C-31 also contains valuable information on the government's rationale for Bill C-31 and Aboriginal positions on the bill. In addition, this material describes the difficulty faced by parliamentarians who sought to understand the conflicting viewpoints within the Aboriginal community over the issue of native women's rights and to understand how the problem of ending discrimination against Indian women should be solved.

The terminology used in this report to describe individuals and groups within the Aboriginal community includes Indian, native, 12(1)(b) women, and non-status Indian. The term "Aboriginal" refers to any individual or group that self-identifies as Aboriginal, whether or not they have legal Indian status. The term "Indian", on the other hand, refers to individuals with legal Indian status, although it is also used in the context of "discriminatory treatment of Indian women", which pertains to how Indian women were dealt with under the discriminatory provisions of the Indian Act, such as section 12(1)(b). "Native" and "non-status Indian" refers to individuals who self-identify as Aboriginal, but are not registered Indians, many of whom were women who had lost status under section 12(1)(b). The phrase "12(1)(b) women" refers to women affected by section 12(1)(b) of the Indian Act.

## *Chapter I. Lavell-Bedard Case: the Origins of the 12(1)(b) Debate, 1969-1973*

In 1971, an Ojibway woman from Manitoulin Island named Jeannette Corbière Lavell launched a legal challenge against section 12(1)(b) of the Indian Act. This provision took Indian status away from those Indian women who married non-Indians. Yet Indian men who married non-Indians kept their status.

Lavell's was a milestone case that galvanized native women in Canada. No longer willing to tolerate the discriminatory affects of section 12(1)(b), native women joined together in common cause to fight for equality under Canadian law. When it first began, Indian leaders paid very little attention to the case. But once it reached the Supreme Court of Canada in 1973, Lavell's case had become a *cause célèbre* within the Indian community, leading to bitter divisions between native women's groups and many of Canada's largely male-dominated Indian associations. The case also set the stage for the long and contentious 12(1)(b) debate that culminated in Canada's 1985 Indian Act amendment, known as Bill C-31.

Lavell's case began in a York County court in June 1971. After her name was struck from the Indian register in 1970 as a result of her marriage to a "white photographer", Lavell appealed. She argued that section 12(1)(b) of the Indian Act contravened the equality clause of the 1960 Canadian Bill of Rights because it discriminated on the basis of gender. In contrast to Indian women, noted Lavell, Indian men who married non-Indians retained their legal status; moreover, these men transmitted status to their non-Indian wives and children through section 11 of the Indian Act. In essence, section 12(1)(b) fully disinherited Indian women of their Indian rights and benefits including their rights to band membership, to inherit on-reserve property, or to live on reserve. In contrast, these same rights and benefits were extended to the non-Indian wives and children of Indian men.[3]

At the time Lavell filed her case, the treatment of Indian women under the Indian Act's discriminatory provisions received little attention from Indian leaders or government officials and was virtually unknown to the Canadian public. Yet, gender discrimination was a longstanding feature of the Indian Act that was derived from the nineteenth-

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[3] Leone Kirkwood, "20 lawyers heard as Lavell case opens before overflow crowd: Reasonable that Indian family's status should be decided by male spouse, Supreme Court told", in *Globe and Mail*, February 23, 1973, p. 13; Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict" in Sandra Burt, Lorraine Code, and Lindsay Dorney, eds., *Changing Patterns* (Toronto: McClelland & Stewart Inc., 1993) pp. 97 & 98; Katherine Dunkley, "Indian Women and the Indian Act: a background for parliamentarian," (Ottawa: Library of Parliament, March 1981) pp. 2-5; Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Ministry of Supplies and Services, 1978) p. 1.

century legal definitions of Indian status. During the emergence of the women's movement for equality during the late 1960s, however, Indian women became increasingly impatient with being treated differently from Indian men. In 1967, when the federal government appointed the Royal Commission on the Status of Women to investigate the issue of gender equality in Canada, "non-status" Indian women were provided with a forum to protest the Indian Act and to demand that the government make changes to the discriminatory provisions. The Commission heard from several Indian women who had lost their status through marriage, including a non-status Mohawk woman from Kahnawake named Mary Two-Axe Early, who became internationally renowned for her struggle to achieve equality for Indian women.[4]

The Commission publicized its recommendations in 1970. The recommendations included amending the Indian Act to allow an Indian woman who married a non-Indian to: 1) retain her legal status, and 2) transmit status to her children. Although the Commission's report was encouraging to native women, the government did not act upon its recommendation to amend the Indian Act. Instead, it was a 1970 court ruling dealing with racial discrimination against Indians that convinced some native women that it was necessary to pursue a judicial solution to the problem of gender discrimination in the Indian Act.[5]

In 1970, an Indian man named Joseph Drybones successfully appealed to the Supreme Court of Canada a conviction for being found intoxicated off reserve, which was prohibited under the Indian Act. The case was based on the argument that the conviction was racially discriminatory and contrary to the Bill of Rights' equality provision, which guaranteed all Canadians equality before the law. The *Drybones* case demonstrated that the Bill of Rights could be used to override an Act of Parliament, and native women took note. Encouraged by the *Drybones* decision and disappointed that the government had not followed the Royal Commission's recommendation to amend the Indian Act, some Indian women decided to turn to the courts for redress with the objective of forcing the government to change the Indian Act. The following year, Lavell

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[4] Rudy Platiel, "To Mrs. Lavell, it's [a] 'question of human rights'", in *Globe and Mail*, February 22, 1973, p. W6; Weaver, "First Nations Women and Government Policy, pp. 96- 98; Dunkley, "Indian Women and the Indian Act," pp. 2-5; Jamieson, *Indian Women and the Law in Canada*, 1978, p. 1; Sally Weaver, "Proposed Changes in the Legal Status of Canadian Indian Women: The Collision of Two Social Movements" (Department of Anthropology, University of Waterloo 1973) p. 11; Lilianne Ernestrine Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Germany: Verlag Breitenbach Publishers, 1991) pp. 75-76.

[5] Weaver, "First Nations Women and Government Policy, pp. 96-98; Jamieson, *Indian Women and the Law in Canada*, pp. 79-80.

began her legal challenge against section 12(1)(b).[6]

Initially, the judiciary bristled at having to handle the 12(1)(b) issue. The lower court judge dismissed Lavell's arguments, stating that the matter should be dealt with by Parliament, not by the courts: "If Section 12(1)(b) is distasteful or undesirable to Indians, they themselves can arouse public conscience and thereby stimulate parliament by legislative amendment to correct any unfairness or injustice." Undaunted, Lavell appealed her case to the Federal Court of Appeal in October 1971, and won. The Federal Court of Appeal ruled that the Indian Act contravened the Bill of Rights because it denied Indian women equality before the law and it ordered that 12(1)(b) be repealed. The court also ordered the repeal of two additional clauses that were considered discriminatory: section 11(1)(f), which granted status to the non-Indian wives of Indian men, and section 14, which took membership away from Indian women who married outside the band.[7]

Following Lavell's victory, a second legal challenge was launched against the Indian Act by Yvonne Bedard, a Six Nations woman who had also lost her status under section 12(1)(b). Unlike Lavell, Bedard sought the repeal of the entire Indian Act, claiming that it discriminated on the basis of gender and race. The Supreme Court of Ontario ruled in Bedard's favour by declaring section 12(1)(b) inoperative, but declined to rule on the question of whether the entire Indian Act should be repealed. As native women had hoped, the court based its decision on the *Drybones* case: "It is, therefore, the duty of the Court, applying the Bill in the way in which the majority in the *Drybones* case directed it should be applied, to declare s.12.(1)(b) of the *Indian Act* inoperative and accordingly, I do so."[8]

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[6] Jamieson, *Indian Women and the Law in Canada*, p. 1; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, pp. 75-76; Kroswenbrink-Gelissen, "Sexual Equality as an Aboriginal Right," p. 80; Salley Weaver, "Indian Women, Marriage and Legal Status," final revised paper for Professor K. Ishwaran, ed., *Marriage and Divorce in Canada* (Toronto: McGraw-Hill Ryerson, 1978) pp. 14-15.

[7] Weaver, "Indian Women, Marriage and Legal Status," p. 14; Jamieson, *Indian Women and the Law in Canada,* p. 80; Leone Kirkwood, "20 lawyers heard as Lavell case opens before overflow crowd: Reasonable that Indian family's status should be decided by male spouse, Supreme Court told", in *Globe and Mail*, February 23, 1973, p. 13; "Indian rights for Indian women: Debates moves into court," in *Ottawa Citizen*, February 23, 1973, p. 35; Rudy Platiel, "In one corner, the Bill of Rights, in the other, the Indian Act," in *Globe and Mail*, February 22, 1973, p. W6; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, p. 80.

[8] *Bédard v. Isaac et al.* [1972] 2 O.R. 391-397 (OSC); "Two women lose appeal: Indian Act biased but valid, court says," in *Globe and Mail*, August 20, 1973, p. 11; Weaver, "First Nations Women and Government Policy, 1970-92, pp. 97-98; Sally Weaver, "Indian Women, Marriage and Legal Status," final revised paper for Professor K. Ishwaran, ed., *Marriage and Divorce in Canada* (Toronto: McGraw-Hill Ryerson, 1978) p. 16; Weaver, "Proposed Changes in the Legal Status of Canadian Indian Women: The

While native women celebrated the Lavell and Bedard rulings, Indian leaders grew fearful that Indian reserves would be opened up to hundreds of native women and their families. As well, some status Indians felt that "non-status" women should have to live with their decision to "marry-out", and therefore resented Lavell and Bedard's efforts to bring about changes to the Act. One Indian woman told Bedard: "You have made your bed - now lie in it."[9]

Generally, however, Indian attitudes were rooted in much broader concerns over the special status of Indian people in Canadian society and the preservation of Indian culture and land. Indian groups feared that the Lavell and Bedard cases could lead to the abolition of the entire Indian Act, which would in turn lead to the disappearance of the Indian reserve system and the destruction of the Indian way of life. In many ways, this reaction stemmed from the psychological impact of a 1969 federal policy proposal that had sought to end the federal government's special relationship with the Indian people.[10]

In June 1969, the Trudeau government shocked Indians by releasing a White Paper on Indian Policy that recommended terminating all special rights for Indians, ending legal status and the Indian reserve system, and repealing the Indian Act. The proposed policy was a reflection of Prime Minister Trudeau's promise of a Just Society, with its emphasis on equality and the protection of individual rights, and his general mistrust of collective rights. Trudeau opposed special status for any group in Canadian society, including the Indian people. The White Paper argued: "This government believes in equality ... The discrimination which affects the poor, Indian and non-Indian alike, when compounded with a legal status that sets the Indian apart, provides dangerously fertile ground for social and cultural discrimination." Indian leaders, however, flatly rejected the White Paper, denouncing it as an attempt by the government to abrogate its legal and moral responsibility to the Indian people. The government's proposed policy created wide-spread fear among Indians, who perceived it as a fundamental threat to the survival of

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Collision of Two Social Movements" (Department of Anthropology, University of Waterloo, 1973) pp. 13-14; Jamieson, *Indian Women and the Law in Canada*, p. 82.

[9] Sally Weaver, "Indian Women, Marriage and Legal Status," p. 19; "'Our reserves belong to us', Cardinal says: Indian leader predicts violence if women push too far," in *Globe and Mail*, February 22, 1973, p. W7; Guy Demarine, "'Male chauvinism': Treaty Indians don't want whites on reserves," in *Ottawa Citizen*, February 22, 1973, p. 41; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, pp. 80-82.

[10] Harold Cardinal, *Rebirth of the Canadian Indian* (Edmonton: Hurtig, 1977) pp. 109-110.

the Indian people.[11]

This fear galvanized the Indian movement in Canada and led to a resurgence of Indian organizations. Indian leaders across Canada joined together to create a powerful new lobby association they called the National Indian Brotherhood (NIB) to "negotiate from strength with the federal government." The unity achieved among Indian leaders in the aftermath of the White Paper was unprecedented in the history of Indian-White relations in Canada.[12]

Through the NIB, the Indian people vehemently opposed the White Paper. But the most effective response to the government came from the Indian Association of Alberta (IAA) whose 24 year-old president, Harold Cardinal, published a widely-read condemnation of the White Paper entitled *The Unjust Society* - a mocking reference to Trudeau's Just Society promise. Cardinal provides a scathing account of the government's 1968-1969 Indian Act consultations - which ostensibly had sought Indian input on possible amendments - noting, "Indian leaders repeatedly have informed the government that they do not want the *Indian Act* repealed until the government settles the outstanding issue between it and the Indian people - the question of Indian rights." Cardinal warned that the White Paper was just another federal policy amounting to "total assimilation of the Indian people, plans that spell cultural genocide."[13]

In June 1970, the Alberta Chiefs presented the Trudeau government with their own policy proposal, called the "Red Paper", which rejected outright the White Paper, asserting that: "Retaining the legal status of Indians is necessary if Indians are to be treated justly. Justice requires that the special history, rights and circumstances of

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[11] "Ottawa plans to abolish treaties, move out of Indian affairs in 5 years," in *Globe and Mail*, June 26, 1969, pp. 1-2; "Indian leaders surprised by move", in *Globe and Mail*, June 26, 1969, p. 3; Canadian Press, "Indian press Ottawa for policy change," in *Globe and Mail*, June 27,1969, p. 45; J.R. Miller, *Skyscrapers Hide in the Heaven: a History of Indian-White Relations in Canada* (Toronto: University of Ontario Press, 1991) p. 224; Weaver, "Proposed Changes in the Legal Status of Canadian Indian Women," p. 9; Harold Cardinal, *Unjust Society* (Vancouver: Douglas & McIntyre, 1999) pp. 90-99, 111-119; Weaver, "Indian Women, Marriage and Legal Status," p. 11; Presentation by NWAC on Bill C-31, Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 28, 1985, Issue No. 28, pp. 69-70.

[12] J.R. Miller, *Skyscrapers Hide in the Heaven: a History of Indian-White Relations in Canada* (Toronto: University of Ontario Press, 1991) p. 224; Weaver, "Proposed Changes in the Legal Status of Canadian Indian Women," p. 9; Harold Cardinal, *Unjust Society* (Vancouver: Douglas & McIntyre, 1999) pp. 90-99, 111-119; Weaver, "Indian Women, Marriage and Legal Status," p. 11; Presentation by NWAC on Bill C-31, Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 28, 1985, Issue No. 28, pp. 69-70.

[13] Cardinal, *Unjust Society*, pp. 107-119.

Indian people be recognized." It also embraced the concept of Indians as *Citizens Plus* (an idea first put forward in Harry B. Hawthorne's 1967 study of Indian conditions in Canada) who "possess certain additional rights as charter members of the Canadian community." As a result of these pressures, the Trudeau government jettisoned its proposed policy and publicly promised not to make changes to the Indian Act without the consent of the Indian people. "We won't force any solution on you. We're not looking for any particular solution," Trudeau told a group of about 150 Alberta chiefs who had travelled to Ottawa with their proposals.[14]

The 1972 Lavell-Bedard rulings brought back many fears for Indian leaders. While the White Paper had failed to end special status for Indians or repeal the Indian Act, many in the Indian community believed that the Lavell-Bedard cases might succeed where the White Paper had not. Many Indians believed that a ruling in favour of the women could lead to the disappearance of reserves and destruction of the Indian way of life. With the objective of preventing abolition of the entire Indian Act, the Alberta Chiefs convinced the NIB to intervene against Lavell and Bedard. As explained by Harold Cardinal, "Our alarm, which led to our decision to oppose the two women, was based on our belief that if the Bill of Rights knocked out the legal basis for the Indian Act, it would at the same time knock out all legal basis for the special status of Indians." The federal government appealed the Lavell-Bedard cases to the Supreme Court of Canada, hoping to avoid being forced to revise the Indian Act. Indian Affairs Minister Jean Chretien, still reeling from the Indian community's reaction to the White Paper, sought to appease Indian leaders by offering to fund their interventions against Lavell-Bedard; about 18 Indian associations accepted the Minister's offer. The Lavell-Bedard cases were heard jointly before the Supreme Court of Canada in February of 1973.[15]

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[14] Rudy Platiel, "'Won't force solution,' Trudeau tells Indians," in *Globe and Mail*, June 5, 1970, p. 1; Cardinal, *Rebirth of the Canada's Indians*, p. 108; Miller, *Skyscrapers Hide in the Heaven,* pp. 230-232; Roger Gibbons, "Historical Overview and Background," in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) pp. 32-34; Jamieson, *Indian Women and the Law in Canada*, p. 81; H.B. Hawthorne, ed., *A Survey of the Contemporary Indians of Canada: a Report on Economic, Political, Educational Needs and Policies,* Volume 1 (Ottawa: Department of Indian Affairs and Northern Development, 1966) p. 13; DIAND, Main Records Office, File 1/1-8-3, Vol. 31, DIAND brief dated 1975 entitled "Indian Act Revisions" [07076]. The 1975 DIAND brief states:

> For its part, the Government decided not to pursue the White Paper proposals and assumed a commitment not to revise the Indian Act, until the views of the Indian people have been made known.

[15] Cardinal, *Rebirth of the Canada's Indians*, pp. 108-113; Jamieson, *Indian Women and the Law in Canada*, p. 84; Indian Rights for Indian Women Paper prepared in August 1980 entitled "Position Review"; Weaver, "Proposed Changes in the Legal Status of Canadian Indian Women," p. 14; Cardinal, *Unjust Society*, pp. 90-99; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, pp. 82-83;

Lavell and Bedard, then, were up against both the Government of Canada and a multitude of powerful, well-funded and politically-organized Indian associations. The two women did received strong support from a group of native women known as Indian Rights for Indian Women (IRIW); however, this organization was less organized and less influential than the NIB, IAA, or any of the other Indian associations.[16]

The IRIW began as an Alberta non-status women's group in 1971. In 1972, the group organized itself into the National Committee on Indian Rights for Indian Women, with the primary objective of bringing about an end to discrimination against Indian women in the Indian Act. Although the Lavell case provided the main impetus to the formation of the IRIW, the group did not formally incorporate until 1974, and was therefore unable to intervene on behalf of Lavell and Bedard. Instead, Lavell and Bedard were defended before the Supreme Court by the Native Council of Canada (NCC), a national organization for Métis and Non-Status Indians, on behalf of the IRIW. Moreover, a group of about 15 Indian women calling themselves Ansishnawbekwek of Ontario, apparently an affiliate of the IRIW, also intervened on Lavell's behalf after incorporating shortly before the case began. According to a representative of the group: "As far as I know, our submission is the only female Indian submission to be accepted by the court." Native Women's Association of Canada (NWAC), an Aboriginal-women's organization formed around the same time as the IRIW, did not intervene in the case as it was primarily concerned with social and economic issues; the 12(1)(b) issue did not become a priority for NWAC until the early 1980s.[17]

When the Supreme Court case began, Harold Cardinal presented Jean Chretien with an IAA proposal to prepare a new Indian Act. Chretien agreed to fund the IAA's proposal, but, in hopes of achieving a consensus on the Indian Act, urged Cardinal to consult with

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"'Our reserves belong to us', Cardinal says: Indian leader predicts violence if women push too far," in *Globe and Mail*, February 22, 1973, p. W7; Guy Demarine, "'Male chauvinism': Treaty Indians don't want whites on reserves," in *Ottawa Citizen*, February 22, 1973, p. 41.

[16] Weaver, "Indian Women, Marriage and Legal Status," p. 19; Weaver, "First Nations Women and Government Policy, 1970-92," pp. 97-98.

[17] Indian Rights for Indian Women, "Position Review", August 1980, pp. 1-2; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, pp. 85-88; Weaver, "Indian Women, Marriage and Legal Status," p. 19; Weaver, "First Nations Women and Government Policy, 1970-92," p. 97-98; Library Archives Canada (LAC), Record Group (RG) 22, Acc. 1998-01695-1, Box 11, File D1021-J1-1-2-Membership, Vol. 13, press release issued in ca. November 1981 by NWAC entitled "Native Women's Association of Canada's Position on the Indian Act, Section 12 (1)(b) and the United Nations Ruling" [00405a]

Indians across the country.[18]

While Cardinal met with Chretien in the minister's Ottawa office, a small group of native women gathered on Parliament Hill to protest the government's opposition to Lavell and Bedard and its failure to end discrimination against Indian women. The women were also angry with Indian leaders. Jenny Margetts, a Cree Indian from Edmonton who soon became the National President of IRIW, stated that "there is definitely male chauvism" involved in Indian attitudes toward the case, claiming that some native women involved in the Lavell campaign had been threatened with violence. Indian leaders showed little sympathy towards these women. George Manuel, the first president of the NIB, dismissed the women gathered on Parliament Hill as "non-status", asserting that treaty women "think our way." Cardinal cautioned that although he would listen to "women liberationists" while preparing new Indian Act proposals, "no group of people will be allowed to break up our treaties and our [Indian reserve] system ... As far as I'm concerned they can be left out in the cold." Furthermore, asserted Cardinal, the IAA's amendments would "straighten out" the right of Indian bands to decide who has Indian status and band membership.[19]

Few Indians paid attention to the Lavell and Bedard cases while they were in the lower courts; but by the time it reached the Supreme Court of Canada in February 1973, it had aroused wide-spread interest in Aboriginal and non-Aboriginal communities across the country. The Supreme Court's chamber on the day the case came forward was packed with Indian leaders and representatives, native women, women's rights groups, non-status Indian groups, observers, and lawyers. Many chiefs and Indian representatives who had travelled to Ottawa to attend the case were unable to gain seats even though most had lined up outside the courtroom several hours before the morning session. Lavell herself had trouble entering the courtroom through the crowd of people.[20]

Lawyers for Lavell and Bedard argued that the Indian Act discriminated against Indian

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[18] Guy Demarine, "'Male chauvinism': Treaty Indians don't want whites on reserves," in *Ottawa Citizen*, February 22, 1973, p. 41.

[19] Guy Demarine, "'Male chauvinism': Treaty Indians don't want whites on reserves," in *Ottawa Citizen*, February 22, 1973, p. 41; "'Our reserves belong to us', Cardinal says: Indian leader predicts violence if women push too far," in *Globe and Mail*, February 22, 1973, p. W7; "Indian groups to be consulted before ruling," in *Globe and Mail*, February 28, 1973, p. 10.

[20] Cardinal, *Rebirth of Canada's Indians*, pp. 108-113; "Indian rights for Indian women: Debates moves into court", in *Ottawa Citizen*, February 23, 1973, p. 35; Leone Kirkwood, "20 lawyers heard as Lavell case opens before overflow crowd: Reasonable that Indian family's status should be decided by male spouse, Supreme Court told", in *Globe and Mail*, February 23, 1973, p. 13; Jamieson, *Indian Women and the Law in Canada*, pp. 79-88.

women and that the discriminatory provisions should be struck down by the Bill of Rights, following the precedent set by *Drybones*. The federal government argued that the Bill of Rights could not overrule an Act of Parliament and that the Indian Act protected the special status of Indian people. Lawyers for Indian groups argued that the legal banishing of Indian women who married non-Indians was simply following Indian custom in that women traditionally go to live with the men they marry. The Act's inequalities, they maintained, were necessary to protect Indian land and culture. Indian leaders acknowledged the need for Indian Act revisions, but asserted that such changes should be made by Parliament, not by the judiciary.[21]

In the end, the court ruled five to four against Lavell and Bedard, dismissing the argument that the Bill of Rights could be used to override the Indian Act. Moreover, Judge Roland Ritchie, who spoke for the majority, contended that the Lavell-Bedard cases could not be compared to the *Drybones* case because the latter concerned racial discrimination in the Act's liquor provisions, "whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1)(b) of the Indian Act." In sum, "the *Bill of Rights* is not effective to render inoperative legislation, such as 12(1)(b) of the *Indian Act*, passed by the Parliament of Canada in discharge of its constitutional function under s. 91(24) of the *B.N.A. Act*, to specify how and by whom Crown lands reserved for Indians are to be used."[22]

The ruling against Lavell and Bedard dismayed native women. Mary Two-Axe Early saw a bleak future for Indian women, remarking "I was very mad at the decision. This is suppose to be the most democratic country in the world and yet something like this can happen. We will be told to get off the reserve, but where will we go?" Indian leaders, however, hailed it as a major victory for Indian rights. While some Indian leaders openly acknowledged that the Indian Act was unjust to Indian women, they remained firm in their resolve to oppose changes to any of its provisions, especially those dealing with status. The NIB's George Manuel commented "There is no doubt that the provision [12(1)(b)] is unjust in many ways, yet we cannot accept a position where the only safeguards we have have had can be struck down by a court that has no authority to put

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[21] Cardinal, *Rebirth of Canada's Indians*, pp. 108-113; "Indian rights for Indian women: Debates moves into court", *Ottawa Citizen*, February 23, 1973, p. 35; Leone Kirkwood, "20 lawyers heard as Lavell case opens before overflow crowd: Reasonable that Indian family's status should be decided by male spouse, Supreme Court told", in *Globe and Mail*, February 23, 1973, p. 13; Jamieson, *Indian Women and the Law in Canada*, pp. 79-88; "Indian rights for Indian women: Debates moves into court", *Ottawa Citizen*, February 23, 1973, p. 35; Weaver, "Proposed Changes in the Legal Status of Canadian Indian Women," pp. 13-14.

[22] Jamieson, *Indian Women and the Law in Canada*, p. 85; Dunkley, "Indian Women and the Indian Act" pp. 2-5; Two women lose appeal: Indian Act biased but valid, court says," in *Globe and Mail*, August 20, 1973, p. 11.

something better in place. The tragedy of this situation, like so many others, is that it never needed to arise."[23]

The ruling destroyed the hopes of many native women affected by section 12(1)(b) of regaining their Indian rights. Parliament, it appeared, was the only route left for Indian women to achieve equality, but federal officials had clearly demonstrated their reluctance to change the Indian Act without the approval of Indian leaders. Moreover, these women felt "politically powerless" in the face of highly-effective, well-organized Indian associations, most of whom were indifferent, or even hostile, to the concerns of these native women. Indeed, neither the federal government nor the NIB would pay any serious attention to the issue of discrimination against Indian women until the late 1970s.[24]

The challenges facing native women following their defeat in the Supreme Court were daunting, and yet, there was also a silver-lining: for the first time, Canadians learned about the problem of discrimination against Indian women. The case was highly publicized in the national media, focussing attention on the treatment of Indian women in Canada. As a result of the Supreme Court judgement, the Advisory Council on the Status of Women announced that the status of Indian women had become its top priority.[25]

The realization that many Canadians supported their cause was encouraging for native women. Realizing that the 12(1)(b) problem was now a publically articulated issue, they refocused their efforts to bring about changes to the Act through political pressure. The determination by native women to continue the struggle for their Aboriginal rights was expressed by Jeannette Lavell on the heels of her defeat in the Supreme Court: "We're fighting for our right as Indian people. You should have every right to go back if you want to the place where you were born and grew up. If you were born in Orangeville, for instance, and your husband died and you wanted to go back there to live, there would

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[23] Jamieson, *Indian Women and the Law in Canada*, pp. 85-86, 89; Kathleen Rex, "Amendment to BNA Act needed to safeguard rights, lawyer says" in *Globe and Mail*, August 29, 1973, p. 9; Weaver, "First Nations Women and Government Policy, 1970-92," p. 100; Weaver, "Indian Women, Marriage and Legal Status," p. 20.

[24] Jamieson, *Indian Women and the Law in Canada*, pp. 85-86, 89; Weaver, "First Nations Women and Government Policy, 1970-92," p. 100; Weaver, "Indian Women, Marriage and Legal Status," p. 20; LAC, RG 10, Acc. 1997-98/374, Box 3, File E1021-J1-1, Vol. 3, DIAND speaking notes prepared in ca. 1978 [00159a].

[25] Kathleen Rex, "Women plan day of mourning for Canada's Bill of Rights," in *Globe and Mail*, September 10, 1973, p. 10; Weaver, "First Nations Women and Government Policy, 1970-92," p. 100.

be nothing to stop you from returning. That is what the women want."[26]

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[26] Kathleen Rex, "Women plan day of mourning for Canada's Bill of Rights," in *Globe and Mail*, September 10, 1973, p. 10; Joe Rosenthal, "Indian Rights", *Globe and Mail*, September 12, 1973, p. 7; Weaver, "First Nations Women and Government Policy, 1970-92," p. 100; "A Sterile view of rights," editorial in *Globe and Mail*, September 6, 1973, p. 6.

## *Chapter II. Initial Attempts to Find an "Indian Act Consensus," 1974-1977*

The White Paper and the Lavell-Bedard case had transformed Indian perceptions of the Indian Act; instead of denouncing it as solely an instrument for colonizing the Indian people, many leaders also saw it, paradoxically, as a "repository of sacred rights for Indians." Although Indian leaders opposed Lavell's efforts to bring about an end to section 12(1)(b), they nevertheless believed that work on modernizing the Indian Act should be started. While the leaders did not agree on how to change the Act, they made it clear to federal officials that any proposals to do so should emanate from the Indian people.[27]

During the Lavell case, Chretien had promised the IAA funding to prepare Indian Act proposals, but an agreement to this effect was not reached until spring 1974. Subsequently, the Alberta Chiefs "put a team together consisting of Indian people from various reserves and various walks of life" who spent three months examining each section of the Indian Act, before coming up with a comprehensive proposal. As stated by Cardinal, "Our proposal was a lock, stock, and barrel revision of the entire act." The Alberta chiefs presented their proposals to both the NIB and the new Minister of Indian Affairs, Judd Buchanan. Although federal officials reacted "very coolly" to the proposals, it had become clear to them that any changes to the Act would have to be achieved through consultation with Indian leaders.[28]

Thus, after being presented with the proposals of the Alberta chiefs in October 1974, the federal government agreed to a unique policy-making experiment called the Joint NIB-Cabinet Committee. The Joint Committee created two working groups to deal separately with the areas of Aboriginal and treaty rights and Indian Act revisions. Cabinet's pledge not to change the Indian Act without the approval of the NIB through the Joint Committee was hailed by Indian leaders as a "vitally important commitment."[29]

Federal officials considered the Joint NIB-Cabinet Committee as a consultative mechanism intended to bring about changes to Indian policy without causing an upheaval in the Indian community. But native women were left out of the entire process.

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[27] Cardinal, *Rebirth of Canada's Indians*, pp. 114-115; Cardinal, *Unjust Society*, pp. 90-100; Jamieson, *Indian Women and the Law in Canada*, pp. 2-3; 89-92.

[28] Cardinal, *Rebirth of Canada's Indians*, pp. 114-115; Cardinal, *Unjust Society*, pp. 90-100.

[29] Cardinal, *Rebirth of Canada's Indians*, pp. 114-115; DIAND, Main Records Office, File 1/1-8-3, Vol. 31, DIAND brief dated 1975 entitled "Indian Act Revisions" [07076]; Weaver, "First Nations Women and Government Policy, 1970-92, p. 101; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, p. 91.

The NIB steadfastly opposed participation on the Committee by native women's groups claiming that the issue of discrimination against Indian women was local and should be dealt with by individual band councils. As well, to many Indian leaders, native women who spoke out against the Act were speaking out against Indian rights. For its part, Cabinet complied with the NIB's wishes, largely due to its reluctance to antagonize Indian leaders who were more powerful, more organized and more influential than native women's groups. In the face of a seemingly unified Indian movement determined to resist any attempt by Ottawa to unilaterally change the Indian Act, federal officials undertook to consult exclusively with the NIB.[30]

In April 1975, a working group of the Joint Committee began discussing the process for developing recommendations on Indian Act revisions "acceptable to the Indian people." Initially, the Alberta chiefs proposed the immediate revision of the entire Act; however, the working group soon agreed on a phased approach that would see changes to specific sections on a "step-by-step" basis. To provide a foundation for the Indian Act revisions, the sections dealing with "Band Government" would be the main focus of the initial stage of consultations with Indian groups. After taking the lead role on devising a process for developing proposed amendments, the NIB began its efforts to "seek a consensus among Indian people through grass roots consultations." The process was cumbersome and slow, involving dozens of meetings across the country. Many in the Indian community were reluctant to recommend specific changes to the Act for fear that they would be used to undermine Indian rights. Officials grew concerned that Indian Act revisions "may be declining as a priority" for Indian leaders as they became more focussed on Aboriginal rights issues.[31]

By 1977, NIB priorities had shifted away from Indian Act revisions to the NIB's other agenda items involving Aboriginal rights and claims, but the Joint Committee made little

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[30] Kathleen Jamieson, "Sex Discrimination in the Indian Act," in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart Limited, 1986) p. 127; Jamieson, *Indian Women and the Law in Canada*, pp. 2-3; 89-92; Weaver, "First Nations Women and Government Policy, 1970-92, p. 101; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, p. 91.

[31] Cardinal, *Rebirth of the Canada's Indians*, pp. 93, 115-123; DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798]; LAC, RG 22, Acc. 1998-01695-1, Box 11, File D1021-J1-1-2-Membership, Vol. 8, Shirley Joseph, "White Tape/Red Tape: Which Women is Indian?" United Native Nations, 1979; DIAND, "Discussion paper for the Indian Act Revision" in *Indian News*, November 1978, p 1; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 4, except of DIAND brief prepared ca. 1975 entitled "Indian Act Revision" [02310]; DIAND, Main Records Office, File 1/1-8-3, Vol. 31, DIAND paper prepared ca. 1975 entitled "Indian Act Revision" [07076].

progress on any issues, especially Indian Act revisions. Meanwhile, the government was coming under increasingly "strong public and political pressure" to solve the problem of discrimination against Indian women.[32]

Pressure to deal with the status of Indian women was not new - section 12(1)(b) had captured national-media attention during the Lavell case - but several other events occurred in 1977 that caused the federal government a great deal of embarrassment. First, MPs became outraged over the treatment of Indian women after the government exempted the Indian Act from the effects of a human rights bill tabled in spring 1977, a measure that was clearly aimed at preventing native women from launching another legal challenge to the act. In response, the IRIW denounced the government's actions before the parliamentary committee that reviewed the bill and won the sympathies of many federal politicians. One MP exclaimed that the Indian Act is "extremely discriminatory legislation" embodying "blatant cruelty to women."[33]

Justice Minister Ron Basford, however, argued that it would be "unconscionable" for the government to allow the human rights legislation to supercede the Indian Act while consultations with Indian leaders for suggestions on reforming the Act were still underway in the NIB-Cabinet Joint Committee. Although Basford assured parliamentarians that the government would seriously "consider" abolishing the Indian Act provisions that discriminated against Indian women, clause 63(2) (which later became section 67)[34] - the provision exempting the Indian Act - remained in the Human Rights Act. He also stated that once the Indian Act was amended the clause would be deleted. Thus, the government stood by its 1970 commitment to Indian leaders that changes to the Act would only be made with their consent, a commitment that was

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[32] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., report prepared ca. November 1979 by National Indian Brotherhood entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program," [07798]; LAC, RG 10, Acc. 1995-96/309, Box 12, File E1165-C6, Vol. 1, DIAND brief prepared ca. 1977 entitled "Status of Indian Women" [06245]; LAC, RG 10, Acc. 1995-96/309, Box 12, File E1165-C6, Vol. 1, DIAND paper prepared in November 1977 [00870a].

[33] Jamieson, *Indian Women and the Law in Canada*, pp. 89-92; LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; LAC, RG 10, Acc. 1995-96/309, Box 12, File E1165-C6, Vol. 1, DIAND brief prepared ca. 1977 entitled "Status of Indian Women" [06245]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, DIAND briefing paper prepared in November 1977 [00870a]; Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 9, 1982, Issue No. 2, pp. 5-6; Canada, *Debates of the House of Commons*, June 2, 1977, p. 6221.

[34] See Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act* (Ottawa: Minister of Public Works and Government Services, 2005) pp. 5- 7.

reaffirmed when the Joint Committee was established in 1974.[35] The government's position is effectively summarized in a 1978 brief:

> When the Human Rights Act was before the Parliament, the Minister of Justice asked that the Indian Act be excluded since it was in the process of revision. The Government cannot unduly hasten this process since revisions, particularly those relating to discrimination on the basis of sex, could have wide ranging effects on Indian society. In line with its policy (since 1970) of consulting with Indian people on major issues of Indian policy, the Government will continue to discuss revisions with the Indian people as fully as possible, prior to submitting revisions to Parliament.[36]

Native women's groups were greatly frustrated by the government's actions. They perceived the removal of the Indian Act from the reach of the new human rights legislation as a deliberate attempt to deny native women "the basic human rights enjoyed by other Canadians", just as the government had failed to protect their rights under the Canadian Bill of Rights three years earlier.[37]

With seemingly no where else to turn, a "non-status" native woman named Sandra Lovelace from the Tobique Reserve, in New Brunswick, brought her case to the United Nations Human Rights Committee in December 1977. While it took the government a couple of years to send the UN a response to Lovelace's complaint, officials became worried that discrimination against Indian women in the Indian Act was undermining Canada's international reputation for human rights. Indeed, the Lovelace case soon brought international attention to the problem.[38]

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[35] Jamieson, *Indian Women and the Law in Canada*, pp. 89-92; Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 9, 1982, Issue No. 2, pp. 5-6; Canada, *Debates of the House of Commons*, June 2, 1977, pp. 6200-6201; Cardinal, *Rebirth of the Canada's Indians*, pp. 114-115; Weaver, "First Nations Women and Government Policy, 1970-92," pp. 101-103.

[36] LAC, RG 85, Acc. 1997-98/603, Box 4, File N1021-J2-1, Vol. 1, DIAND brief entitled "The Federal Government and the Revision of the Indian Act as it Relates to Human Rights" dated May 11, 1978 [04576].

[37] Jamieson, *Indian Women and the Law in Canada*, pp. 89-92; Kathleen Jamieson, "Human Rights: Indian Women Need Not Appeal," ca. March 1979 [publication information unknown]; Canadian Human Rights Commission, *A Matter of Rights*, pp. 5-7; Weaver, "First Nations Women and Government Policy, 1970-92," pp. 103-104.

[38] Jamieson, *Indian Women and the Law in Canada*, pp. 89-92; Kathleen Jamieson, "Human Rights: Indian Women Need Not Appeal," ca. March 1979 [publication information unknown]; Canadian Human Rights Commission, *A Matter of Rights*, pp. 5-7; DIAND, Main Records Office, File

The IRIW, meanwhile, was gaining prominence as a national organization for native women. The IRIW's opposition to clause 63(2) in the Human Rights Act and its involvement in making representations to the parliamentary committee reviewing the Indian Act increased its awareness of lobbying techniques and the political process. Since its formation during the Lavell case, the IRIW had struggled to gain political clout; unlike many Indian associations, non-status native women's groups were not funded by the federal government. The IRIW argued that Indian leaders felt "threatened" by the native women's demand to be included in the consultation process, while the NIB maintained that they alone spoke for the Indians across Canada. However, after the sympathetic attention brought to the IRIW over the exclusion of the Indian Act from the Human Rights Act, the voices of native women began to be heard by federal officials.[39]

In June 1977, the IRIW sent Indian Affairs Minister Warren Allmand a proposal "for research to develop suggested revisions to the Indian Act with a view to improving the equity of the social and legal position of native women." Although the Indian associations had been "liberally funded" by Indian Affairs to research the topics of treaty and Aboriginal rights, the claims of the many thousands of native women affected by discrimination had been "ignored" by Indian leaders, the IRIW argued. Moreover,

> The development of a viable organization among non-status women has been hindered by the initial insistence of the funding agency (Secretary of State) that they share funding with status groups. This was unworkable because of the split between status and non-status native Indian women. Consensus among status and non-status Indian women is impossible on an issue as sensitive as enfranchisement [e.g. loss of treaty benefits and

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D1021-J1-1-2MBSHP, vol. 12, NWAC paper dated September 6, 1980 entitled "Native Women and the Constitution" [0969a]; Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 13, 1982, Issue No. 4, pp. 47 to 57; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 4, government paper entitled "The Federal Government and the Revision of the Indian Act as it Relates to Human Rights" prepared ca. 1978 [02309]; LAC, RG 10, Acc. 1995-96/309, Box 12, File E1165-C6, Vol. 1, DIAND brief prepared ca. 1977 entitled "Status of Indian Women" [06245]; Weaver, "First Nations Women and Government Policy, 1970-92," pp. 103-104.

[39] LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 1, research proposal by National Committee on Indian Rights for Indian Women dated May 1977 [00845]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 3, policy paper by Indian Rights for Indian Women dated April 6, 1978 entitled "Some Proposed Changes to the Indian Act" [02299]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, DIAND briefing paper prepared in November 1977 [00870a].

right to live in a reserve community].[40]

At the same time, the Advisory Council on the Status of Women agreed to support an IRIW study on the origins of discrimination against native women in Canada and on the consequences of the existing Indian Act on native women and their children. This study culminated in the publication of Kathleen Jamieson's *Indian Women and the Law in Canada: Citizens Minus,* widely acclaimed as a landmark in the struggle to raise awareness of Canada's treatment of native women. Encouraged by the hope that the voices of native women were finally being heard after a 10-year struggle by a "silent" few, Mary Two-Axe Early eloquently stated: "We have the same blood, the same memories, the same beliefs in our subconscious and the same words in our tongues, but we can't be buried alongside our ancestors or inherit our land and bestow it to our children."[41]

Canada's Human Rights Commissioner, Gordon Fairweather, also took up the cause of native women's rights. The plight of Canada's native women caught Fairweather's attention in the fall of 1977 when a group of "homeless" women from the Tobique Reserve confronted Prime Minister Trudeau to protest the reserve's housing crisis during his visit to New Brunswick. The Women of Tobique, as they were later called, also sent a petition to the Minister of Indian Affairs requesting that the department investigate the living conditions of native women and children on the reserve who had been put out of their homes by their husbands. However, because the women were not supported by the Tobique band council, the department refused to get involved. The local Indian Affairs director explained: "In the old days, we'd get in there and say 'these are the rules' but in our desire to make sure Indians are given every opportunity to

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[40] DIAND, Main Records Office, File 1/1-8-3, vol. 34, letter dated June 8, 1977 from Jenny Margetts, President of IRIW, to Warren Allmand, Minister of DIAND [0704]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 1, research proposal by National Committee on Indian Rights for Indian Women dated May 1977 [00845]. For a description of enfranchisement, see the *Report of the Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back*, (Ottawa: Minister of Supply and Services Canada, 1996) p. 288.

[41] DIAND, Main Records Office, File 1/1-8-3, vol. 34, letter dated June 8, 1977 from Jenny Margetts, President of IRIW, to Warren Allmand, Minister of DIAND [0704]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 1, research proposal by National Committee on Indian Rights for Indian Women dated May 1977 [00845]; "Council to aid non-status Indian women in study of discrimination against them," in *Globe and Mail*, June 23, 1977, p. F4; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, draft DIAND brief dated December 5, 1977 [00864]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 3, policy paper by Indian Rights for Indian Women dated April 6, 1978 entitled "Some Proposed Changes to the Indian Act" [02299]; Jamieson, *Indian Women and the Law in Canada*. Jamieson's study was first released during the widely attended IRIW conference in April 1978, which is discussed below.

handle their own affairs, now we have to stay out of it."[42] An exasperated spokesperson for the women remarked:

> We've already tried the regional office of Indian Affairs ... they told us it's either local or federal but not their business ... We tried federal human rights but the Indian Act is specifically left out of the new human rights legislation. We sent a petition to Indian Affairs and Northern Development Minister Warren Allmand in June. We got it back saying it had to be signed by a majority of the voters on the reserve.[43]

Fairweather took notice of these events. Meanwhile, he was also being pressured by the IRIW to take a stand on behalf of native women. By late 1977, bringing about amendments to the Act had become the Commissions' top priority. Fairweather warned officials that if the Indian Act was not amended to eliminate discrimination against Indian women, his commission would demand that the government make the changes.[44]

Realizing that the problem of discrimination against Indian women could no longer be ignored, and that "it is unlikely that any amendments to the Indian Act could pass until this issue is resolved", Cabinet announced in the fall of 1977 its commitment "to end discrimination on the basis of sex in the Indian Act, with particular reference to section 12(1)(b)." Subsequently, federal officials informed Indian leaders that revising the Indian Act to remove "discriminations as regards Indian women" was now the government's "top priority issue." A consensus among Indian groups on how to change the Act had yet to be achieved; however, officials felt that the NIB needed a political push.[45]

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[42] Patricia Bell, "Ottawa refuses to get involved in problems on N.B. Indian reserve," in *Globe and Mail*, November 3, 1977, p. F8; Jeffrey Simpson, "Fairweather finds political touch is hand in Human Rights posting," in *Globe and Mail*, December 29, 1977, p. 9; Allan Chambers, "New economic plan needed to solve problems, PM says," in *Globe and Mail*, November 11, 1977, p. 10.

[43] Patricia Bell, "Ottawa refuses to get involved in problems on N.B. Indian reserve," in *Globe and Mail*, November 3, 1977, p. F8.

[44] Jeffrey Simpson, "Fairweather finds political touch is hand in Human Rights posting," in *Globe and Mail*, December 29, 1977, p. 9; Canadian Press, "Fairweather brings respect for convictions to new post as human rights commissioner," in *Globe and Mail*, September 12, 1977, p. 2; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, DIAND briefing paper prepared in November 1977 [00870a].

[45] LAC, RG 10, Acc. 1997-98/374, Box 3, File E1021-J1-1, Vol. 3, DIAND speaking notes prepared in ca. 1978 [00159a]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, Draft discussion paper dated February 20, 1978 [00862]; LAC, RG 22, Acc. 1998-01695-1, Box 10, File

In December 1977, Indian Affairs Minister Hugh Faulkner (1977-1979) agreed to fund IRIW's research on native women's rights and Indian Act membership alternatives. As officials began to look more closely at ways of ending discrimination against Indian women, it became evident that revisions of the status provisions would lead to a "consideration of the broader issues of membership." For example, before amending section 12(1)(b), DIAND would have to settle questions concerning the status of non-Indian spouses as well as the children of mixed marriages. There were also questions on how changes to the membership sections would affect reserve land use and occupancy and other related subjects such as inheritance. The IRIW, officials hoped, would help shed light on these thorny issues.[46]

Initially, Noel Starblanket, President of the NIB, supported the government's commitment to end discrimination against native women. In October 1977, he pledged before a conference of some 100 native women to support the IRIW's research proposal and promised the group's national president, Jenny Margetts, "full input" into the NIB-Cabinet Joint Committee. Native women were greatly encouraged by Starblanket's public endorsement of their cause. When the Joint Committee met in December 1977, Starblanket agreed to discuss the membership issue while emphasizing "that in doing so the NIB did not relinquish in any way its mandate to speak on behalf of all Indians in this country as regards the Indian Act." He also agreed that membership would be added as an item to the June 1978 committee agenda and that the issue be referred to a joint working group for preliminary study. But in April 1978, before the issue was ever brought forward for discussion, the Joint Committee collapsed when the NIB withdrew from the process out of frustration over the lack of progress on the agenda items. The Joint Committee had failed to find a solution to the membership problem; instead, that spring the NIB passed a resolution which demanded that bands have complete control of their own membership. Despite this set back, the federal government reaffirmed its commitment to end discrimination against Indian

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D1021-J1-1-2-Membership, Vol. 4, DIAND memorandum dated September 22, 1978 from Susan Annis, Policy Branch, Policy, Research and Evaluation Group, to Caroll Hurd [01732]; DIAND, Main Records Office, File D1021-J1-1-2, vol. 2, draft DIAND discussion paper prepared in ca. April 1978 [0119]; DIAND, Main Records Office, File D1021-J1-1-2, vol. 8, DIAND brief dated October 3, 1979 [0114]; LAC, RG 10, Acc. 1995-96/309, Box 12, File E1165-C6, Vol. 1, DIAND brief prepared ca. 1977 entitled "Status of Indian Women" [06245]; Jamieson, *Indian Women and the Law in Canada*, p. 89.

[46] LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, DIAND briefing paper prepared in November 1977 [00870a]; LAC, RG 85, Acc. 1997-98/603, Box 4, File N1021-J2-1, Vol. 1, DIAND paper entitled "The Federal Government and the Revision of the Indian Act as it Relates to Human Rights" dated May 11, 1978 [04576]; LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Membership, Vol. 4, DIAND memorandum dated September 22, 1978 from Susan Annis, Policy Branch, Policy, Research and Evaluation Group, to Caroll Hurd [01732].

women.[47]

Meanwhile, as the joint-committee experiment was unfolding, IRIW held a conference in Edmonton in early April 1978 to "discuss the issue of changing the membership sections of the Indian Act." Attended by Indian women from status and non-status organizations across Canada, IRIW's conference developed a detailed policy paper which proposed changes in a broad range of areas including: criteria for status; status of children; band maintenance of a membership registry, establishment of an appeal board operated at a regional level; restoration of status and membership rights (a concept often referred to as retroactivity); establishing property and residential rights for non-status spouses through matrimonial properties agreement; additional lands for bands; hunting and fishing rights; adopted children; enfranchisement, and removal of status from non-Indian women who had gained it through marriage.[48]

The cornerstones of IRIW's policy paper were the definition of Indian status through a "1/4 blood rule" and the restoration of status and membership to native women who lost it through past discrimination, and to their descendants "who meet the criteria of 1/4 blood." The quarter-blood definition of "Indianness" would be non-discriminatory because it would allow the Indian "bloodline" to be established through "either the mother or father or both." As well, all Indians who met the quarter blood criteria would be "given full rights" to both status and membership. The paper also provides detailed discussions of the reasoning underlying IRIW's policy recommendations. For example, the IRIW considered the possibility of defining Indian status through a residential or cultural criteria. These alternatives, however, were ultimately rejected because both would exclude those who did not meet criteria based on "way of life" or residence on a reserve, in the case of Indians who lived off reserve. IRIW sent its proposals to federal

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[47] Jamieson, *Indian Women and the Law in Canada*, pp. 89-92; DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798]; Weaver, "First Nations Women and Government Policy, 1970-92," pp. 101-103; LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; LAC, RG 22, Acc. 1998-01695-1, Box 5, File D1021-J1-1, Vol. 1, DIAND draft discussion paper prepared ca. July 1978 [03391]; LAC, RG 10, Acc. 1995-96/309, Box 12, File E1165-C6, Vol. 1, DIAND brief prepared ca. 1977 entitled "Status of Indian Women" [06245]; DIAND, Main Records Office, File D1021-J1-1-2, vol. 2, draft DIAND discussion paper prepared in ca. April 1978 [0119]; DIAND, "NIB/Committee Separates" in *Indian News,* ca. April 1978; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, letter from Noel Starblanket, President, National Indian Brotherhood to Jenny Margetts, President, Indian Rights for Indian Women [00865].

[48] LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 3, policy paper by Indian Rights for Indian Women dated April 6, 1978 entitled "Some Proposed Changes to the Indian Act" 02299].

officials and Indian leaders across the country.[49]

Officials had serious reservations towards the broad scope of IRIW's proposals. During a meeting with Jenny Margetts and Mary Two-Axe Early in early June 1978, Faulkner cautioned that IRIW's status criteria and retroactivity proposals were "broader questions" with far-reaching consequences. Initially, explained Faulkner: "the thing we wanted to deal with was 12.1.b. And so the quarter blood is a concept that was not one that I expected to come out of this resolution. But now that they've brought it forward we're going to have to look at it." IRIW's proposals on retroactivity, argued Faulkner, went even farther beyond the government's principal concern of dealing with section 12(1)(b):

> Well, that takes us well beyond the amendments to the 12.1.b and raises some very fundamental questions about band membership. If we adopted the quarter-blood rule and applied it retroactively, I think you would have a fairly major influx of Indians, and I think that raises serious questions about the ability of existing bands to respond to that and a range of very fundamental questions. So that's not one [proposal] that I can respond to very quickly ... It raises some very fundamental questions about who's an Indian.[50]

The minister also discussed the question of band membership, stating that "the general question of band membership - is something that should be left to the bands, if you talk about concepts like quarter blood." Faulkner's response dismayed the IRIW. This dismay turned to bitterness when later that month DIAND released an Indian Act revision proposal that bluntly rejected the concept of retroactivity.[51]

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[49] LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 3, policy paper by Indian Rights for Indian Women dated April 6, 1978 entitled "Some Proposed Changes to the Indian Act" [02299].

[50] LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Membership, Vol. 2, transcript of June 1978 "Minister's [Indian Affairs] Press Conference - Indian Rights for Indian Women" [05239a]; LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021, DIAND letter dated June 29, 1978 from Theresa Nahanee, Chief, Communications, Public Communications and Parliamentary Relations, Indian and Inuit Affairs, to Phil Gibson, Huguette Labelle [Director General, Policy, Research and Evaluation] [05239].

[51] LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Membership, Vol. 2, transcript of June 1978 "Minister's [Indian Affairs] Press Conference - Indian Rights for Indian Women" [05239a]; LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021, DIAND letter dated June 29, 1978 from Theresa Nahanee, Chief, Communications, Public Communications and Parliamentary Relations, Indian and Inuit Affairs, to Phil Gibson, Huguette Labelle, [DIAND] [05239]; Kathleen Jamieson, "Human Rights: Indian Women Need Not Appeal," ca. March 1979 [publication unknown].

The demise of the NIB-Cabinet Joint Committee in April 1978 had increased the level of acrimony and distrust between the federal government and the NIB. Although officials' attitudes hardened towards Indian political leaders, DIAND remained committed to amending the Indian Act and providing bands with greater autonomy. Cabinet had also promised in late 1977 that it would soon bring an end to section 12(1)(b); subsequently, it funded IRIW's 1978 Edmonton conference to allow native women the opportunity to develop their own ideas on membership policy. Although they had reservations towards IRIW's policy paper, officials hoped that it would contribute to DIAND's objective of finding a consensus on amending section 12(1)(b).[52]

[52] LAC, RG 10, Acc. 1997-98/374, Box 3, File E1021-J1-1, Vol. 3, DIAND speaking notes prepared in ca. 1978 [00159a]; Sally M. Weaver, "Self-Government Policy for Indians, 1980-1990: Political Transformation or Symbolic Gestures," (University of Waterloo: Department of Anthropology, 1991) pp. 4-5.

## *Chapter III. DIAND Brings Forward its own Indian Act Proposal*, *1978*

In late June 1978, Indian Affairs Minister Faulkner presented Aboriginal leaders with a package of Indian Act amendments which, he asserted, were derived from "over a hundred meetings" with Indian representatives since 1975. While developing his proposals, Faulkner had drawn upon the discussions and research of the previous three years in the NIB-government consultation process and the IRIW's recently-released membership paper. Generally, the paper sought to introduce Indian Act revisions on a "phased basis", which was a reflection of the "step-by-step" approach that had been discussed in the NIB-Cabinet Joint Committee meetings. The first phase of the process would concentrate on "obtaining feedback" in the following areas: tribal government; education; land surrenders; hunting, fishing and trapping rights; anachronisms in the Indian Act; and membership. Aboriginal reaction to the amendment package focussed primarily on the tribal government and membership proposals, the details of which are examined below.[53]

Faulkner's tribal government proposal was aimed at enlarging band powers through a statutory framework, an idea that had its "evolutionary beginning" in the Joint Committee working group on the Indian Act. Its cornerstone was a charter system that sought to provide a "more flexible legislative framework to enable Indians to govern their own affairs within the context of the Canadian community". Essentially, the system would allow a band council to "opt-in" to its own charter and negotiate a "constitution for the purposes of local self-government"; however, its authority - comprised mainly of powers to pass by-laws in areas such as education, housing, social services, economic development, and finances - remained subject to federal legislation. In other words, municipal-type powers would be delegated to bands through a revised Indian Act.[54]

Faulkner's proposal signalled the department's new priority of strengthening Indian Band Government by amending the Indian Act, a concept discussed but not developed into concrete form by the Joint NIB-Cabinet Committee. Over the next few years, DIAND officials continued to promote its proposals in the hope that it could convince

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[53] LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND, "Discussion paper for the Indian Act Revision" in *Indian News*, November 1978, p 1; LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [GAP-03358]; LAC, RG 10, Acc. 1997-98/374, Box 3, File E1021-J1-1, Vol. 3, DIAND speaking notes prepared in ca. 1978 [00159a]; Weaver, "Self-Government for Indians," pp. 4-5.

[54] LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND, "Discussion paper for the Indian Act Revision" in *Indian News*, November 1978, p 1; DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; LAC, RG 22, Acc. 1998-01695-1, Box 5, File D1021-J1-1, Vol. 1, DIAND paper prepared ca. July 1978 entitled "Draft Discussion Paper on Revision of the Indian Act" [03391].

Indians to "exercise Indian control over Indian government, Indian lands, Indian and other aspects of Indian socio-economic development" under an updated Indian Act.[55]

Faulkner viewed tribal government as the centrepiece of his amendment package. But he also emphasized that "whatever else happens in relation to the Indian Act revision, the provisions discriminating against Indian women, and in particular section 12(1)(b), must be revised." Discrimination against Indian women was no longer tolerable in Canadian society; moreover, Cabinet had made a firm commitment in 1977 to deal with the problem. Faulkner's amendment package brought forward for the first time, a membership proposal to amend section 12(1)(b), which, he asserted, was influenced by proposals submitted by native women's groups.[56]

The membership proposal dealt with: 1) the effects of mixed marriages upon Indian status; and 2) the effects of mixed marriages upon the status of children. Establishing a definition of Indian status that did not discriminate against Indian men, women or children would be the underlying principle of the government's new membership policy. Options included either taking away status from all Indians (men and women) who marry non-Indians or allowing all Indians who marry non-Indians to keep their status; giving or denying status to non-Indian spouses; giving or denying status to all children of mixed marriages; allowing the children themselves or the band to decide status; and establishing a status cut-off rule whereby "all children of mixed marriages have registered status as long as they are considered to be 1/4 Indian."[57]

DIAND based its 1/4 principle on the IRIW's blood quantum proposal, but officials had "serious philosophical problems" over determining Indian status solely on the basis of blood quantum. The blood quantum principle proposed by IRIW, they felt, would be difficult to incorporate into a clear set of rules for defining Indianness. Instead, DIAND

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[55] DIAND, "Discussion paper for the Indian Act Revision" in *Indian News*, November 1978, p 1; LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; LAC, RG 22, Acc. 1998-01695-1, Box 5, File D1021-J1-1, Vol. 1, DIAND paper prepared ca. July 1978 entitled "Draft Discussion Paper on Revision of the Indian Act" [03391]; Weaver, "Self-Government for Indians, 1980-1990," pp. 4-5, 8-9.

[56] LAC, RG 10, Acc. 1997-98/374, Box 3, File E1021-J1-1, Vol. 3, DIAND speaking notes prepared in ca. 1978 [00159a]; LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [3358].

[57] LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; DIAND, Main Records Office, File D1021-J1-1, vol. 1, DIAND background Paper on discrimination in the *Indian Act* prepared in August 1978 [01742a]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, draft DIAND discussion paper dated February 20, 1978 [00862].

sought to modify IRIW's status criteria by adopting an ancestral approach with a clearly defined "charter group" who would be considered 100% Indian. Subsequently, "the children and grandchildren of all members of the charter group, regardless of who they marry, would be considered status Indian, although they may have 1/2 or 1/4 Indian ancestry. However, in three generations, children who do not have at least one grandparent of full Indian ancestry (or 2 grandparents of 1/2 Indian ancestry etc.) would not be considered status Indians." Over the next several years, a "quarter-blood rule" for defining Indian status would become the centerpiece of DIAND's policy proposals to amend section 12(1)(b).[58]

In November 1978, Faulkner's membership proposal was published in *Indian News*. Unlike the June discussion paper, the published proposal made specific recommendations that all Indians (men and women) retain status upon marriage to a non-Indian, non-Indian spouses not gain status, and first generation children of mixed marriages be eligible for status. It would also provide bands with the option of passing by-laws to designate as "band beneficiaries" the second-generation children of mixed marriages and/or non-Indian spouses who would have benefits similar to other members, such as inheritance rights, housing and education services, and residency rights. This measure was designed to provide bands with "increased discretion" over membership.[59]

DIAND also considered the possibility of making the membership revisions retroactive as officials realized that retroactivity would continue to be a priority for native women. In its widely-distributed membership paper, the IRIW had already recommended that victims of past discrimination "and their offspring who meet the criteria of 1/4 blood Indians be registered as status Indians retroactive to the day they lost their status".[60] DIAND, however, was not yet ready to embrace retroactivity, arguing that there were "practical and other difficulties" with the concept, such as:

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[58] LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; DIAND, Main Records Office, File D1021-J1-1, vol. 1, DIAND background paper on discrimination in the *Indian Act* prepared in August 1978 [01742a]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, draft DIAND discussion paper dated February 20, 1978 [00862].

[59] DIAND, "Discussion paper for the Indian Act Revision," in *Indian News*, November 1978, pp. 7-9.

[60] LAC, RG 22, Acc. 1995-96/308, Box 15, File D1165-C1-12, Vol. 2, DIAND paper dated June 13, 1978 entitled "Draft Discussion Paper on the Revision of the Indian Act" [03358]; DIAND, "Discussion paper for the Indian Act Revision" in *Indian News*, November 1978, pp. 7-9; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 3, policy paper by Indian Rights for Indian Women dated April 6, 1978 entitled "Some Proposed Changes to the Indian Act" [02299].

> increased demands on Indian lands and cost increases which would result from a larger Indian population. As well, there is concern that retroactivity in whatever reasonable way it is recognized may lead to further inequalities. Moreover, granting retroactivity in this case could set a precedent for demands from other groups who have been discriminated against in the past. It would be a difficult, if not impossible, task to right all the wrongs of past discrimination.[61]

A series of drafts were presented to the IRIW and the NIB throughout the summer and fall of 1978, but it soon became apparent that both groups had serious misgivings towards the government's ideas on Indian Act revisions.[62]

For its part, the IRIW denounced Faulkner's proposals. In January 1979, the native women's group expressed its "extreme disappointment" that the minister had "either totally ignored or only partially incorporated into the proposed revisions" the IRIW's recommended membership changes. However,

> Our greatest disappointment is with the Government's apparent rejection of any concept of retroactivity. We cannot accept the Government's suggestion that the '"practical difficulties" with "retroactivity" are too great to overcome.

The IRIW argued that the government's claim that retroactivity would lead to "further inequities" was vague and unclear, and should not be used to prevent native women from regaining their rights. The argument that it was "impossible" to right all the wrongs of past discrimination, especially since "granting retroactivity in this case could set a precedent for demands from other groups who have been discriminated against in the past" was also rejected. Certainly, the IRIW asserted, the wrongs of all past discrimination cannot be remedied, "But the fact that we cannot remedy all injustices does not mean that we should not remedy as many as possible, as far as possible." Moreover, "talk about fear of setting precedent for other victims of discrimination is a red

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[61] DIAND, "Discussion paper for the Indian Act Revision," in *Indian News*, November 1978, pp. 7-9.

[62] LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Membership, Vol. 2, transcript of "Minister's [Indian Affairs] Press Conference - Indian Rights for Indian Women," held in June 1978 [05239a]; Kathleen Jamieson "Human Rights: Indian Women Need Not Appeal", ca. March 1979 [publication information unknown].

herring."[63]

The IRIW was also sceptical towards the government's band beneficiaries proposal. While greater band autonomy was "desirable and should be encouraged", the rights of band beneficiaries should not be subject to band by-laws, as Faulkner proposed. Instead, IRIW argued, the basic rights and benefits of beneficiaries should be specifically spelled out under the Indian Act. Otherwise, "injustice will occur across Canada" as beneficiaries are subjected to different treatment from band to band. IRIW pointed to the example of residential rights. Under a system where the beneficiary rights are determined through band by-laws, some beneficiaries would be permitted to live on reserve while others would not, inevitably leading to split families in the Indian community. Such circumstances were "unacceptable" to native women.[64]

Indian leaders also bristled at DIAND's proposal, in particular the concept of Indian government. Initially, the leaders had agreed to the minister's proposed legislative process, which entailed drafting proposals in the minister's office without Indian input, submitting them to a parliamentary committee for a nation-wide review by the Indian people, and finally tabling a bill in the House of Commons. But reaction to Faulkner's band charter proposal was overwhelmingly negative. The NIB felt it would lead to "increased bureaucracy and government controls." DIAND "essentially proposes a system of local Indian governments that derive their authority from the Indian Act, and this is a far cry from what Indian people are saying in terms of Indian Government and Indian sovereignty."[65] The Union of Nova Scotia Indians mocked the proposal as "symbolic self-determination," asserting that "we cannot accept Ministerial discretion to approve or reject a band's charter proposals."[66]

These statements allude to the Indian people's renunciation of what the NIB referred to

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[63] LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 5, paper by IRIW dated January 18, 1979 entitled "Indian Act Revision, In Response to the Minister's Discussion Paper: Membership".

[64] LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 5, paper by IRIW dated January 18, 1979 entitled "Indian Act Revision, In Response to the Minister's Discussion Paper: Membership".

[65] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798].

[66] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., "State of Principles of the Union of Nova Scotia Indians" contained in NIB report prepared August 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798].

as the "Indian Act mentality". As DIAND focussed its policy efforts on increasing band authority through a legislative framework, the Indian people had already begun to embrace the notion of entrenching Aboriginal rights in a renewed Canadian constitution. Prime Minister Trudeau's conferences on constitutional patriation, which began in 1978, had captured the attention of Indian leaders; soon after, constitutional entrenchment of Aboriginal rights became their top priority. Indian leaders expressed divergent ideas on Indian government, but, generally, they viewed it as a "Third Order of Government within Confederation" with powers equivalent to federal and provincial governments. Noel Starblanket of NIB described the crux of it as "the right to pass and enforce Indian laws on Indian land without Hugh Faulkner's or any other Minister's approval."[67]

Indians no longer viewed the Indian Act as an adequate vehicle to protect their rights. The Nova Scotia Chiefs contended that "A new Indian Act, however improved, would remain vulnerable to amendment by Parliament without Indian consent. A new Indian Act can, in our judgement, serve only as a stopgap remedy for the insecurity of band government and the paternalism of Ministerial discretion." Indian leaders denounced Faulkner's band charter proposals as a deliberate attempt to "divert attention away from constitutional reform by enticing bands into limited Tribal Government experiments." Indian focus on constitutional entrenchment of their rights as a foundation for the "full sovereignty they enjoyed prior to European colonization," then, signalled a significant divergence from DIAND's goal of establishing self-government through Indian Act amendments. For Indian leaders, the Indian Act should only be modified *after* the constitutional enshrinement of Aboriginal rights. The NIB asserted that the "rights of Indian people must be entrenched in the Canadian Constitution and then complemented by other pieces of legislation such as the Indian Act which would serve as an administrative mechanism." [68]

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[67] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798]; DIAND, Main Records Office, File A1025-5/F2, Vol. 1, presentation dated April 28, 1980 by Starblanket, Noel V., President, National Indian Brotherhood, to the First Nations Constitutional Conference [05266]; DIAND, Main Records Office, File D4117-2-C3, vol.4, NIB report prepared in ca. 1980 entitled "Position of the National Indian Brotherhood concerning the Revision of the Canadian Constitution" [0266]; Weaver, "Self-Government for Indians, 1980-1990," pp. 5-8.

[68] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798]; DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., "State of Principles of the Union of Nova Scotia Indians" contained in NIB report prepared August 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798]; DIAND, Main Records Office, File A1025-5/F2, Vol. 1, presentation dated April 28, 1980 by Starblanket, Noel V., President, National Indian Brotherhood, to the First Nations Constitutional Conference [05266]; DIAND, Main Records Office, File D4117-2-C3, vol.4, NIB report prepared in ca. 1980 entitled "Position of the National Indian Brotherhood concerning the Revision of the Canadian

Membership was also looked upon as a constitutional issue. The NIB compared it to citizenship in a nation, asserting that "Each band should have the jurisdiction under the constitution to determine who may and may not be a member of that band." However, Indian views on band membership alarmed many native women. In late 1979, the IRIW wrote to the Prime Minister expressing concern over the "latest statements" by "the NIB and other associations" on the notion of citizenship in Indian governments. The Prime Minister was reminded that native women "not only want this discrimination in the INDIAN ACT ended, but we seek as well to be reinstated as registered Indian people in Canada enjoying all of the rights of which we were deprived under this discrimination."[69] IRIW made it "absolutely clear" to the prime minister that reinstatement must occur before band control of membership:

> Indian Rights for Indian Women does not want this issue tied to the constitutional renewal process or discussions among first ministers and the National Indian Brotherhood. We agree that eventually Indian membership and status should be enshrined in the Canadian Constitution. However, Indian Rights of Indian Women will not allow this to be an excuse for delaying promised changes in favor of Indian women. The women are fully aware that this constitutional process has been going on for 100 years and will take another 10 -15 years to resolve. The women are not prepared to wait.[70]

Indeed, throughout the late 1970s and early 1980s, IRIW had remained steadfastly focussed on native women's rights under the Indian Act, even as other Aboriginal groups such as NWAC and NIB poured their energies into lobbying government to enshrine Aboriginal rights into Canada's 1982 Constitution Act.[71]

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Constitution" [0266]; Weaver, "Self-Government for Indians, 1980-1990," pp. 5-8.

[69] DIAND, Main Records Office, File D4117-2-C3, vol.4, NIB report prepared in ca. 1980 entitled "Position of the National Indian Brotherhood concerning the Revision of the Canadian Constitution" [0266]; DIAND, Main Records Office, File A1025-1, Vol. 4, letter from Jenny Margetts, President of Indian Rights for Indian Women, to Joe Clark, Prime Minister of Canada [07655].

[70] LAC, RG 22, Acc. 1998-01695-1, Box 11, File D1021-J1-1-2-Membership, Vol. 8 , IRIW "Open letter to the Prime Minister dated October 12, 1979" [03855].

[71] See Canada, House of Commons, *Minutes of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, December 2, 1980, Issue No. 17, pp. 64, 65 and 71; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, pp. 100-102; Miller, *Skyscrapers Hide in the Heaven*, p. 239; DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol. 12, NWAC presentation prepared in September 1980 entitled "Native Women and the Constitution".

Ultimately, Faulkner's Indian Act proposals were never brought before Parliament. The Liberal government fell in the spring of 1979, before he could even present them to Cabinet and Canada's first policy initiative to end discrimination against Indian women fell by the wayside. Native women, however, continued their relentless campaign to expose the consequences of discrimination in the Indian Act to the Canadian public. Consequently, the government began to come under intense public and political pressure to solve the 12(1)(b) problem.[72] The events that created this pressure are examined next.

[72] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798].

## *Chapter IV: The 12(1)(b) Problem Becomes a National Debate, 1979-1980*

In July 1979, the Tobique Women rekindled national and international awareness of their cause by organizing a "Native Women's March" from Oka, near Montreal, to "the steps of Parliament Hill" to protest housing conditions on reserves and the treatment of native women in Canada. With enthusiastic support coming from the IRIW, United Church and non-status women's groups across Canada, the Women's March garnered a great deal of favourable media attention, especially after receiving a warm reception from the new Conservative Prime Minister Joe Clark.[73] To their delight, Native women soon discovered that Clark strongly supported their cause. He promised that the government would act quickly to remove the "seriously discriminatory" clauses from the Indian Act and warned Indian groups that: "The NIB was supposed to draw up amendments seven years ago, but now I have to say if there is no action on the part of the NIB in the next four or five months to bring amendments [forward], we will have to do it ourselves."[74]

Clark's threat to unilaterally amend the Indian Act startled the NIB. However, the leadership also realized that the Native Women's March had created more pressure on the government to end discrimination against Indian women and that the issue could no longer be ignored. Consequently, Starblanket issued a public statement which supported "Indian women's demand for justice" and for retroactively providing status to 12(1)(b) women and their "offspring". Native women were encouraged to work with the NIB to combat "an unjust act by a white government" which had divided the Indian people for so long. But Starblanket also asserted that Indian governments should have the authority to define their own citizenship and decide who had status, and he warned that "without the entrenchment of Indian Government rights in the Constitution, there can be no justice for Indians."[75]

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[73] Newspaper article dated July 20, 1979 entitled "Clark will hear protest, Epp tells Indian women," in *Globe and Mail*; newspaper article entitled "Treaty Women's status reviewed," in *Indian Record*, Fall 1980, p. 20; newspaper article entitled "Indian Act 'sexism' cut promised" in *Victoria Times*, July 18, 1979, p. 32 (0349c); newspaper article entitled "Indians meet PM about 'sexist' law; Government 'sympathetic' to their cause," in *The Province*, July 20, 1979; Weaver, "First Nations Women and Government Policy, 1970-92," p. 103.

[74] Newspaper article entitled "Indians given deadline for act-change proposals," in *Victoria Times*, July 20, 1979 [0349b].

[75] "Statement by Noel V. Starblanket, president of the National Indian Brotherhood, on the right of Indian women and children under the Indian Act," (Ottawa: The Brotherhood, 1979); DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798]; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, p. 94.

The Conservative government, however, was prohibited from acting on its promise of quick action on the Indian Act. Clark's threat to override the wishes of Indian associations on the membership issue was soon overtaken by political event when his government fell in December 1979.[76]

Canadian officials faced further international embarrassment in August 1979 when the United Nations Committee on Human Rights found admissible Sandra Lovelace's 1977 complaint that section 12(1)(b) of the Indian Act was in violation of certain family, minority and sexual equality rights protected under the International Covenant on Political and Civil Rights. Subsequently, the Committee asked the Canadian government to respond to Lovelace's complaint. The eyes of the international community were now cast upon Canada's treatment of Indian women.[77]

In September 1979, Canada responded that while there were "difficulties" with section 12(1)(b), removing it would change the definition of legal Indian status in Canada, which was essential for the protection of Indian culture, language and lands. Therefore, "the policy of the Government of Canada is that no decisions can be taken on any changes to the Act without the prior consultations with the various segments of the Canadian Indian community." Moreover, "opposing views" by Aboriginal groups on how to deal with the Indian Act "have been widely and consistently expressed, underlining the magnitude of differences of opinion in the Indian community." Finally, creating a new Indian Act policy to change section 12(1)(b) raised questions affecting not only the status of Indian women, but also the children and grandchildren of mixed marriages, which "has far-reaching consequences for Indian bands and families," and neither Canada nor Indian groups had succeeded in formulating a legislative proposal that would satisfactorily deal with these consequences. In sum, the Canadian government "remains committed" to amending the Indian Act, but "the desire for quick and immediate legislative action has been and must continue to be, balanced by an understanding and appreciation of the very basic way in which such changes in the law will affect Indian society."[78]

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[76] DIAND, Main Records Office, File E4200-8, Vol. 1, Encl., NIB report prepared ca. November 1979 entitled "Indian Government, the Land, the People, and the Resources, Report of the Indian Government Program" [07798].

[77] Newspaper article by "Indian women's status after marrying whites becomes issue at UN," in *Globe and Mail*, June 14, 1980, p. 13; Weaver, "First Nations Women and Government Policy," pp. 103-104.

[78] LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Lovelace, Vol. 2, submission prepared by Canada in ca. April 1980 entitled "Response of the Government of Canada to the Decision of the Human Rights Committee Contained in Document CCPR/C/DR(VII)R.6/24 Dated 19 September 1979 in the Matter Concerning Sandra Lovelace" [00431a]; and M.J.B. Jones, "Sexual Equality, the Constitution

In June 1980, Sandra Lovelace sent the Human Rights Committee a scathing rebuttal to Canada's response charging that:

> If Canada [was] serious about preventing discrimination Canada would not have allowed the I.A. [Indian Act] to supercede the Human Rights Act. Also if Canada were serious about change it would not have taken ten years of discussions with no change. If Native women had not rebelled there would be no intent to change the Indian Act at present. There was no serious discussion previous to this complaint.[79]

She felt the government had "no intention" of amending the Indian Act until "political pressures created during and after the Native Women's Walk" forced them to. Lovelace also rejected Canada's argument that the Indian Act protects Indian culture and language, asserting that "this excuse has been used for ages but the intent of the Indian Act was to assimilate the native people in Canadian society. This is a Red herring." Meanwhile, IRIW denounced the government's response to the Human Rights Committee as "inaccurate, superficial and mendacious" and hoped that a decision against Canada "will speed reform of the Indian Act." The group sent a petition to the Permanent Mission of Canada to the United Nations charging that the government's position was "riddled with obvious historical and sociological inaccuracies" and dismissing as "ridiculous" the view that the Indian Act was formed to protect and preserve the Indian way of life.[80]

The Lovelace case also provoked harsh criticisms from federal parliamentarians. In July 1980, Flora MacDonald, a Conservative opposition member and outspoken critic of section 12(1)(b), rose in the House of Commons to demand that the prime minister take immediate steps to remove section 12(1)(b), pointing out that the Lovelace case "is the first time that Canada's record of human rights has ever been questioned in the United Nations." Trudeau responded that he would not impose a solution on the Indian people; instead, the government would continue its efforts to amend the Indian Act with the consent of Indian leaders "rather than ride roughshod over some of their traditions."

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and Indian Status: a final comment on S. 12(1)(b) of the Indian Act" [S. l. : s. n., 1983?] pp. 56-57.

[79] LAC, RG 22, Acc. 1995-96/308, Box 48, File D1403-11: Lovelace, S. Vol. 1, submission by Sandra Lovelace to UN Human Rights Division dated June 20, 1980 entitled "Additional Information and Observations" [01016f].

[80] LAC, RG 22, Acc. 1995-96/308, Box 48, File D1403-11: Lovelace, S. Vol. 1, submission by Sandra Lovelace to UN Human Rights Division dated June 20, 1980 entitled "Additional Information and Observations" [01016f]; newspaper article by "Indian women's status after marrying whites becomes issue at UN", in *Globe and Mail*, June 14, 1980, p. 13; newspaper article by Frank Dolphin entitled "Nellie Carlson - fighter for women's rights," in *Indian Record*, Fall 1980, pp. 14-15.

He also reminded MPs of his government's White Paper experience: "I think the attempt of my government back in 1969 to not only delete that section but, perhaps, to abolish the Indian Act in its entirety was a lesson, for me at any rate, that it was not wise even to go in a progressive direction over the heads of the Indian leaders themselves." However, if the leaders were not prepared to agree, the government would have to act on its own "in two or three years."[81]

The Lovelace case galvanized women from all political parties. On July 17, 1980, a coalition of 23 female MPs and Senators tabled in the House of Commons a "Declaration of Solidarity of Canadian Women Parliamentarians to recognize equal right for Indian women." This was the first time that female MPs dropped their party affiliations to join together for a common cause. The resolution called for a moratorium on the use of section 12(1)(b) until the Indian Act was revised.[82]

In response, John Munro, the new Liberal Minister of Indian Affairs (1980-1984), announced that the government would invoke section 4(2) of the Indian Act to "suspend certain sections of the Indian Act which discriminate against Indian women who marry non-Indians and their children" - but only at the request of individual band councils. The moratorium, Munro argued, was an interim action that would help relieve some of the discrimination faced by Indian women, since "a long-term change in these very controversial sections of the Indian Act ... is seemingly some time away from being finally resolved."[83]

The Women of Tobique, however, viewed the moratorium as a "delaying tactic" with little benefit for Indian women:

> Band governments are overwhelmingly male thanks to the Indian Act. <u>To require all 500 band governments now to agree to give Indian Women equal rights is not only ridiculous but also revealing of how little the present government is committed to removing discrimination in the Indian</u>

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[81] DIAND, Main Records Office, File E6000-1, vol. 1, excerpt from the *Debates of the House of Commons* dated July 7, 1980 [0024a].

[82] LAC, RG 22, Acc. 1994-95/087, Box 2, File A-1024-100, Vol. 3, DIAND brief dated September 18, 1980 [01007]; Dunkley, "Indian Women and the Indian Act," p. 11; LAC, RG 10, Acc. 1997-98/374, Box 9, File E1021-J1-2-2, Vol. 2, news clipping entitled "Ottawa's women win Indian deal" [00626].

[83] LAC, RG 22, Acc. 1994-95/087, Box 2, File A-1024-100, Vol. 3, DIAND brief dated September 18, 1980 [01007]; LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Lovelace, Vol. 4, DIAND press release dated July 24, 1980 entitled "Government Ready to Lift Discrimination" [03172]; LAC, RG 10, Acc. 1997-98/374, Box 5, File E1021-J1-1, Vol. 20, letter dated August 5, 1980 from E.R. Daniels, Coordinator, Indian Act Revision Process, DIAND to Departmental Secretariat, [DIAND] [04852].

> Act. It is simply passing the buck.[84]

Meanwhile, the Human Rights Commissioner also chided the government over its treatment of the Lovelace case. In a letter to Trudeau, Fairweather expressed "disappointment" that the government's response to the Lovelace complaint failed to provide a forthright admission that the Indian Act is discriminatory and that it must be changed.[85]

The national media also waded into the chorus of condemnation against Canada's position on native women's rights. Noting the government's failure to protect the rights of Jeannette Lavell and Yvonne Bedard in 1973, the *Globe and Mail* urged quick action to remedy discrimination against native women:

> So it is that Sandra Lovelace has been compelled to seek redress beyond Canada's borders. There can be no defending the iniquity she has suffered. No trotting out of worn excuses, such as the need to respect the internal affairs of reserves, can justify so fundamental an abuse in a country that has pledged, both in its own law and through international covenant, to ensure equality. The Government has tottered too long. The Indian Act must be amended, and promptly.[86]

By 1980, then, discrimination against Indian women had become an intensely controversial issue in Canada. Public awareness of the "12(1)(b) issue" began with the 1973 Lavell-Bedard case, but the 1977 exclusion of the Indian Act from the federal Human Rights Act dramatically increased political pressure to end discrimination against Indian women. The 1979 Native Women's March and the emergence of the IRIW as an effective, nationally-based vehicle for native women to focus a spotlight on the Indian Act's discriminatory provisions further intensified the concern within Canadian society towards the rights of Indian women. But it was the political and public condemnation of Canada's response to Sandra Lovelace's complaint to the UN Human Rights Committee and the international attention that the case brought to Canada's position on native women's rights that most embarrassed federal officials.

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[84] LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Lovelace, Vol. 4, letter dated September 3, 1980 from the Native Women of Tobique to Eyard Corbin, MP [03180a].

[85] LAC, RG 22, Acc. 1998-01695-1, Box 10, File D1021-J1-1-2-Lovelace, Vol. 3, draft reply from Prime Minister Trudeau to Human Rights Commissioner Gordon Fairweather prepared July 1980 [03222b].

[86] Editorial, "Legal discrimination," in *Globe and Mail*, August 9, 1980.

The federal government, however, steadfastly resisted pressures to impose its own solution to the problem of discrimination against Indian women. In response to criticisms in the House of Commons towards Canada's position on the Lovelace case, the prime minister harkened back to the government's 1970 promise in the wake of the White Paper fiasco that only through the consent of Indian leaders would the Indian Act be changed. This experience, it seems, had transformed not only Indian society (by galvanizing its leaders into forming powerful Indian associations), but also the federal government's perceptions of how it should deal with these leaders.

A consensus within the Indian community on amending the Indian Act, however, could not be found. The challenges of reaching an agreement on how to deal with the act had already been demonstrated to federal officials in the failed Joint NIB-Cabinet Committee experiment. Moreover, by 1978 Indian leaders began viewing Indian Act revisions as an appendage to their broader policy priority of entrenching Indian rights in the Canadian constitution. Only after this process is complete, they argued, should the Act be changed. Nonetheless, the government responded to increasing pressure to deal with native women's rights by announcing its commitment to amend section 12(1)(b), and warning the NIB that changes to the membership section could no longer be avoided. Yet by 1980, the government was still unwilling to make Indian Act amendments "over the heads" of Indian leaders. Federal Indian Act policy was in a deadlock.

Pressure and resentment by native women and growing public opinion had failed to bring about an end to the Indian Act's discriminatory provisions. However, in spite of the government's commitment to Indian leaders and inability to find a consensus on Indian Act amendments, ending discrimination against Indian women soon became an urgent priority for federal policy makers because of two key events: first, the 1981 United Nation's ruling in favour of Sandra Lovelace; and second, the creation of an equality provision in the 1982 Charter of Rights and Freedoms.

## *Chapter V: Solving the 12(1)(b) Problem Becomes DIAND's Top Priority, 1981-1983*

After returning to power in 1980 and defeating Québec successionists in a referendum on sovereignty, Prime Minister Trudeau immediately began to negotiate with the provinces for patriation and amendment of the Canadian constitution. While federal and provincial politicians clashed over how to amend the constitution, Aboriginal leaders fought furiously for the entrenchment of Aboriginal rights. And in the end, they succeeded. When the Canadian Constitution Act came into force in April 1982, recognition of treaty and Aboriginal rights was secured in section 35: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Although it does not explicitly entrench the right to self-government, section 35 was perceived as a great victory by Aboriginal men and women. But more significant for "non-status" native women was the enshrinement of a new Charter of Rights and Freedoms. Section 15 of the Charter guaranteed that

> every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disabilities.

Because it would not come into effect until April 17, 1985, Section 15 provided the federal government with a three-year period in which to remove all discriminatory legislation. Thus, the Charter served notice that the Indian Act's discriminatory membership provision must be changed.[87]

Even before the Constitution was enacted, Canadian officials recognized that the Indian Act would have to be amended. A parliamentary briefing note prepared by a DIAND official in October 1981 states:

> The government is firm in its commitment to amend the Indian Act. This commitment is reflected in section 15 of the Charter of Rights, which would guarantee equality before and under the law, and the equal protection and benefit of the law. The Indian Act will have to be amended

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[87] Miller, *Skyscrapers Hide in the Heaven*, pp. 239-242; Weaver, "First Nations Women and Government Policy," p. 107; *Report of the Royal Commission on Aboriginal Peoples, Volume 4: Perspective and Realities* (Ottawa: Minister of Supply and Services Canada, 1996) p. 33; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, p. 111.

before the Charter is implemented.[88]

Some officials had become impatient with the government's delay in amending the Indian Act. While expressing her frustration that Cabinet had yet to fulfill its promise of ending discrimination against Indian women, Judy Erola, Minister Responsible for the Status of Women, asserted in December 1981 that government would be legally compelled to do so under the Charter once it became law. "Lord knows, I don't want to wait three years," she added.[89]

Meanwhile, a ruling against Canada in the Lovelace case only heightened the government's sense of urgency to rid the Indian Act of its discriminatory provisions. The United Nations Committee on Human Rights ruling on the Lovelace complaint, released in July 1981, found that Canada was in violation of Article 27 of the Covenant on Civil and Political Rights - a provision that protects minority rights. The ruling stated that Lovelace was being denied the enjoyment of her cultural community because, as a result of her loss of status under section 12(1)(b), she was prohibited from having membership. Because Lovelace had lost her status before Canada's ratification of the Convention in 1976, the Committee did not rule on whether section 12(1)(b) violated Lovelace's equality rights. However, Canadian officials learned that the Committee had already received a communication from another Indian woman who lost her status under section 12(1)(b) *after* 1976, making it highly likely that it would, sooner or later, find the Indian Act in violation of equality rights.[90]

Because the Charter alone would have spurred the government to amend the Indian Act's discriminatory provisions, the Lovelace ruling's greatest significance was its

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[88] LAC, RG 22, Acc. 1998-01695-1, Box 7, File D1021-J1-1-2, Vol. 10, parliamentary briefing card dated October 9, 1981 [00285]. See also DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol.14, DIAND discussion paper published in August 1982 entitled "The Elimination of Sex Discrimination from The Indian Act" [Sum. No. 0946]. DIAND paper states that "Once Section 15(1) has come into force, there is a strong likelihood that provisions of the Indian Act that discriminate on the basis of sex will be found inoperative. The Government would like to amend the Act before this occurs."

[89] Canadian Press, "Discrimination against women: Indian Act changes delayed again," in *Globe and Mail*, December 1, 1981.

[90] LAC, RG 22, Acc. 1998-01695-1, Box 7, File D1021-J1-1-2, Vol. 9, draft DIAND discussion paper dated September 15, 1981 [00260c]; DIAND, Main Records Office, File D1021-J1-1-2, vol. 17, draft DIAND discussion paper prepared in ca. January 1982 [0139]; LAC, RG 22, Acc. 1995-96/308, Box 37, File D1165-S1-6, Vol. 2, DIAND briefing note dated November 13, 1981 [00797]. In December 1981, the Canadian government ratified the UN Convention on the Elimination of All forms of Discrimination against Women after once again vowing to eliminate discrimination from the Indian Act. See LAC, RG 10, Acc. 1997-98/374, Box 10, File E1021-J1-2-2, Vol. 12, press release dated December 10, 1981 entitled "Canada Ratifies Pact to Counter Discrimination Against Women" [01525a].

impact on government policy thinking on the retroactivity issue. A parliamentary briefing note prepared by Indian Affairs officials in October 1981 states: "The United Nations Human Rights Committee's ruling in the Lovelace case indicates that the Government, to uphold its international obligations, will have to provide some form of reinstatement for those individuals who have involuntarily lost their status." Another official observed that "This ruling imposes an obligation upon Canada to allow Lovelace, and women in similar situations, to regain their status and band membership, and therefore the rights they have lost." Thus, Canada's policy to eliminate discrimination against Indian women would have to include, at a minimum, reinstatement of women affected by section 12(1)(b).[91]

A suggested press line on the Lovelace ruling states: "The Government as indicated by the Prime Minister in 1980 remains committed to amending the Indian Act in consultation, and if possible, in agreement, with the Indians on this point." Indeed, the government would continue to consult Indian leaders for their views, but officials realized that finding a consensus on how to amend the Indian Act was highly unlikely. While officials hoped that, "if possible", Indian leaders could agree on a new Indian Act policy, they warned that the government "cannot hold off amendments until there is consensus on the best amendments." Subsequently, the government decided to formalize its consultation process by referring the matter to a parliamentary committee.[92]

On August 4, 1982, through an all-party agreement in the House of Commons, the Standing Committee on Indian Affairs and Northern Development (SCIAND) was mandated "to study the provisions of the Indian Act dealing with band membership and Indian status, with a view to recommending how the Act might be amended to remove those provisions that discriminate against women on the basis of sex." Indian Affairs Minister John Munro hoped that the Committee would consult with a broad range of Aboriginal groups "to ensure that government action to eliminate discrimination has the benefit of Indian peoples' and others most up-to-date views on the issue." While the

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[91] LAC, RG 22, Acc. 1998-01695-1, Box 7, File D1021-J1-1-2, Vol. 10, parliamentary briefing card dated October 9, 1981 [00285]; DIAND, Main Records Office, File D1021-J1-1-2, vol.17, draft DIAND discussion paper prepared in ca. January 1982 [0139]; LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-4, Vol. 22, DIAND briefing paper dated August 26, 1983 entitled "Membership/Discrimination Against Indian Women" [00202].

[92] LAC, RG 22, Acc. 1995-95/308, Box 48, File D1403-11: Lovelace, S., Vol. 2, suggested DIAND press release prepared ca. August 1981 entitled "Suggested Press Line: Complaint to the UN Human Rights Committee by Mrs. Lovelace" [01038a]; LAC, RG 22, Acc. 1995-96/308, Box 37, File D1165-S1-6, Vol. 2, DIAND briefing paper dated November 13, 1981 entitled "Membership/Discrimination Against Indian Women" [00797]; LAC, RG 22, Acc. 1998-01695-1, Box 8, File D1021-J1-1-2, Vol. 20, DIAND brief dated December 8, 1983 entitled "Removal of Sex Discrimination from the Indian Act" [02052].

government was committed to amending the Indian Act in "a manner which is most acceptable to Indian people," Munro noted that the Charter "requires elimination of any form of discrimination from all legislation within three years following the enactment of the Charter in April, 1982."[93]

Ending discrimination was now DIAND's top priority, but it also continued to search for a way to increase local band authority. Therefore, SCIAND was also asked "to review all legal and related institutional factors affecting the status, development and responsibilities of Band Governments on Indian reserves." As with Minister Faulkner, Munro favoured a legislative framework for strengthening local Indian government and hoped that the committee would recommend ways to achieve this. He asked the committee to "consider possible provisions of new legislation and improved administrative arrangements applying to some or all bands on reserve in the course of its review of Indian Government."[94]

Shortly after the August 4th all-party agreement, Munro released a discussion paper

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[93] LAC, RG 14, Box 166, File 6050-321-I3, Wallet 1, report of the Subcommittee on Indian Women and the Indian Act, prepared September 1982 [1152]; LAC, RG 22, Acc. 1995-96/308, Box 23, File D1165-E1, Vol. 5, Terms of Reference to Standing Committee on Indian Affairs and Northern Development prepared in ca. August 1982 [03403b]; DIAND Main Records Office, File E1021-J1-2, vol. 1, DIAND communique dated August 4, 1982 entitled "Committee to Review Issues facing Indians" [0838a]; Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 1 and September 8, 1982, Issue No. 1, pp. 19 to 25.

[94] LAC, RG 22, Acc. 1995-96/308, Box 23, File D1165-E1, Vol. 5, Terms of Reference to Standing Committee on Indian Affairs and Northern Development prepared in ca. August 1982 [03403b]; DIAND Main Records Office, File E1021-J1-2, vol. 1, DIAND Communique dated August 4, 1982 and entitled " "Committee to Review Issues facing Indians" [0838a]. Legislation on band government had been a goal for Munro since becoming Indian Affairs Minister in 1980. Like the Liberal band government proposals of the late 1970s, Munro sought to provide local Indian governments with a "municipal-style" system of powers delegated through locally-designed band constitutions. But Indian associations vehemently opposed Munro's Indian government proposal, charging that it was just another Liberal tactic aimed at diverting the Indian people from discussing Aboriginal constitutional rights. Munro's proposed Indian-government bill was shelved in spring 1982, partly as a result of confrontations with a number of Indian chiefs. Nevertheless, Munro hoped that a legislative framework for band government could be established through the parliamentary committee. See DIAND, Main Records Office, File E4200-8, Vol. 4, draft DIAND discussion paper prepared in ca. May 1981[07219a]; DIAND, Main Records Office, File E4200-8, Vol. 4, press release by Indian Association of Alberta dated May 19, 1981entitled "Federal Indian Government Bill Features 1969 White Paper Concepts" [07220]; LAC, RG 10, Acc. 1995-96/309, Box 7, File E1021-J1-8-2101, Vol. 1, Indian Legislation Revision and Formulation Activities Report - January 1 - September 30, 1982 prepared by the Assembly of First Nations in ca. October 1982 [06910]; newspaper article entitled "Munro faces hostile reception in talks on Indian Act changes", in *The Gazette*, May 30, 1980, p. 12; Weaver, "Self-Government Policy for Indians, 1980-1990," pp. 10-11.

entitled “The Elimination of Sex Discrimination from the Indian Act” to present some of the membership policy options being considered by the government. Munro’s paper was a culmination of the policy work conducted by DIAND over the previous two years. The preamble notes that “Once Section 15(1) has come into force there is a strong likelihood that discrimination on the basis of sex will be found inoperative. The Government would like to amend the Act before this occurs.” While committed to amending the Act, the government was “equally committed to a policy of consulting with Indians.” The new Indian Act policy’s guiding principle would be that “amendments will not discriminate on the basis of sex or marital status”. Because of this guiding principle, “Indians marrying non-Indians would retain their status and would retain all rights they had previous to marriage.” However, it wasn’t enough to simply remove the discriminatory sections from the Act:

> amendments will have to replace the existing system with a new one which defines status on a basis that does not discriminate on the basis of sex or marital status. Such a system will have to take into consideration rights of non-Indian spouses, if any, and the status of children born of marriages between Indians and non-Indians. As well, the issue of reinstatement of those who have involuntarily lost their status will need to be addressed.

The government also sought opinions on whether status under the current Indian Act should be considered as an “acquired right.”[95]

Munro’s paper provided options for dealing with questions concerning jurisdiction over status and membership, rights of the children of mixed unions, rights of non-Indian spouses, and reinstatement; but it made no recommendations. Options for determining status and membership included: bands define membership and status; bands define membership while the government defines status; bands have the option to define status and membership; and government defines both status and membership. The rights of non-Indian spouses could be dealt with by either not giving them any rights or

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[95] DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol. 14, DIAND discussion paper published in August 1982 entitled “The Elimination of Sex Discrimination from The Indian Act” [0946]. For earlier examples of DIAND policy papers, see DIAND, Main Records Office, File D1021-J1-1-2, vol. 5, discussion paper dated February 27, 1980 [0200]; DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol. 12, draft discussion paper by DIAND prepared ca. May 1981 [0958A]; DIAND, Main Records Office, File D1021-J1-1-2, vol. 6, briefing note dated June 22, 1981 by Ann Beauregard, Policy Advisor, Corporate Policy, DIAND [0860].

by only giving them limited rights such as residential rights.[96]

The children of mixed marriages also had to be treated equitably under a new Act. The options included: denying status to all children of mixed marriages; granting status to all children of mixed marriages; or using a quarter-blood rule to limit the transmission of status to children of mixed marriages. The paper explained that a quarter-blood rule could be based on a calculation of the percentage of Indian-blood quantum transmitted through either the mother or father. Moreover: "if acquired rights were respected any one who is entitled to be registered as a status Indian at the time of the amendments to the Act would have to be considered as having 100% Indian blood."[97]

Options for dealing with reinstatement included setting a cut-off date (1976, the year that Canada ratified the UN Covenant on Civil and Political Rights, was mentioned as an example) or limiting reinstatement to one or more specific categories of people who involuntarily lost status, the largest of which was Indian women directly affected by section 12(1)(b). Providing first-time registration rights to the first-generation children of these women was presented as an option as well. Inter-band marriage, illegitimate children, and enfranchisement were also discussed in the paper.[98]

SCIAND began its deliberations on the August 4th all-party reference from the House of Commons on September 1, 1982. As a reflection of DIAND's priorities, the terms of reference instructed the Committee to deal with discrimination against Indian women before band government and report its findings to Parliament before October 27, 1982. Consequently, SCIAND created the Subcommittee on Indian Women and the Indian Act to review the discrimination issue separately from self-government. The Assembly of First Nations (AFN - the newly established Indian association formed out of the NIB), NWAC, and Native Council of Canada (NCC) were all appointed as ex officio members. The number of Aboriginal groups who could make submissions was limited, and the report deadline was shortened to September 20th, 1982. The Committee saw as its priority the examination of the "broader implication" of Indian self-government; therefore, upon completion of its report on discrimination, a second subcommittee would immediately begin an "in-depth", cross-country study of the issue. Like the AFN, Committee members were unwilling to view the Indian Act's discriminatory sections

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[96] DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol.14, DIAND discussion paper published in August 1982 entitled "The Elimination of Sex Discrimination from The Indian Act" [0946].

[97] DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol.14, DIAND discussion paper published in August 1982 entitled "The Elimination of Sex Discrimination from The Indian Act" [0946].

[98] DIAND, Main Records Office, File D1021-J1-1-2MBSHP, vol.14, DIAND discussion paper published in August 1982 entitled "The Elimination of Sex Discrimination from The Indian Act" [0946].

separately from the broader questions concerning Aboriginal rights.[99]

The AFN greatly influenced SCIAND's view of its mandate. Concerned that the second part of the Committee's mandate on self-government would not be renewed by the House of Commons once the Parliament reconvened on October 27th, the AFN pushed for having the first Subcommittee deal with the discrimination issue by September 20th so that the second Subcommittee could be struck immediately thereafter. Once underway, the AFN believed, the Subcommittee on Indian self-government would be "unstoppable." But DIAND officials felt that the short time frame for the Committee's first report would prevent it from serious consideration of the "whole membership question".[100]

Officials were also dismayed to learn that NWAC had agreed to the AFN approach. Because it feared that the government was using the discrimination issue to divide the Aboriginal associations, the AFN sought to avoid public confrontation with NWAC over the issue by developing a good working relationship and encouraging SCIAND to appoint NWAC as an "ex officio" member. An Aboriginal consulting group observing the Subcommittee's hearings describes the AFN-NWAC agreement as a "common front" strategy. Each group took measures not to antagonize the other. The AFN agreed that discrimination against Indian women must end, while NWAC avoided lambasting Indian men for inaction on ending the discrimination. The two groups may have sought to minimize conflict, but they did not lose their separate objectives. The AFN wanted to deal quickly with the issue of discrimination, and move on its more important issue of Indian self-government, while NWAC maintained its bottom line

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[99] LAC, RG 22, Acc. 1995-96/308, Box 23, File D1165-E1, Vol. 5, Terms of Reference to Standing Committee on Indian Affairs and Northern Development prepared in ca. August 1982 [03403b]; LAC, RG 14, Box 166, File 6050-321-I3, Wallet 1, LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 2, report of the Subcommittee on Indian Women and the Indian Act, prepared September 1982 [1152]; DIAND memo dated September 1, 1982 [01661a]; LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 2, memorandum to file dated September 1, 1982 by Ann Beauregard, [Corporate Policy], DIAND memorandum to files entitled "Standing Committee Meeting August 31, 1982" [01662]; Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 8, 1982, Issue No. 1, pp. 11-14; Weaver, "First Nations Women and Government Policy," pp. 106-107.

[100] LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 2, DIAND memo dated September 1, 1982 [01661a]; LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 2, memorandum to file dated September 1, 1982 by Ann Beauregard [Corporate Policy], DIAND memorandum to file entitled "Standing Committee Meeting August 31, 1982" [ 01662]; LAC, RG 22, Acc. 1998-01695-1, Box 7, File D1021-J1-1-2, Vol. 19, paper prepared by the Indian Consulting Group in January 1983 entitled "The Elimination of Sex Discrimination From the Indian Act and Related Issues" [01798].

position that discrimination against Indian women must be ended and that reinstatement must occur before band control of membership.[101]

Several additional observations can be made on NWAC's approach to the membership question. When NWAC formed in the early 1970s, its main priority was to deal with a broad range of social and economic problems affecting Indian women. The 12(1)(b) issue was not part of NWAC's mandate, in part, because status women comprised a large segment of its membership. Unlike IRIW, NWAC was not specially formed to deal with discrimination against Indian women, although by the late 1970s it too began opposing section 12(1)(b). The 1981 Lovelace ruling led NWAC to refocus its priorities. NWAC applauded the ruling in a press release stating: "Now, for the first time in its history, the Native Women's Association of Canada has been mandated to lobby on behalf of all Native women in Canada in regards to The Indian Act ... with particular emphasis on 12(1)(b)."[102]

Yet, while vehemently opposed to the Indian Act's discriminatory provisions, NWAC also developed a close-working relationship with the AFN. NWAC's strong support for Aboriginal constitutional rights - as demonstrated in its testimony before Parliament's joint constitutional committee - was one reason for its good relations with the AFN. Also, maintaining a cooperative relationship with national Aboriginal groups was part of NWAC's overall strategy. As it explained to the constitutional committee: "[IRIW] in particular have focussed their energies on the removal of Section 12(1)(b) of the Indian Act. We [NWAC] are developing a more cohesive relationship with that organization as we are extending that kind of hand to every other national native organization in the country." The AFN-NWAC alliance in the Subcommittee on Indian Women and the Indian Act would not be the only occasion that the two groups joined together to

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[101] LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 2, DIAND memo dated September 1, 1982 [01661a]; LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 2, memorandum to file dated September 1, 1982 by Ann Beauregard [Corporate Policy], DIAND entitled "Standing Committee Meeting August 31, 1982" [ 01662]; LAC, RG 22, Acc. 1998-01695-1, Box 7, File D1021-J1-1-2, Vol. 19, paper prepared by the Indian Consulting Group in January 1983 entitled "The Elimination of Sex Discrimination From the Indian Act and Related Issues" [01798].

[102] LAC, RG 22, Acc. 1998-01695-1, Box 11, File D1021-J1-1-2-Membership, Vol. 13, press release issued in ca. November 1981 by the Native Women's Association of Canada entitled "Native Women's Association of Canada's Position on the Indian Act, Section 12 (1)(b) and the United Nations Ruling" [00405a]; LAC, RG 22, Acc. 1998-01695-1, Box 6, File D1021-J1-1-2, Vol. 2, DIAND briefing paper prepared in November 1977 [00870a]; Representation by NWAC in Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 26, 1984, Issue No. 17, pp. 69-78 [0237].

promote their respective objectives vis-a-vis the membership issue.[103]

When Munro appeared before the Subcommittee on September 8th, he warned that "time is running out. While there have been compelling reasons in the past to take decisive action, we now have to take into account the requirements of the Charter of Rights and Freedoms." He also admonished the Subcommittee for cutting short its review of the discrimination issue: "To make recommendations with respect to discrimination which are linked to the band government issue may delay legislation for years ... It is surprising, to say the least, that the committee has decided, without significant consultation, to throw this burning issue in with all others related to band government." The government did not oppose the principle of band control of membership, but its immediate priority was to end discrimination against Indian women, he argued. Munro's rebuke was not well received. One committee member, angry that SCIAND had been asked to solve in a few weeks a problem that had been before government for years, shot back that "The minister can use the door any time he wants, as far as I am concerned."[104]

In his testimony, AFN's National Chief David Ahenakew argued that the Indian Act should not be amended before the constitutional entrenchment of the right to self-government: "First, we have to secure our right place in Canada, the rights of our First Nations. Then we would deal with the discrimination against women, by having each First Nation assume its just responsibility by determining its own citizenship." The Federation of Saskatchewan Indians felt that by using the Charter to override Indian society's collective rights, the government was "heading down a path even more discriminatory." Ahenakew also believed that the Charter was "in conflict with our philosophy and culture and organization of collective rights."[105]

The next day, NWAC's president Jane Gottsriedson argued that native women's rights must not be kept in abeyance while Indian leaders and federal and provincial governments sort out the meaning of Aboriginal constitutional rights. "We are willing to

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[103] Canada, House of Commons, *Minutes of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, December 2, 1980, Issue No. 17, pp. 64-71; Representation by NWAC in Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 26, 1984, Issue No. 17, pp. 69-78; [0237]; Kroswenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, pp. 99-102, 164.

[104] Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 1 and September 8, 1982, Issue No. 1, pp. 19-32.

[105] LAC, RG 14, Box 166, File 6050-321-I3, Wallet 1, *Report of the Subcommittee on Indian Women and the Indian Act*, prepared September 1982 [1152].

consider band control of membership, but whatever you decide in this area we want reinstatement first. This is a problem that was created by the federal government and not by Indian bands." Moreover, native women were not asking for retroactivity, involving compensation for lost rights and benefits; instead, they were asking for reinstatement from the date of the revised act and full "access to federal programs and services immediately, and the enjoyment of rights accorded to all Indians." The children of women who lost status should also be reinstated, Gottfriedson added. NWAC supported Aboriginal self-government, she asserted, but "If band control of membership means Indian women must suffer under federal discriminatory legislation for another five or twenty years while you hash out the meaning of Indian government, we will not accept this."[106]

NWAC also believed that non-Indians should not acquire status through marriage, but Gottfriedson took this recommendation one step further, demanding that non-Indian women who acquired status through marriage be deleted from the band lists. This, she argued, would save the federal government "many millions of dollars" and address some of the fears of Indian bands. If "the concern is so great that the land base will not accommodate the Indian women who would otherwise have been entitled to live there we sincerely recommend the removal of all non-Indian women from Indian band lists." This suggestion irritated Committee members. One member stated that "it is not right for a legislator to change the rules of the game and [retroactively] deprive people of rights that were grated to them by law." Most members saw removing status from non-Indian women married to Indians as "punitive" and strongly opposed the idea.[107]

Like NWAC, the NCC demanded immediate reinstatement of all individuals who lost status through discrimination; the issue of band membership and Aboriginal self-determination, the group argued, should be dealt with later. Mary Two-Axe Early, who spoke briefly on behalf of the IRIW, made a plea for compassion: "I represent women in their 70s and 80s, and their only desire is to be permitted to be buried in their cemetery." IRIW recommended reinstatement of all Indian women affected by the Indian Act's discriminatory provisions and their children "up to one-fourth Indian blood"; after this, "local bands government should determine membership." Moreover, the quarter-blood criteria for Indian status should be based on the blood line through the mother or father or both and there should be no separation of status and membership

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[106] Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 9, 1982, Issue No. 2, pp. 39-76.

[107] Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 9, 1982, Issue No. 2, pp. 39-76.

rights - all quarter-blood Indians should have full access to both. When asked by a Committee member to explain the reasoning behind the quarter-blood rule, IRIW responded "a line has to be drawn somewhere, and that is the consensus we came up with." Like NWAC, IRIW was not after retroactive compensation, but it did want status taken away from non-Indian women.[108]

Not all native groups agreed with IRIW's status criteria. The NCC "reject any attempts to artificially deny to individuals who identify as Indian and who are ancestrally Indian their place in aboriginal communities on the basis of a racist one-quarter blood concept." Quebec Native Women's Association demanded full reinstatement of native women and their children "with no cut-off"; thereafter, bands should be allowed to determine membership.[109]

On the last day of testimony, Gottfriedson stated that NWAC, NCC, and AFN all agreed that the Subcommittee should recommend immediate deletion of section 12(1)(b) and reinstatement to status and membership of 12(1)(b) women and their first-generation children. The second Subcommittee, she added, could deal with the question of second-generation children and additional financial and land resources for bands affected by reinstatement. The Subcommittee was also urged to promptly table its first report so SCIAND could "begin the second round of hearings on Indian government."[110]

The Subcommittee on Indian Women and the Indian Act tabled its report on September 22nd, 1982, after five days of hearings. The report recommended that:

- no one gain or lose status by marriage;
- children of mixed marriages be treated equally in the future;
- section 12(1)(b) be repealed;
- women who had lost status and their first generation children should be reinstated;
- bands would decide on the residency and political rights of non-Indian spouses;

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[108] Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 10, 1982, Issue No. 3, pp. 6-59; Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 13, 1982, Issue No. 4, pp. 47-78

[109] Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 14, 15, 16, 17, 20, 1982, Issue No. 5, pp. 117 and 130.

[110] LAC, RG 14, Box 166, File 6050-321-I3, Wallet 1, Report of the Subcommittee on Indian Women and the Indian Act, prepared September 1982 [1152].

- non-Indian women who, in the past, gained Indian status by marriage would retain that status (acquired rights principle);
- the issue of whether to provide status and membership to the quarter-blood descendants should be referred to the Indian government subcommittee.[111]

NWAC and AFN both publicly supported the Subcommittee's report. The AFN felt that the Subcommittee had supported the right of the Indian people to determine their membership while NWAC praised it for adopting the group's "bottom line position" on reinstatement. Munro also approved of the Subcommittee's recommendations, but expressed concerns that many Indian groups "were not heard by the Committee because of its self-imposed time limit."[112]

With the first Subcommittee's hearings complete, SCIAND appointed another Subcommittee to study the self-government part of its reference; in December 1982, however, the House of Commons upgraded the Subcommittee to a Special Committee in recognition of the "inquiry's broad nature". Once again, AFN was appointed as an ex officio member, while NWAC and NCC were appointed as "liaison members". Subsequently, the Special Committee on Indian Self-Government began its hearings and until fall 1983 travelled to every region of the country hearing from 567 witnesses during 215 presentations.[113]

When Munro appeared before the Special Committee, he tabled another Indian band government proposal to transfer powers to bands in the areas of health, management and control of reserve land and trust monies, housing, social assistance, control over resources, and band membership. Munro's proposal, however, caused friction between many Aboriginal groups and the Special Committee whose members "had to emphasize constantly that the Committee was not a consultative mechanism on the

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[111] Canada, House of Commons, *Minutes of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, September 13, 1982, Issue No. 4, pp. 117 and 130; LAC, RG 14, Box 166, File 6050-321-I3, Wallet 1, *Report of the Subcommittee on Indian Women and the Indian Act*, prepared September 1982 [1152].

[112] LAC, RG 10, Acc. 1995-96/309, Box 7, File E1021-J1-8-2101, Vol. 1, Indian Legislation Revision and Formulation Activities Report - January 1 - September 30, 1982 prepared by the Assembly of First Nations in ca. October 1982 [06910]; LAC, RG 22, Acc. 1995-96/308, Box 31, File D1165-S1-3, Vol. 6, NWAC press statement dated September 1982 [00526]; DIAND, Main Records Office, File E1021-J1-8, vol.4, DIAND press release dated September 22, 1982 entitled "Minister to Review Recommendations by the Standing Committee" [0316].

[113] Canada, House of Commons, "Report of the Special Committee on Indian Self-Government," in *Minutes of Proceedings of the Special Committee on Indian Self-Government*, October 12 and 20, 1983, Issue No. 40, pp. 54-56 [POL-0287].

DIAND Indian band proposal."[114]

On the membership question, witnesses unanimously supported First Nations control of band membership, but disagreed on whether this should occur before or after native women and their children were reinstated. NWAC, for example, stated: "[Our basic position is that] ... Indian governments determine their own membership, but only after all of those so entitled have been listed or relisted on their band lists." The NCC took a similar position. Meanwhile, Indian bands rejected the notion of automatic reinstatement to band membership. The AFN maintained that: "It is up to the Indian governments across the country to resolve that and to put into place some just means of making sure that there is reinstatement or whatever it is they want to do." Several Aboriginal groups recommended a "two-tier" membership system that would allow reinstatement to a general band list, while still allowing bands to decide whether to admit these individuals as band members. Status would remain under the control of the federal government.[115]

The Special Committee's final report was tabled on November 3, 1983. As its overarching themes, the Penner Report (named after the Committee's chairman Keith Penner) endorsed the establishment of a "new relationship" with First Nations and the entrenchment of Aboriginal self-government in the Constitution. In the interim, the federal government should introduce an Indian First Nations Recognition Act. On the question of membership, it recommended the use of a General List "as a means of providing special status to people who are Indian for purposes of Indian programs, but who are not included in the membership of an Indian First Nation." The report did not provide recommendations on how to resolve the conflicting views on whether reinstatement to membership should be automatic or controlled by the band. The Penner Report's 58 recommendations were endorsed by all three parties in the House of Commons.[116]

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[114] Canada, House of Commons, "Report of the Special Committee on Indian Self-Government," in *Minutes of Proceedings of the Special Committee on Indian Self-Government*, October 12 and 20, 1983, Issue No. 40, pp. 54-56 [POL-0287]; LAC, RG 22, Acc. 1994-95/612, Box 13, File P1165-168-2, Vol. 1, John Munro's speaking notes for the Sub-Committee on Indian Self-Government, dated December 7, 1982 [02314].

[115] Canada, House of Commons, "Report of the Special Committee on Indian Self-Government," in *Minutes of Proceedings of the Special Committee on Indian Self-Government*, October 12 and 20, 1983, Issue No. 40, pp. 54-56 [POL-0287].

[116] Canada, House of Commons, "Report of the Special Committee on Indian Self-Government" in *Minutes of Proceedings of the Special Committee on Indian Self-Government*, October 12 and 20, 1983, Issue No. 40, pp. 54-56 [POL-0287]; PCO, File N-2-5 (a), letter dated November 17, 1983 from David Ahenakew, National Chief, National Indian Brotherhood to Members of Parliament [1665] .

The AFN fully supported the Penner Report and urged the government to act quickly to implement its recommendations. Harold Cardinal said: "we are pleasantly surprised with the direction this report has taken." Federal officials, however, rejected the notion of Indian authority beyond federal control and continued to press for band government legislation.[117]

While the Special Committee consulted Aboriginal groups between December 1982 and November 1983, the federal government waited for its final recommendations before bringing forward new proposals to amend the Indian Act. After the Penner Report was tabled, however, officials had little hope that a consensus could be found within the Indian community on how to end discrimination against Indian women. Moreover, the report's recommendations suggested that federal Indian Act amendments should not interfere with Indian government. Officials fully expected "opposition to amendments from Indian groups, especially from the AFN, whose main concern is the Constitution and the recognition of what they have called the third order of government, Indian Government." But with the Charter deadline looming, Munro was ready to act. A DIAND official noted in December 1983, "Based on the recommendations of the Standing Committee and taking into account the ideas put forward by the Special Committee, the Department is now in the process of drafting a cabinet memorandum."[118]

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[117] PCO, File N-2-5(a), letter dated November 25, 1983 from Peter [Mark] for David Ahenakew, National Chief, AFN to Prime Minister Trudeau [1671]; PCO, File N-2-5 (a), letter dated November 17, 1983 from David Ahenakew, National Chief, AFN to Members of Parliament [1665]; newspaper article entitled "MP fears disaster if rights rejected," in *Winnipeg Free Press*, November 5, 1983, p. 10; DIAND, Main Records Office, File A1025-1-1, Vol. 4, John Munro, Minister, DIAND, *Response of the Government to the Report of the Special Committee on Indian Self-Government*, March 5, 1984 [07853]; Weaver, "Self-Government for Indians, 1980-1990, pp. 12-13.

[118] LAC, RG 10, vol. 7972, File 62,131, vol. 2, letter dated May 24, 1983 from John Munro, Minister, DIAND, to Charles Wood, President of the Indian Association of Canada [0193]; PCO-1960, DIAND brief prepared in ca. March 1984 [4014]; Weaver, "First Nations Women and Government Policy 1970-1992," p. 111; LAC, RG 22, Acc. 1998-01695-1, Box 8, File D1021-J1-1-2, Vol. 20, DIAND brief dated December 8, 1983 entitled "Removal of Sex Discrimination from the Indian Act" [02052]; Canada, House of Commons, "Report of the Special Committee on Indian Self-Government" in *Minutes of Proceedings of the Special Committee on Indian Self-Government*, October 12 and 20, 1983, Issue No. 40, pp. 54-56 [POL-0287].

## *Chapter VI: Bill C-47: Canada's First Attempt to Implement a Non-discriminatory Membership Policy, 1984*

With the parliamentary-committee consultation process complete, DIAND officials set about creating a new Indian Act policy. Creating a new, non-discriminatory definition of Indian status and addressing past discrimination against native women and their children were seen as the core issues. DIAND's policy proposals were largely driven by the need to comply to the Charter and with the Lovelace ruling; the Subcommittee's report was also a factor. A 1983 Indian Affairs presentation to federal deputy ministers illustrates this, noting that the quarter-blood rule is "probably acceptable under the Charter" and that it "balances collective (band) and individual (child) rights." Although reinstatement is "not necessary under Charter" it is "necessary to bring us in line with international covenants (and Sub-committee)." However, reinstatement should be restricted to the first-generation children (e.g. half-blood) because "those that are 1/4 are further removed from reserve life." While these statements provide useful insight into DIAND policy thinking at the time, they lack detailed explanations.[119]

In March 1984, federal officials unveiled plans to bring forward two legislative packages - one to deal with ending discrimination against Indian women, the other with Indian band government.

First, on March 5th, Munro tabled in the House of Commons the government's official response to the Penner Report. Cabinet rejected the notion of enshrining self-government in the Constitution. Instead, the government would introduce framework legislation to establish Indian government. Indian band government legislation, Munro argued, would be a first step in changing the government's relationship with the Indian people. Keith Penner reacted negatively to the government response to his report, expressing great disappointment that it had "failed in effect to put much muscle on its bare bones acceptance of the principle of self-government."[120]

Secondly, on March 8th, Prime Minister Trudeau announced that Indian Act amendments to end discrimination against Indian women would, in the near future, be brought forward because the current membership provisions conflicted with the

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[119] LAC, RG 22, Acc. 1998-01695-1, Box 8, File D1021-J1-1-2, Vol. 20, DIAND presentation dated October 7, 1983 entitled "Discrimination - D.M.s: Outline of presentation by JC to DMs" [02054a].

[120] DIAND, Main Records Office, File A1025-1-1, Vol. 4, John Munro, Minister of Indian Affairs and Northern Development, *Response of the Government to the Report of the Special Committee on Indian Self-Government*, March 5, 1984 [07853]; LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, media transcript of CBC program "Our Native Land" dated March 17, 1984 [04600].

Canadian Charter of Rights and Freedoms and UN Conventions. The main components of the proposed amendments included a quarter-blood rule to define legal status in the future and a half-blood rule to determine eligibility for reinstatement of individuals affected by *past* discrimination. In other words, the second-generation descendants of mixed marriages (e.g. grandchildren or "quarter-bloods") born *after* the amendments would be eligible for legal status, whereas those born *before* the amendments would not be eligible. However, the amendments provided reinstated women and their first-generation children with an automatic right to membership.[121]

The government was pushing ahead with its own legislative agenda of ending discrimination against Indian women and strengthening Indian band government. As the Aboriginal leadership focussed its attention on the government's announced membership legislation, reaction to the Penner Report response was relatively muted. Indian leaders were greatly alarmed by the reinstatement proposal, angrily rejecting it in any form. "They're intruding on first nations governments jurisdiction again. We've made the position very clear. Correct your injustices and stay the hell away from our affairs," exclaimed David Ahenakew of the AFN. The Chiefs of the Treaty 6 Alliance warned that they would "go to jail rather than accept the federal government's proposal to reinstate Indian women who have lost their status through marriage to non-Indians ... The Alliance rejects all proposals to legislate the membership of First Nations calling it an 'invasion of our sovereignty.'" NWAC's concerns were that DIAND's reinstatement proposal didn't go far enough to include all the victims of past Indian Act discrimination.[122]

Indian leaders also had grave concerns over the impact of reinstatement on band resources, especially on reserve lands and band funds. Munro agreed to consider the possibility of providing additional resources to cope with the expected influx of reinstated band members. This did little to appease Indian bands, however, especially in Alberta, who were very resentful towards the reinstatement proposals. In April, Ahenakew wrote to the prime minister warning that reinstatement could go as far back "as the late 19th century" and that this "would be tantamount to genocide against the peoples of the First Nations and we cannot stand idly by and allow that to occur." At the very most, he argued, those being reinstated should be added to a general band list, as

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[121] DIAND, Main Records Office, File E1021-J1-2-1, vol. 14, DIAND press release dated March 8, 1984 entitled "Government Announced Plans to Eliminate Discrimination Against Indian Women" [0501]

[122] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, media transcript of CBC program "Our Native Land" dated March 17, 1984 [04600]; newspaper article entitled "Women follow men in traditional Indian society say chiefs", in *AMMSA*, May 25, 1984, p. 2; newspaper article entitled "Alberta chiefs walk out: Partial reinstatement accepted," in *AMMSA*, May 25, 1984, p. 3.

recommended in the Penner Report.[123]

In response to the reaction of Indian leaders, Trudeau withdrew the government's proposed amendments "indefinitely" in May, saying that he wanted to "avoid any suspicion of paternalism" and "grant Indians more time to heal an internal split over the protection of women's rights." Therefore, the government would wait a little longer before tabling its legislation to end discrimination against Indian women.[124]

While legislators waited and hoped that Aboriginal groups would sort out their differences over how to address the discrimination problem, the AFN and NWAC met in Edmonton from May 16th to 18th to listen to each other's concerns and attempt to formulate a common position, especially on the dicey issue of reinstatement. Both groups realized that, to meet its Charter requirements, the federal government would, sooner rather than later, act on its own to amend the Indian Act if Aboriginal leaders could not come to an agreement. Once again, NWAC and AFN succeeded in establishing a consensus, but it was one that cost the AFN much of its support from western Indian leaders.[125]

The main components of what became known as the Edmonton Consensus were a demand that the government reinstate Indian women who lost status and all their descendants (e.g. grandchildren) and that the "newcomers" would be reinstated to a "general" band list from where they could apply for "active" membership in bands. The Indian Association of Alberta, however, was furious that the AFN had accepted any form of reinstatement and left the conference in protest. The Alberta chiefs remained vehemently opposed to removing section 12(1)(b), arguing that they would not consider the issue until the possible effects of reinstatement have been examined and the federal government has promised more land and protection against law suits by reinstated women. Most of the chiefs from Manitoba and Saskatchewan also opposed the deal, which they demonstrated by abstaining from voting on the AFN resolution

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[123] Newspaper article entitled "Munro offers compromise over Indian Act changes," in *Globe and Mail*, May 19, 1984, p. 3; newspaper article entitled "Judy riles the reserves", in *Alberta Report*, May 28, 1984, pp. 8-10; PCO, File 2715-2, vol. 4, letter dated April 19, 1984 from David Ahenakew, National Chief of AFN to Prime Minister Trudeau [1567].

[124] Newspaper article entitled "Judy riles the reserves", in *Alberta Report*, May 28, 1984, pp. 8-10; newspaper article entitled "Indian women's bill could be introduced early: Erola," in *The Citizen* [Ottawa], May 25, 1984, p. 5.

[125] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 7, 1985, Issue No. 12, p. 13 [0313]; newspaper article entitled "Munro offers compromise over Indian Act changes," in *Globe and Mail*, May 19, 1984, p. 3.

endorsing the Consensus.[126]

The cornerstone of the Edmonton Consensus was the general band list concept. Borrowed from the Penner Report, the general band list would allow bands to determine the criteria for active membership. As explained by AFN representative Gary Potts: "A general list is the list that is primarily kept by Ottawa of people of Indian status, but are not allowed active participation within the community structure." Although the AFN would have preferred to "settle the whole business" in the context of self-government, Potts admitted "pressure is being created by the fact that the federal government is bringing in legislation to remove the 12 1 B discrimination clauses."[127]

NWAC's Marilyn Kane also acknowledged that government pressure to find some consensus was an important factor in reaching a compromise. She referred to the Consensus as an "interim measure" and was pleased that the AFN "at least agreed to reinstate women to a general list," emphasizing that NWAC had always supported the right of First Nations to determine their membership.[128]

IRIW, who were not invited to the meeting, totally rejected the concept of the general list. Jenny Margetts blasted the proposal: "Such conditions are unacceptable." Native women should have "full, fair treatment - the same as the men are getting ... It's really a hollow victory."[129]

In response to the Edmonton Consensus, DIAND pressed ahead with its Indian Act

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[126] Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12, March 7, 1985 [POL-0313]; newspaper article entitled "Munro offers compromise over Indian Act changes", in *Globe and Mail*, May 19, 1984, p. 3; newspaper article entitled "Alberta chiefs walk out: Partial reinstatement accepted," in *AMMSA*, May 25, 1984, p. 3.

[127] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, media transcript, CBC, May 17, 1984 [04594]; newspaper article entitled "Alberta chiefs walk out: Partial reinstatement accepted", in *AMMSA*, May 25, 1984, p. 3; newspaper article by Margaret Mironowicz entitled "The Indian women's fight to end double standard," in *Globe and Mail*, June 5, 1984, p. 7.

[128] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, media transcript, CBC, May 17, 1984 [04594]; newspaper article entitled "Alberta chiefs walk out: Partial reinstatement accepted", in *AMMSA*, May 25, 1984, p. 3; newspaper article by Margaret Mironowicz entitled "The Indian women's fight to end double standard," in *Globe and Mail*, June 5, 1984, p. 7.

[129] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, media transcript, CBC, May 17, 1984 [04594]; newspaper article entitled "Alberta chiefs walk out: Partial reinstatement accepted", in AMMSA, May 25, 1984, p. 3; newspaper article by Margaret Mironowicz entitled "The Indian women's fight to end double standard," in *Globe and Mail*, June 5, 1984, p. 7.

amendment package. In June 1984, a DIAND official announced that the amendments had passed through Cabinet and that the legislation was being drafted. Officials also warned, however, that the amendments would *not* meet all the conditions recently agreed to by the AFN and NWAC and that there might not be enough time for the bill to pass into law before the summer recess. The difficulty in finding an agreement among Aboriginal groups was blamed for the delay in tabling the legislation. Another factor that complicated the timing of the bill was the Liberal leadership campaign to replace Prime Minister Trudeau, who had announced his retirement earlier that year. The leadership convention to replace Trudeau was held in June and Munro was one of the leadership candidates. Some observers suggested that Munro was deliberately delaying the proposed amendments to prevent any interference with his leadership ambitions.[130]

On June 18, 1984, a little more than a week before Parliament adjourned for summer recess, the Liberals introduced Bill C-47, *An Act to amend the Indian Act*. The main components of the bill were:

- status and membership would not be determined on the basis of gender;
- Indian status would not be lost or acquired through marriage;
- in the *future*, status and membership would be provided to individuals with at least one-quarter descent from individuals registered as Indians;
- Indian women who, in the *past*, lost status through the Act's discriminatory membership provisions, and their first-generation children, would be automatically eligible for regaining both status and membership;
- non-Indian spouses would have the right to live on reserve.

DIAND estimated that approximated 30,000 "non-status" women and 40,000 children would be eligible for status and membership under Bill C-47. The quarter-blood descendants of "12(1)(b) women", on the other hand, would be eligible for neither status nor membership. Nor did the bill provide band control of membership. After a two-year waiting period, both reinstated women and their children would be

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[130] Newspaper article by Margaret Mironowicz entitled "The Indian women's fight to end double standard", in *Globe and Mail*, June 5, 1984, p. 7; newspaper article by Jeff Sallot entitled "Ottawa move to eliminate Indian Act sex discrimination," in *Globe and Mail*, June 19, 1984, pp. 1 and 4. On Munro's leadership ambitions, an article in the Ottawa Citizen claimed that Munro "has taken the necessary step [of introducing amendments to the Indian Act] - but at a time when the effort is almost meaningless, with a mere week of sitting days left, and perhaps conveniently, after the Liberal Leadership Convention. Munro might have feared losing some of his native power base had he pressed ahead sooner." Campaign workers for Munro's leadership opponent, John Turner, made similar accusations. See newspaper article "Rather late than never," in *Ottawa Citizen*, June 20, 1984, p. 8; and newspaper article by Jeff Sallot entitled "Ottawa move to eliminate Indian Act sex discrimination," in *Globe and Mail*, June 19, 1984, pp. 1-4.

automatically transferred from the departmental “General List”, which would operate during this period as an “Interim Band List”, to the active membership lists. The departmental General List was first established in 1951 for individuals who were not members of a band but were entitled to be registered as Indians.[131]

Following First Reading of Bill C-47, Munro was asked why the government decided not to allow bands control over membership. He appeared apprehensive about the absence of band control of membership in the bill:

> I find it difficult to respond to it. They, but, [sic] it’s our decision for which I take the political responsibility for that because there’s a feeling of reluctance out there in certain areas of the Indian community, it was decided that if we’re going to conform with the United Nations stipulations that we agreed to, as well, as our own charter, we would have to ensure not only that those re-instated women, got on the general list, we would have to ensure they got on the band list as well.[132]

On June 26, 1984, three days before summer recess, SCIAND began its review of Bill C-47. During his brief appearance, Munro was again questioned as to why the government had decided against band control of membership and the reinstatement of the grandchildren of Indian women affected by past discrimination. Munro argued that band control of membership would be for the future and would be done in the context of the government’s pending Indian self-government bill; moreover, in view of the Lovelace ruling, denying reinstatement to band membership would make a “mere mockery” of the government’s objective of “finally doing away with this discrimination” against Indian women. He defended the government’s position on restricting reinstatement to first-generation children by arguing that the second-generation individuals were “so remote from the culture of the Indian community over so many years ... The person may not be very Indian who is going to take advantage of this provision.” As well, there was the question of costs. If, Munro argued, “you do include grandchildren, and do it on the same basis that we are recommending to the people

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[131] DIAND, Main Records Office, File E1021-J1-1, vol. 24, DIAND brief dated ca. June 1984 [0054]; LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-9, Vol. 1, DIAND brief sheet prepared in June 1984 entitled “Bill C-47" [03008]; Canada, Bill C-47, *An Act to Amend the Indian Act*, First Reading, June 18, 1984 [POL-0288]; DIAND, Main Records Office, File E1021-J1-1, vol. 24, "Speaking Notes for ... John C. Munro .... on Amendments to Remove Sex Discrimination from the Indian Act," dated June 18, 1984 [0053]; DIAND, Main Records Office, File D1021-J1-1-8, vol. 1, transcript of press conference with John Munro, Minister of DIAND, dated June 18, 1984 [0513]; *The Indian Act*, S.C. 1951, c. 29, clause 6.

[132] DIAND, Main Records Office, File D1021-J1-1-8, vol. 1, transcript of press conference with John Munro, Minister of DIAND, dated June 18, 1984 [0513]; LAC, RG 10, Acc. 1997-98/374, Box 11, File E1021-J1-2-2, Vol. 22, media transcript of CBC interview, dated June 23, 1984 [02190].

who lost their status plus their children, that after two years they would be entitled to band membership, then you are running into a horrendous cost, because they are entitled to come back to the reserves and everything else." He estimated more than 70,000 descendants could be eligible for status under a quarter-blood registration scheme. Furthermore, stated one of Munro's officials:

> The question of reinstatement, the question of dealing with unfairness that may have existed in the past, has been seen not as a matter that the government must deal with because of the charter but as a matter for policy which the government should deal with as a matter of fairness.[133]

Although its time to review Bill C-47 was limited, SCIAND heard from several Aboriginal witnesses, including NWAC, AFN, NCC, IRIW, Indian Association of Alberta (IAA), Coalition of First Nations, and the Brotherhood of Indian Nations. It became clear during the hearings that these organizations all opposed Bill C-47, often for different reasons.

The testimony of AFN, NWAC, IRIW, and IAA illustrates the core criticisms of Bill C-47 as well as differing views on Indian Act policy. As a reflection of their Edmonton Consensus, AFN and NWAC made a joint presentation that both demanded the reinstatement of "all generations who lost status as a result of discrimination" and denounced the bill's encroachment "on the fundamental aboriginal right of each first nation to define its own citizenship."

The main points of the NWAC-AFN presentation included:

- The federal government must delete all of the Indian Act's discriminatory provisions.
- All generations of Indian ancestry affected by past discrimination must be reinstated. NWAC charged that the government was permitting "new divisions within Indian families" by using a quarter-blood rule for future generations but only a half-blood for reinstatement.
- People of Indian ancestry affected by past discrimination must be entered unto "general band lists" that will be administered by DIAND.
- Bands must control the "active band lists". The "orderly transfer" of band members from the general lists to the active lists would occur within a two-year period. However, "[p]rocedures for registration are expected to be developed in

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[133] Newspaper article entitled "Parting thought," in *The Sun*, June 26, 1984, p. A4; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 26, 1984, Issue No. 17, pp. 15-16 [0237].

conjunction with our representatives. Criteria for entry to the active band list is to be developed by the band and will be managed accordingly."

- Bands must have exclusive control over residency rights.
- After reinstatement of those affected by past discrimination, the federal government must never again interfere with "the fundamental aboriginal right of each first nation, to determine its own membership."

SCIAND asked AFN and NWAC to explain the difference between their conceptions of "general band lists" and "active band lists." Essentially, the Committee wanted to know whether the AFN believed that individuals on general band lists had guaranteed rights to active membership; yet, much of the testimony is confusing and ambiguous.[134] Nonetheless, the next day, AFN National Chief David Abenakew provided a summary of the Edmonton Consensus, which sheds some light on the AFN's distinction between general and active bands lists:

> [The Penner Report] recommended First Nations control over reinstatement to a general list. The AFN proposes to go further than that - and the Native Women agreed with us, on May 17, 1984. They propose the removal of all discrimination, including Section 12(1)(b), the reinstatement in the general list of all generations who lost status or were never registered, the recognition of First Nations' control of and jurisdiction over citizenship. Bands will then determine who gets on active band lists. Bands only will determine the residency of non-Indians and non-members.

In Ahenakew's view, bands would ultimately decide who gets on the active band list. He recommended an "appeal mechanism of the governments themselves, that is, the Indian governments" to provide a recourse for individuals on the general band lists who were not accepted onto the active band lists. Ahenakew insisted that "this is not a women's issue strictly. It is a First Nations issue."[135] However, Judy Erola, Minister Responsible for the Status of Women, asserted that "this strictly is an issue of equality."[136]

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[134] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 26, 1984, Issue No.17, pp. 69, 70-71 [0237].

[135] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 27, 1984, Issue No. 18, pp. 5-7 [ 0236].

[136] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 28, 1984, Issue No. 19, p. 18 [ 0235].

Like NWAC, Mary Two-Axe Early, appearing as an IRIW member, warned that Bill C-47 would divide grandchildren within the same family:

> There are harmful provisions in the Bill. Those of us who are grandmothers will see our daughters divided. The little ones born to our daughters before June 30 will remain non-Indians; the little ones yet to come will be Indian. What a bitter legacy this government leaves the Indian people.

Although IRIW and NWAC held a similar view toward the reinstatement of descendants of Indian women, they differed over the membership issue. Margetts of the IRIW asserted: "In principle, we can agree with the concept that native communities should have control over their own affairs, including membership. However, control over membership basically can only mean the maintaining of records of those who are born into membership within the band." The general list, she argued, would deny Indian women their ancestral rights: "We are status and treaty natives, with full band membership rights. To accept anything less would be a betrayal of what we have fought for 15 years and of what our forefathers intended for us, the aboriginal people."[137]

IAA told SCIAND that because it contravened section 35 of the Constitution Act, Bill C-47 was unconstitutional. It recognized that Canada's objective in creating the bill was to meet its Charter obligations; however, "Collective rights in Section 35 cannot be abrogated by the individuals rights protection in the Charter," the Association asserted.[138]

On June 27, 1984, Munro tabled Bill C-52, the government's Indian self-government legislation. Bill C-52 was described as an enabling bill that set out a general framework for bands to be recognized as Indian Nation Governments, but only if they opted to do so. An important feature of Bill C-52 was that it allowed band governments control over membership - but bands could not override the government's reinstatement policy under Bill C-47. At a press conference following the First Reading of Bill C-52, Munro advised that the "amendments to remove discrimination from the Indian Act which I tabled last week include reinstatement provisions. It is intended that any members reinstated as band members under the provisions would be eligible to be members of an Indian nation seeking recognition." Bill C-52, explained Munro, "flows from the federal response to the report of the Special Committee on Indian Self-Government

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[137] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 27, 1984, Issue No. 18, pp. 40-41 [0236].

[138] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 28, 1984, Issue No. 19, p. 30 [0235].

released in March, 1984." Yet, Bill C-52, primarily introduced for discussion purposes, never made it past the first reading. It died on the Order Paper when an election was called that summer.[139]

After some minor amendments, Bill C-47 received third reading in the House of Commons on June 29, 1984. Munro once again defended the government's decisions, asserting that it had sound legal reasons for denying bands control of membership.

> Let me say to these people that I have a legal view which casts doubt on that suggestion....If we gave the bands the power to decide band memberships, indeed it could be struck down by the Charter. If we gave the bands power to decide band membership, we can be sure - and this is true - that people would be treated differently from one band to another. Of course they would be. There are 600 or more bands in the country. Since they would be treated in many cases differently from one band to another, and since they would all have lost their membership for that reason - it would be contrary to Section 15 of the Charter.

Munro also responded to criticisms over the bill's reinstatement scheme by challenging the Opposition, should they win the upcoming election, "to increase the potential number of returning Indians from 70,000 to 140,000 people by taking the reinstatement back to the grandchildren of those who lost their status."[140]

MPs expressed reservations towards Bill C-47, due in part to the short three-day period allotted to SCIAND to review the bill. Yet they were also loath to block it, feeling that to do so would amount to denying Indian women an "historic occasion" to achieve equality. One MP stated: "We will hold our noses and swallow the medicine and see it

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[139] DIAND, Main Records Office, File E1021-J1-8, vol. 5, DIAND communiqué dated June 27, 1984 entitled "Minister introduces Indian Self-Government Legislation" [0334]; Canada, *Bill C-52, An Act relating to self-government for Indian Nations*, First Reading, June 27, 1984; LAC, RG 85, Acc. 1997-98/603, Box 36, File N1165-S11, Vol. 2, speaking notes dated June 27, 1984 for John Munro, Minister of DIAND [03805]; LAC, MG 35, A-148, Crombie Box 16-4, Bill C-31, DIAND briefing note dated November 16, 1984 [1298]; LAC, RG 10, Acc. 1999-01284-4, Box 4, File N1021-J2, Vol. 2, draft letter prepared ca. July 1984 from Douglas C. Frith, Minister, DIAND to Sheila Keet, Director, Women's Bureau, Department of Justice and Public Services, Government of the Northwest Territories [06381].

[140] Canada, *Debates of the House of Commons*, June 29, 1984, 5336- 5337 [POL-0291]; Canada, *Debates of the Senate*, June 29, 1984, p. 903; Canada, *Debates of the House of Commons*, June 29, 1984, pp. 5327-5341 [POL-0291]; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, June 28, 1984, Issue No. 19, pp. 87-88 [0235]; Bill C-47, *An Act to amend the Indian Act*, June 18, 1984; Bill C-47, *An Act to amend the Indian Act*, June 29, 1984 [0235].

[Bill C-47] go through." Thus, Bill C-47 was supported by all three parties and sent to the Senate.[141]

Because it was the last sitting day of the thirty-second Parliament, the bill required unanimous consent for it to be passed in the Senate before Parliament adjourned for the summer. Unanimous consent, however, would not be granted. NWAC and AFN had lobbied some Senators to reject Bill C-47, including Senator Charlie Watt, an Inuit from northern Quebec. An angry Judy Erola confronted Watt just before the Senate vote: "Erola stormed into the coffee shop. Sensing the rebellion, she aimed her remarks at Inuit Senator Watt. She declared: 'If the Liberals lose the election, it will be on your head.'" Erola's threats, however, were ignored. Two senators, one of whom was Watt, denied unanimous consent and Bill C-47 died on the Senate Order Paper when an election was called that summer. A newspaper report claims that "two senators applied a rarely used procedural trick that put the bill on a backburner. When Parliament was dissolved for the election, the unfinished bill died on the order paper. But the death [of Bill C-47] went largely unnoticed as John Turner's ascendancy to prime minister grabbed the headlines."[142]

After the years of controversy over native women's rights and with the imminent deadline of the Charter's equality provision, it may seem surprising that the government waited until the last few days of the parliamentary session to introduce Bill C-47. The Liberal leadership campaign was a contributing factor as it distracted Liberal ministers, including John Munro who was a candidate. But it also appears that the government was still reluctant to amend the Indian Act "over the heads" of Indian leaders. Although Canadian officials no longer expected to achieve a consensus within the Aboriginal community, the angry reaction towards the Liberal amendment proposals was sufficient to make Trudeau temporarily retract them in May 1984.

The Edmonton Consensus of May 1984 was an historic occasion in that it was the first time native women and Indian leaders had formally agreed on the highly contentious issue of reinstating women affected by past discrimination. The government, however, rejected the two main tenants of the Consensus: reinstatement of all generations affected by past discrimination; and adding these individuals to a general band list.

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[141] Canada, *Debates of the House of Commons,* June 29, 1984, pp. 5333-5334 [POL-0291].

[142] Newspaper article "Anti-discrimination law discriminates - Indians," in *Whitehorse Star*, September 17, 1984 [0538]; newspaper article entitled "Coffee shop showdown: How the Indians halted the feminist cavalry," in *The Alberta Report*, July 23, 1984, p. 7; Canada, *Debates of the Senate*, June 29, 1984, p. 903; Canada, *Debates of the House of Commons*, June 29, 1984, pp. 5327-5341 [POL-0291]; newspaper article entitled "PC optimistic he can improve Indian Act", in *Winnipeg Free Press*, November 8, 1984, p. 58.

Government officials believed that the primary objective of Indian policy was to fulfill Canada's obligations under the Charter and the UN conventions. They viewed reinstatement beyond the first-generation children unnecessary to fulfill these obligations; moreover, Munro had argued that it was too costly. The general band list was rejected because officials believed that denying reinstated women and their children full membership rights would conflict with UN covenants and the Charter.

Full reinstatement to status and membership rights of 12(1)(b) women and their first-generation descendants was an unyielding cornerstone of the 1984 policy that led to Bill C-47. Nevertheless, the Liberals failed to pass Bill C-47 into law. The bill satisfied neither native women's groups nor Indian associations. As the clock ticked towards the April 1985 deadline for bringing its legislation into line with the Charter's equality provision, DIAND took note of Aboriginal criticisms of Bill C-47 and began re-evaluating its policy options. The federal election in fall 1984 brought to office a new government that was willing to make one more effort to achieve a consensus within the Aboriginal community.

## *Chapter VII: Bill C-31: Canada Adopts a New Indian Act Policy, 1985*

During the 1984 election campaign, Conservative Leader Brian Mulroney promised that the Tories would deal with the problem of discrimination against Indian women on "an emergency basis". When the Conservatives took office in September 1984, they had only six months to act on this issue. Once the Charter's equality provision came into effect in April 1985, officials believed that the Indian Act's membership provisions would likely be struck down by the courts. Without a non-discriminatory alternative to the current membership provisions, DIAND could be left without an Indian registration system, leading to wide-spread confusion over who should and should not have legal Indian status. One official warned that: "Not to amend the Act would not only be a dereliction of responsibility on the part of the federal government, but would lead to chaos".[143]

Thus, Canada's "minimum legal obligation" under the Charter was to remove the Act's discriminatory provisions. Officials also had to address the issue of reinstating native women affected by section 12(1)(b), and their descendants. Reinstatement, they believed, was not a Charter issue: "There would appear to be no legal obligations to provide for any reinstatement for individuals who lost status as a result of sexually discriminatory provisions of the Indian Act." But because of Canada's obligations under the international agreements - namely the Covenant of Civil and Political Rights - officials believed that there were "compelling reasons" to consider reinstatement options.[144]

Finding a consensus among Aboriginal groups, especially towards the reinstatement issue, was still the greatest obstacle to amending the Indian Act. Aboriginal groups were unwilling to reconsider their positions. The AFN warned: "We are not going to change our stance. The right to decide band membership belongs totally to each first nation." Grand Chief of the Nishnawbe-Aski Nation wrote to the new Minister of Indian

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[143] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-9, Vol. 1, DIAND paper prepared in ca. November 1984 entitled "Sexual Equality and Indian Band Membership" [03026]; LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, DIAND media transcript dated December 16, 1984 [04581]; newspaper article in the *Winnipeg Free Press* on March 13, 1985 entitled "Indian bands denounce bill" [0578n]; newspaper article by Susan Riley entitled "Indian woman split on how government should rule on discriminatory clause," in *The Ottawa Citizen*, December 4, 1984, p. A12; PCO, File 1230-J1-3, vol. 3, letter dated January 21, 1985 from Chaviva Hosek, President of Action Committee on the Status of Women, to David Crombie, Minister of DIAND [0235].

[144] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-9, Vol. 1, DIAND paper prepared in ca. November 1984 entitled "Sexual Equality and Indian Band Membership" [03026]; LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, DIAND media transcript dated December 16, 1984 [04581].

Affairs, David Crombie, to express his concerns: “The Nishnawbe-Aski Nation is very concerned that the Government of Canada in repealing the discriminatory aspects of the Indian Act must not go beyond and intrude upon the rights of the Nishnawbe-Aski nation. The federal government must respect the cultural integrity of the Nishnawbe-Aski Nation and its member bands.”[145]

IRIW, on the other hand, wrote to newly-elected Prime Minister, Brian Mulroney, demanding “immediate reinstatement of all Indian women and their descendants to their individual bands. Entitlement to Indian status and band membership would be based on at least one quarter blood quantum.” A group of native women from British Columbia and New Brunswick broke with NWAC over its support of the “general band list” principle and formed the Aboriginal Women’s Coalition. The Coalition, which had the support of the National Action Committee on the Status of Women, demanded that native women be directly reinstated to their reserves. But for NWAC, the issue of Indian self-determination had overriding importance. “This is not a sexual equality issue, this is an Indian issue,” Marilyn Kane maintained.[146]

Nevertheless, David Crombie, the new Minister of Indian Affairs, soon gained popularity within the Indian community and was optimistic that by consulting widely with Aboriginal groups, a workable solution could be found. In fact, Crombie believed that the new Conservative government could do better than the “old one” at dealing with discrimination against Indian women. “Despite my normal, cheerful demeanor, I’m always very clear about what I think can be done and I don’t normally over-promise,” he stated.[147]

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[145] Article entitled “PC optimistic he can improve Indian Act,” in *Winnipeg Free Press*, November 8, 1984, p. 58; newspaper article by Susan Riley entitled “Indian woman split on how government should rule on discriminatory clause,” in *The Ottawa Citizen*, December 4, 1984, p. A12; DIAND, Main Records Office, File D1021-J1-1-2, vol. 25, Dennis Cromarty, Grand Chief, Nishnawbe-Aski Nation to David Crombie, Minister of Indian Affairs and Northern Development, November 7 [0904].

[146] LAC, RG 22, Acc. 1998-01695-1, Box 9, File D1021-J1-1-2, Vol. 27, letter dated January 1, 1985 from Jenny Margetts, President, IRIW to Brian Mulroney, Prime Minster of Canada [00881]; LAC, RG 14, Accession 1996-97/193, Box 81, File 5900-331-I1, P 33, Wallet 6v, paper prepared in February 1985 by Mildred J. Morton, Library of Parliament, entitled “Amending the Indian Act to Eliminate Gender Discrimination: an Overview of the Issues,” prepared for the House of Commons Standing Committee on Indian Affairs and Northern Development [0124]; and newspaper article by Susan Riley entitled “Indian woman split on how government should rule on discriminatory clause,” in *The Ottawa Citizen*, December 4, 1984, p. A12.

[147] Article entitled “PC optimistic he can improve Indian Act”, in *Winnipeg Free Press*, November 8, 1984, p. 58; DIAND, Main Records Office, File D1021-1-8, vol. 1, transcript of an interview with David Crombie, Minister of DIAND, on the CBC program *Morningside*, dated October 30, 1984 [0541]; Weaver, “First Nations Women and Government Policy, 1970-92,” p. 115.

While Crombie consulted extensively with Aboriginal groups across the country, hoping to find some common ground between Indian leaders and native women's groups, his officials re-evaluated the policy options that had formed the basis of government policy thinking since the early 1980s. They outlined three "strategic options" for both eliminating future discrimination and rectifying past discrimination through reinstatement. These were:

- an Indian Act regime providing a uniform, non-discriminatory status and membership criteria;
- band by-law regime providing bands with control over status and membership;
- mixed jurisdiction regime providing federal control of status and band control of membership.

Officials believed that, unlike Bill C-47, a "1/2 or 1/4 Indian blood quantum" rule should apply to the "same degree" to those who acquired Indian status in the future and to those affected by past discrimination.[148]

While DIAND acknowledged the need for reinstatement, officials noted that: "Control of Band membership is being sought by most Indian communities and any new legislation will have to include some degree of such control to gain Indian/support." The strong reaction by Indian groups against federal control of band membership during the Bill C-47 review appears to have influenced DIAND policy thinking.[149]

Crombie rejected Bill C-47 as a solution to the "12(1)(b) issue". Bill C-47, he argued, flew in the face of the Penner Report and the principles of self-government, which Crombie fully endorsed, because it did not respect the "integrity of Indian communities to determine their own membership." Moreover, Crombie also rejected the notion that the problem of ending discrimination was "only a women's issue", arguing that because of the social and economic implications of reinstatement on many bands, "it is also an Indian issue." He told SCIAND, "what we need to do is have a replacement for Bill C-47" before the Charter's equality provisions came into effect in April 1985. Crombie set out to develop an amendment package that struck a balance between the rights of native women to equality and of Indian bands to self-government, a dichotomy often

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[148] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-9, Vol. 1, DIAND paper prepared in ca. November 1984 entitled "Sexual Equality and Indian Band Membership" [03026].

[149] LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-9, Vol. 1, DIAND paper prepared in ca. November 1984 entitled "Sexual Equality and Indian Band Membership" [03026].

characterized as individual vs collective rights.[150] In a CBC interview broadcast in October 1984, Crombie outlined the three principles that would form the basis of his government's new amendment proposals:

> One, clearly, that the discrimination must be gotten rid of immediately. Secondly, that the concept and the idea of reinstatement is something that we must consider and accept. Thirdly, that in doing so we must recognize and affirm the integrity of Indian communities to be able to determine their own membership.

He told SCIAND: "My own view is that it is possible to arrive at a consensus so that we can accommodate all three principles. It will not be easy."[151]

In December 1984, Crombie invited representatives from the native women's groups and Indian associations to attend a "membership" workshop to discuss their ideas on reinstatement and band control of membership. After reiterating his commitment to band control of membership, Crombie strongly urged the groups to work together to find common ground, warning, "it would be difficult to move forward with a bill if some consensus - or near consensus - is not reached by interested and affected parties."[152]

After the workshop, Indian Affairs officials felt that there was "broad agreement" among Aboriginal leaders on need to amend the Indian Act, federal control of Indian status, reinstatement to status without financial compensation, band control of membership "at least in the long run," and additional land and financial resources for bands affected by reinstatement. But, they also noted that the precise meaning of the general band list "is unclear"; moreover, IRIW insisted on reinstatement to band membership while others, including NWAC, "want 'self-determination' recognized in band membership."[153]

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[150] DIAND, Main Records Office, File D1021-1-8, vol. 1, transcript of an interview with David Crombie, Minister of DIAND, on the CBC program *Morningside*, dated October 30, 1984 [0541]; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 3, December 4, 1984, pp. 4-13 [9019].

[151] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 3, December 4, 1984, pp. 4-13 [9019].

[152] LAC, MG 35, A-148, Crombie Box 25, Bill C-31, DIAND speaking notes prepared in ca. December 1984 [1378]; LAC, RG 22, Acc. 1998-01695-1, Box 13, File D1021-J1-1-8, Vol. 1, DIAND media transcript dated December 16, 1984 [04581].

[153] LAC, MG 35, A-148, Crombie Box 25, Bill C-31, DIAND brief entitled "Significance of the Sunday Workshop" and dated December 18, 1984 [1350].

DIAND began preparing its proposals to eliminate discrimination from the Indian Act in January 1985. On the verge of introducing its amendments, one of Crombie's Cabinet memos was leaked to the AFN in February 1985. The document, cited extensively in media reports, recommended the reinstatement of women who lost status and their children. While bands would be allowed to decide on membership in the future, Indian women who lost status through past discrimination would have an automatic right to membership. The first-generation children of these women, however, would not have an automatic right to membership.[154]

Aboriginal groups denounced Crombie's proposals. NWAC charged that the reinstatement proposals did not go far enough. Grandchildren of Indian women who lost status should be reinstated. "But then it would be up to bands to determine who should qualify for active band membership, which entitles them to access to such things as reserve housing, education and health care." The AFN, however, warned that "we're not going to accept something that takes away from our jurisdiction on citizenship."[155]

Crombie, nonetheless, pressed ahead with his amendments and on February 28, 1985 tabled Bill C-31, DIAND's new legislation to amend the Indian Act. The main points of Bill C-31 were:

- Removing all discriminatory provisions.
- Preventing anyone from gaining or losing status through marriage.
- Restoring status and membership rights to people who had lost them through past discrimination.
- Restoring of status, but not membership, to the first generation children of those who had lost them through past discrimination.
- Providing band control of membership for the future.
- Respecting rights acquired under the current Indian Act. In other words, neither non-Indian women who acquired legal status through marriage (under section

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[154] LAC, RG 22, Acc. 1995-96/308, Box 7, File D1021-33-1-C-31, Vol. 1, Theresa Nahanee, Legislative Assistant to David Crombie Minister of DIAND, to Bruce Rawson, Deputy Minister of DIAND [00046]; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 25, March 26, 1985, p. 12 [0279]; newspaper article entitled "Indian Act amendments to cost up to $420 million, memo says," in *Winnipeg Free Press*, February 19, 1985, p. 15 [02139bb]; newspaper article entitled "Indian Act proposal before Cabinet: Sex discrimination bill discussed," in *Globe and Mail*, February 19, 1985, p. 5; newspaper article entitled "Crombie proposal to fix Indian Act meets resistance," in *Globe and Mail*, February 20, 1985, p. 3 [GAP-02139z].

[155] Newspaper article entitled "Native groups give leaked bill mixed response," in *Winnipeg Free Press*, February 26, 1985, p. 18 [02139u]; newspaper article entitled "Indian Act amendments to cost up to $420 million, memo says," in *Winnipeg Free Press*, p. February 19, 1985 [02139bb].

11(1)(f)) nor their children would lose any of their rights.[156]

Bill C-31 defined two main categories of status Indians:

- Section 6(1) assigned status to all those who were currently registered Indians, members of new bands created after the amendments came into effect, and those who had lost status under the discriminatory sections of the Indian Act e.g. (12(1)(b)). Individuals registered under section 6(1) could transmit status to their children regardless of whether they had married an Indian or non-Indian.
  - The children with one parent registered under section 6(1) and one parent registered in either 6(1) or 6(2) would be registered under section 6(1).
  - The children with one Indian parent registered in section 6(1) and one non-Indian parent would be registered under Section 6(2).
- Section 6(2) assigned status to all those with only one Indian parent registered under section 6(1) (e.g. children of 12(1)(b) women). Individuals registered under section 6(2) could only transmit status to their children if they married an Indian registered under either section 6(1) or 6(2).
  - Children with one parent registered under section 6(2) and one parent registered under either section 6(1) or 6(2) would be registered under section 6(1).
  - Children with one parent registered under section 6(2) and one non-Indian parent would *not* be entitled to legal status.

Section 6(2), then, established a second-generation cut-off rule for acquiring Indian status. Therefore, the grandchildren of 12(1)(b) women would not be entitled to Indian status. And unlike Bill C-47, Bill C-31's second-generation cut-off rule was applied to both individuals affected by past discrimination and to future generations.[157] The

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[156] DIAND, Main Records Office, File D1021-J1-1, vol. 7, transcript of remarks by David Crombie, Minister of DIAND, during a Press Conference on Indian Act Amendments, dated February 28, 1985 [0570].

[157] DIAND, Main Records Office, File D1021-J1-1, vol. 7, transcript of remarks by David Crombie, Minister of DIAND, during a Press Conference on Indian Act Amendments, dated February 28, 1985 [0570]; LAC, RG 22, Acc. 1995-96/308, Box 7, File D1021-33-1-C-31, Vol. 1, DIAND presentation prepared ca. February 1985 [03993]; LAC, RG 10, Acc. 1999-01284-4, Box 4, File N1021-J2, Vol. 2, DIAND paper prepared in ca. July 1985 entitled "Key Amendments to the Indian Act - A Summary" [06377c]; DIAND, Main Records Office, File D1021-J1-1-11, vol. 1 DIAND paper prepared in ca. February

following table further illustrates the transmission of Indian status under Bill C-31:

**Table A**
**Registration scheme under Bill C-31**

| Parent 1 | | Parent 2 | | Child |
|---|---|---|---|---|
| 6 (1) | + | 6(1) or 6(2) | = | 6(1) |
| 6 (1) | + | non-Indian | = | 6(2) |
| 6 (2) | + | 6(1) or 6(2) | = | 6(1) |
| 6 (2) | + | non-Indian | = | non-Indian |

Bill C-31, for the first time, formally separated legal status and band membership. The federal government would continue to control legal status; bands, however, would have the right to determine their own membership for the future, in accordance to their own rules, if they chose to do so. A band that chose not to take control of its membership would be governed by Section 11, under which band membership would be automatically conferred to all status Indians listed as members of the band, as under the previous Indian Act regime. Section 10, on the other hand, set out the requirements for a band to assume control of its own membership list and the transfer of federal responsibility for that list to the bands. Band control of membership, however, was subject to two principles: 1) band rules must be approved by a majority of band electors; and, 2) band rules must protect acquired rights of existing band members and those eligible to have their membership restored - namely Indian women who lost status under section 12(1)(b).[158]

Unlike Bill C-47, Bill C-31 did *not* provide first-generation children of reinstated women with an acquired right to band membership; however, it did provide them with a "conditional" right to membership. This meant that these individuals would be automatically provided with band membership ("acquired right" principle) if, following a two-year transitional period which began once Bill C-31 came into force, a band opted not to assume control of its membership. If a band chose not to adopt its own membership code, or neglected to do so, within the two-year transitional period, its membership would automatically be placed under the federal regime whereby status confers membership. A band could still assume control of its membership after the two-year period, but the acquired rights of the first-generation children of reinstated women

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1985 and entitled Background Notes: Removal of Discrimination from the Indian Act [0217f].

[158] LAC, RG 10, Acc. 1999-01284-4, Box 4, File N1021-J2, Vol., DIAND paper prepared in ca. July 1985 entitled "Key Amendments to the Indian Act - A Summary" [06377c]; DIAND, Main Records Office, File D1021-J1-1-11, vol. 1, DIAND paper prepared in ca. February 1985 entitled "Background Notes: Removal of Discrimination from the Indian Act" [0217f].

would be protected.[159]

Bill C-31 also provided bands with greater by-law powers to regulate residency rights and allowed bands to accept as members people who were not registered as status Indians. DIAND estimated that the amendments would affect approximately 22,000 victims of past discrimination and approximately 46,000 first generation descendants of these people. Officials expected that 70 to 80 percent of those entitled to do so would apply for reinstatement and that 10 to 20 percent of those eligible for band membership would return to reserve. They also estimated that the Bill C-31 amendments would cost between $295 million and $420 million over a five year period.[160]

During a press conference on the day Bill C-31 was tabled, Crombie maintained that the basic principles of his bill were the elimination of discrimination, restoration, and band control of membership, the same principles he had emphasized during the CBC interview in October. Overall, Crombie was satisfied with the new bill.

> Did it go too far? Should it have done better? I don't know. I did the best I could; and that best strikes a balance between individual and collective rights ... I think it draws a balance, an acceptable balance between individual and collective rights and I think it passes the test of fairness. So that is why, whatever happens to the criticism, I am open to new approaches so long as they respect those three principles, but I am at peace. I have consulted and done my best.[161]

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[159] LAC, RG 10, Acc. 1999-01284-4, Box 4, File N1021-J2, Vol. 2 , DIAND paper prepared in ca. July 1985 entitled "Key Amendments to the Indian Act - A Summary" [06377c]; DIAND, Main Records Office, File D1021-J1-1-11, vol. 1, DIAND paper prepared in ca. February 1985 entitled "Background Notes: Removal of Discrimination from the Indian Act" [0217f].

[160] DIAND, Main Records Office, File D1021-J1-1, vol. 7, transcript of remarks by David Crombie, Minister of DIAND, during a Press Conference on Indian Act Amendments, dated February 28, 1985 [0570]; DIAND, Main Records Office, File D1021-J1-1-11, vol. 1, DIAND paper prepared in ca. February 1985 entitled "Background Notes: Removal of Discrimination from the Indian Act" [0217f]; LAC, RG 22, Acc. 1995-96/308, Box 7, File D1021-33-1-C-31, Vol. 1, DIAND presentation prepared ca. February 1985 [03993]; LAC, RG 10, Acc. 1999-01284-4, Box 4, File N1021-J2, Vol. 2, DIAND paper prepared in ca. July 1985 entitled "Key Amendments to the Indian Act - A Summary" [06377c].

[161] DIAND, Main Records Office, File D1021-J1-1, vol. 7, transcript of remarks by David Crombie, Minister of DIAND, during a Press Conference on Indian Act Amendments, dated February 28, 1985 [0570].

Crombie contended that, since becoming Indian Affairs Minister, he had consulted with over 300 "chiefs and councils, [and] many other groups - Indian, Status Indian, Non Status Indian communities" across the country for input on solving the problem of discrimination against Indian women.[162]

Bill C-31 was read a second time in the House of Commons on March 1st. During the debate over the general principles of the bill, opposition critics disagreed that Crombie had offered the best solution. Keith Penner criticized the bill for not providing bands with full control of membership:

> Band control of membership in this Bill is for the future. The Government is saying that it will impose its will on the Indian people only one more time. It asks to be forgiven and understood because it will not happen again. The Government must clean up those droppings in its dirty little nest and is going to let those droppings fall on the heads of the Indian people.[163]

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[162] DIAND, Main Records Office, File D1021-J1-1, vol. 7, transcript of remarks by David Crombie, Minister of DIAND, during a Press Conference on Indian Act Amendments, dated February 28, 1985 - Source [0570]. Although Crombie had limited time to pass amendments before the Charter deadline, it appears that he did travel quite extensively to consult with Aboriginal groups for input on how to amend the Indian Act. For example, an NWAC report prepared in November 1984 states: "The Interim President and the President of the Yukon Indian Women's Association met with the new Minister of Indian and Northern Affairs, David Crombie, a few weeks ago when he was in Whitehorse. His expressed wish to involve the N.W.A.C. in the development of a new legislative package around Indian Act amendments was again reiterated to N.C.A.R. members when they spoke to him during the Aboriginal Summit last week." See DIAND, Main Records Office, E4200-9-2251, Vol. 4, report entitled "Native Women's Association of Canada 1983 - 1984 Annual Report to the 10th Annual Assembly November 16 - 18, 1984, Ottawa" [07235]. In November 1984, Crombie met with the Professional Native Women's Association in British Columbia to discuss the "Loss of status of Native women under Section 12(1)(b)." See NAC, RG 22, Acc. 1998-01695-1, Box 43, File D1180-M3-36/0, Vol. 1, DIAND brief dated November 28, 1984 and entitled "Ministerial Consultation Meetings, South Pacific Coast (Includes Nanaimo, Campbell River, Vancouver I.N.A.C. Districts), November 28, 1984" [04425]. Crombie also consulted with Aboriginal groups in Quebec, the Atlantic region, Alberta, and Ontario. In November 1984, for example, Crombie met in Walpole Island with representatives of 30 Ontario bands to discuss possible Indian Act amendments. See NAC, RG 22, Acc. 1994-95/612, Box 20, File P1180-M1, Vol., DIAND memorandum dated December 14, 1984 from Shawn Moher, A/Director, Program Services, DIAND to Donald K. Goodwin, Assistant Deputy Minister, DIAND [00425]. The memorandum, entitled "Minister's Consulations Meetings", states "please find a draft copy of the minutes for the Walpole Island, Huron Village [Quebec], Atlantic and Labrador, Alberta and Northern B.C. and South Pacific Coast meetings." See also see discussion of Walpole Island meeting in newspaper article by Laura Ramsay entitled "Crombie promises to alter Indian Act", in *London Free Press*, November 14, 1984

[163] DIAND, Main Records Office, File D1021-J1-1-1, vol.1, excerpt from House of Commons Debates, March 1, 1985 [0217h].

Penner also charged that the descendants of Indian women affected by section 12(1)(b) would have fewer rights than the descendants of Indian men who also "married out". Because they had only one Indian parent, Penner explained, children of 12(1)(b) women would be registered under section 6(2), and could therefore only pass on status to the next generation if they married status Indians. Children of Indian men and non-Indian women who had status before Bill C-31, on the other hand, were registered under section 6(1) - their rights to 6(1) status being protected by the acquired-rights principle - and could therefore pass on status to the next generation regardless of who they married. Thus, Penner concluded, "we have not solved all our problems. We still have discrimination. That is the tragedy of trying to clean up an Act which really cannot be cleaned up." MP Sheila Firestone expressed similar concerns, making reference to what some critics of Bill C-31 described as the "cousins issue":

> I understand with respect to the transmittal of status that women who lost status will now have it back but their children will be treated differently from the children of an Indian man who married a non-Indian woman. Therefore, if I understand it correctly, one can be in a situation where first cousins who are of Indian ancestry will not have the right to claim that ancestry, which could put them in conflict. I hope that that problem can be resolved.[164]

After Bill C-31 was read for a second time, it was referred to SCIAND for detailed review. Unlike Bill C-47, Crombie ensured that the Committee was given ample time to hear from all women's groups and Indian associations and bands who wanted to present their views on Bill C-31. When Crombie appeared before the Committee, he criticized Bill C-47 for not dealing with band control of government and dismissed Bill C-52 as a "non-starter" because it was unpopular with Aboriginal groups. Alluding to the second-generation cut-off for reinstatement, Crombie cautioned that legislation rarely redresses "past wrongs" and that attempting to remove all of these could create "new injustices and new problems." Crombie also expected that some parliamentarians and Aboriginal groups would raise concerns that the children of reinstated women were not being given automatic membership rights, but he argued that to do so would make a "mockery out of band control of membership." Penner asked Crombie if he thought that Bill C-31 followed the principles of the Edmonton Consensus. Crombie replied that it did on most points, however, he saw a discrepancy between NWAC and AFN views towards the general band list principle.[165] He stated that:

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[164] Canada, *Debates House of Commons*, March 1, 1985, pp. 2644-2662.

[165] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 7, 1985, Issue No. 12, pp. 6-11 [POL-0313].

> So in all them except one [principle] you will find in this bill - of the Edmonton consensus. The difficulty with the other one, for all generations, is that the NWAC saw the restoration of everyone to a general list. I think if you check with the AFN, their impression of the Edmonton consensus is that there should be no restoration. So there was not agreement on that particular point.[166]

Over the next several months, Bill C-31 received close scrutiny in both SCIAND and the Standing Senate Committee on Legal and Constitutional Affairs (SSLCA) where Aboriginal bands and organizations from across Canada presented their views on the bill. It soon became apparent that Bill C-31 was in for a rough ride - very few of these groups supported Crombie's amendments.

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[166] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 7, 1985, Issue No. 12, pp. 13-14 [POL-0313].

### *Chapter VIII. Aboriginal Viewpoints on Bill C-31, 1985*

Aboriginal viewpoints on Bill C-31 were thoroughly presented before the Standing Committee on Indian Affairs and Northern Development, which reviewed the bill during March and April 1985.

Generally, native women's groups were disappointed with Bill C-31 because it did not, in their view, put them on an equal footing with Indian men. IRIW, for example, feared that band control of membership will "shift the discrimination down to the reserve level" and demanded that children of 12(1)(b) women be registered under section 6(1) and that the children and grandchildren of these women be given automatic membership rights.[167]

Many complaints from native women's groups centred around the so-called "cousins issue". Quebec Native Women's Association felt that Bill C-31 met none of its stated objectives because it treated the descendants of 12(1)(b) women differently than the descendants of Indian men who also married non-Indians. "Our children are being singled out [for] 'special treatment', which results in their having few rights." Therefore, the Association argued, the bill contravened both the Charter and international conventions. The National Action Committee on the Status of Women, whose presentation before SCIAND included an appearance by Mary Two-Axe Early, charged that Bill C-31 failed to meet the standards of the Charter and international conventions because it "retains a strong element of discrimination against these [reinstated] women in the area of transmission of their rights to their children." The Women of Tobique Reserve contended that Crombie's proposed amendments, at best, "merely transpose the effects of discrimination to another generation" because they do not allow the children of reinstated women to enjoy the same rights as children of Indian men and non-Indian women. Similarly, the Native Okanagan Women's League felt that "the bill fails to end discrimination, because it still allows descendants of these [reinstated] women to be discriminated against."[168]

Marilyn Kane of NWAC saw Bill C-31's second-generation cut-off rule as "a great deal

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[167] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 26, 1985, Issue No. 24, pp. 11 to 13; 32 to 34; 42 to 43.

[168] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 26, 1985, Issue No. 24, pp. 11 to 13; 32 to 34; 42 to 43; LAC, RG 14, Accession 1996-97/193, Box 80, File 5900-331-I1, P 33, Wallet 3, submission on Bill C-31 dated March 14, 1985 prepared by the Women of the Tobique Reserve for the Standing Committee on Indian Affairs and Northern Development; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 27, 1985, Issue No. 25, pp. 7-11 [POL-0316].

more restrictive than that contained in Bill C-47." Whereas Bill C-47 drew an "irrational line" between the second-generation children born before and after the amendments were to come into force, Bill C-31 "is doubly regressive" because it denied membership to first-generation descendants of those whose rights are restored and both status and membership to the second and succeeding generations. NWAC also rejected Bill C-31's legal distinction between status and membership arguing that it created more divisions within the Indian community.[169]

Committee members were reminded that NWAC, "in concert" with AFN, had proposed the previous year that all people of Aboriginal ancestry be added to a general band list, from which they would be transferred in a timely and orderly fashion to an active band list, once the community members had decided upon a criteria. Kane took issue with Crombie's contention that NWAC and AFN disagreed on the purpose of the general band list. She maintained that both groups agreed that "all citizens" must be fully reinstated with "a connection to the appropriate band." When asked by Penner to explain the meaning of the general band list, Kane replied:

> In our proposal a person who would be on a general band list would have status, and would also be a band member of his or her band. To really simplify it, using a comparison, a person on a general band list would have the rights similar to a current off-reserve status Indian. So the person would, of course, have the right to access any federal program that is there for status Indians, but, being a band member, would also have the right to reside in the community, would have the right to own property, to request loans to build a house, to die there.[170]

Kane was also asked about her views on self-government. Ultimately, she stated, recognition of First Nations government in the Constitution is "what aboriginal groups are after". But because of the problems created by the Indian Act, the federal government's first responsibility was to restore status and membership rights to those affected by past discrimination under the Act. "Once that happens, we will be able to re-establish ourselves as our government. We are not talking about the perpetuation of the Indian Act system."[171]

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[169] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, 1985, March 28, Issue No. 28, pp. 56-70; 94-96.

[170] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, 1985, March 28, Issue No. 28, pp. 56-70; 94-96.

[171] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 28, 1985, Issue No. 28, pp. 96-100.

Other native women's groups were even more apprehensive towards self-government. While they supported it in the long term, they believed that the government's primary goal should be full restoration of status and membership rights to victims of past discrimination, and their descendants. The Quebec Native Women's Association, for example, felt that the Indian Act was not the "proper context" to discuss self-government; it should be dealt with during upcoming constitutional discussions. However, "we agree with Indian self-government, and we support it; and we see that happening not through the process of the reinstatement of ourselves and our children and our grandchildren, but as a process by which we can participate in the future." The Professional Native Women's Association asserted that "reinstatement must occur prior to the development of band membership codes." Indian Homemakers of BC agreed, "after complete reinstatement and restoration to band membership by the federal government, band control of membership should be construed as including the right to determine status." The Native Okanagan Women's League also agreed: "We believe the criteria determining who is an Indian should be ancestry; that band must not determine membership; and that the reinstatement of the women and their descendants who have been discriminated against by the act take place prior to self-government."[172]

Shirley Bear of the Tobique Women, appearing with Sandra Lovelace, believed that the self-government issue could be accommodated by adopting an alternative status criteria:

> the rights of the individual can be preserved and the requirements for Indian self-government can be met if the amendments to the Indian Act are based instead upon a combination of two elements: sanguinity and cultural affinity and preference ... Most importantly, there has been a failure to recognize that cultural affinity and preference, when combined with blood ties, are elements which can serve to unify what heretofore have appeared to be conflicting goals: the need to eliminate unjustified discrimination on the one hand, and on the other, the determination to grant Indian people the right to self-government.

At the same, however, the Tobique Women maintained that the children of reinstated

[172] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 20, 1985, Issue No. 20, pp. 17-22; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 24, March 26, 1985, p. 14; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 27, 1985, Issue No. 26, p. 7 [0316].

women should be granted automatic membership rights.[173]

Native women also continued to criticize the Bill C-31 principle of respecting the rights of non-Indian women who had acquired status through marriage. NWAC contended that officials were "far too zealous in protecting 'acquired rights' to the detriment of aboriginal women who were deprived of their rights." It recommended that non-Indian women currently registered as Indians "not be considered as having status when it comes to transmitting status and membership to future generations" and that they lose status upon separation, divorce or death of their Indian spouses. The Tobique Women held similar views. If the government insisted on denying full Indian rights to the descendants of native women affected by past discrimination, the Women argued, then "logic and consistency demands" that the children of non-Indian women who married Indian men should "share the same plight."[174]

Indian associations were also critical of Bill C-31; in fact, some of these groups completely rejected it. The most common criticism was that the bill did not provide bands with total control over membership. Nevertheless, the AFN took a moderate view of the bill. Regional Vice Chief Wally McKay, for example, stated that Crombie's "Legislation is acceptable to the First Nations as a transitional step, but not as any substitute for constitutional recognition of an inherent right of the First Nations." But like NWAC, AFN felt that the bill did not conform to the principles of the Edmonton Consensus because it neither fully reinstated "all citizens" of all generations affected by past discrimination nor provided them with "a connection with the appropriate band". But "at the same time, bands must have absolute control over the exercise of active membership lists." Warning that the AFN would not accept a bill that "threatens the viability of our communities", McKay emphasized that it must "prevent a flood of people from suddenly descending on reserves." AFN also demanded that the federal government recognize as status Indians any individuals recognized as band members and that the "acquired rights provisions should be removed entirely because they are in conflict with the basic principle of self-determination of citizenship by the First Nation."[175]

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[173] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 14, 1985, Issue no. 16, pp. 36-41 [0314].

[174] LAC, RG 14, Accession 1996-97/193, Box 80, File 5900-331-I1, P 33, Wallet 3, submission on Bill C-31 dated March 14, 1985 prepared by the Women of the Tobique Reserve for the Standing Committee on Indian Affairs and Northern Development; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 28, March 28, 1985, pp. 57-58.

[175] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 14, 1985, Issue no. 16, pp. 5-10 [POL-0314].

The Iroquois Association took a similar view towards the bill. This group felt that all generations of Aboriginals affected by past discrimination should be reinstated and saw Bill C-31 as "an interim measure until the recognition of the right of self-determination of First Nations, recognized in the Constitution, is fully implemented in our Communities." The Nishnawbe-Aski Nation of Northern Ontario saw Bill C-31 as a violation of band control of its citizenship and felt that Crombie should have accepted the "sensible mechanism of general and active band lists" developed by the AFN and NWAC. Moreover, in comparison to the children of non-Indian women with acquired status, Bill C-31 granted the children of reinstated women only "half status", which the Nation viewed as "another example of continuing discrimination" against 12(1)(b) women. It also felt that the government should provide bands with additional land and financial resources to cope with the impacts of reinstatement. The Muskegoq Cree Council of western James Bay also supported the general band list concept, arguing that "First Nations governments be fully responsible to control the membership and status matters that affect our citizenship criteria and authority." But at the same time the Council saw Bill C-31 as a "gradual move towards self-government." Of all the groups that made representations to SCIAND, Six Nations was probably the most supportive of Crombie's amendments, stating that "the first bill, C-47, went a way and Bill C-31 has gone a long way further. We are not really opposed to the bill itself. We say the bill needs some fine tuning and some commitment for resources."[176]

However, many Indian associations were harsh in their criticisms of Bill C-31, not only objecting to the principle of providing reinstated women with an automatic right to membership, but also fearful of the impact that new band members could have on reserve land and resources. The Manitoba's Brotherhood of Indian Nations believed that by automatically reinstating 12(1)(b) women to band membership, Bill C-31 "will destroy our land and collective rights for the sake of the dominant society and its values of individual rights." The Union of New Brunswick Indians informed SCIAND that "the Micmac and Maliseet Nations totally and unequivocally reject the Government of Canada's proposed legislation."[177]

Some of the most negative reaction, and concern over the potential for large numbers

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[176] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 20, 1985, Issue No. 21, pp. 25-28; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 25, 1985, Issue No. 23, p. 21; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 27, 1985, Issue No. 27, pp. 23-25.

[177] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 12, 1985, Issue No. 13, p. 35; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 18, 1985, Issue No. 17, p. 12.

of returning members, came from Alberta bands. A representative of the Sarcee Nation of Alberta, dismissing the government's premise of employing a legislative solution to the discrimination problem, angrily asserted: "I do not think we are prepared to talk about any changes in Bill C-31. We totally reject it. We are not saying that Sacree determine their own membership. We are not saying if you change it, if you do that, we will do this. We are saying, no, we do not want Bill C-31. So we are not prepared to compromise on any section." The Treaty Six Chief Alliance, from northern Alberta, warned: "... we expect that violence will occur if the government does not respond to the aspirations of our people. We have a very aggressive community, and our people stop at no end." The Indian Women of Treaties 6, 7 and 8 also warned: "When attacked by the reinstatement of these native women, it is going to be hell bursting open at the seams ... Band membership is a matter for the band to decide, and one in which only the band should rule."[178]

The priority for these groups was the constitutional recognition of First Nations government, not ending discrimination against Indian women. As such, the bill was often characterized as a violation of First Nations citizenship and collective rights. As stated by the Four Nations of Hobbema, Alberta:

> In conclusion, it is common knowledge that Indian nations live such that there is always a continuing respect for the collective interests of the whole community. This bill, which focuses on individual rights, fails to take into full consideration the traditions, customs and values of Indian nations, yet it is advanced in the cause of being a step toward Indian government. There is an inherent conflict in the idea that Parliament can define who is an Indian and at the same time claim to be moving toward the recognition of Indian government.

Instead of Bill C-31, recommended the Hobbema group, the government should introduce a constitutional amendment to recognize Indian government.[179] The Coalition of First Nations, which represented over 70,000 Indian people across Canada, asserted that the:

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[178] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 21, 1985, Issue No. 22, p. 17; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 20, 1985, Issue No. 21, pp. 8-9; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 21, 1985, Issue No. 22, p. 35.

[179] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 21, 1985, Issue No. 22, p. 59.

> issue of membership of our First Nations and the right of residency upon our territories is not a membership issue. It is not an issue of discrimination, as you wish to describe it, nor is it an issue that could be resolved by the intervention of a third party, namely, the Government of Canada. The citizenship of our Coalition of First Nations is an Indian issue which speaks to the fundamental rights, powers and authorities of our First Nations people and their First Nations governments.[180]

The Blood Tribe of Alberta felt that Bill C-31 violated its "jurisdictional rights" under section 25[181] of the Charter and that the bill undermined the Tribe's "inherent right to determine its own citizenship." The group demanded that the federal government suspend its proposed amendments to the Indian Act until Aboriginal government rights "have been firmly entrenched in the Canadian Constitution." Furthermore: "The people affected by section 12.(1)(b) were victims of federal legislation. Having created the problems, the federal government now proposes to make ham-fisted amendments which will only add to our existing social and economic problems." The Treaty Eight Group believed that Bill C-31 was "constitutionally invalid" because it violated Aboriginal rights protected under section 35. "That is because it [Bill C-31] compels existing bands to share their entrenched rights with other people without their consent." Noel Starblanket of the Federation of Saskatchewan Indians agreed that "Bill C-31 encroaches on the jurisdiction of First Nations in citizenship."[182]

Non-status Indian associations were also critical of Bill C-31 because it did not restore status "to all persons of Indian ancestry who identify as such." In unison with the native women, these associations demanded that reinstated individuals be granted band membership before "steps are taken to give bands self-government". Moreover, Crombie's approach was not, in their view, "properly balanced" - at the very least, full Aboriginal rights should be extended to the children and grandchildren of those affected by past discrimination. Non-status groups were also displeased with the use of an ancestral criteria to define Indian status. The New Brunswick Association of Métis and

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[180] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 18, 1985, Issue No. 17, pp. 7-8.

[181] Section 25 of the Charter states: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."

[182] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 21, 1985, Issue No. 22, p. 42; Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 26, 1985, Issue No. 25, p. 16 (lh-0279); Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 28, 1985, Issue No. 28, p. 40.

Non-Status Indians, for example, stated that:

> All aboriginal persons who wish to practise their right and become members of their ancestors' community or former bands should be able to do so without any artificial criteria. The only enabling criteria should be self-identification based upon: (1) common aboriginal land ancestry; (2) traditional family ties to their respective nations.[183]

Although many members of SCIAND sympathized with the concerns of Aboriginal groups, they also questioned them on their positions regarding the bill. The Coalition of First Nations was asked by Sheila Firestone if it would accept the legislation as an interim measure, as suggested by the AFN during its appearance before the Committee. She asked, "Can you find it in your principles or in your heart possible to accept back the women who have been disenfranchised?" Sharon Venne, Legal Council for the Coalition, responded: "The answer is no ... The chiefs say we cannot find it in our hearts to agree with anything AFN says." Warren Allmand, a Liberal committee member and former Minister of Indian Affairs, asked whether the Union of New Brunswick Indians would accept a bill that abolished the membership sections and recognized First Nations' right to control membership. The Union categorically rejected any type of government-legislative solution. "That would be doing up another bill where Indian were not participants ... In suggesting to do away with one section dealing with the total membership issues in the Indian Act, you are just jumping from the pot into the fire."[184]

Native women were also questioned on their proposals. The Tobique Women were asked how the government should reconcile the AFN's view that, on the one hand, all descendants of reinstated women must have their rights fully restored, but on the other, bands should have absolute control over membership. "I think it is obvious that the two positions at this point are not in agreement," stated one committee member before asking "if you see any way of a compromise between those two positions." A Tobique representative responded:

> personally I do not see it as compromise. I think Canada has an international obligation to reinstate those it struck off. Those children were struck off [the band lists] because they struck off the mother. I think that in order to rectify the injustice Canada as a nation has the duty to

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[183] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 19, 1985, Issue No. 18, pp. 12 to 24 [POL-0315]

[184] Canada, House of Commons*, Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 18, 1985, Issue No. 17, pp. 38, 39 and 45.

> reinstate those women who are closest to the people on the reserves, the status Indians. Beyond that, it should be up to the band governments to decide. I do not think one should compromise when it involves a basic human right.[185]

In a heated exchange, two Committee members questioned the Quebec Native Women's Association on how the government should legislate "community acceptance" in cases where bands refused to accept reinstated women as new band members. "But that band that is jealously guarding its sovereignty, how will it receive women who are introduced in the way you are suggesting?" An Association representative asserted: "I do not know. But I am jealously guarding my membership and my right to that reserve as well ... It is the federal government's responsibility. The federal government did it to us; the federal government will correct it."[186]

Some Committee members struggled with the contradictions between the various Aboriginal positions and sought input on how the government should balance collective and individual rights. Warren Allmand, for instance, asked the NCC how the government's goal of ending discrimination in the Indian Act should be balanced with the Aboriginal right to self-government. The President of the NCC, Louis (Smokey) Bruyere, responded: "Very simple. In terms of our organization, you allow every person who wants and whose birth right it is to return home if they so desire. Then you have the basis of your self-government and you have the basis for your self-determination because those are the people." Allmand had misgivings towards Bruyere's "simple" solution and further inquired: "I am 100% for getting rid of the discrimination, but how do you work out the reinstatement so that you both respect individual rights that you have discussed ... How do we fully respect Indian self-determination and self-government[?]" But Bruyere insisted that the issue was straight-forward: "Change the word from 'reinstatement' to 'birthright' then deal with it."[187]

SCIAND's review of Bill C-31, then, demonstrated that Crombie's bill satisfied neither native women's groups nor Indian associations. Yet, there was very little common ground among these organizations, especially in relation to their perspectives on reinstatement and self-government. Native women demanded full restoration of their

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[185] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 14, 1985, Issue no. 16, pp. 54-56 [POL-0314].

[186] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 26, 1985, Issue No. 24, pp. 23-25.

[187] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, March 19, 1985, Issue No. 18, pp. 33-35 [POL-0315].

status and membership rights for themselves and their descendants whereas most Indian associations rejected the entire reinstatement principle, condemning it as a violation of their right to self-determination. Nonetheless, the AFN and NWAC attempted to present a common position by arguing that those affected by past discrimination should be reinstated to a general band list with a “connection to the appropriate band.” While NWAC believed that reinstated individuals should have automatic rights to live, own a house, and die on reserve, the AFN asserted that “bands must have absolute control over the exercise of active membership list.” NWAC and the AFN’s viewpoints on the membership issue, therefore, appeared to differ on whether or not those affected by past discrimination should have automatic band membership rights.

Crombie had failed to achieve a consensus on amending the Indian Act. Bill C-31 was widely denounced by Aboriginal groups, but the reasons for their criticisms were varied and conflicting. However, the time for consultations on how to amend the Indian Act was over. On April 17, 1985, Section 15 of the Charter came into effect and the government pushed ahead with its legislative proposals, for the most part “over the heads” of Aboriginal leaders.

## *Chapter IX. The Enactment of Bill C-31, June 1985*

At the end of April 1985, SCIAND began its clause-by-clause review of Bill C-31. Penner asked Crombie, who insisted on being present for the Committee's review, "would the Minister agree that these three principles are only met in part, that we have gone a little way down the road on each one?" Crombie continued to defend his bill. "I think Mr. Penner, Mr. Chairman, has a point if he is agreeing with me that the difficulty may occur in this bill that if we want to preserve all three principles you are not going to get 100% of each one. I made the comment, and I think others did as well, that it is the balance and the fairness with respect to those three principles that is important."[188]

SCIAND debated a broad range of contentious issues relating to Bill C-31, including the question of whether to provide status to the second-generation descendants of reinstated women, often referred to as the "cousins issue". Jim Manley, the NDP Indian Affairs critic, brought forward a motion to amend section 6(1) to "ensure that the children of Indian women married to non-Indian men will have the same status with the federal government and the same right to transmit status as the children of Indian men and non-Indian women." Essentially, Manley sought to place 12(1)(b) women on the same footing as their Indian brothers.[189]

Crombie, however, opposed the amendment arguing that it would: 1) increase the number of people eligible for status by 40,000; and 2) "create an unrecognized inequity" in the future.[190]

Crombie's officials explained that, first of all, by registering first-generation descendants under section 6(1), the second-generation descendants, who would have one parent registered in 6(1), would consequently become eligible for status under section 6(2). In other words, the half-blood rule for reinstatement would be changed to a quarter-blood rule, as proposed by most native women's groups. This would drastically increase the number of individuals eligible for reinstatement, Crombie argued.[191]

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[188] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, April 17, 1985, Issue No. 31, pp. 6-7.

[189] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, April 23, 1985, Issue No. 34, pp. 47-48.

[190] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, April 23, 1985, Issue No. 34, pp. 50-52.

[191] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, April 23, 1985, Issue No. 34, pp. 50-54.

Secondly, Manley's proposed amendment provided 6(1) status to the first-generation descendants of reinstated women born *before* Bill C-31; in the future, however, first-generation descendants of mixed unions would have 6(2) status. Crombie saw problems with this, arguing that it could also create an "even greater" cousins problem in the future. Crombie believed that the proposal would lead to a situation in which the children of two Indian siblings, one of whom married-out before while the other married-out after the enactment of the bill, would be treated differently; the children in the former case would have 6(1) status, the children in the latter would have 6(2) status. "What I want to do is remind the member that in fact he will create an inequity for the future. It is something I wish to avoid," he maintained.[192]

Crombie's response infuriated Manley, who insisted that the government's priority should be to remove discrimination "that exists right now between a brother and a sister", not at some future date. Because of its potential impact on government expenditures, Manley's amendment was overruled by the Committee's chairman.[193]

SCIAND also debated motions in relation to expanding the scope of reinstatement to include additional categories of individuals who had been enfranchised, use of transitional membership lists for bands significantly impacted by reinstatement (high-impact bands), review of Bill C-31 two years after its implementation, an appeal mechanism for membership decisions, and the two-year transition period for bands to adopt membership codes.[194] Motions to amend Bill C-31 were also brought forward in the House of Commons, leading to heated debate on whether the discrimination problem was "just a women's issue." When MP Sheila Firestone brought forward a motion to subject the membership codes to the Charter, for example, MP Jack Shields angrily contested that:

> It would strip the historical community of control. It cedes to the newly created membership. It could devastate bands. If offends, in my view, the fundamental, basic issue, and that is, band control of band membership. The whole Bill offends that, but this amendment would clearly offend that.

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[192] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development*, April 23, 1985, Issue No. 34, pp. 47-54.

[193] Canada, House of Commons, *Minutes of the Standing Committee on Indian Affairs and Northern Development,* April 23, 1985, Issue No. 34, pp. 52-53.

[194] LAC, RG 10, Acc. 1997-98/374, Box 2, File E1021-J1, Vol. 4, speaking notes prepared in June 1985 for second reading of Bill C-31 in the Senate [01612].

Furthermore, he maintained, changing the Indian Act's membership provisions "is fundamentally an Indian issue; it is not a women's issue."[195]

When Bill C-31 was read for a third time in the House of Commons on June 12, 1985, its fundamental principles remained intact; the government had accepted some minor amendments, but no major changes were made to the bill's registration and membership provisions. Crombie again expressed his unwavering conviction that Bill C-31 was an appropriate solution to the 12(1)(b) problem:

> After all the debate, Bill C-31 is, I say with some modesty, a careful balance between two just causes, that of women's rights and that of Indian self-government. If either of those two clauses had triumphed, it could only have been at the expense of the other. Therefore, this Bill avoids both those extremes. No one gets 100 per cent of what they sought, but each group gets something that is vitally important to them. There was no other fair path to take.

He acknowledged, however, that Bill C-31 did not address the long-standing desire by the Indian people for self-determination. But that would be for another day. "Bill C-31 is not self-government. Band control of membership is merely a modest step forward."[196]

Bill C-31 passed in both the House of Commons and the Senate and was enacted into law on June 28, 1985.[197]

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[195] Canada, *Debates of the House of Commons*, June 11, 1985, pp. 5619-5622.

[196] Canada, *Debates of the House of Commons*, June 12, 1985, pp. 5686-5687.

[197] DIAND Library, Press Release Binder, 1985, DIAND Communiqué dated June 28, 1985 [POL-0270].

## *Conclusion*

The passage of Bill C-31 in 1985 ended a policy deadlock that had existed since 1970 when Prime Minister Trudeau had promised not to change the Indian Act without the consent of Indian leaders. During the 1970s and early 1980s, federal officials tried to achieve a consensus in the Aboriginal community on Indian Act amendments through both formal and informal consultations. The most contentious issue between native women's groups and Indian associations was the question of whether Indian women who had lost status through section 12(1)(b) of the Indian Act should be reinstated to band membership.

When Canada passed Bill C-31, Aboriginal groups were still divided over the question of membership rights. Native women's groups felt that the government's priority should be restoring full Indian rights to 12(1)(b) women and their descendants, while status associations strongly opposed any government interference in deciding band membership. The main priority of most Indian groups was the constitutional enshrinement of Aboriginal self-government. Although native women's groups also supported the principles of Aboriginal self-government, most native women believed that the process for achieving self-government should occur only after the full restoration of their Indian rights.

Through the 1984 Edmonton Consensus, NWAC and AFN attempted to establish a common position on membership rights by agreeing that all generations of those with Aboriginal ancestry affected by past discrimination should be reinstated to a general band list with a "connection to the appropriate band." The parliamentary record on Bill C-31, however, reveals that NWAC and AFN had different understandings of whether the general band list provided those affected by past discrimination with an automatic right to band membership. NWAC felt that those on the general list should have "the right to reside in the community ... to own property, to request loans to build a house, to die there," while the AFN demanded that "bands must have absolute control over the exercise of active membership list." Moreover, in 1984, AFN National Chief David Abenakew asserted during SCIAND's review of Bill C-47 that those affected by past discrimination had been reinstated to a general band list, "Bands will then determine who gets on active band lists. Bands only will determine the residency of non-Indians and non-members."

After years of consultations with Aboriginal leaders, a consensus on how to amend the Indian Act to end discrimination against Indian women eluded federal officials. Instead of an Indian Act amendment achieved through consensus among Aboriginal leaders, the main catalysts to Bill C-31 were the creation of an equality provision in the Charter of Rights and Freedoms and the 1981 United Nations ruling in favour of Sandra Lovelace. The Charter and the Lovelace case also had an enormous impact on the

rationale underlying Canada's Indian Act policy. The main pillars of that policy were that the discriminatory provisions of the Indian Act must be removed, and that women affected by past discrimination must be reinstated to both Indian status and band membership. These principles can be found in both Bill C-47 and Bill C-31.

Bill C-31 passed with the support of very few Aboriginal groups. However, federal officials felt that they had to proceed with amending the Indian Act for fear that the discriminatory registration provisions would be struck down by a challenge under the Charter of Rights and Freedoms. Thus, the federal government abandoned its policy of not amending the Indian Act without a consensus in the Aboriginal community and provided its own solution to the problem of ending discrimination against Indian women by enacting Bill C-31 "over the heads" of Aboriginal leaders. In the end, Canada's 1985 Indian Act amendment pleased neither native women's groups nor Indian associations and continued much of the controversy and divisiveness that began with the Lavell-Bedard case in the early 1970s.