

# Discrimination in the Rules of Indian Status and the *McIvor* case

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The recent decision of the British Columbia Court of Appeal in the *McIvor* case<sup>1</sup> can be summarized in the following three propositions: first, Indians are a racial group; second, it is acceptable to define a racial group exclusively in terms of ancestry; third, however, to the extent possible, sex or gender distinctions should not be used to identify the group.

The decision has far-reaching implications. More than 100,000 persons might gain Indian status if the changes it recommends are carried out. Yet, if the Court of Appeal's decision is not reversed, the *Indian Act*<sup>2</sup> system of ascribing Indian status on the basis of ancestry alone will be validated. Mrs. McIvor's victory, which was based on the unacceptability of gender distinctions, will be short lived. The only gain will be that the effects of what is known as the "second generation cut-off rule" will be postponed for one generation. The use of racial distinctions in the *Indian Act* will continue, and a large number of individuals will be deprived of Indian status on the sole basis of ancestry calculations.

Here's how it all happened.

When colonial legislatures, and later Parliament, began to define Indian status in the mid-nineteenth century, patrilineal descent was the main criterion used.<sup>3</sup> Someone was an Indian if his or her father was an Indian. Moreover, in 1869, Parliament adopted a rule whereby an Indian woman who "married out" – that is, who married a non-Indian – thereby

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<sup>1</sup> *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, [2009] 2 C.N.L.R. 236 (B.C.C.A.) [*McIvor, appeal*]. While the federal government indicated that it would not appeal the decision, and that it would revise the *Indian Act* to make it compliant with the directions given by the Court of Appeal, Ms. McIvor filed an application for leave to appeal to the Supreme Court of Canada, which is still pending at the date of writing.

<sup>2</sup> R.S.C. 1985, c. I-5, ss. 6-7.

<sup>3</sup> A history of that legislation may be found in the trial decision: *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827, [2007] 3 C.N.L.R. 72 (B.C.S.C.) [*McIvor, trial*], or in S. Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal & Kingston: McGill-Queen's University Press, 2009) [Grammond, "Identity"].

lost her status.<sup>4</sup> This blatant instance of gender discrimination was unsuccessfully attacked in the Supreme Court of Canada in the *Lavell*<sup>5</sup> case in 1974, and then successfully challenged before the United Nations Human Rights Committee in the *Lovelace*<sup>6</sup> case in 1981. As a result, Parliament adopted Bill C-31<sup>7</sup> in 1985, removing gender distinctions from the criteria for Indian status.

Another feature of the rules of Indian status attracted less attention. Starting in 1951, the so-called “double-mother rule” deprived of such status persons who had only one Indian grandparent, that is, persons having less than 50 percent Indian blood. In 1985, this feature of the old *Indian Act* was carried over in Bill C-31. It became known as the “second generation cut-off rule.” Understanding precisely how that rule operates is crucial. Section 6(1) of the *Indian Act* states that you have Indian status if *both* your parents have that status. Section 6(2) of the *Indian Act* states that you are Indian if *one* of your parents is Indian *under section 6(1)*. As a result, a “6(2) Indian” cannot, alone, transmit his or her Indian status to his or her children. Another way of expressing the rule is to say that in order to be Indian, you must have two Indian grandparents. Yet another is to say that Indian status is lost after two generations of marriages with non-Indians. Although this is not made explicit in the legislation, section 6 amounts to a form of blood quantum requirement (50% Indian blood is needed to have Indian status), and the calculation takes only two generations of ancestors into account.<sup>8</sup>

The precise problem at the heart of the *McIvor* case arose from the transition between the old and the new regimes. That problem is usually referred to as “residual discrimination”. It was caused by the fact that, in 1985, all previously registered Indians were granted 6(1) status. This included not only persons who had 50 percent Indian blood, but also the non-Indian wives of Indian men, who gained status upon marriage under the old rules. Also, women who had lost status under the old rules, for having married a non-Indian, regained Indian status, but their (non-indigenous) husbands were not granted such status.

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<sup>4</sup> *Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42, S.C. 1869, c. 6.*

<sup>5</sup> *Lavell v. Canada*, [1974] S.C.R. 1349.

<sup>6</sup> *Lovelace v. Canada*, 24/1977, U.N. Doc. CCPR/C/13/D/24/1977 (1981).

<sup>7</sup> *Act to amend the Indian Act*, R.S.C. 1985, (1st supp.), c. 32 amending R.S.C. 1985, c.I-5, ss.6-7.

<sup>8</sup> Actually, many persons with less than 50% indigenous ancestry currently have Indian status, largely because everyone who had Indian status before Bill C-31 came into force became “6(1) Indians” – the category that can be described as “full-blooded Indian” – including persons without any indigenous ancestry, such as the non-Indian wives of Indian men.

Hence, children of Indian women who “married out” before 1985 would have 6(2) status, as their fathers would not have Indian status. In contrast, children of Indian men who married non-Indian women before 1985 would have 6(1) status, as both their parents would be considered Indian, the father because of his Indian blood, and the non-indigenous mother because she had married an Indian. If these children subsequently marry non-Indians, one can see “residual discrimination” at play. In the first case, the grandchildren would not have Indian status, because their only Indian parent has 6(2) status. In the second case, by contrast, the grandchildren would have Indian status, because their Indian parent has 6(1) status. Thus, the second generation cut-off rule operates one generation sooner when the Indian grandparent is a woman.

Upon the enactment of Bill C-31, indigenous women’s groups were quick to denounce the situation as yet another instance of gender discrimination.<sup>9</sup> Because Bill C-31 had been heralded as ending, at least on its face, gender discrimination in the rules of Indian status, the phrase “residual discrimination” was coined to describe the fact that the second generation cut-off rule operated differentially according to gender. When United Nations treaty monitoring bodies conducted their review of Canada’s human rights record, indigenous women’s groups invited them to highlight this situation as an instance of gender discrimination. The Human Rights Committee agreed, remarking as follows in its 1999 concluding observations:

The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee’s views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community.<sup>10</sup>

Likewise, when indigenous women initiated lawsuits before Canadian courts seeking the invalidation of section 6 of the *Indian Act*, especially in the *McIvor* case, they

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<sup>9</sup> See e.g. Sally Weaver, “First Nations Women and Government Policy, 1970-92: Discrimination and Conflict” in Sandra Burt, Lorraine Code and Lindsay Dorney, eds., *Changing Patterns: Women in Canada*, 2d ed. (Toronto: McClelland & Stewart, 1993).

<sup>10</sup> United Nations Human Rights Committee, *Concluding Observations: Canada*, U.N. Doc. CCPR/C/79/Add.105 (7 April 1999), at para. 19; see also Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, U.N. Doc. CEDAW/C/CAN/CO/7 (7 November 2008), at para. 17.

focused their arguments on gender discrimination.<sup>11</sup> In the result, “residual discrimination” has come to be viewed essentially as a problem of gender discrimination.

However, one cannot deny that the differential treatment of grandchildren according to the gender of their Indian grandparent also results from the second generation cut-off rule itself. If Indian status could be transmitted by descent no matter how many Indian grandparents one has, there would be no “residual discrimination.” Indeed, the residual discrimination problem is an instance of what is often referred to as intersectional discrimination, which means discrimination based on a combination of two or more prohibited grounds of distinction. Research has shown that it is not enough to see the effects of intersectional discrimination as simply being the sum of the effects of discrimination on each of the separate grounds involved.<sup>12</sup> The classic example is discrimination against black women, which is more than the sum of discrimination against white women and discrimination against black men.<sup>13</sup> The rules of Indian status under Bill C-31, in using purely genealogical criteria, are another example; they discriminate not just on the basis of gender, but also on the basis of race. As discussed below, the belief that cultural or behavioural characteristics are transmitted biologically from parents to their children is a typically racial one.<sup>14</sup>

By framing her attack on section 6 of the *Indian Act* on the basis of gender discrimination alone, and not racial discrimination, Mrs. McIvor invited the courts to embrace a truncated vision of the shortcomings of the *Indian Act*. This focus on gender discrimination can be easily understood. Indigenous women’s groups have been the main critics of the rules of Indian status for the last 40 years, and it is normal for them to frame their challenges in terms of gender discrimination. Moreover, there is a widespread lack of clarity among Canadian judges, lawyers and the general public as to the nature of the indigenous population. Is it a race? A cultural group? A political group? Given the widely held perception that the

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<sup>11</sup> Other cases, which have not proceeded to trial, include *Moses v. Canada*, [2003] 1 C.N.L.R. 100 (F.C.); *Moses v. Canada*, [2004] 2 C.N.L.R. 135 (F.C.); *Perron v. Canada (A.G.)*, [2003] 3 C.N.L.R. 198 (Ont. S.C.J.).

<sup>12</sup> See Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993/1994) 19 *Queen’s L.J.* 179; Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 *Can. Bar Rev.* 893.

<sup>13</sup> See Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color” (1991) 43 *Stan. L. Rev.* 1241.

<sup>14</sup> For a more detailed argument in this regard, see Sébastien Grammond, “Disentangling Race and Indigenous Status: The Role of Ethnicity” (2008) 33 *Queen’s L.J.* 487 [Grammond, “Role of Ethnicity”].

indigenous peoples are a “race,” one is not surprised to find Supreme Court of Canada judges saying, in relation to Indian status, that “it is not easy so to legislate irrespective of race or sex when it is race which has to be defined.”<sup>15</sup> Recourse to racial distinctions to define Indian status has an intuitive plausibility that makes it harder to challenge the gender distinctions.

Hence, to bring to light the various grounds of discrimination at play in section 6 of the *Indian Act*, it is necessary to clarify exactly what sort of group the federal legislation seeks to define. This requires us to consider not only sociological thought about indigenous identity, but also philosophical and moral considerations about which conceptions of indigenous identity constitute acceptable bases of public policy. Racial, cultural and ethnic conceptions of indigenous identity are discussed below.

“Race” is a very difficult concept to define, because scientists have now reached a consensus that races do not objectively exist. Race is better understood as a social construction which means that a race is what people think is a race, rather than any scientific or objective reality.<sup>16</sup> Racial conceptions of human diversity generally hold that some cultural, intellectual or behavioural attributes of an individual are transmitted by descent in a deterministic fashion, in the same way certain physical characteristics are (such as skin or eye colour, or hereditary diseases). On that reasoning, persons of a particular race would share a particular trait for the reason only that their ancestors had that trait.

The indigenous peoples have often been described as a race.<sup>17</sup> More specifically, a racial definition of the indigenous peoples would hold that indigenous culture or identity is genetically transmitted by descent. This is indeed what colonial legislation has done since the mid-19<sup>th</sup> century, and what the *Indian Act* still does today: as described above, Indian status is determined at birth based on one’s ancestry, and that status cannot thereafter change. The implication is clear: for the legislator, indigenous identity, with all its cultural, social and political attributes, is something that is transmitted genetically. That is a racial conception of identity.<sup>18</sup>

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<sup>15</sup> *Canada (A.G.) v. Canard*, [1976] 1 S.C.R. 170 at 207 (Beetz J.); other examples are mentioned in Grammond, “Role of Ethnicity”, *supra* note 14.

<sup>16</sup> See Grammond, “Role of Ethnicity”, *supra* note 14 at 492-95; Grammond, “Identity” *supra* note 3 at 4-8; Ian Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 2006).

<sup>17</sup> For recent examples in Canadian judicial discourse, see Grammond, “Role of Ethnicity” *supra* note 14 at 489-90.

<sup>18</sup> See Grammond, “Role of Ethnicity”, *supra* note 14 at 514-16; Grammond, “Identity”, *supra* note 3 at 129-32.

Today, racial conceptions of human diversity are almost universally disapproved of, and the use of racial distinctions in laws or public policy is widely condemned. One exception is the case of affirmative action. While race is a scientifically invalid concept, we must sadly acknowledge that many people did, and still do, act upon racial beliefs, visiting profound injustice upon persons they believe to be inferior. To redress that injustice, we generally accept that the state can provide compensatory benefits to the members of a racialized group.

If the only way we can describe the indigenous peoples is through a racial conception of human diversity, the only measures that may legitimately be enacted to benefit them would be those akin to affirmative action. For example, if we conclude that their underrepresentation in the work force is due to racial discrimination, we might take measures to increase their access to specific types of employment. However, it is difficult to justify other kinds of measures, such as self-government, on the basis of race. We must thus find another way of describing what makes the indigenous peoples distinctive. As the Royal Commission on Aboriginal Peoples said more than a decade ago, “the Aboriginal peoples ... are political and cultural entities rather than racial groups. ... The Aboriginal identity lies in people’s collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.”<sup>19</sup>

Culture is increasingly mentioned as the basis for the special rights recognized to indigenous peoples. From that standpoint, indigenous peoples would constitute cultural groups, and what would make such a group distinctive are its cultural traits: its language, its way of life, its traditions, its artistic forms. Modern philosophers such as Will Kymlicka forcefully argue that states should take special measures to relieve cultural groups of the burdens that flow from their minority status.<sup>20</sup> However, a cultural view of the indigenous peoples runs the risk of essentializing certain features of their cultures. The jurisprudence of the Supreme Court of Canada has been heavily criticized on that basis.<sup>21</sup> By requiring indigenous peoples to prove that certain practices were central to their culture before the arrival of the Europeans, the Court takes a stereotyped view of these cultures, for example,

<sup>19</sup> Royal Commission on Aboriginal Peoples, *Report*, vol. 2 (Ottawa, 1996) at 166, 168.

<sup>20</sup> W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) [Kymlicka].

<sup>21</sup> See e.g. Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill L.J. 993; Ronald Niezen, “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada” (2003) 18 C.J.L.S. 1.

focusing mainly on hunting and fishing activities. However, all cultures, including indigenous ones, are in a perpetual state of evolution. Thus, viewing the indigenous peoples as cultural groups has significant shortcomings.<sup>22</sup>

Modern anthropology provides us with another way to describe the distinctiveness of the indigenous peoples: the concept of ethnicity. This approach to human diversity, unlike the cultural concept, does not presume that there are any objective differences between the cultures of neighbouring ethnic groups. Rather, it builds upon the observation that members of two ethnic groups in contact will single out some cultural features as markers of the boundary between them, but not necessarily those features that are most apparent to an outside observer.<sup>23</sup> This means that an outside observer cannot, without asking group members, decide what cultural traits are constitutive of the identity of the ethnic groups in question. Moreover, the concept of ethnicity is fluid: members of a society may hold diverging conceptions of what makes up their cultural identity, and there is no way an outsider can resolve the conflict or decide what the “true” identity of the group is. An ethnic conception of indigenous identity has the advantage of sidestepping the pitfalls of racial or purely cultural conceptions of indigenous identity. However, its fluid nature makes it difficult to translate into legal terms. Jurists seeking clear criteria become somewhat confused when they learn that they must work without a definition of a group’s culture.

Yet, the law may successfully define ethnic identity by following the ways in which culture is transmitted. Quite easily observable factors, such as where one was born, raised or schooled, or what language one speaks, may be very good indicators of one’s culture. And because parents usually transmit their culture to their children, ancestry may be a proper factor to consider in determining ethnic identity, *if it is not employed in a deterministic or genetic way*.<sup>24</sup> For example, the membership codes of certain Indian bands include persons whose two parents are members, while allowing those without the requisite degree of ancestry to apply for membership upon proof of a series of factors including residence among the

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<sup>22</sup> T. Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory and the Politics of Self-Government* (Vancouver: UBC Press, 2003), esp. at 69, 120.

<sup>23</sup> Fredrik Barth, “Introduction” in Fredrik Barth, ed. *Ethnic Groups and Boundaries* (Prospect Heights, Illinois: Waveland Press, 1998); Richard Jenkins, *Rethinking Ethnicity: Arguments and Explorations* (London: Sage Publications, 1997); Hilary N. Weaver, “Indigenous Identity: What Is It, and Who Really Has It?” (2001) 25 *American Indian Quarterly* 240.

<sup>24</sup> Grammond, “Identity”, *supra* note 3 at 15-16; Grammond, “Role of Ethnicity”, *supra* note 14 at 508-13.

band, knowledge of the language and family ties.<sup>25</sup> (Notice the difference from the *Indian Act*, which allows nothing like this). In the end, adopting an ethnic conception of indigenous identity allows us to accept cultural justifications of special rights without being forced to define indigenous culture.

The difference between these conceptions of indigenous identity is neatly illustrated by comparing the trial and appeal judgments in the *McIvor* case. These differences are especially apparent at the section 1 justification stage, because the generally accepted framework for the section 1 analysis<sup>26</sup> requires the judge to assess both the objective of the impugned law, and the proportionality between that objective and the means used to attain it. In this case, the objective of section 6 of the *Indian Act* is easy to discern: to differentiate between Indians and non-Indians. However, the appropriateness of the means employed by the *Indian Act* to that end cannot be assessed properly if one does not know what kind of groups the indigenous peoples are. This is where the conceptions of indigenous identity held by the judges reveal themselves.

At trial, the government asserted several general objectives behind Bill C-31, but Ross J. rejected them as being too general and not related to the justification of differential effects according to gender. The government, however, also argued that to remedy the residual discrimination caused by the second-generation cut-off rule would “involve giving status to people who are two generations away from the reserve and who would not likely have had much contact with their Indian culture.”<sup>27</sup> Notice that this argument was based on a purely racial view of the indigenous peoples and their cultures. According to that view, persons with only one Indian grandparent are necessarily “away from” the reserve and have lost their indigenous culture – a deterministic approach that is incompatible with contemporary knowledge about culture and genetics. In any event, Ross J. roundly rejected that argument on the government’s part as being entirely unsupported by evidence. This finding amounts to the rejection of a racial conception of indigenous identity, in favour of an ethnic conception more in line with current social science. In the end, Ross J. declared section 6 of the *Indian Act* to be of no force and effect insofar as it led to the differential treatment of the descendants of Indian men and women born before 1985.

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<sup>25</sup> Grammond, “Identity”, *supra* note 3 at 139-42; one such code was considered in *Grismer v. Squamish Indian Band*, 2006 FC 1088, [2007] 1 C.N.L.R. 146 (F.C.).

<sup>26</sup> See e.g. *R. v. Oakes*, [1986] 1 S.C.R. 103.

<sup>27</sup> *McIvor, trial*, *supra* note 3 at para. 309.

Had the matter been argued explicitly, it is highly probable that the trial judge would have found that the second generation cut-off rule itself discriminated on the basis of race and was not saved by section 1. The government's objective of recognizing Indian status only for those who "are in contact with their Indian culture" would perhaps have been considered as legitimate, because being a member of a minority culture entails certain burdens that the State may legitimately attempt to redress.<sup>28</sup> However, having found no evidence that persons with only one Indian grandparent have lost their culture, the judge would most certainly have concluded that the *Indian Act* failed the other parts of the section 1 test because it lacked a rational connection with the stated objective, or because it did not minimally impair the rights of indigenous persons. Thus, the trial judgement raised the hope that Canadian courts would, one day, scrutinize the ancestry criteria that define Indian status and demand a cogent justification for the continuing presence of racial distinctions in federal legislation.

The British Columbia Court of Appeal saw the matter quite differently. It invalidated section 6 of the *Indian Act*, but on a much narrower basis than the trial judge had suggested, even leaving open the possibility that some forms of residual discrimination might be valid in light of the will of the federal government to define Indian status through ancestry. The Court expressly declared that linking Indian status to ancestry alone was a valid statutory objective that could justify an infringement of individual rights:

In my view, there was such an objective, though the objective is apparent only when one examines the broader provisions and goals of the regime put in place in 1985. The 1985 legislation was passed only after years of consultation and discussion. The legislation resulted in a significant increase in the number of people entitled to Indian status in Canada. There were widespread concerns that the influx might overwhelm the resources available to bands, and that it might serve to dilute the cultural integrity of existing First Nations groups. The goal of the legislation, therefore, was not to expand the right to Indian status *per se*, but rather to create a new, non-discriminatory regime which recognized *the importance of Indian ancestry to Indian status*.

In fashioning the legislation, *the government decided that having a single Indian grandparent should not be sufficient to accord Indian status to an individual*. This was in keeping with the views expressed by a number of aboriginal groups. It was also in keeping with the existing legislative regime, which included the Double Mother Rule.<sup>29</sup>

Thus, the Court of Appeal seems to agree with the government's assertion that persons with only one Indian grandparent "would not likely have had much contact with their Indian culture." Although it does not use the word "race," the Court appears comfortable with

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<sup>28</sup> Kymlicka, *supra* note 20.

<sup>29</sup> *McIvor, appeal, supra* note 1 at paras. 129-130 [emphasis added]. Recall that the "double-mother rule" in force from 1951 to 1985 was the predecessor of the second-generation cut-off rule.

a racial conception of indigenous identity, whereby the recognition of one's cultural or political affiliation with an indigenous group depends *exclusively* on one's ancestry. Yet, racial conceptions of identity have been almost universally rejected as a basis for differentiated rights. It is disturbing that the preservation of a racial classification could be considered as a public policy objective that justifies breaches of individual rights. In other contexts, the Supreme Court of Canada has stated that an objective incompatible with the values entrenched in the *Charter* cannot ground a section 1 justification.<sup>30</sup> Protecting indigenous culture may be an acceptable objective and, as explained above, taking ancestry into account when defining status may be a useful means to that end. However, protecting indigenous ancestry as such,<sup>31</sup> can only be explained in racial terms that are incompatible with the *Charter* and should not be a reason to curtail individual rights. The Court of Appeal failed to acknowledge that the *Indian Act* protected indigenous ancestry without protecting indigenous culture, and saw only a tiny bit of gender discrimination where it should have recognized a complex mix of racial and gender discrimination.<sup>32</sup>

Most importantly, this decision, if not reversed, precludes any challenge to the use of racial distinctions in the *Indian Act*. Indigenous communities will remain divided along arbitrary lines between those who have Indian status and those who do not, with major consequences in terms of material benefits and official recognition of one's identity.<sup>33</sup> At the same time, those who criticize the idea of special rights for the indigenous peoples on the basis that these rights are race-based<sup>34</sup> will point to the Court of Appeal's failure to strike the racial criteria from the rules of Indian status as proof of their argument.

It took more than 25 years for Ms. McIvor to successfully challenge "residual discrimination." It might take even longer to deal with the real problem: the second

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<sup>30</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116; see also P.W. Hogg, *Constitutional Law of Canada*, looseleaf 5th ed. vol. 2. (Toronto: Carswell, 2008) at 38-26.

<sup>31</sup> Thus, the Supreme Court of Canada, in *Martin v. Chapman*, [1983] 1 S.C.R. 365 at 371, said that the aim of the "double-mother rule" was "a restriction on the dilution of Indian blood" (at 371, *per* Wilson J.) or "to promote the preservation of purity of Indian blood" (at 379, *per* Lamer J.).

<sup>32</sup> A more encouraging, recent decision is *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, [2009] 3 C.N.L.R. 261 (Alberta C.A.) (application for leave to appeal to the Supreme Court of Canada pending), where the Court invalidated a provincial statutory provision disentitling status Indian from membership in Métis settlements.

<sup>33</sup> J. Fiske and E. George, "Bill C-31: A Study of Cultural Trauma" in J.P. White, E. Anderson, W. Cornet and D. Beavon, eds., *Aboriginal Policy Research: Moving Forward, Making a Difference* (Toronto: Thompson Educational Publishing, 2006).

<sup>34</sup> See e.g. Tom Flanagan, *First Nations? Second Thoughts*, (Montreal & Kingston: McGill-Queen's University Press, 2000) at 194.

generation cut-off rule. As time goes by, that rule will have the insidious effect of drastically reducing the size of the status Indian population.<sup>35</sup> We must open our eyes before it is too late.

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<sup>35</sup> Stewart Clatworthy, "Impacts of the 1985 Amendments to the Indian Act on First Nations Populations" in Jerry P. White, Paul S. Maxim and Dan Beavon, eds., *Aboriginal Conditions: Research as a Foundation for Public Policy* (Vancouver: UBC Press, 2003).