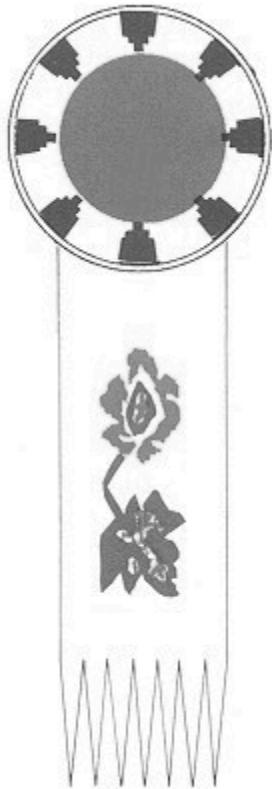


Native Women's Association of Canada



ABORIGINAL WOMEN & THE IMPLEMENTATION OF BILL C-31

~ October 3, 1991 ~

Ontario Native Women's Association
Thunder Bay, Ontario

An NWAC Presentation

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1. Introduction

I have been asked to speak about Bill C-31 with the intention of addressing some of the problems and experiences of women inside and outside Indian communities. It is a very broad topic and I will do my best to confine it to a 10 - 15 minute introduction to the subject. My particular focus will be the application of the Canadian Charter of Rights and Freedoms to Indian Act governments. So I am only interested in those governments created under the federal Indian Act -- those governments which act under delegated legislation. I am not speaking of constitutional self-government, nor do I make any reference to the inherent right to self-government.

2. The Facts

As of June 30, 1990, it is estimated that 70,285 people have been registered under the provisions of Bill C-31. Of these, 13,672 or 19 per cent were women who originally lost their status under section 12(1)(b) of the Indian Act. An additional 40,745 are the children and grand-children of section 12(1)(b) women or registrants. Between December 1985 and June 1990, the status Indian population grew from 360,241 to 487,355, an increase of 33 per cent. The on-reserve population grew by 12 per cent, with only 22 per cent of that figure representing Bill C-31 registrants. At the same time, the off-reserve population grew by 84 per cent, with 70 per cent of those persons being Bill C-31 registrants. It is estimated that 90 per cent of Bill C-31 registrants live off reserve. Over a period of five years since the passage of Bill C-31, only 2 per cent of the registrants were successful in moving back to the reserves! Almost 50 per cent of Bill C-31 registrants said they would rather live on reserve, yet only 12 per cent saw any chance of ever moving back!

In terms of programs for Bill C-31 registrants... considering that the Government of Canada set aside \$360 million for their re-entry to Indian life -- the biggest hindrance is housing. There is no extra housing and this has largely resulted in families not moving back to reserves. Because housing is not available to Bill C-31 registrants, the impact of the "new" population has not been felt in the communities to the extent that it would if everyone moved back home.

Since 90 per cent of C-31 registrants continue to reside off-reserve, C-31 has markedly accelerated the trend to off-reserve residence. As of 1990, 40 per cent of status Indians reside outside the communities to which they are registered. Within the next 20 years we may well see a situation where more than half of the status population resides off-reserve. Those who reside off reserve have no voice in decisions on self-government, land claims, and Aboriginal rights.

3. Indian Women, the Charter and Indian Governments

I want to talk about Indian women, the Charter and Indian governments in the context of Indian reserves, band councils and the present constitutional regime. First, I consider the historical position of women within our societies. Second, I consider why our leadership is opposed to the application of the Charter of Rights and Freedoms to Native self-government. Finally, I consider the current regime and application of the Charter to Indian Act governments.

I begin by quoting Catharine MacKinnon, an articulate feminist writer who says, "I find that some people consider equality to be a white idea." Each Aboriginal nation in Canada is distinct, but it can generally be said that women in traditional societies had established social, cultural and political roles. Likely those roles were different from the roles of men, but were no less equal. The view may well be held among the more matriarchal Aboriginal societies that the role of women was superior because they appointed the political leaders. The notion of hierarchy between males and females, or nobles and slaves was not unknown in some Aboriginal societies. Aboriginals are not, and never were, a homogenous group occupying what is now Canada. What is important to recognize is that women and men had roles, and the roles of women were eroded by the Europeans who subsumed Aboriginal societies and populations.

The male missionaries, the male Indian agents, male traders and the male European clergy often found themselves bargaining with Aboriginal women at contact, and each refused to accept the emancipated position of Aboriginal women. It is these same actors, confronted with emancipated Aboriginal women, who put in motion a process for furthering the purposes of white society. Those purposes included the destruction of women's place in Aboriginal society, as well as destroying Aboriginal cultures as they found them. Since 1869, Indian women were legally subordinated through banishment from their communities for intermarrying with white men. Professor Mary Ellen Turpel has argued that the banishment of "First Nations" women from their communities was a deliberate federal government policy to destroy Aboriginal culture and communities.

Aboriginal women not only lost their social and political position, but also lost the right to remain Indian if they married non-Indians. Communities were drained not only of children and elders, but also of Indian women. It is only in the last decades that "the family" is finding some revival in Aboriginal communities. As well, the improvement in health, to a certain extent, has ensured that there are now a few elders left in the community. While many communities are trying to re-establish a sense of law and order, along with reviving their language, traditions and cultures, there is still a high level of lawlessness on reserves. Much of the crime is committed in the private sphere against women and children, and it is only now in this healing phase that admissions are being made as to the preponderance of these crimes. As women we are more than victims. Those of us who are able, those of us who want to, must seize this opportunity to make a difference in our lives.

I want to consider with you why our leadership does not favour the application of the Canadian Charter of Rights and Freedoms to Native self-government. The position of the Assembly of First Nations to the Standing Committee on Aboriginal Affairs in 1982. The Assembly stated that:

[a]s Indian people we cannot afford to have individual rights override collective rights... if you isolate the individual rights from the collective rights, then you are heading down another path that is ever more discriminatory... The Canadian Charter is in conflict with our philosophy and culture.

The opinion is widely held that the Charter is in conflict with our notions of sovereignty, and further that the rights of Native citizens within their communities must be determined at the community level.

The Charter is individual-rights based document recognizing and guaranteeing fundamental human rights to each individual Canadian. This notion of fundamental rights and freedoms emanates probably from time immemorial, but certainly it is captured in the Charter of the United Nations and the Universal Declaration on Human Rights. These international instruments of law celebrate the individual nature of fundamental rights and freedoms. These are the rights which attach to individuals. They are the legal, political and constitutional rights which attach to human beings because they are human beings. I am an individual rights proponent. I believe we have rights which attach to us like skin, and once removed, you no longer have a human being. We are human beings and we have rights which cannot be denied or removed at the whim of any government. That, in my view, is how fundamental these individual Charter rights are. My views are in conflict with many First Nations and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is their unwavering view that the 'collective' comes first, and that it will decide the rights of individuals.

We can look at nations around the world which have placed collective and cultural rights ahead of women's sexual equality rights on the basis that this is an interference with tradition, custom and history. I am speaking of international human rights instruments passed by the United Nations guaranteeing to women around the world that they are entitled to sexual equality with respect to their human, civil and political rights. Women have a right not to be tortured. Women have a right not to be dominated by men and Government to their detriment. But there are many, many nations around the world which have refused to implement United Nations guarantees of sexual equality. This country... called Canada... cannot exempt itself from this example. One of our own Aboriginal women, Sandra Lovelace, a Maliseet from New Brunswick, took our nation to the United Nations Committee on Human Rights. She won her case because this nation cannot deny us, as women, access to our people, to our communities, to our languages and to our cultures. And yet are they still not doing it to us today? Yes, they are. Did you know that the urban Indian population has grown by 80 per cent since the passage of Bill C- 31? Did you know that only 2 per cent of our women gained access back to their communities? And I don't need to tell you that if you are an Indian and live off the reserve,

the Government denies you your programs, services and benefits. We are the beggars in our own land. We are the ones, as women, doing without houses. Many of our women are denied their rights and we are helpless in our struggle. We have organizations without funds. When we have gained knowledge which we want to share with our women in the communities, we have no way to communicate. This is why the application of the Charter should not be left to Governments. The federal government which has mistreated us as women for 100 years. If there is a legacy we will leave for women in the future, it is their right to enjoy all of the rights granted to us by the united Nations. We want our nations to act within the spirit and intent of the united Nations, and not do as so many nations have done before them... opt out of sexual equality rights.

The Charter of Rights and Freedoms applies to Indian Act governments. I speak of Band Council and Chiefs who make the laws on Indian reserve lands today. When a Band Council acts, it acts under the authority of federal law, namely, the Indian Act. When the Band Council passes a band council resolution, that is a federal law and is recognized as a regulation under the Statutory Instruments Act. There is a mixed regime respecting BCRs, and some are subject to closer scrutiny than others, but this does not detract from their stature as federal statutory instruments, as laws and regulations are referred to. The subjection of Band Chiefs, Councils and BCRs to the scrutiny of the Charter is new since 1982. Prior to passage of the Charter, even the federal Indian Act could discriminate against Indian women based on sex as it did under section 12(1)(b). After 1982, the Charter applied to us as women and this resulted in amendments to the Indian Act in 1985.

I can say all of this as simply as this, but in fact we have Charter cases across the land being taken by men and women against our Indian Act governments.

The Charter protection must extend to aboriginal women because there is a long history of discrimination against aboriginal women in Canada. The protection of the Charter will enable aboriginal women to challenge discrimination resulting both from the enforcement of Band by-laws enacted under delegated authority and from federal legislation.

There are at least two areas where there is residual discrimination left in the Indian Act: first, under section 6 pertaining to registrations under section 6(2) where the grandmother was a section 12(1)(b) Indian; and second, in the exercise of band by-law powers by Band Councils respecting residence on reserves.

4. Conclusion

I recognize that there is a clash between collective rights of sovereign First Nations governments and individual rights of women. Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, Indian women have had a tremendous struggle to regain their social position... since the 1970s, it has been argued that the equality provisions of the Charter would not apply to the Indian Act and it would not have resulted in the Supreme Court of Canada overturning the Lavell decision. From my involvement in the passage of Bill C-31, it was evident, I would argue, that the Government of Canada believed that the Charter did apply to the Indian Act. Had the Indian Act not been amended to repeal section 12(1)(b), it did not seem evident to the Government that the Supreme Court of Canada could uphold the Lavell decision. Faced with criticism from the international community because of Lovelace; fearful of the feminist upsurge following the Charter victory, the Government brought in Bill C-31 and passed it into law.

I will conclude by saying that if, as women, you find yourself discriminated against on the basis of sex... or any other prohibited ground found in the Charter of Rights and Freedoms... by your Band Council you will want to consider one of three options: negotiating a settlement (preferable); going to court to enforce your right; or accept the treatment in the hope that your situation will change.