EXPLORING INEQUITIES UNDER THE *INDIAN ACT*

Cheryl Simon, Judy Clark*

INTRODUCTION

The lives of Aboriginal women have been deeply affected by Government policy. The *Indian Act*[1] (the *Act*) was enacted in 1876 and continues to govern the lives of status Indians. The *Act* has long discriminated against women and eroded cultural values and practices within the Mi'kmaq nation.

In 1982 the Canadian Constitution[2] was repatriated. The new Constitution included the *Canadian Charter of Rights and Freedoms* (the *Charter*). As part of the supreme law of Canada, the Charter guarantees the protection of individual rights. For many Canadians, this was a positive step ensuring government could not infringe on their rights. However, in an effort to balance the collective and individual rights of Aboriginal people, the implementation of the *Charter* not only failed to protect Aboriginal women in our First Nation, it enshrined a system of discrimination where remedy would prove to be extremely elusive.

As Mi'kmaq, the legal history of the *Act's* membership provisions cannot be viewed in an objective manner. The women in our family live under the *Act* and are born, married and give birth within the *Act's* regime. The *Act* has impacted not only how we view ourselves, but also how we are treated by our extended family and Canadian society. While these issues impact men as well as women, our story will be told through the experiences of Mary Jane Jadis (grandmother), Judy Clark (Mother), Cheryl Simon (daughter) and Declan Simon (grandson).

We are from Abegweit First Nation and our membership is determined by a custom code that was developed under section 10 of the *Act.* This paper traces the development of our community's Custom Membership Code, the on-going problems with the Code, and our options for seeking justice. Much has been written about the discrimination in the *Act*, and the recent attempt by Bill C-3 to address the discriminatory provisions. However, the amendments have had little impact on our Membership Code and we feel that we must share our story to help people understand why.

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* This piece is a reflection piece telling the story of the Authors' experiences in relation to the *Indian Act*.

[1] *Indian Act*, RSC, 1985, c I-5.

[2] *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, (UK) 1982, c 11.

This paper is a search for a safe and effective forum to discuss our membership issues given the love we have for our children and the lessons learned from our ancestors. We have permission to share our family's story with you. As mothers, we are givers of life and teachers and will carry these obligations until we are Grandmothers.[3] Our method of teaching involves telling stories. People must draw lessons from the stories they hear. What is asked in return is that you treat our story with respect.

MI'KMA'KI

We are members of the Mi'kmaq nation. Our territory, Mi'kma'ki, is divided into seven districts located in eastern Canada. The majority of our family live within the Epekwitk aq Piktuk district which includes the island Epekwitk, also known as Prince Edward Island (PEI). Traditionally, family groups made use of specific areas within the district for their livelihood. Each district had a Saqamaw[4] who spoke for the people. The Mi'kmaq Grand Council brought the district Saqamaq's together to decide issues that affected the nation as a whole.

After the French lost the battle for North America, the British annexed the island with the Royal Proclamation of 1763. Upon acquisition, the British had Epekwitk surveyed. The island was divided into lots and a lottery held in London; no consideration was given for the rights of the Mi'kmaq.

Mi'kmaq continued to live on what became known as Lennox Island off the western coast. The Aborigines Protection Society purchased Lennox Island for the Mi'kmaq in 1870. The island became a reserve and a Band under the *Indian Act, 1876.*[5] Three more reserves would be added, purchased primarily by philanthropists groups: Scotchfort, Morell and Rocky Point.

The people who settled these reserves were Mi'kmaq and membership was determined according to Mi'kmaq law. There is no question that there were non-Native people who were part of these communities, but Mi'kmaq law was inclusive. On PEI, non-Natives married Mi'kmaq people and were accepted by their family, they were adopted by Mi'kmaq people and brought up according to Mi'kmaq culture, or they moved to the community and lived a life that aligned with Mi'kmaq cultural values and were accepted.

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[3] The term "grandmother" refers to a female Elder.

[4] Chief

[5] *The Indian Act, 1876,* SC 1880, c 19, s 3(1).

However, the Canadian government viewed people of mixed heritage differently than the Mi'kmaq. Our first Prime Minister, Sir John A McDonald, stated in 1885 that "[if] they are half-breed, they are [considered by the government to be] white."[6] Another big change was that the Mi'kmaq nation had always been matrilineal. However, under the *Indian Act,* lineage passed through the male line. The government's exclusive view of heritage coupled with the patrilineal system would undermine the role women played in the governance structure of the nation. From the time the first *Indian Act* was passed, the government approach would create an assimilationist policy with long-lasting effects.

MARY JANE

Mary Jane Thomas was born on January 26, 1921 in a campsite in Tyne Valley, which is located on the mainland, across from Lennox Island. Her mother passed away when she was 5 years old and she lived with various family members until her father remarried.

Mary Jane was only able to obtain 2 years of education in Lennox Island. As a teenager she was sent to Shubenacadie, Nova Scotia with her sister, but did not attend the residential school because they were at full capacity and not accepting students. She returned to Lennox Island when she was sixteen.[7]

Mary Jane met Francis Frederick Jadis (Frank) when she was 17 years old. Frank was born in Kentville, NS and his family was from Sipekne'katik district and had been put on the Shubenacadie Band List. As a young man, Frank had joined the Merchant Marine in the United States (US) during World War II. By serving in the US, he avoided becoming an "enfranchised Indian", a legal status which serving in the Canadian army would have granted. Enfranchisement would have caused him to lose his Indian status. Compared to others at the time, Frank was considered to be an educated man because he had obtained a grade ten education.

Frank and Mary Jane were married on March 5, 1938 when she was 17 and he was 30. It was an arranged marriage, but Mary Jane was happy because she thought he was a good man whom she could grow to love. Because Frank had avoided enfranchisement, they both remained status Indians upon their marriage.

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[6] *1876-1877: The Indian Act, 1876 and numbered treaties six and seven*, online: Canada in the Making <http://www.canadiana.org/citm/themes/aboriginals/aboriginals8_e.html>.

[7] Roberta D Clark, *Ketmite'tmnej- Remember who you are: The educational histories of three generations of Mi'kmaq Women* (MEd Thesis, University of Prince Edward Island, 2001).

It was customary for Mi'kmaq men to move to the woman's community when they were planning on getting married. They would live there for a year and if the family approved, they would marry and remain with her family. While we do not know the extent this custom would have had an effect on them, we do know that Frank and Mary Jane moved to Nova Scotia but returned shortly thereafter because Mary Jane missed the island and her family.

This practice was in contrast to the patrilineal system established by the *Act*. In addition, the governance structure was a patriarchy and politics was a male arena, one which Frank soon entered. Frank was Chief of Lennox Island Band on Sept 4, 1951 when new amendments to the *Act* came into force. [8]

The amendments were troublesome. A central registry was created to list those registered as Indians. These people would be entitled to live on the reserves and receive other benefits. The amendments did not change earlier *Act* provisions that defined "Indian" in a manner that treated men and women differently. Now, Section 12(1)(b) provided that a women who married a non-Indian was not entitled to be registered. In contrast, section 11(1)(f) stated that the wife or widow of any registered Indian man was entitled to status.[9] These provisions emphasized the male lineage. An Indian woman lost her status once she was married. Any adopted children had to be registered.

The effect was immediate. The Lennox Island Band Council in 1951 was comprised of five members. One of the councillors was James Tuplin. James was not born Mi'kmaq, but had been given up at three months and raised on Lennox Island[10]. He was the adopted child of his Mi'kmaq family and spoke Mi'kmaq as a first language. He married a Mi'kmaq woman and they had children. However, he was not registered as an Indian. In 1951, the Indian Agent[11]informed him that as non-Indians he and his family would have to leave the reserve.

Mary Jane's younger sister, Aunt Josephine, married a non-Indian. She lost her status and was not entitled to live on the reserve. Unfortunately, her marriage did not last. Although she was no longer married, she was still a non-Indian and not entitled to come home. Judy remembers how Aunt Josephine and her children could only come back to visit for two weeks at a time. She could not even be buried with

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[8] *Indian Act*, SC 1951, c 29.

[9] Megan Furi & Jill Wherrett, *Indian Status and Band Membership Issues* (Ottawa: Queens Printer, 2003).

[10] M Olga McKenna, *MicMac by Choice: Elsie Sark- An Island Legend* (Halifax: Formac, 1990).

[11] Government employees under the authority of the *Indian Act* working on reserves.

her family because the cemetery was on reserve. Aunt Josephine's loss was poignant because family ties are an extremely important element of Mi'kmaq culture.

Mary Jane would have 14 pregnancies with 7 surviving children.[12] Judith (Judy) Jadis was born in 1955 and was the eldest of two daughters. They continued to live on Lennox Island but would move to Maine for blueberry and potato harvesting seasons. Frank taught his children about the *Indian Act,* the Peace and Friendship Treaties and the Jay Treaty; it was the Jay Treaty that enabled them to work across the border.

Mary Jane and Frank worked hard to provide for their growing family. They were gifted basket makers and taught their children how to fish and live off the land. They were surrounded by a large extended family and Mi'kmaq was the language spoken at home. While family life continued to follow the natural cycles in Lennox Island and Maine, Canada was entering very tumultuous times politically.

As Chief, Frank was a member of the National Indian Brotherhood (NIB) and was often in Ottawa. The organization was a result of the growing Aboriginal identity that grew out of the resistance to the 1969 White Paper. The White Paper proposed getting rid of the special status that Indians "enjoyed" under the *Indian Act*. It was part of the vision Prime Minister Pierre Trudeau had for Canada. Frank was on an advisory committee and was in Ottawa a lot during this time. Mary Jane found it difficult to have her husband away on political business but she could count on her family and older boys to help her with her growing family.

All that would change, for circumstances in Lennox Island compelled the family to leave the reserve. Frank was in Amherst, NS when the family moved to the Scotchfort reserve, which is 20 minutes east of Charlottetown and approximately 2 hours away from Lennox Island. Upon his return, Frank built a house for the family with sweat equity and money from a trust set up by the same group who had purchased the reserve for the Indians.

JUDITH

In 1972, three reserves separated from the Lennox Island Band to form the Abegweit Band.[13] The first Chief was a woman named Margaret Bernard who lived on the

[12] In order of age: Joseph, Michael, Peter, Judy, Francis, Barbara and Thomas.

[13] "Abegweit" is the anglicized version of Epekwitk.

Scotchfort Reserve. The Band's administration and programs were the primary source of employment for band members.

My brothers worked for the band and became involved with a fishery project in the early 1970's that required them to become certified SCUBA divers. Their instructor was John Clark and he became a good friend of theirs. They brought him out to the reserve to meet the rest of the family, which is how he and I (Judy) met.

When John proposed in 1975, I asked him for six months to consider. This may seem harsh but the decision went beyond the normal scope of a marriage proposal. I was 19 years old and had a good job with Abegweit Band's administration. I lived on the reserve as a status Indian and was surrounded by my family. Marriage meant losing my status as an Indian, and leaving my job, the reserve, and my family.

My mom was worried because of what happened to Aunt Josephine and Dad was worried about what the loss of status would mean. These were valid concerns given recent court decisions at the time.

In 1974 the Supreme Court of Canada (SCC) released *Lavell v Canada* and *Isaac v Bedard* simultaneously.[14] Both cases involved women who had lost their status upon marriage. Jeannette Vivian Corbiere Lavell was one of the women. Both alleged that the loss of status was sex discrimination under the 1960 *Bill of Rights*.[15] The court found, in a 5-4 decision, that there was no discrimination. Ritchie J. stated that equality is "part of the 'rule of law' and means equality in the administration or application of the law."[16] Therefore, because the *Act* was applied to all Indian men and women equally, there was no discrimination. This was a highly controversial decision.

There seemed to be no legal recourse to the loss of status. Despite this, I accepted John's proposal within a month and we were married on December 22, 1975. I will never forget Dad asking, "Judy are you sure?" before he walked me down the aisle. Our guests were anxious to congratulate us, but I was overcome with the change the marriage would bring and found their wishes difficult to accept. Dad

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[14] *Attorney-General of Canada v Lavell, Isaac v Bedard*, (1973) 38 DLR (3d) 481, 23 CRNS 197 [*Lavell*].

[15] *Canadian Bill of Rights*, SC 1960, c 44.

[16] *Lavell*, *supra* note 14 at 483.

seemed to understand and instructed John to take care of me as we left. It was a truly life-altering event.

John had joined the military to give us employment stability, and he was posted to British Columbia (BC). We flew to BC on December 31, 1975 and the notification that I had been struck from the Indian registry was waiting when we arrived. The irony is that while I had lost my ability to stay with my family, John's family did not accept me. While I may not have been an Indian in the eyes of the law, I was certainly one in the eyes of my in-laws.

The early years of married life were extremely hard. I was young and being suddenly uprooted from the Atlantic, felt claustrophobic due to the looming mountains. In addition, I soon became pregnant with the first of two girls and found myself dealing with motherhood far removed from the support network my family would normally have provided.

Military bases bring with them other people uprooted from friends and family and we would soon meet another young couple; she was from Miramichi and he was Mi'kmaq from Eel Ground Reserve in northern New Brunswick. It was little wonder we would become life long friends and "Aunts" and "Uncles" to each other's children.

Shannon was born in 1976, and Cheryl was born in 1978. Our girls were not Indians when they were born. However, they did become Indians when the youngest (Cheryl) was almost 8 years old.

This is because Canada's position regarding discrimination in the *Act* changed. In 1977, Sandra Lovelace, a Maliseet[17] woman from eastern Canada lost her status. After the disappointing *Lavell* decision of the SCC, she took the issue to the United Nations Human Rights Committee. She claimed the *Act* was sex discrimination. Canada's submission stated that it:

> recognized that "many of the provisions of the ... *Indian Act*, including section 12 (1) (b), require serious reconsideration and reform". The Government further referred to an earlier public declaration to the effect that it intended to put a reform bill before the Canadian Parliament. [18]

[17] The Maliseet Nation are neighbours of the Mi'kmaq nation. Both nations are part of the Wabanaki confederacy that stretches into New England in the United States.

[18] *Sandra Lovelace v Canada*, Communication No R6/24 (29 December 1977), UN Doc Supp No 40 (A/36/40) at 166 (1981).

Regardless, Canada was in violation of the *International Covenant on Civil and Political Rights*. The loss of status prevented Sandra from practicing her culture by keeping her from the reserve. The government proposed to amend the *Act*. It seemed a victory for Indian women.

The *Constitution Act, 1982* came into effect and brought the *Charter*. Two sections of the *Charter* seemed to have particular consequences for Aboriginal women:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [19]

The guaranteed rights reflected the growing recognition of human rights in Canada. Its passage seemed to usher in an era of equality.

The amendments the government spoke of in their UN submission are known as *Bill C-31*.[20] The new status requirements were applied equally:

> 6(1) Subject to section 7, a person is entitled to be registered if
> (*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;
> (*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
> (*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

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[19] *Constitution Act*, *supra* note 2.

[20] *Supra* note 1.

> (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

This gave status to the women who lost it under s.12(1)(b) and all people with one non-Indian parent. The amendment was backdated until April 17, 1985 to bring it under the *Charter*.

There was a national campaign to reach the women affected. I had to apply and prove my genealogy; my girls were included under my application. Unfortunately, my dad, who worried so much about my loss of status died on February 24, 1986, before the application had been processed. We officially became Indians but not in time for him to witness it.

It is difficult to capture what I went through in the almost 10 years I did not have status. As a child, my Mi'kmaq/Indian identity was not something I ever thought would change; it was not something I thought *could* be changed. People are aware now of the effects of lateral violence and it is not a stretch to say I suffered it at the hands of my family. Even today, close relatives will get angry and bring up my off-reserve status. In addition, I found it difficult to pass on the Mi'kmaq language, though it was not for a lack of trying. I raised my girls to be proud Mi'kmaq women and to understand that marrying for love and having children should be a positive experience and not something that requires you to give up the only life you have known. The experience made us all strong, but it was difficult.

CUSTOM CODE

Cheryl is a status Indian today because of legislative changes. While it seemed an era of advancement, the new system created distinctions between status Indians. The sections that applied to us are:

> 6(1)Subject to section 7, a person is entitled to be registered if
> (*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;
> (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).[21]

The resistance to *Bill C-31* was fierce. Many Bands feared they could not provide housing and services to the new Indians. Others felt that the government should not intervene in national membership issues. The government deferred to the

[21] *Ibid*.

latter by giving the Bands until June 28, 1987 to enact custom membership codes. These codes were to determine membership by the custom of the Band. They would not be subject to *Bill C-31* amendments. They could exclude women who had lost their status and their children without being subject to *Charter* scrutiny.

My girls and I had been registered with the new Abegweit Band. The Council, with my brother Mike as Councillor, wasted no time drafting the *Abegweit Band Membership Code* (the Code) and an Election Code. In her book *Beyond Blood*, Dr. Pam Palmater states that "though many First Nations are looking at self-government agreements and their own citizenship codes as a way of moving forward, some are considering using the same principles or criteria embedded in the *Indian Act, 1985* as the basis for their citizenship codes. "[22] This was certainly the case with the Abegweit Band where the Code reads:

> 8. Persons entitled to membership in the Abegweit Band shall be all persons described under section 11.(1) (a)(b)(c) and (d) of the Indian Act, which reads as follows….[23]

The Code makes no reference to the customs, practices or traditions of the Mi'kmaq Nation. It takes criteria from the *Act* with one distinguishing feature. It does not include people registered under s.6(2). Any status Indian registered with Abegweit Band with a non-Indian parent does not qualify as a Band Member.

This sounds like strictly a policy issue, but my younger brother Francis made the motion to accept the Code. Out of a possible 75 votes there were 69 cast in the plebiscite to pass the Code. Only 1 person voted against it. Needless to say I was *not* happy with my brothers. They assured me that notwithstanding the criteria, the Chief had the discretion to create new members and Cheryl and her sister would get membership when they turned 18. There was nothing I could do but wait.

There is one other provision of the Code that needs to be discussed. Initially the Code required a majority vote to pass amendments; it was amended to increase the threshold to 75%. The Code has never been subject to legal scrutiny. The question we, and a group within the community are now facing, is whether it should be.

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[22] Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing Ltd, 2011).

[23] *Abegweit Band Membership Code*, 1982.

CHERYL

Colonisation caused our traditional governance to be replaced by the *Act*. The balance within our communities was disrupted and men were given power over women. Our Code is called "custom" by the *Act* but it is more reflective of a Canadian government than a Mi'kmaq government.

When I turned 18, I (Cheryl) applied for Band Membership and a status card was issued to me for the first time. As an adult, I now had my own registry number and Mom (Judy) was relieved when it came. I went off to university and followed the recommendation of my older sister to take Native American Studies. I enjoyed it so much it soon became my major.

While at school, the government launched the Royal Commission on Aboriginal Peoples (RCAP). RCAP was a response, in part, to the brutal and degrading slaying of an Aboriginal Woman. RCAP's report was released in 1996. The commission had travelled the country hearing from Aboriginal people about issues of concern. The report includes a chapter on women's perspectives. It speaks of how "tensions stemmed from the perception that women's rights were pitted against Aboriginal rights."[24] In challenging the provisions of the *Act*, the women are often viewed as bringing challenges to the Band Council's authority.

The Band Councils are recognized as the beneficiaries to the Treaties by the government and courts. They are the political representatives of the Aboriginal people in Canada and many are in active negotiations. Dissent is viewed as a challenge to the self-government the Bands are working towards, not as a justified critique of the system. The *Act* creates Indians, not members of the Mi'kmaq nation, but everyone does not understand the distinction.

A Maliseet woman told the commission:

> If we are to put…self-government…in place, we must ensure that all our people will have a means to take their complaints forward. We must ensure that all our administration and self-governing is accountable to ensure that the basic rights and freedoms our grandfathers and our mothers suffered starvation for will be assured….We must protect all of our people's rights. We are being blinded by the terminology being used today that helps to divide us, such as status and non-status, on-reserve, off-reserve.[25]

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[24] Canada, *Report of the Royal Commission of Aboriginal Peoples*: *Perspectives and Realities*, vol 4 (Ottawa: Supply and Services Canada, 1996).

[25] *Ibid*.

University gave me the national context for my family's story. Despite this, I was shocked in 1999 when three women were arrested in Scotchfort when they tried to vote in the Band Council Election. My auntie Barbara, Mom's younger sister,[26] was one of the women. I remember my cousin calling to report "Mom's in Jail!" The women could not vote because they lived off reserve and the Abegweit Band dealt with the issue by allowing it to become a criminal matter. The Court refrained from addressing the discrimination issue because of a case before the SCC. It seemed at the time that change was finally going to happen.

Off-reserve voting is seen as a woman's issue because the majority of off-reserve members are *Bill C-31* women and their children. In *Corbiere v Canada* (*Corbiere*), the SCC found that the residency requirement constituted discrimination under section 15 of the *Charter*.[27] The Court of Appeal found a constitutional exemption was warranted because other Bands might prove an Aboriginal Right to restrict voting. However, the SCC found that if ""Aboriginality-residence" is to be an analogous ground…then it must always stand as a constant marker of potential legislative discrimination."[28] Further, the "effect [of the requirement] is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. "[29] The SCC declared that the on-reserve residence requirement was void but suspended the judgment for 18 months. This was to allow the government to develop a process that balanced the interests of all members.

The government spent the time developing election regulations. The new process involves mail-in ballots (without affidavits) and a notification period that is longer than the federal government elections. They did not apply to Abegweit First Nation because of our custom election code. Due to the timing of the arrests, if the Code were to be challenged, an application would still have to be brought forward. The women who were arrested received probation; the election was carried out with only on-reserve, 6 (1) members being able to vote, and no application was filed so nothing changed with respect to the codes. My Uncle Francis became Chief and my Uncle Joe as one of the two Councillors.

By now I had graduated from university and Uncle Fran had an administration to be filled. I moved in with Grammy (Mary Jane) and eagerly started

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[26] Auntie Barbara's action was very risky for her. She is a teacher and had a lot to lose from gaining a criminal record. It worked out well for her but it speaks to her level of commitment on the issue.

[27] *Corbiere v Canada (Minister of Indian and Northern Affairs*), [1999] 2 SCR 203 [*Corbiere*].

[28] *Ibid* at para 10.

[29] *Ibid* at para 18.

work as Director of Administration. I was 21 years old and only 1 of 5 Band members with a university degree. Mom also moved home, became Financial Comptroller, and for a time lived with Grammy as well.

During the early days of the administration, the Band was involved in a judicial review because the former Chief, who had held the position for over 20 years, wanted to create a new Band. I went to the Discovery with Uncle Fran and it was there that a witness[30] had me removed from the proceedings. I was told that the case was a Band matter, and as I was not a Band member, I was not entitled to be there. Words cannot explain how shocking and humiliating it was.

As a child, I had been listed under Mom's registry number on the central registry of Indians. When the Band sent my membership card, they issued a new registry number but because I was a s.6(2) Indian, I was not put on the Band list. The Council could have granted membership but the addition to the Band list would have been open to challenge. For several years, I was not a member but had not been told.

It was very degrading. When my lack of membership became common knowledge, I even had a first cousin ask if I was Mi'kmaq. Being a s.6(2) Indian means nothing in Abegweit First Nation.

CHANGE

In 2002 the department of Indian Affairs approved a Band proposal to amend the Code. With the support of Council, I was the director of the project and began a community consultation process that would lead to a referendum. In the meantime, the government was again proposing amendments to the *Act*.

The purpose of the *First Nations Governance Act* (FNGA)[31] was to bring accountability and transparency to Band governance. This would include application of *Charter* values. However, the FNGA did not address membership or other "women's issues". It did however, set out requirements that even custom election codes would have to adhere to.[32] While changing the Code would have been worthwhile, there were many reasons why it was better that the FNGA did not pass.

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[30] The witness, Brian Francis is the current Chief of Abegweit First Nation.

[31] Bill C-7, *First Nations Governance Act*, 2nd Sess, 37th Parl, 2002-2003.

[32] Mary C Hurley, "Bill C-7: The First Nations Governance Act" (10 October 2002), online: Parliament of Canada Legislative Summaries

Meanwhile, the community consultation process was underway. It was hoped that the dialogue across the region about Custom codes would provide an incentive to bring about change. By the time the proposal was accepted, money received, consultations carried out and drafting occurred, it was once again election time. There was fierce opposition to the amendments, which would have included s.6(2)'s, a more fair amendment process, an appeals process, and a mechanism that would allow transfers of membership to the Band.[33] For various reasons, the 74 on-reserve Band members voted against the amendments.[34]

When the results were announced, one woman was heard to declare that she had voted against the change because she was glad her daughter would have to live off reserve when she turned 18; it would mean a better life. Unfortunately, this is not always the case.

Mom is President of the Aboriginal Women's Association of PEI and has been active on the National Woman's Advisory Council (NWAC) Executive Council. NWAC has worked tirelessly to bring the issue of Murdered and Missing Women to the attention of the Canadian public. The reality is that life off reserve is often very difficult and can be tragic, especially when moving is not voluntary and the loss of family and separation from culture becomes a reality.

In the meantime, my experience with the band referendum and judicial review was strong motivation to become a lawyer. In 2003 I attended the University of Victoria Law School and spent three years thinking about possible ways the Code could be amended. Given the SCC *Corbierre* decision which did not apply to custom codes, the failed referendum, the lack of appeals process, the arrests, and the proposed changes under the FNGA, none of which served as a catalyst for change within Abegweit First Nation, there seemed to be few options available.

Bringing a court challenge would likely bring change. Despite having approved the Code, the Department of Aboriginal Affairs and Northern Development Canada (AANDC) will not involve themselves in the issue because the Band has jurisdiction. There seems to be an acknowledgement within the community that the Code is discriminatory and needs to be changed, but the Council

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<http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c7&source=library_prb&Parl=37&Ses=2#isectiontxt>.

[33] Lennox Island is a custom code Band that took these steps on their own volition. They balanced interests by creating a seat on Council to represent off-reserve members.

[34] Despite Auntie Barbara's arrest, her daughter voted against the amendment.

is looking to the Court for direction on the issue. Councillors have repeatedly told Mom that they are waiting for someone to bring forward a challenge.

We have explored this possibility by speaking to a lawyer about our options and the possible costs, which are prohibitive. One off reserve member expressed reluctance to join a court procedure due to the disruption it would cause the on-reserve Band members. This may seem counter-intuitive, but remember we are considering the impact on the families we love and have first-hand experience with unexpected change to your identity. That being said, we cannot envision a remedy, which would not result in a community-led referendum on proposed amendments. The courts have been reluctant to rewrite problematic codes, which is warranted because we would not want non-Mi'kmaq people to define such an important cultural component.

A human rights challenge is another possible mechanism for change. While there may be ample grounds for challenging the membership code, we would still face the issue of who would be voting in a referendum to accept amendments.

The problem is that a referendum would have to be held to amend the Code but the Election Code restricts the voters to members residing on-reserve, while the Membership Code prohibits 6(2)'s from voting. These provisions, in addition to no new members being added to the list, have kept the electorate small. Unfortunately, the issue of residency, which had been grounds for amending the *Indian Act* provisions under the *Charter*, is not available for a human rights challenge.

This would be a costly process because we might still be dealing with a *Charter* challenge where the remedy would lead back to a referendum, a process that has already been unsuccessful. There is a frustrating lack of accountability by Abegweit First Nation to the Mi'kmaq nation and its citizens.

DECLAN

Declan is my (Cheryl's) son and the only one of Mom's three grandchildren not registered as an Indian. During the time when legal options and possible remedies were being explored, I married a non-Native man in 2008. The wedding was in September but it was not until January that the marriage was registered with AANDC. I was extremely reluctant to do so, but a membership case was on its way to the SCC so there was a glimmer of hope for my situation and that of any children we might have. I was in Winnipeg on a business trip and decided to finally go through with it. I expected to have to simply report that my husband was non-Native and was taken back by the level of personal information they required regarding my

husband. The process was more intrusive than expected and it left me feeling ashamed for several days afterwards. I still do not like to think about that day, and it's been four years.

Unfortunately, Grammy passed away while I was in my second year of law school and my husband did not have the opportunity to meet her. Her spirit lives on in her many grandchildren, great grandchildren, and great-great grandchildren. The extended family is huge and while we may all be from the same family, we are still not equal under the law.

During this time, the membership case *McIvor*[35] was being decided and we had great hope that the court challenge we had considered might be already accomplished. The decision dealt with the distinctions that were made in status when Bill C-31 was enacted. Sharon McIvor had been reinstated under Bill-C31 just as Mom had. The case dealt with the inequity of the "second generation cut-off" because Sharon's son was not able to pass status to his children as a s.6(2). Unfortunately, the court narrowed the issues in *McIvor* and many of the problems with the *Act* were not addressed. For example, the court attempted to resolve the issue of the grandchildren who could not be registered as status Indians but would not address the issue of being denied Band membership, nor did it deal with the inherent right of Aboriginal nations to define their own membership.

Mom and I were both anxious about whether the Crown would decide to seek leave to appeal to the SCC. Many people were frustrated with how the government continually fights these types of cases. Many resources are wasted in a fight to prevent citizens from realizing their rightful place within their nations.

Parliament was given one year to amend legislation to address the discriminatory provisions. Bill C-3, the *Gender Equity in Indian Registration Act*,[36] received Royal Assent on December 15, 2010. While it appeared that my sister and I would both be entitled to have our status changed from 6(2) to 6(1), this was not the case. Shannon already had children and was therefore entitled to apply for her children to be registered, which would then enable her status to be changed. I did not have children, so would not be entitled to have my status changed until I had a child. This distinction was an indication that suggested that the amendments were not going to adequately deal with the problem of having different types of status Indians.

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[35] *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 [*McIvor*].

[36] *Gender Equity in Indian Registration Act,* SC 2010, c 18.

I was finally able to have my status changed with the birth of Declan in 2011. I was entitled to become a s.6(1)(c.1) Indian, which was still not the same as the s.6(1)(a) that Judy is, but is as close as we have ever been to being equals.

After all these years of struggling to be recognized and find equality under the law, something happened when Declan was born that was completely unexpected. I found myself unwilling to register his birth with AANDC. The reason: I love my son and was hesitant to introduce him to a system that had brought so much degradation, pain, and discrimination to my mother and myself. Not being an Abegweit Band member has caused me to explore and develop a deep sense of self as a Mi'kmaq woman, which in my mind is clearly distinct from whether or not I am an Indian. It is this Mi'kmaq identity I wish to pass to my son.

While I struggled with this issue, Abegweit First Nation has held yet another referendum where members rejected amendments to the Code. The dialogue within the community has not centred on citizenship, Mi'kmaq law, the fear of the dwindling membership nor the discrimination that is now widely recognized. It is not known whether my change in status would affect my ability to become a Band member. The Code could be interpreted so as to grant membership to the s.6(1) status Indians as per the 1985 legislation and not those defined as 6(1)'s under the recent amendments. We have not obtained an opinion on this issue but it may be worth exploring if the Abegweit First Nation continues to deny membership.

Many community members are concerned over the lack of housing and limited funds for programs. This fear is understandable due to the dependency on AANDC funding; increased numbers would appear to only be a liability. It is unfortunate that the Mi'kmaq values of inclusiveness have suffered so much damage. Some successful First Nations have embraced those who have lived off reserve and welcomed them back as valued contributors to their economy and community. This lesson is not one that has been embraced by Abegweit First Nation.

There may be a lack of legal recognition, but on a social level, Declan has been welcomed to the family and his birth, baptism and first birthday were celebrated with the extended family on PEI.

Mom says she understands my feelings with respect to Declan's registration. Her reinstatement has not served to bring her equality because she lives off reserve and is not able to vote, she still suffers lateral violence, she has watched her daughters be denied Band membership, and when her grandchildren were born

they were viewed as non-Native by the government. All of this has taken place without any dialogue surrounding Mi'kmaq cultural values or membership law.

Given all of this, why should Declan be registered? The argument for registration is twofold. First, there is the exertion of his Aboriginal and Treaty rights. While I may be hesitant to have him defined as an Indian under the *Act* and section 91(24) of the Constitution, there remains the issue of being a recognized Indian under section 35. Aboriginal people are defined as "Indian, Inuit and Metis" and I am concerned about Declan not being able to fully exercise his Aboriginal Rights if he is not registered. He has already accompanied me in the harvesting of sweet grass and other medicines and given this start to life, it is hoped he will continue to exercise his rights as he grows.

This fear may be unfounded; in *Daniels*[37] the Federal Court recently addressed the issue of people who are "Indians" with respect to the *Constitution*, but not "Indians" as per the *Indian Act*. While the Crown has decided to appeal the ruling, I am hopeful that this type of distinction bodes well for Declan if I decide not to register him. While this case winds its way up through the system, I also take comfort in recent case law in New Brunswick that found that non-Status Indians were recognized as Aboriginal Peoples with Aboriginal Rights[38] by applying a modified *Powley*[39] analysis. How this would play out while harvesting birch bark or sweet grass remains to be seen. This body of law is growing and I hope it triggers an effort to work on Mi'kmaq citizenship rather than adding more and more layers to the already complex definitions of "Indian" under the *Indian Act.*

This distinction between Indians may allow Declan to exercise his Aboriginal rights, but I wonder about his Treaty rights. The Bands are the recognized descendants of the signatories to the Mi'kmaq Treaties. If Declan is not registered with a Band, can he exercise his Mi'kmaq Treaty right to Fish? We come from a long line of fishers and it is worrisome that he may be denied this opportunity. There is also nothing to say that Declan would not suffer the same lateral violence I have, because he is not officially registered as a 6(2). Regardless, he will still not be an Abegweit Band member.

The second issue is that it would be difficult for me to not consider the generations of women who have fought for change and brought about the

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[37] *Daniels v Canada*, 2013 FC 6 [*Daniels*].

[38] *Hopper v R*, (2008), 331 NBR (2d) 177; *R v Acker*, (2004) 281 NBR (2d) 275; and *R v Lavigne*, (2007) 319 NBR (2d) 261.

[39] *R v Powley*, 2003 SCC 43 [*Powley*].

advancements over the past few decades. Respect for these women runs deep and it is this, more than anything, which will probably lead to Declan's registration.

CONCLUSION

This paper has sought to demonstrate the impact of the *Indian Act* on Abegweit First Nation through four generations our family. The *Act* has created a system of discrimination that has eroded traditional Mi'kmaq values and caused pain during times that should have been celebrated: marriage, coming of age, motherhood, and becoming a grandmother.

The distinction between the types of Indian status is a legal construct far removed from citizenship and self-government. While the Department of Indian Affairs (as it was then known) approved the Code, it has declined to become involved in the problematic membership issues of Abegweit First Nation. While it is neither desirable nor appropriate for the federal government to define Mi'kmaq citizenship, it is also not appropriate to delegate the liability of the Code without also delegating the appropriate authority to address the discrimination and oversee a return to Mi'kmaq law. A Governance model for Abegweit First Nation which is not culturally relevant is destined to fail regardless of how "transparent or accountable" it is with respect to its funding.

We are not advocating that Abegweit First Nation address Mi'kmaq citizenship in isolation; this dialogue needs to take place within the Mi'kmaq Nation. Mi'kmaq citizenship needs to return to the inclusivity of Mi'kmaq traditional law with the necessary mechanisms to interpret and enforce this law.

We believe this paper has also demonstrated the inadequacies of the Canadian legal system to effectively deal with these complex national issues. If Abegweit First Nation is discriminating against Mi'kmaq citizens, there should be an adjudicative body that can enforce Mi'kmaq law in a culturally appropriate manner. Administering the current system is not self-government and until this system is dismantled, the discrimination will not end.

In addition, Mi'kmaq people need to move away from the "Us vs Them" dichotomy created by the *Indian Act* regime. Nations have the authority to enact immigration policies and Mi'kmaq people should seriously consider what they would have to gain by adding people of other nationalities. We are a nation and we need to govern like one.

Wela'lin (thank you), for reading the story of our family's journey under the *Indian Act.* We continue to hope that the distinctions we have lived with will be resolved for Declan and his cousins.