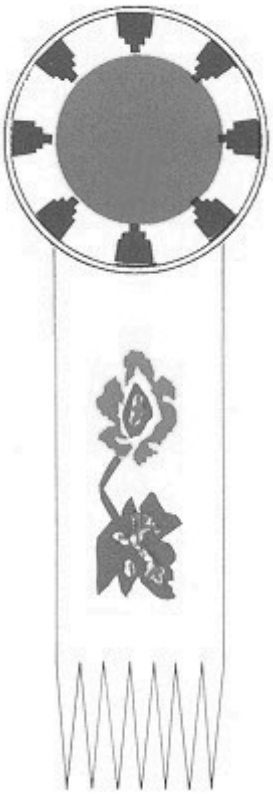
Native Women's Association of Canada



ABORIGINAL WOMEN'S RIGHTS

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Canadian Human Rights Act Review

An NWAC Research Paper

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1. Executive Summary

The study begins with a description of the Native Women's Association of Canada, founded in 1974. NWAC has membership in all the provinces and territories of Canada, and represents approximately 513,00 Aboriginal women. The majority of its members are status Indians, many of whom were reinstated following passage of An Act to Amend the *Indian Act*, S.C. 1985. c.27 ("Bill C- 31").

The founding of NWAC was closely tied to Native women's struggle to overcome the discrimination inherent in s.12(1)(b) of the *Indian Act*, which deprived a woman of Indian status upon marriage to a non-Indian, but permitted a status man to bestow on his non-Indian wife status under the *Indian Act*.

The report traces the development of opposition to s.12(1)(b) among Indian women, and the measures taken by individuals, as well as NWAC and the Indian Rights for Indian Women organization to force change in the legislation.

The Lavell case in the Supreme Court of Canada and the Lovelace case before the United Nations, as well as extensive advocacy by the women's organizations, and the entrenchment of the Charter of Rights resulted ultimately in the passage of Bill C-31 to address the historic discrimination in the *Indian Act*. The study notes that the Canadian Human Rights Act, passed in 1977, was being considered while the anti-s.12(1)(b) advocacy was continuing, and s.67 of the CHRA was inserted in order to prevent Native women from using the CHRA to challenge s.12(1)(b). The measure was intended to be temporary, until a more thoroughgoing reform of the *Indian Act* could be undertaken, but s.67 still exists, and the *Indian Act* is still, except for Bill C-31, largely the same.

The Report examines Bill C-31. This legislation did reinstate to Indian status women who had lost it under s.12(1)(b), and others who had been involuntarily disenfranchised. However, features of Bill C-31 have left a continuing legacy of discrimination. A Bill C-31 reinstatee cannot pass her own status on to her children: only children born with a status father will have status. This ‘second-generation cut-off’ enacted in Bill C-31 and now effected by s.6(2) of the *Indian Act* means that cousins of the first degree will have different status under the Act depending on whether they descend in the male or the female line. Brothers and sisters have different ability to pass on their status to their children. A Bill C-31 woman who has a child out of wedlock must name the father, and he must be status, before her child is eligible. Mothers who are restored to Indian status by Bill C-31 will be grandmothers of children who cannot claim status, as well as those who can, depending on the marital arrangements of their parents.

The Bill effects finer and finer differentiations among the Aboriginal community, has divided families, and will result in the extinction of some First Nations as the affects of the second generation cut-off are realized. These kinds of distinctions, based in continuing discrimination against women, are not permitted in Canadian citizenship law: Benner v. Canada [1997],1 S.C.R. 358

The shrinking of the status Indian community as a result of the application of the discriminatory provisions will enable the federal government to shed its responsibilities toward Aboriginal people, since it now recognizes obligations only to those who have status under the *Indian Act*. Bill C-31 also restricts the life choices of young Aboriginal people whose parents are C-31 reinstatees: to ensure that their children can be registered, they will have to partner with a status Indian. Policies restricting access of Bill C-31 reinstatees to their Bands or Band reserves may make it difficult to make such social connections; in any event, forcing them erects a kind of race segregation that resembles apartheid.

By severing status and Band membership, Bill C-31 has created a class of reinstates who may be restored to the General list under the *Indian Act*, but have no band membership. Bands are permitted to shape their own membership codes, and there is no requirement for these codes not to discriminate against Bill C-31 reinstatees. There is essentially no oversight mechanism for these codes, and it is very difficult to get access to them. In addition to these flaws, the separation of status and Band membership penalizes those Bands which do wish to be inclusive: the federal government allocations to Bands cover only status Indians, so that a Band which includes in its membership the non-status spouses and children of reinstatees must care for them out of the funds Provided for those Band members who are status Indians.

At two national consultations held by NWAC, and in a study done by the Aboriginal Women's Action Network of B.C., there was evidence of Band discrimination against Bill C-31 reinstatees and their families, including exclusion from membership, not permitting residency on reserve, discrimination in housing and in educational and health funding. Recurrent complaints of the negative effects of nepotism and favouritism on Bill C-31 reinstatees were heard. Bill C-31 reinstatees also face negative stereotyping, and difficulty in accessing even the benefits for which they are eligible without band membership.

The Report documents the extensive disadvantage experienced by Aboriginal women in Canada, the stubborn legacy of historical discrimination in the *Indian Act*, drawing upon the observations of the Supreme Court of Canada. Commissions of Inquiry, and Statistics Canada.

It analyses the jurisprudence dealing with s.67 of the *Canadian Human Rights Act*, pointing out that the section prevents many disadvantaged Persons from accessing the CHRA to deal with race and sex discrimination. It cannot be equated to s.15(2) of the Charter, which aims to protect equality initiatives from attacks by better situated individuals and groups, because its overbroad reach denies human rights protection even to the seriously disadvantaged. The report also notes the delays and added expense that arise from having to overcome s.67 through resort to highly technical arguments based on the evolving jurisprudence.

The Report is critical of the fact that s. 67 insulates from scrutiny not only the discriminatory acts of Band Councils, but also of the Government of Canada under the *Indian Act*, even though Canada is signatory to many important international instruments protecting human rights. Section 67 allows Canada to act inconsistently with its international obligations, without being called to account through the CHRA.

The Report emphasizes that the decision of the Supreme Court in Vriend v. Alberta [1998], 1 S.C.R. 493 is strong support for the argument that s.67 is unconstitutional. It clearly implies that Aboriginal people are entitled to less protection of their human dignity than other Canadians.

The Report reviews principles of international human rights and women's rights found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention on the Elimination of Discrimination Against Women, and concludes that in its treatment of Aboriginal women Canada falls far below the standards set by the international community and adopted by Canada for basic human rights protection.

The Report concludes by urging the Review to recognize the longstanding discrimination against Native Women in Canada, and the role played in that discrimination by government policy, the *Indian Act*, and the actions of government and others pursuant to the *Indian Act*. Without effective human rights protection, now blocked by s. 67, Aboriginal women restored to status under C-31 may be excluded from any role in determining the future of First Nations communities under self-government. Their only recourse against any type of discrimination will continue to be vastly expensive Charter cases.

The CHRA and the CHRC have a definite role to play in the advancement of the human rights of Aboriginal women. NWAC's recommendations to the Review are as follows:

1. Section 67 of the Canadian Human Rights Act should be repealed.

2. To protect traditional Aboriginal rights from the impact of a CHRA without section 67, include in the Act a provision similar to s.25 of the Charter: the guarantee in this Act of certain rights shall not be construed so as to abrogate or derogate from any Aboriginal, treaty Or other right that pertains to Aboriginal peoples in Canada.

3. However it should be recognized that some of Canada's most prominent foes of the rights of Aboriginal women have argued that the right to discriminate against and exclude women is part of the traditional heritage of Aboriginal peoples. This argument is made, for example, by the Sawridge band in its case against Bill C-31, and in its intervention to oppose John Corbière's attack on s.77 of the *Indian Act*. Accordingly, any provision drafted pursuant to recommendation 2 should include a safeguard, or rider, to the same effect as ss. 35(4) of the Constitution Act, 1982, that aboriginal and treaty rights are extended equally to men and women.

4. To the existing grounds in the CHRA should be added the prohibited grounds of off-reserve residence, non-*Indian Act* status, and "Bill C-31" status, drafted in language that is compatible with the other provisions of the Act but aims appropriately at the kinds of discrimination discussed in this paper.

5. It would also be appropriate to include in the Act prohibitions against nepotism and favouritism.

6. The CHRA should apply to Band Councils, to their membership codes, and to the actions of the federal Government Pursuant to the *Indian Act*. The Act should also include a standard provision that would make the CHRA applicable to self-government agreements unless and until measures to protect human rights were put in place pursuant to the agreement.

7. In the long run, NWAC recommends that there be a national Aboriginal Bill of Rights, drafted from the grass roots, that would be applicable to First Nations governments. The drafting should include participation from NWAC as well as organizations representing off-reserve and non-status Indians. This Bill of Rights could also be made applicable to the federal and provincial governments, given the role of government in reproducing the inequality of Aboriginal people, and the continuous devolution of responsibility for Native people from the federal government to the provinces.

8. Section 6(2) of the *Indian Act* should be repealed.

9. Amendments should be made to the *Indian Act* which would remove all discrimination, present and historical, against Aboriginal women and their children.

10. The government should undertake a full review of Bill C-31, to document its impact on Aboriginal women. In this review, Aboriginal women and their organizations should be centrally involved. The government should conduct the review with full transparency, revealing government practices and information, and there should be similar transparency from First Nations governments and organizations.

11. Consideration should be given to including in the CHRA basic procedural rights, which could be enforced against procedural unfairness in dealing with claims for reinstatement under Bill C-31 I and in the ways First Nations deal with reinstatees.

12. The CHRC needs to be provided with the funding to make it fully effective as an instrument of human rights enforcement. In the case of Aboriginal people, such funding would allow the Commission to take account of the facts that Aboriginal people live in isolated and remote areas; may not have access to sophisticated communications means; may have literacy and language issues in dealing with

the Commission; do not have ready access to legal advice because of their isolation and poverty; live in small communities where reprisals for complaints may be a continuing problem or in urban centres where they may be homeless or transient; and are dealing with organizations (Canada and some Band Councils) with a record of poor communication, so that access to required documentation may be difficult to obtain.

13. The considerations noted in recommendation 12 suggest that innovative methods of organization and approach need to be adopted for cases involving Aboriginal people. These could include, for example, the creation of an Ombudsman or Ombudsman-like office within the Commission, to deal with Aboriginal matters. This office would have to have regional ramifications and the language capability to be accessible to all Aboriginal people. The Ombudsman would assist in claims against First Nations and the Government of Canada.

14. NWAC recommends that the Commission establish staff and Tribunal panels comprised of Aboriginal people with a background not only in human rights but also in traditional dispute resolution methods. Persons appointed would be sourced/approved through the national Aboriginal organizations, including NWAC.

15. The CHRC should have a special monitoring function with respect to Canada's compliance with its international human rights obligations. Through the Commission, an initial database reflecting the discrimination against Aboriginal women should be constructed, and regular updates undertaken. This function should be confided to Commission staff who are Aboriginal.

16. As a first step in implementing recommendation 15, there should be convened a national conference of Native women that would address human rights issues pertaining to the *Indian Act*.

17. The Government of Canada, through the Department of Justice, should agree to periodic reviews of the CHRA (e.g. every five years).

2. The Native Women's Association of Canada

The Native Women's Association of Canada ("NWAC") is a national non-profit organization incorporated in 1974. It is an aggregate of associations in the provinces and territories of Canada, and works on principles like those of the traditional "Grandmothers' Lodge", in which members as aunties, mothers, grandmothers and relatives collectively recognize, respect, promote, defend and enhance our Aboriginal ancestral laws, spiritual beliefs, language, and the traditions given by the Creator.

Among the objectives of NWAC are to be the national voice for Native women, to address issues in a manner which reflects the changing needs of Native women in Canada, to assist and promote common goals towards self-determination and self-sufficiency for Native peoples in our role as mothers and leaders, to promote equal opportunities for Native women in programs and activities, to advance issues and concerns of Native women, and to cultivate and teach the characteristics that are unique aspects of our cultural and historical traditions.

The Board of Directors of NWAC consists of the President, four Regional Executive Leaders, four Regional Youth Representatives, thirteen Regional Representatives and a Council of Elders. NWAC represents approximately 513,000 Aboriginal women, and has membership in all of the provinces and territories of Canada. The majority of NWAC's membership are status Indians, many of whom were reinstated following passage of *An Act* to *Amend the Indian Act* (S.C. 1985, c.27), commonly referred to as *Bill C-31*.

3. NWAC and Bill C-31

In 1999, NWAC celebrated its twenty-fifth anniversary. From the beginning, NWAC has been deeply involved in the struggle of Native women to assert their rights as human beings, as Aboriginal people, and as Indians under the *Indian Act*, R.S.C. 1985, 1-5 *("Indian Act")*. In 1971, Jeannette Corbière Lavell of the Wikwemikong Band (unceded) brought a court action under the *Canadian Bill of Rights* to assert her right to equality and overturn ss. 12(1)(b) of the *Indian Act*. Her name had been removed from the band list for marrying a non-Aboriginal male, and she was the first Aboriginal woman to challenge the operation of this provision. At the same time, Yvonne Bedard was challenging the refusal of the Council of the Six Nations Indians to allow her to live on the reserve in a house bequeathed to her by her mother, after her separation from her non-Aboriginal husband.

These women's position was opposed by the Government of Canada and by thirteen Aboriginal organizations who were provided intervener funding by the Department of Justice and Indian Affairs. The women received no funding for their case. They lost in the Supreme Court of Canada: *Canada (AG) v. Lavell [1974] S.C.R. 1349*. However, in a strong dissent, Mr. Justice Laskin (later to be Chief Justice of Canada) stated:

> *Section 12(1){b) effects the statutory excommunication of Indian women from [their] society but not of Indian men. Indeed, as was pointed out by counsel for the Native Council of Canada, the effect of ss. 11 and 12(1)(b) is to excommunicate the children of a union of an Indian woman with a non-Indian. There is also the invidious distinction... that the Indian creates between brothers and sisters who are Indians and who respectively marry non-Indians. (at 1386)*

Ms. Lavell's struggle resulted in the formation of the National Committee on Indian Rights for Indian Women (NCIRIW) and of NWAC. The first national meeting of the local and regional organizations which established NWAC took place in March, 1971 in Edmonton, Alberta, with subsequent national meetings in Truro, Nova Scotia and Winnipeg, Manitoba. In August 1974, in Thunder Bay, Ontario, the first Annual Assembly of the Native Women's Association of Canada was held. After Ms. Lavell's loss in the Supreme Court in 1973, renewed efforts to challenge ss. 12(1)(b) became the focus of NWAC's activities.

Sandra Lovelace, a Maliseet woman, lost her Indian Act status and band membership when she married a non-Aboriginal male in 1970. After her divorce, she was forbidden to live again on her Reserve, the Tobique reserve in New Brunswick. On December 29, 1977, she filed a complaint with the United Nations Committee on Human Rights under the Optional Protocol to the *International Covenant on Civil and Political Rights*.

Going to the international level represented the only recourse for Native women at that time. In 1974, the federal government and the Native Indian Brotherhood had created the Joint Cabinet/NIB Committee for joint policy making. The government had promised the NIB that it would not change parts of the *Indian Act* until the entire Act was changed, and that any amendments would be cleared through the Joint Committee before going to Parliament. In 1975, the Joint Committee began working on revisions to the Act with respect to Indian women. Indian Rights for Indian Women was excluded from these discussions. The new Human Rights Commissioner, Gordon Fairweather, stated that “The fact that they are not represented is itself discriminatory." At a December 1977 meeting of the Joint Committee, the government claimed that it was not clear that Aboriginal people had the education rights that the NIB claimed. In turn, the NIB refused to discuss the rights of Indian women, claiming they were even more tenuous. The NIB withdrew from the Joint Committee in April 1978 and the issue of Indian women's rights remained unresolved.

In 1976, the NCIRIW and NWAC recommended as a temporary solution the use of section 4 of the *Indian Act* to suspend the operation of ss. 12(1)(b). In 1980, after the Native Women's March, the Minister of Indian Affairs agreed to suspend ss. 12(1)(b) and ss. 12(1)(a)(iv) [the ‘double mother' provision denying Indian status to a person whose mother and grandmother had both gained status by marriage to an Indian male] when requested to do so by the Bands. Both men and women lost status pursuant to the double mother provision, whereas women only lost status by ss. 12(1)(b). By July 1982, 63 Bands had accepted the government offer to suspend the operation of ss. 12(1)(b), yet 285 Bands had suspended ss. 12(1)(a)(iv).

Pressure on the government to amend the *Indian Act* was mounting by 1977. Passage of the *Canadian Human Rights Act* that year provided another focus for that pressure. Since the government could not amend the *Indian Act* at that time without going through the Joint Committee, it exempted the *Indian Act* from the application of the *Human Rights Act*. This action foreclosed the possibility that Indian women, strong advocates for change through Indian Rights for Indian Women and other organizations, would use the *Canadian Human Rights Act* to challenge the *Indian Act*. This exemption, in s.67, was intended as a temporary solution, but it is still in the *CHRA*.

In 1978, the Canadian Advisory Council on the Status of Women published *Indian Women and the Law in Canada*: *Citizens Minus* by Kathleen Jamieson, the first major study of discrimination against Aboriginal women. The study was undertaken after representations to the Council by Jenny Margetts, the head of Indian Rights for Indian Women.

In the summer of 1979, a group of women from the Tobique Reserve, including Sandra Lovelace, began a march to Ottawa to protest poor housing conditions for women on the Reserve. The Native Women's March to Ottawa was joined by others along its route, and culminated in the Native Women's Rally on Parliament Hill, Ottawa, on July 21, 1979 and a meeting with the Prime Minister and some members of his Cabinet.

On July 30, 1981, the UN Human Rights Committee found Canada in violation of Article 27 of the *Covenant*, because it denied Sandra Lovelace the right to live in her community. She was denied access to her culture, her religion and her language contrary to Article 27. In her complaint, Ms. Lovelace had argued that her major continuing loss as a result of ss.12(1)(b) was of identity, of emotional ties to her friends and relations, and of the cultural benefits which result from living in an Indian community. The Committee found Article 27 of the *Covenant* to be the most directly relevant to these losses. The terms "belonging to a minority" within the terms of Article 27 include those persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties. Sandra Lovelace continued to be denied the right of access to her native culture and language in community with other members of her group.

Although the Committee did not hold that Article 27 gives a right to reside on a reserve, it considered whether the restrictions on residence imposed by Canada have both a reasonable and objective justification and are consistent with other provisions of the *Covenant*, read as a whole, such as the provision against discrimination. The Committee held that the denial to Sandra Lovelace of the right to reside on the reserve was neither reasonable nor necessary to preserve the identity of the tribe.

The *Lovelace* decision focused international attention on Canada. In 1982, the Government of Canada empowered the Standing Committee of the House of Commons on Indian Affairs and Northern Development to review all legal and related institutional factors affecting the status, development and responsibilities of band Governments in Indian Reserves, a study on Aboriginal self-government which had long been sought by

the Chiefs. However, before the study could proceed, the issue of sex discrimination against Indian women was referred to a Sub-committee on Indian Women and the *Indian Act*. Before that Sub-committee, the Minister of Indian Affairs made it clear that the actions of Aboriginal women had played a key role in bringing the issue of ss. 12(1)(b) to the forefront. He also admitted that the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 left little room for further postponement.

In its testimony before the sub-Committee, NWAC emphasized that both the *Charter* and Canada's obligations under international covenants required removal of sex discrimination from the *Indian Act*. The opposing point of view, taken by among others the Assembly of First Nations, emphasized that the rights in section 15 of the *Charter* are individual rights and inconsistent with the right to self-government, which means that only those whom the First Nations declare to be members could be members.

Near the end of the 1984 Parliament, the Government responded to the Report on Aboriginal Women and the *Indian Act* by bringing forth *Bill C-47*, which failed to achieve passage. On June 28, 1985, after the general election had returned a new Government, *Bill C-31* was passed. *Bill C-31* ended the entitlement of Indian males to pass on status to their non-Indian wives. It ended the statutory excommunication of Indian women upon marriage to non-Indians. It reinstated to Indian status those women who had lost their status under ss.12(1)(b), and their children. However, these gains were offset by other provisions bringing a legacy of trouble and continuing discrimination. The problems caused by *Bill C-31* are examined in more detail below.

4. Bill C-31

a) Section 6(2)

By *Bill C-31* t the *Indian Act* was amended to provide in ss. 6(2) that a person cannot be registered as an Indian if one parent is a non-Indian and the other is a reinstatee under *Bill C-31*. In effect, a *Bill C-31* reinstatee must have children with a status Indian person if those children are to be eligible for registration under the Act. Thus, the "Indian-ness" of the reinstatee is less powerful that the "Indian-ness" of someone who derives status under other provisions of the *Indian Act*; this is so even if their Aboriginal lineage is identical. Subsection 6(2) of the *Indian Act* is called, colloquially, the "second generation cut-off'.

The effects of this provision are extremely divisive in the Aboriginal- community. Cousins of the first degree will have different status under the *Indian Act*, depending on whether they descend in the female line or the male line. Brothers and sisters have different abilities to pass on their status to their children. A "6(2)" woman who cannot or will not name the father of her child born out of wedlock (because, for example, the child is the result of rape) will see that child denied status under the Act even if the father is a status Indian. Mothers who are restored to Indian status pursuant to *Bill C-31* will be grandmothers of children who cannot claim status, because their "6(2)" parent married a non-Aboriginal.

Thus *Bill C-31* affects finer and finer differentiations among the Aboriginal community, and has divided families.

The *Bill C-31* reinstatees, in effect, are given a "life interest" in Indian status that relates to themselves alone, and they do not have the same ability in law to pass their status on to their children as do others with status under the Act including the white women who became status Indians under the old s. 12. The largest group of these "Indians for life only" is female, setting a base of gender discrimination firmly under Aboriginal communities. This discrimination has been prohibited with respect to Canadian citizenship: Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 (S.C.C.). It should not be allowed to persist with respect to *Indian Act* status.

Quite apart from the discriminatory effect of the law on women, it is now clear that it has a negative effect on Aboriginal communities. Its operation will result in the shrinking of *Indian Act* communities, as the grandchildren's generation loses status. As the federal government's current policy is to accept legal and fiscal responsibility for only *Indian Act* communities, it will be able to shed its fiduciary duties through the operation of *Bill C-31*.

In order to guard against the assimilative effect of the second generation cut- off, Aboriginal persons, especially Aboriginal people affected by *Bill C-31*, will have to have children within the shrinking *Indian Act* population. This stricture has the effect of curbing free choice of life partner, contrary to many international human rights principles. It also resembles the apartheid laws, which segregated persons very dramatically by race. Moreover, it is often difficult for *Bill C-31* reinstatees to make social connections with those who have full status under the *Indian Act*, because of the exclusion of Bill C- 31 reinstatees from band membership and residence on reserve lands.

b) Severance of Status and Band Membership

The second feature of the *Bill C-31* amendments which has perpetuated the old discrimination is the effective severance of band membership from *Indian Act* status. A person can be restored to status (and membership on the General List) pursuant to *Bill C-31*, upon application to the federal government. However, it is up to the band to decide whether the person will be re-admitted to band membership. At the May 1999 *Bill C-31* Conference sponsored by the NWAC, Harold Cardinal described this situation as being consigned to the "legal limbo" called General List Indians, expected to exist in a white man's spirit world that is not anchored in any ground or any community."

Several problems arise from this bifurcated structure. If a band structures its membership code so as to include non-status people in membership (so that the non-status families of *Bill C-31* reinstatees could, for example, be members), the band suffers a financial penalty: funding for Bands covers only persons who have status under the *Indian Act*. Thus there is a disincentive for including Bill C-31 families in band membership.

Secondly, a band might structure its membership code so that *Bill C-31* reinstatees are not permitted membership. This means that such persons would remain on the general list, but not have a band to belong to, and not enjoy the benefits of band membership. The bifurcation of band membership from Indian status means, among other things, that Bill C-31 reinstatees who are not yet band members are excluded from voting on band membership codes under the *Indian Act*. The codes on which these reinstatees, largely women, have not voted, may be framed so as to exclude them from membership.

This problem with the membership codes affects not only those reinstated under *Bill C-31* to Indian status, but also those who kept their Indian status but were moved to their husband's band by reason of the effects of section 11 of the *Indian Act*. These persons are not able to vote on the membership codes of their own bands unless and until they regain their membership. Whether they can regain their membership may depend on membership codes which they have no part in formulating.

Exclusion from band membership has far-reaching implications. Persons who are on the General List but not a band list do not have access to many kinds of payments. Significantly, the federal government has chosen to conduct its self-government negotiations and other highly important activities with only *Indian Act* bands. This means that excluded *Bill C-31* reinstatees have no part to play in forging the future of Aboriginal communities. They run every risk of being as excluded from the future as they are in the present and as they were in the past.

When it was reviewing band membership codes during the initial two year period allowed for their formulation after passage of *Bill C-31*, the federal government would point out problems with exclusionary provisions, but not require that they be remedied. More important from a long-term perspective is that a band membership code once enacted can be changed, and discriminatory provisions introduced to it, without any further federal review. Moreover, band membership codes are not readily accessible, even to band members. Bands can deny membership under discriminatory codes, and there is no appeal to the department. About half of the bands in Canada have taken control of their membership codes since 1985. Because of the inaccessibility of band membership codes, systematic review of discriminatory provisions is not possible.

Not being a band member also means that a person may not be able to reside on the reserve. The bands can pass by-laws under s.81 of the *Indian Act* concerning the right of residence on the reserve, and also the right of residence of a member's spouse and children. Even if the *Bill C-31* reinstatee is a band member, she may not be able to live on the reserve; alternatively, she may be able to return, but her non-member spouse and children may not. If her non-member children are allowed to live with her on the reserve while in their minority, they may lose that right - and thus connection to their community -- upon reaching adulthood.

In the conferences on *Bill C-31* sponsored by NWAC, as well as the study conducted by the Aboriginal Women's Action Network in British Columbia, it emerged very clearly that there are certain widespread and stubborn problems facing *Bill C-31* reinstatees in their dealings with the bands. Some band members have preferential access to benefits, like

funding for post-secondary education and non-funded health benefits. One factor in the differential access is off-reserve status: even when off-reserve members are legally entitled to certain benefits (like education assistance and non-funded health benefits) reserve members may be better treated in comparison. Another factor mentioned repeatedly at the conferences and in the AWAN interviews is favouritism or nepotism. Nepotism, in fact, was called a "pernicious" issue: who you know, and who you are related to, can make all the difference to realizing your entitlements. The effects can be grave: while some conference participants or AWAN interviewees talked of getting less than non-Bill-C-31 people, the May 1999 conference also heard that no education funds are available for children of reinstated women, and no education funds are available for people living off-reserve.

Housing has been a constant and serious issue for those reinstated under *Bill C-31*. The bands control housing funds, and so all of the difficulties arising from favouritism and nepotism may come into play in this area too. As John Corbière pointed out at the May 1999 conference, there is no means of enforcing Band Council accountability in the manner of housing funding. Another lay 1999 participant stated that those with C-31 status were the last people considered for band housing programs and services.

The crushing shortage of adequate housing for Aboriginal people has played a large part in the differential treatment of *Bill C-31* reinstatees. The federal government provided funds for housing at the time *Bill C-31* came into effect, but seriously underestimated the number of *Bill C-31* claimants there would be. Arguably, then, the amounts necessary for housing *Bill C-31* returnees to reserves fell short because of these underestimates. However, to compound the problem, there was not enough housing for existing band members, and waiting lists *pre-Bill-C-31* were long. The federal government thus, as a matter of policy, advised bands that they could apply the C-31 funds to provide housing to those on their existing waiting lists.

Underlying the differential treatment of *Bill C-31* reinstatees is a serious problem of stereotyping and discrimination. Repeatedly, NWAC was advised at the conferences that *Bill C-31* people are branded as second class. Those reinstated under the Bill are often not seen as "real Indians" or "pure Indians". Attitudes towards these women and their families are informed by the internalized racism absorbed at the reserve level from the larger society, and by the stratification politics of the *Indian Act*. It is reported that many Native people believe that the women left "voluntarily" and now want "something for nothing". The overwhelming majority of the women interviewed for the AWAN study reported not feeling welcomed.

With the devolution of authority from the federal government to First Nations, another kind of problem arises. The negotiation of Health Transfer Agreements goes on behind closed doors, and there is not much information available about the details of these agreements. Medical benefits are not contingent on band membership, but to many women, it is not clear who is responsible for the administration of medical services to children who are not band members. Non-members may be entitled, but who is administering these services?

At the conference in May 1999, delegates identified access to housing and educational benefits as the most contentious aspects of individuals' relations with the bands. There was also a concensus that a priority should be given to the repeal of s.6(2) of the *Indian Act*. Delegates desired a membership code that would be fair to all Aboriginal people, and considered that means should be available to challenge in the court system those that are not fair and equal. Delegates also asked for a full review of *Bill C-31*, and the framing of a national *Bill of Rights* for Aboriginal people, worked out at the grassroots, and enforced at the band level.

In the AWAN study, it was recommended, among other approaches, that support be given to a national Native women's conference that would address human rights issues as they pertain to the *Indian Act*. In the words of that study report, "Can Native women find respect and justice in working with our patriarchal brothers without human rights mechanisms in place?"

5. NWAC's Continuing Advocacy with Respect to Bill C-31 and Equality Issues

Passage of *Bill C-31* has not given Aboriginal women substantive equality, nor restored excluded women and their families to the position they would have been in without the previous discrimination in the *Indian Act*. NWAC continues to militate against discrimination wrought by *Bill C-31*, and other discrimination against Indian women. It has organized and hosted two national conferences on the impact of *Bill C-31*, in March 1998 and May 1999, resulting in recommendations for action. The recommendations in this study are based on those national conferences. NWAC was an intervener in the Supreme Court of Canada in support of the challenge to s. 77 of the *Indian Act* by John Corbière and others, to invalidate the provision, denying the vote in Band Council elections to off-reserve band members. In addition to its participation in the Corbière case, NWAC also intervened in the November 1999 hearing of the case of *Lovelace et al. v. Queen in Right of Ontario and The Chiefs of Ontario*, to support the claim of several Aboriginal communities who are not bands under the *Indian Act* to a share of the proceeds from Casino Rama under an agreement with the Ontario government.

Just as in Corbière, where NWAC argued successfully that discrimination against off-reserve band members is contrary to the Charter of Rights and Freedoms, so in Lovelace did NWAC argue that using *Indian Act* status as a marker for eligibility for government benefits for Aboriginal people violates section 15. NWAC argued in its Lovelace brief that non-*Indian Act* status, like off-reserve residency for band members, is what the Supreme Court has identified as "an embedded analogous ground" under section 15 of the Charter. In March of 2000, NWAC is hosting a national conference to study the implications of the Corbière decision, which it believes are far-reaching.

It is hoped that this overview of NWAC's involvement in the movement for Indian rights for Indian women, and to end discrimination against Aboriginal women, will set the context for its recommendations concerning the Canadian Human Rights Act. In particular, it should be understood that considerations of discrimination against

Aboriginal people, and Aboriginal women in particular, need to be undertaken with an understanding of the thoroughgoing nature and long existence of the systemic racism and colonialism of the *Indian Act*. This statute, given special protection by s.67 of the CHRA, has been an instrument of oppression and cultural domination. It has been the vehicle by which the Government of Canada has divided the Aboriginal community, and striven for assimilation of its peoples.

The struggle against only one of the Act's provisions, ss. 12(1)(b), has consumed over thirty years of litigation and political action, and is not yet over. The divisive legacy of ss. 12(1)(b) has only been highlighted by *Bill C-31*. Without *Bill C-31*, however flawed it is, the exiled women and their families would have vanished from the Aboriginal world, and sunk from official view. They and their suffering would have been out of sight, out of mind. The determination of women to resist that fate has brought to the forefront, and kept alive, this striking example of the damage that is done by government definition, from a colonialist and assimilationist point of view, of who is an Indian.

Whatever reforms of the Canadian Human Rights Act are undertaken with respect to the *Indian Act* should be infused by this awareness of the scope, the intentionality, and the devastating consequences of the discrimination wrought by the *Indian Act*.

6. The Situation of Aboriginal Women

In a judgement of the Federal Court of Appeal in *Native Women's Association of Canada et al. v. Canada*, [1992] 3 F.C. 192, Mr. Justice Mahoney speaking for a unanimous panel of the Court accepted the evidence led by NWAC regarding the disadvantaged economic, legal and social conditions of Aboriginal women. He concluded in his reasons that

> *There is ample evidence which need not be reviewed that they individually and native women as a class remain doubly disadvantaged in Canadian society by reason of both race and sex and disadvantaged in at least some Aboriginal societies by reason of sex. The uncontradicted evidence is that they are also seriously disadvantaged by reason of sex within the segment of Aboriginal society residing on or claiming the right to reside on Indian reservations. (at 199)*

In her reasons in *Corbière v. Canada (MIN.A.)* (1999}, 173 D.L.R. (4th) 1, Madame Justice L'Heureux-Dubè describes in greater detail the kind of discrimination faced by Aboriginal women, especially those living off-reserve. Justices Gonthier, Iacobucci and Binnie concur in her reasons, and Justices McLachlin and Bastarache, writing for themselves and Lamer, C.J.C., Cory and Major JJ., adopt the factual background which Justice L'Heureux-Dubè sets out.
Justice L'Heureux-Dubè emphasizes that all band members affected by the *Indian Act*, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples. However, her analysis focuses on the particular disadvantage, stereotyping and vulnerability of off-reserve band members.

She writes that band members living off-reserve form part of a "discrete and insular minority" defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society (at 44). Decision-makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots. She notes that the Royal Commission on Aboriginal Peoples ("RCAP") observed that before RCAP began its work, little thought had been given to improving the circumstances of urban Aboriginal people, even though their lives were often desperate (at 44-45).

RCAP has identified stereotyping as one of the sources of inattention to urban Aboriginal peoples' situation. Justice L'Heureux-Dubè refers to the Commission's observations about general stereotypes in society concerning off-reserve Aboriginals: people have been seen as truly Aboriginal only if they live on reserves. The assumption that Aboriginal cultures and mores are incompatible with contemporary industrialized society has led in turn to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed. They are seen as assimilated, and their cultural identity becomes irrelevant.

Justice L'Heureux-Dubè also notes that off-reserve band members experience particular disadvantages as a result of their separation from the reserve. They are apart from communities to which many feel connection, and have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways because of this fact. Moreover, the context is one in which Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances of Canadian and Aboriginal society. (at 44-45)

The Court sees the creation of the group of off-reserve people as a consequence, in part, of historic policies towards Aboriginal peoples, particularly what RCAP has called the "displacement and assimilation" policies from the early 1800s to 1969. (at 49).

It emphasizes that off-reserve people often live apart from reserves due to factors that are largely beyond their control. Lack of land, scarce job opportunities on reserves, and the need to go far from the community for schooling, are among the reasons for leaving the reserve both in the past and today. Involuntary enfranchisement deprived Indians of status if they secured higher education, or if they wanted to vote or hold Canadian citizenship. Those serving in the military in the two world wars were required to enfranchise themselves and their families, and those absent from the country for more than five years also lost status. (at 50-52)

The Court identifies "particular issues" affecting Aboriginal women's migration. Women lost status because they married men who did not have Indian status; women who married outside their band became members of their husband's band. The Court traces the long history of these exclusionary provisions, from 1857, and notes that the

legislation introduced patriarchal concepts into many Aboriginal societies which did not exist before.

The *Aboriginal Justice Inquiry of Manitoba* identified domestic violence as anotl1er strong reason why women have been forced to leave reserves. Aboriginal women are subject to higher rates of domestic abuse than non-Aboriginal women (one in three, compared to one in ten). Women move to urban centers to escape such violence, and the Aboriginal Justice Inquiry of Manitoba has identified bias in favour of the male partner in a domestic abuse situation as a contributing factor. It criticizes chiefs and councils for being unwilling to address the plight of women and children suffering abuse at the hands of husbands and fathers. It calls the failure of Aboriginal government leaders to deal with such abuse "alarming" and "unconscionable": (Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People (1991), Chapter 13, 482-485).

The Native Women's Association of Canada launched an action against the Government of Canada in 1999, alleging that the failure of the government to provide for reserve residents an easily accessible way of resolving issues of occupation or possession of the matrimonial home, and related matters, in the event of family breakdown is a violation of the Charter. Aboriginal women living on reserves are the only women in Canada who do not have available to them a legal process for handling these issues. Whether they can continue to occupy the matrimonial home in the event of violence or separation depends entirely on the discretionary action of the Band Council. This surely is another factor explaining the flight of women from their reserve communities.

In addition to cultural isolation, and discrimination, women living off- reserve experience economic hardship. A Statistics Canada study of Canada's off-reserve population shows that Aboriginal people living off-reserve changed residence more often than the overall Canadian population; that 23% of off-reserve families were headed by single parents, compared with 12% of Canadian families; that 87% of off-reserve single parents were women, compared with 83% of the non-Aboriginal families headed by single parents; that the unemployment rate for Aboriginal people living off- reserve was 28%, almost triple that of all Canadians; that Aboriginal women living off-reserve earned $9,000 per year on average, compared to $12,900 for all Canadian women; and that the median income of Aboriginal women off-reserve was $7,200 while for Canadian women overall it was $10,800. Although the incomes of Aboriginal people living off-reserve were lower than incomes generally, their families were larger: an average of3.4 people per family compared with 3.1 for the average Canadian family. Canada's Off-Reserve Aboriginal Population, Canadian Social Trends, Winter 1991.

It can clearly be seen that Aboriginal women are among the most disadvantaged people in Canada.

7. Aboriginal Women and the Canadian Human Rights Act

Section 67 of the Canadian Human Rights Act provides that nothing in the Act "affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

This provision was included in the CHRA in 1977, as described above. It has been found that one of the purposes of the provision was to prevent non-*Indian Act* persons from challenging their exclusion from the Act or the privileges and benefits conferred by it: *Jacobs v. Mohawk Council of Kahnawake*, [1998] 3 C.N.L.R. 68 at 101. To this extent, perhaps, it can be seen as roughly analogous to ss.15(2) of the Charter , or those provisions in human rights legislation which protect special action programs from attack.

It should be remembered, however, that this paradigm does not accurately apply in the *Indian Act* situation. The exclusion may well prevent non-Aboriginal persons who are more privileged than status Indians from challenging the *Indian Act*, operating as a shield for so-called "protective" legislation. It will also prevent from challenging the *Indian Act* those Aboriginal persons who are excluded from it, including status Indians who are living off-reserve, or non-status Aboriginal people who do not have any recourse to the *Indian Act*. It also shields from challenge, by those subject to it, the *Indian Act* 's systemic racist structure, and both its assimilationist and its apartheid-type provisions and effects.

On balance, then, it may be said that the rationale of protecting the *Indian Act* system from destruction at the hands of privileged non-Aboriginal persons who do not wish to recognize the distinctiveness of Indian culture is greatly overwhelmed by the invidious effect of section 67 in protecting from examination the systemic racism of the Act.

One particular area in which this protection is extended is with respect to the challenges of Aboriginal women to ss. l2(1)(b). It is common ground that one of the reasons for section 67 was to prevent Aboriginal women from using the *CHRA* to challenge their loss of Indian status upon marriage to non-Aboriginal men. As a result of this provision, women had to resort to other forms of litigation and protest to secure change of the *Act*.

Two of the strongest instruments available to Aboriginal women in their quest for equality have been the *Charter*, particularly section 15, and the *Constitution Act*, 1982, in particular section 35(4). The Native Women's Association of Canada has had to defend the availability of the Charter during constitutional discussions subsequent to 1982. In particular, NWAC took court action during the discussions related to the Charlottetown Accord in an effort to get into the talks and ensure that self-government provisions would remain subject to the Charter. Otherwise, women dealing with Aboriginal self-governments would have no recourse against discrimination: it was doubtful whether the CHRA could be invoked, because of s. 67, and there was as yet no new Aboriginal Charter of Rights and Freedoms evolved within the Aboriginal communities.

NWAC continues to see the Canadian Charter as an essential safeguard for Aboriginal women. However, litigation to invoke its protections is well beyond the means of individual Aboriginal women, and a serious strain on the resources of Aboriginal women's groups.

Not only the purpose of section 67 is problematic. Its language is also a concern.

The language of section 67 is, on its face, very broad and general, protecting "any provision of the *Indian Act*" and "any provision made under or pursuant to that Act." The reference to any provision of the *Indian Act* is clearer than the rest: this language rules out the CHRA as a way of attacking any of the sections of the *Indian Act*. Reading "provision" in the second half of the sentence in the same way as in the first (a reasonable approach}, suggests that section 67 also insulates any piece of subordinate legislation made pursuant to the *Indian Act*: e.g. regulations. It is likely that other forms of lawmaking provided for in the *Indian Act* are also brought within the protection: i.e. the making of by-laws, provided that all of the steps required by the Act have been undertaken (i.e. securing of Ministerial or departmental approval).

Even without contemplating what other kinds of actions might be encompassed within "any provision" in the second half of section 67, its protections of band and government action are considerable, affecting very wide areas of Band Council action and the life of a band member, on or off the reserve. For example, it is broad enough to protect from *CHRA* review matters relating to the registration or non-registration of someone on the general list or the band list (ss. 5 and following of the Act); decisions about the creation of new bands by the Minister under s. 17; use of reserve lands under section 18; possession of land on reserves; compensation for persons removed from occupation of lands on a reserve; surrender of lands in a reserve; rulings with respect to the property of deceased Indians and distribution of property on an intestacy; Ministerial decisions with respect to "incompetent" Indians pursuant to s. 51 and guardianship under s. 52; management of reserve lands and Indian moneys; elections of Band Councils; and the enactment of bylaws by those Councils under section 81 to 86. Under those sections, bylaws may be enacted on a wide range of subjects, from the observance of law and order, residence of persons on reserve, regulation of some kinds of commerce and enterprise, rights of spouses and children living with members on the reserve, money bylaws and bylaws relating to intoxicants.

Section 67, in effect, creates a wide zone in which neither the Minister nor the Band Council can be held accountable to human rights values with respect to their conduct. It may be suggested that the Band Council, particularly in contemporary society, is attempting to develop its capacity for self-governance in light of traditional communitarian values, and deserves some insulation from the rights ideas of the European Enlightenment, and the post- World War II human rights renaissance. NWAC is unconvinced of this position. But even those who espouse it cannot, in NWAC's, submission, stretch it to cover the actions of the government of Canada pursuant to the *Indian Act*. The government of Canada has been a signatory to numerous international conventions relating to human rights, which exist because they have garnered sufficient

support in the extremely diverse world human community to achieve ratification in the United Nations. These conventions are not narrowly Eurocentric, but represent some broader consensus about what is necessary to protect human dignity and further human aspirations. Yet, the Government of Canada insists that in its actions pursuant to the *Indian Act*, it need not act in accordance with the *CHRA*, which is one of the main repositories of those values in this country.

The jurisprudence dealing with section 67 has, it seems, tried to limit its scope by insisting that band or Government action be squarely within the terms of the *Indian Act* before it will escape application of the *CHRA*. Thus, discriminatory hiring practices by Bands will not escape review, as these appear not to be explicitly authorized by the *Indian Act*: *Re Desjarlais* (1989) 12 C.H.R.R. D/466; *Dokis v. Dokis Indian Band*, [1995] C.H.R.D. No. 15; *Dewald v. Dawson Indian Band*, [1993] C.H.R.D. No. 15; *Leonie Rivers v. Squamish Indian Band Council*, [1994], C.H.R.D. No.3. A moratorium imposed by a Band Council denying services to newly reinstated *Bill C-31* registrants was not protected by section 67 because the band did not have authority under the *Indian Act* to impose it: *Raphael v. Montagnais du Lac Saint-Jean Band*, [1995] C.H.R.R. No.10. A decision taken by a committee pursuant to a Band Council policy of uncertain status was not protected: Canada (*Human Rights Commission*) *v. Gordon Band Council* (1996) 31 C.H.R.R. D/385.

Although this is a useful trend in the jurisprudence, it is not effective as a safeguard for human rights. It may often require detailed argument, to the Commission during the complaints process, or before a court or tribunal, to assert successfully that section 67 should not block application of the *CHRA*. Individual complainants do not have the financial or the legal resources to engage in this kind of sophisticated analysis, against a Band Council that has superior resources. Even if the argument is successful, and jurisdiction is taken for an investigation, the question is not settled once and for all, and may arise again as the matter moves through its various stages. Moreover, each time the question of section 67 must be considered, important time is lost. The human rights process is already subject to many delays caused by inadequate resources and adversarial maneuvering by respondents, among other factors, and these types of threshold jurisdictional arguments bring further unacceptable delays.

Both the complication, and the delays, involved in addressing the section 67 issue, and the uncertainty that it sows regarding the availability of the *CHRA* as a resource, exert a considerable chilling effect on recourse to the *CHRA* for redress of discrimination under the *Indian Act* and by officials (government and Band Council) acting under it. It seems preferable in important cases to go directly to the *Charter of Rights*. In many other cases, the reality is that there is simply no recourse at all.

The advent of self-government initiatives further complicates the section 67 picture. Where agreements exist between Band Councils and the government for delivery of certain services, for example, is the subject area protected from *CHRA* review? In *Jacobs v. Mohawk Council of Kahnawake* (1998] 3 C.N.L.R. 68, it was held that s. 67 did not prevent review under the *CHRA* of denial of services to a family on the basis of

race and family status. This is because the Financial Transfer Agreement between the government of Canada and Kahnawake does not incorporate the membership code of Kahnawake that denies services. Should it be desired to shield such denials in the future, collaboration between the government and the band in the way they draw up agreements would ensure that result. This is shown by another aspect of the Jacobs case: a Ministerial Order gives effect to the Band's election code and so section 67 prevents review of a Band Council decision pursuant to it to deny the right to vote in Band Council elections on the basis of race and family status.

Actions taken by First Nations under land claims settlement agreements, and self-government agreements, recognized in statute, mayor may not be immune from review under the *Canadian Human Rights Act*. The terms of the Agreement must be consulted, as well as the language of the *Act*.

Here, too, is broad scope for delay and adversarial resistance to individual claims. In one case known to the Native Women's Association, an individual complained about Band Council resolutions passed in 1986 denying access to services and benefits for the person and the person's children. In 1990, the respondent band objected to the jurisdiction of the Commission on the basis of section 67, arguing that the complainant is a reinstatee to the band pursuant to *Bill C-31* and thus the Commission has no jurisdiction. The matter was placed in abeyance pending the outcome of *Twinn v. Her Majesty the Queen*, the protracted challenge to *Bill C-31* brought by one of Canada's wealthiest bands. In 1999, the respondent was notified of the Commission's decision to proceed with the complaint and a defence was requested. By that time, the *Twinn* case had been derailed by a ruling that the trial judge had shown bias. The Commission had also obtained an opinion that section 67 did not prevent it from proceeding.

However, the respondent protested further the jurisdiction of the Commission, on the basis of the decision in *Ermineskin v. The Queen* [1999] A.1. No.1209 .That case was a successful application to restrain the Commission from beginning a Tribunal hearing on the basis that the respondent Ermineskin Tribal Enterprises possesses the right to self-governance and thus federal human rights legislation is inapplicable. The hearing before die Tribunal was halted pending die determination by die Alberta Court of Queen's Bench of the jurisdiction of the Commission, and the federal government, over die subject matter.

Although Sulyma J. opined in the reasons in *Ermineskin* that the stay granted would not "have the effect of suspending the operation of the *Act* or affect its other daily determinations or processes," (at 8) the Commission advised the complainant in its investigation report (November 1999) that it was recommended that the complaint be stood down pending the final decision in the *Ermineskin* case.

This matter shows how powerful and wealthy Bands can delay the Commission from proceeding with a complaint for fourteen years, by engaging in litigation. Section 67 of the *Indian Act* figured in the delay.

The decision of the Supreme Court of Canada in *Vriend v. Alberta* [1998] I S.C.R. 493 should force re-examination of the continued inclusion of section 67 in the *Indian Act*. In that case, the Supreme Court of Canada considered the absence from *Alberta's Individual's Rights Protection Act* of a right to complain of discrimination on the basis of sexual orientation. The preamble to the IRPA, affirming that human dignity is the basis of human rights protection, and evidencing a legislative wish to protect human rights, is not dissimilar to that which opens the *CHRA*. Justices Cory and Iacobucci write in their reasons that being excluded from the protection of human rights legislation "imposes a heavy and disabling burden on those excluded" (at 549). Although the gap in Alberta's legislation resulted from a failure to include gays and lesbians, rather than from an explicit exclusion of them, the Justices remark, "The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion" (at 549).

The Justices' observations on being excluded from human rights protection are as forceful in the case of Aboriginal people as they are for gays and lesbians. They state:

> *...that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the IRPA, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination. (at 550)*

In forceful language, the Justices continue that the exclusion sends a message that it is "permissible, and perhaps even acceptable" to discriminate against individuals on the basis of their sexual orientation. The message tells gays and lesbians that they have no protection against discrimination on the basis of their sexual orientation. The exclusion sends the message that these people are "not worthy of protection", and "constitutes a particularly cruel form of discrimination". (at 551)

When the state denies protection from discrimination, it withholds state recognition of the legitimacy of a particular status. The denial of that recognition stigmatizes people in that group, indicating that they are inferior and less deserving of benefits. In effect, the government is stating that all persons are equal in dignity and rights, except for members of the excluded group. (at 551-552).

These words apply very powerfully to the situation of Aboriginal people under the *CHRA* as a result of s. 67. That section proclaims that the Government of Canada and the government's creations, the Band Councils, are permitted to discriminate at will against Aboriginal people on the basis of race, gender, and other characteristics, as long as their discrimination has a formal connection to the *Indian Act*. It proclaims that Aboriginal people are entitled to less protection of their human dignity than are other Canadians.

8. International Instruments

Canada is a signatory to a number of international instruments guaranteeing basic human rights and women's rights. In the paragraphs below are set out the basic provisions of four of these instruments, as they relate to the situation of Aboriginal women in Canada. Even a brief review of these international principles shows that in its treatment of Aboriginal women, Canada falls far below the standards set by the international community, and adopted by Canada, for basic human rights protection.

In December 1948, the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*, which sets forth the civil, political, economic, social and cultural rights to which every individual is entitled. *The Declaration* is the first of three components of *an International Bill of Human Rights*.The other two components of the *International Bill of Human Rights*, adopted in December 1966, are the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. In December 1979, the General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women*, the first international legal instrument to stipulate what constitutes discrimination against women. It came into effect on September 3,1981.

The Preamble to the *Universal Declaration of Human Rights* notes that the peoples of the United Nations have in its *Charter* reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom. In proclaiming the *Universal Declaration*, the General Assembly described it as "a common standard of achievement for all peoples and all nations". Article 2 of the *Declaration* proclaims that everyone is entitled to all the rights and freedoms set out in the *Declaration*, without distinction of any kind, such as race, sex, birth or other status. It also proclaims that no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, including whether it is under any limitation of sovereignty.

Article 7 of the *Universal Declaration* proclaims that all are equal before the law and are entitled without any discrimination to equal protection of the law. Article 8 states that everyone has me right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. Article 13 of the *Declaration* states in section (1) that everyone has the right to freedom of movement and residence within the borders of each State. Article 16 states that men and women are entitled to equal rights as to marriage, during marriage and at its dissolution. The Article also provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17 of the *Universal Declaration* declares that everyone has the right to own property alone as well as in association with others, and no one shall be arbitrarily deprived of property. Article 25 of the Declaration enshrines the right to a standard of living adequate for the health and well-being of the person and his or her family,

including food, clothing, housing and medical care. Article 26 stipulates that everyone has the right to education, and that parents have the right to choose the kind of education that shall be given to their children.

In Article 29(2) is found the limitation clause of the *Declaration*. It states that in the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 1 of the International *Covenant on Civil and Political Rights* stipulates that all peoples have the right of self-determination, and requires that the States Parties to the *Covenant* promote the realization of the right of self-determination. Article 2 commits the States Parties to respect and to ensure the rights recognized in the *Covenant*, without distinction of any kind, including race, sex, and birth or other status. Article 3 reflects the undertaking of the States Parties to ensure that any person whose rights or freedoms as recognized in the *Covenant* shall have an effective remedy, and have his or her right thereto determined by competent judicial, administrative, or legislative authorities.

The States Parties undertake in Article 3 of the *International Covenant* to insure the equal right of men and women to the enjoyment of all civil and political rights set forth in the *Covenant*. Article 23 of the *Covenant* provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. States Parties are bound by Article 23 to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

Article 25 of the *Covenant* provides to every citizen the right to take part in the conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections by universal and equal suffrage and conducted by secret ballot. Article 26 states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Among the grounds protected are race, sex, and birth or other status.

Article 27 of the *International Covenant* provides that in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The *International Covenant on Economic Social and Cultural Rights* recognizes in its preamble that the rights in it derive from the inherent dignity of the human person. In Part I, the *Covenant* declares that all peoples have the right of self-determination, and the States Parties to the *Covenant* will promote the realization of the right of self-determination and respect that right. In Part II, the States Parties agree that the rights in the *Covenant* will be exercised without discrimination of any kind, including as to race,

sex, and birth or other status. In Article 3 of Part II, the States Parties undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the *Covenant*.

Article 11 of the *Covenant* recognizes the right of everyone to an adequate standard of living for himself or herself and family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 12 recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and Article 13 recognizes the right of everyone to education.

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) defines "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." It commits States Parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including embodying the principle of equality of men and women in their national constitutions or other appropriate legislation, and to ensure through law and other appropriate means the practical realization of this principle. The means contemplated also include: adopting appropriate legislative measures prohibiting discrimination against women; to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; refraining from engaging in any act or practice of discrimination against women and ensuring that public authorities and institutions act in conformity with this obligation; taking all appropriate measures to eliminate discrimination against women by any person, organization or enterprise and to modify or abolish existing laws, regulations, customs or practices which constitute discrimination against women.

Article 7 of the CEDAW states that States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country, and in particular shall ensure to women, on the same terms as men, the right to vote in all elections, to be eligible for election to all publicly elected bodies, to participate in the formulation and implementation of government policy, to hold public office and perform all public functions at all levels of government; and to participate in non-governmental organizations and associations concerned with the public and political life of the country.

CEDAW stipulates that the States Parties shall take all appropriate measures to eliminate discrimination against women in the fields of education, employment, and health care, in order to ensure, on a basis of equality of men and women, the same rights. In Article 14, the *Covenant* notes the particular problems faced by rural women, and the significant roles which they play in the economic survival of their families. It seeks to ensure that they participate equally in and benefit from rural development, including the right to have access to adequate health care facilities, to benefit directly from social security programmes, to obtain all types of training and education, to

organize self-help groups and cooperatives in order to obtain equal access to economic opportunities, to participate in community activities, to have equal treatment in land and agrarian reform, and to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 15 of the CEDAW requires that States Parties shall accord to women equality with men before the law, including the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile. Article 16 requires states to eliminate discrimination against women in matters relating to marriage and family. In particular, states must ensure on a basis of equality of men and women the same right to enter into marriage, and to freely choose a spouse.

Canada's treatment of Aboriginal women through the *Indian Act* and the *Bill C-31* amendments denies the basic protections provided in these instruments: women are denied equality to men, both with regard to their families and to participation in the community and in public life. They do not have equal access to education and health. Significantly, they do not have access to the law of Canada -namely the *Canadian Human Rights Act* -- to secure their rights, by reason of section 67.

The Lovelace case focussed international attention on Canada in 1981. The 1985 reforms to the *Indian Act* made in consequence of that attention continue to fall short of international standards. This is a fundamental violation of the human rights of Aboriginal women.

9. Conclusions and Recommendations

The Native Women's Association of Canada urges the Review to recognize the longstanding discrimination against Native women in Canada, and the role played in that discrimination by government policy, the *Indian Act*, and actions of government and others under the *Indian Act*. Such discrimination is contrary to the Charter of Rights, and the guarantees of ss. 35(4) of the *Constitution Act,* 1982. It is inconsistent with basic principles of human rights and women's rights enunciated in the international instruments adhered to by Canada.

This discrimination is largely unreachable because of section 67 of the *Canadian Human Rights Act*. The presence in the *Act* of this section is not only inconsistent with the jurisprudence of the Supreme Court of Canada, but also runs counter to international human rights principles.

The Canadian Human Rights Commission has a role to play in the advancement of the equality of Aboriginal women. Moreover, absence from the *CHRA* of effective protection for Aboriginal women sends a powerful message that continuing discrimination against these, the most vulnerable, is acceptable.

The stakes are high. Without effective human rights protection, Aboriginal women, restored to status under *Bill C-31*, and living off-reserve or on-reserve, will be excluded from the discussions and negotiations leading to a new generation of Aboriginal governments. The discrimination of the past, unchecked in the present, will poison the future.

Without effective human rights protection, Aboriginal women will face the tough choice: litigate under the Charter, or have no rights at all.

While stating that effective human rights protection in Canadian legislation is necessary now, NWAC acknowledges that this protection will not, by itself, deliver Native women from the multiple disadvantage which they suffer. Rather, effective human rights protection will add an important instrument to the small array of measures which Native women now use to promote their equality in a highly discriminatory world.

In the paragraphs below, NWAC gives details of the *CHRA* and other measures which it asks this Review to recommend:

1. Section 67 of the *Canadian Human Rights Act* should be repealed.

2. To protect traditional Aboriginal rights from the impact of a *CHRA* without section 67, include in the *Act* a provision similar to s. 25 of the Charter: the guarantee in this *Act* of certain rights shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other right that pertains to Aboriginal peoples in Canada.

3. However it should be recognized that some of Canada's most prominent foes of the rights of Aboriginal women have argued that the right to discriminate against and exclude women is part of the traditional heritage of Aboriginal peoples. This argument is made, for example, by the Sawridge band in its case against *Bill C-31*, and in its intervention to oppose John Corbière's attack on s. 77 of the *Indian Act*. Accordingly, any provision drafted pursuant to recommendation 2 should include a safeguard, or rider, to the same effect as ss. 35(4) of the *Constitution Act*, 1982, that aboriginal and treaty rights are extended equally to men and women.

4. To the existing grounds in the *CHRA* should be added the prohibited grounds of off-reserve residence, non-*Indian Act* status, and II *Bill C-31*" status, drafted in language that is compatible with the other provisions of the *Act* but aims appropriately at the kinds of discrimination discussed in this paper.

5. It would also be appropriate to include in the *Act* prohibitions against nepotism and favouritism.

6. The *CHRA* should apply to Band Councils, to their membership codes, and to the actions of the federal Government pursuant to the *Indian Act*. The *Act* should also include a standard provision that would make the *CHRA* applicable to self-government agreements unless and until measures to protect human rights were put in place pursuant to the agreement.

7. In the long run, NWAC recommends that there be a national Aboriginal Bill of Rights, drafted from the grassroots, that would be applicable to First Nations governments. The drafting should include participation from NWAC as well as organizations representing off-reserve and non-status Indians. This Bill of Rights could also be made applicable to the federal and provincial governments, given the role of government in reproducing the inequality of Aboriginal 'people, and the continuous devolution of responsibility for Native people from the federal government to the provinces.

8. Section 6(2) of the *Indian Act* should be repealed.

9. Amendments should be made to the *Indian Act* which would remove all discrimination, present and historical, against Aboriginal women and their children.

10. The government should undertake a full review of *Bill C-31*, to document its impact on Aboriginal women. In this review, Aboriginal women and their organizations should be centrally involved. The government should conduct the review with full transparency, revealing government practices and information, and there should be similar transparency from First Nations governments and organizations.

11. Consideration should be given to including in the *CHRA* basic procedural rights, which could be enforced against procedural unfairness in dealing with claims for reinstatement under *Bill C-31*, and in the ways First Nations deal with reinstatees.

12. The CHRC needs to be provided with the funding to make it fully effective as an instrument of human rights enforcement. In the case of Aboriginal people, such funding would allow the Commission to take account of the facts that Aboriginal people live in isolated and remote areas; may not have access to sophisticated communications means; may have literacy and language issues in dealing With the Commission; do not have ready access to legal advice because of their isolation and poverty; live in small communities where reprisals for complaints may be a continuing problem or in urban centres where they may be homeless or transient; and are dealing with organizations (Canada and some Band Councils) with a record of poor communication, so that access to required documentation may be difficult to obtain.

13. The considerations noted in recommendation 12 suggest that innovative methods of organization and approach need to be adopted for cases involving Aboriginal people. These could include, for example, the creation of an Ombudsman or Ombudsman-like office within the Commission, to deal with Aboriginal matters. This office would have to have regional ramifications and the language capability to be accessible to all Aboriginal people. The Ombudsman would assist in claims against First Nations and the Government of Canada.

14. NWAC recommends that the Commission establish staff and Tribunal panels comprised of Aboriginal people with a background not only in human rights but also in traditional dispute resolution methods. Persons appointed would be sourced/approved through the national Aboriginal organizations, including NWAC.

15. The CHRC should have a special monitoring function with respect to Canada's compliance with its international human rights obligations. Through the Commission, an initial database reflecting the discrimination against Aboriginal women should be constructed, and regular updates undertaken. This function should be confided to Commission staff who are Aboriginal.

16. As a first step in implementing recommendation 15, there should be convened a national conference of Native women that would address human rights issues pertaining to the *Indian Act*.

17. The Government of Canada, through the Department of Justice, should agree to periodic reviews of the *CHRA* (e.g. every five years).

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