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MAR n 8 1985

AN ANALYSIS OF BILL C-31

AN ACT TO AMEND THE INDIAN ACT

BY:

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March 5, 1985

A. OUTLINE OF PROVISIONS

1. Individuals who lost status as a result of specific sections of the Indian Act (specific sections which either discriminated on the basis of sex or are now described by the government as unfair) will be restored to band membership on application by those individuals to DIA. Bands have no say in this process. The government has estimated the number of individuals involved to be 22,000. We do not know how that figure was calculated. Most will be women who lost status as a result of section 12 (1) (b).
2. The first generation children of the 22,000 individuals described above will be registered on the federal Indian register that gives them Indian "status" but not band membership. They will only gain band membership immediately if both parents are members of the particular band. (These rules on children will also apply to individuals who were band members before April 17, 1985.) The number of children of the 22,000 is estimated at 46,000. The parents do not have to be alive.
3. Bands will be able to assume control of their own membership. To do this they must establish written rules which must be approved by a majority of the electors of the band. These rules cannot take away acquired rights. In other words, no individual who now has band membership or gains band membership by C-31 can immediately lose band membership as a result of the new band rules. If a band does not take over control of membership within two years, the children referred to in paragraph 2 above will be automatically entitled

B. GENERAL POINTS ABOUT BILL C-31

1. It is a compromise.

(a) reinstatement to band membership of the 22,000 individuals who lost status goes against the principle of First Nation's self-determination of membership/citizenship.

(b) the fact there is no automatic reinstatement of the children of the 22,000 is contrary to the positions of Indian Rights for Indian Women, the Aboriginal Women's Coalition and the National Action Committee on the Status of Women.

2. It is much better than C-47, the bill proposed by Munro in June, 1984.

(a) automatic entitlement to band membership goes down from 70,000 to 22,000.

(b) there is real band control over membership for the future. The only limitation is that a band will not be able to take status away from any individual who is currently a band member or who regains band membership as a result of this legislation (except for reasons that occur in the future).

3. There is likely to be litigation.

Indian Rights for Indian Women have already said they will go to court unless the children are automatically entitled to band membership. Their chances of winning are not very good, but arguments about the Charter of Rights and Freedoms and possible litigation

C. DETAILED PROVISIONS OF C-31.

C-1. RESTORATION TO BAND MEMBERSHIP

1. What individuals will be entitled to regain band membership?

(a) women who lost status as a result of a marriage to a man who did not have Indian status (section 12 (1) (b)).

(b) individuals who lost Indian status at age 21 because their mother had gained Indian status by marriage and their father's mother had gained Indian status by marriage (section 12 (1) (a) (iv) - the so-called "double mother" rule).

(c) illegitimate children of status Indian women who lost status because the father did not have Indian status (section 12 (2)).

(d) any children of a woman who lost status under 12 (1) (b) who were born before the marriage and who were ordered enfranchised by the Minister (section 109 (1)).

(e) any person, their spouse and children, who lost status by enfranchisement when the enfranchisement was (i) connected with military service, (ii) in order to obtain employment or (iii) connected with becoming a lawyer or priest (under section 111, R.S.C. 1906, Ch. 81).

2. Exclusions from entitlement to regain band membership:

(a) there are two provisions dealing with non-Indian women who gained Indian status by marriage before April 17, 1985. These

were born with Indian status. If a woman gained status by marriage and later lost status, she is not entitled to regain status or band membership under C-31. As well, if a woman who gained status by marriage has a child by a non-Indian, that child is not entitled to status or band membership.

(b) also excluded are individuals who voluntarily enfranchised, including their wives and children (unless they come within paragraph (e) of part 1, above). This is a significant change from bill B-47 where the wives and children of men who voluntarily enfranchised under section 109 (1) were all considered to have been involuntarily enfranchised and were restored to membership.

(c) also excluded are past illegitimate female children of a status Indian man and a non-status woman. As a result of the Supreme Court of Canada decision in Martin v. Chapman, the male illegitimate children of a status Indian man and an non-status woman are recognized as status Indians - but female children are not. The Supreme Court decision was, in truth, a misinterpretation of the Indian Act and created an inequality between males and females in this very narrow situation. Bill C-47 would have resolved this in favour of allowing both males and females into membership. Bill C-31 just leaves it alone as a past mess, while not taking status away from the male children involved.

3. Individuals who will be entitled to band membership after April 17,

1985 and before a band establishes band membership criteria

(a) children born after April 17, 1985, both of whose parents are members of a particular band, will automatically be registered as band members (unless band control of membership has been established and band rules exclude the person). This provision will almost always apply to the children of a couple who were band members before April 17, 1985.

C-2. REGISTRATION AS A STATUS INDIAN WITHOUT BAND MEMBERSHIP

1. The following individuals will be registered as status Indians but without band membership.

(a) an individual who has one parent who is a member of a band. Most children of individuals who regain band membership under C-31 will be in this category.

C-3. THE POWERS OF A BAND TO TAKE OVER MEMBERSHIP

1. A band can "assume control of its own membership" in the following way:

(a) there must be a decision to assume control of membership by a majority of the electors of the band. The electors are band members normally resident on the reserve (unless the band is a "custom" band and has its own rules on voting).

(b) written membership rules must be established.

(c) the rules cannot take band membership away from individuals for things that took place in the past. If the new rules said that anyone who married a non-Indian lost band membership, that would only apply to members who married non-Indians in the future.

(d) the rules can establish a way for decisions on band membership to be reviewed (some kind of an appeal or review procedure). The band does not have to establish a review mechanism. The government assumes decisions can be appealed to the courts.

(e) the band must notify the Minister in writing that it is assuming control of its own membership and must send the Minister a copy of the membership rules developed by the band. The Minister will tell the Registrar to send a copy of the department's band list to the band and after that time the band will have complete responsibility for maintaining its band list.

2. Does C-31 recognize a right of self-determination of membership or citizenship?

Bill C-31 does not talk about any "right" to determine membership, nor does it refer to treaty or aboriginal rights or to self-determination or self-government. But, on the other hand, the wording is very careful not to say that this is a delegation of power from the federal government and not to describe the new rules as "by-laws" (which would sound like delegated power).

The rules do not have to be approved by the Minister or by any other Canadian governmental authority. There is no statement that the rules are subject to the Charter of Rights and Freedoms (though the Department of Justice is of the opinion that they will be subject to the Charter). As long as they meet the conditions already described then the Minister must take the next step, which is to have the registrar send a copy of the current band list to the band. After the band takes control of membership the Department ceases to maintain the band lists for the band. If, in the future, the federal government tried to redefine Indian membership, it can be argued that C-31 was legislation which ended federal control of membership and restored the aboriginal or treaty right to bands to define their own citizenship. In other words, it is possible that this legislation could not be reversed by parliament without the consent of each band involved. The language allows Indians to say that the "right" is now with them and is protected as an "existing aboriginal and treaty right" within section 35 of the Constitution.

C-4. WHAT HAPPENS IF A BAND DOES NOT ASSUME CONTROL OF ITS OWN MEMBERSHIP?

1. What happens within the two year transition period (and before band control).
 - (a) after C-31 is in place and the individuals have been restored to band membership who are so entitled, there are certain rules for new children. The children of two members of the same band will, naturally, be registered as band members. However the children of

any intermarriage between band members and non-members will not gain band membership, though they will be registered on the federal Indian registry.

The following examples use the term "double" to refer to a person both of whose parents are band members. The term "single" refers to a person one of whose parents is a band member.

A band member marries another band member. Their child Craig is a "double" and a member of the band. If Craig marries a person who is not a member of the band, his child Sam is a "single". Sam will not be registered as a band member (unless band rules allow it or unless the band does not assume control of its own membership within two years). But Sam will be registered in the Indian register as a status Indian (but not a band member).

If Sam, in the above example, marries a "double" then the children of the marriage will be band members.

If Sam, in the above example, marries another "single" the result is not clear. A literal reading of section 6 (1) (f) says that the children would come within that section and therefore would be band members. But since both parents come within section 6 (2) and do not have band membership, it is illogical that the children should get band membership.

2. What happens after the two year transition period (and before band control).

If a band does not assume control of its own membership within two years, then on April 17, 1987, children who have one parent who is a band member will be entitled to band membership. To repeat the examples from the last section:

A band member marries another band member. Their child Craig is a "double" and a member of the band. If Craig marries a person who is not a member of a band, his child Sam is a "single". Sam will be registered as a band member. If Sam marries a non-Indian the children will not be members of the band and will not be registered as status Indians on the federal Indian registry.

If Sam marries a "double", the children will be registered as band members.

If Sam marries a "single", the children will be registered as band members.

If Sam, a member of Band A, marries Shiela, a member of Band B, both remain members of their original bands. Section 12 of C-31 would allow Sam or Shiela to transfer to the spouses band with the consent of the admitting band. If the parents continue to be members of two different band, it is not clear how the band membership of the child is determined. It may require the consent of a band under section 12.

C-5. WHAT IS THE ROLE OF THE CONTINUING FEDERAL REGISTER OF INDIANS?

The Indian register will include:

- (a) people presently on band lists,
- (b) people presently on the genral list (a very small number)
- (c) people who will be restored to and membership (estimated at 22,000, primarily women who lost status by section 12 (1) (b)),
- (d) first generation children of the 22,000 (estimated at 46,000) who will be registered as status Indians but who will not have band membership.

The Indian register will, for the first time, include substantial numbers of individuals who are status Indians but are not members of bands. If a band does not assume control of its own membership, those individuals (other than general list members) will automatically be entitled to band membership on April 17, 1987. If bands take control, then some of those children could be excluded permanently from band membership. In that case they would continue to be on the federal register, but will not be band members.

What is the significance of being a status Indian on the Indian register, but not being a member of a band? There could be entitlement for off-reserve DIA programs, such as post-secondary educational allowances, uninsured health care and off-reserve housing.

C-6. CAN A BAND INCLUDE AS MEMBERS INDIVIDUALS WHO ARE NOT ON THE
FEDERAL REGISTER? IF SO, DOES THE FEDERAL GOVERNMENT HAVE
OBLIGATIONS IN RELATION TO THOSE MEMBERS?

The provisions in C-31 on band control of membership do not limit band decisions of members to individuals who the federal government recognizes and registers on the Indian register. This brings out openly something that has existed in fact for many years. Indian bands have often allowed non-status women (and others) to reside on reserves though they did not have Indian status. This has been so common that since 1960 the DIA has had a policy of extending social programs to non-status women and their children on reserves as if they had Indian status. Now this distinction between federally recognized Indians and band recognized Indians will be openly acknowledged. What obligations, if any, will the federal government assume in relation to these individuals who (a) are band members, (b) are not on the federal Indian register and (c) live on the reserve?

The cabinet document which was leaked in February stated:

The existing federal government policy of financing services for Indians only would continue, although in practice there may be some difficulty in maintaining the policy. (paragraph 34)

The statement is interesting. It is inaccurate that the present policy is to fund status Indians only, but it indicates an intention to deliver programs only to individuals on the federal Indian register and not to band members who are not on that register.

Government "Background Notes" released with Bill C-31 state:

The Indian Act will place no restriction on who a band can bring into its membership. All band members will be equal with regard to the band activities governed by the Indian Act such as band elections, land surrenders, and land holdings. Indian Act provisions relating to individuals (eg. wills and personal tax exemptions) will continue to apply to Indians only.

C-7. WHAT ARE THE RULES ON ON-RESERVE RESIDENCY?

The by-law powers of band councils under section 81 of the present Indian Act will be expanded to add powers to determine residence of band members and other persons on the reserve. As well, the band council will be able to enact by-laws in relation to spouses and children of band members on any matters on which band councils can currently make by-laws in relation to members. These provisions meet the objections to the residency provisions in Bill C-47.

C-8. OTHER MATTERS

1. Adopted children will now be considered on the same basis as other children.

There has been a long controversy about the question of adoption and Indian status. Bill C-31 provides that adopted children will be treated in the same way as natural born children for purposes of

Indian status and band membership. Adoption by non-status parents would still not have the effect of ending Indian status. A band which takes over its own membership system would be able to make different rules in relation to adoption.

2. Marriage would no longer have any affect on Indian status, unless band rules on membership provided otherwise.
3. "Enfranchisement" would be ended, but individuals could request that their name be "deleted" from the Indian register or any band list maintained by the Department (that is, for a band that had not assumed control of its own membership).

The individual would have no right under the Indian Act to a per capita share of band funds. The individual band could decide whether any payment should be made to an individual who choses to leave.

C-9. ANOMOLIES OF PROBLEMS

1. There are no guaranties of additional lands, band funds or program funding to ensure that existing band members will not bear the burden of the additions to band funds. The reforms are handled in such a way that individuals will be added, but no one will loose status as a result of C-31 (because of the protection of "acquired rights"). This has the effect of reducing on a per capita basis band assets and DIA funds. Crombie has talked about additional monies for DIA programs.

2. The extent of protection of acquired rights in C-31 seems to affect unborn children and not just individuals who are band members under C-31. If a First Nation wanted to have a strict racial descent rule for band membership, a history of intermarriage before April 17, 1985, would be important. But C-31 seems to prevent new band rules on membership using pre-April 17, 1985 events as grounds for deciding on the band membership of individuals. The effect of sections 10 (3) and (4) should be limited to individuals who have band membership under C-31, but not to subsequently born children.

3. Under Bill C-31 a non-Indian will not gain status by marriage to a status Indian. The only situation where a non-Indian will have gained status by marriage is the case of white women who married status Indian men before April 17, 1985. These women will continue to be band members after April 27, 1985. In contrast the white husbands of Indian women will not gain status, whether the marriage took place before or after April 17, 1985. The white wives who gained status by marriage before April 17, 1985, will be treated fully as Indians for the purposes of the status of their children.

* { This means that an Indian man who married a white wife before April 17, 1985, is in a better position to pass on Indian status to his children than an Indian woman who married a white husband. This can be shown by using two examples.

Indian man Charlie married white woman Sally before April 17, 1985. Both Charlie and Sally are band members under the Indian Act and now under Bill C-31 and their children are automatically entitled to be band members.

Indian woman Edna married white man David before April 17, 1985. Edna lost Indian status on marriage. By Bill C-31, Edna will regain band membership, but David will remain non-Indian. Their Children are not automatically entitled to band members, but will be registered on the federal Indian register as having Indian status. They can only become band members if (a) the band does not assume control of its own membership within two years or (b) if band rules on membership recognize them as members.

This difference results from treating the white women who gained status by marriage as having "acquired rights" and treating those rights as fully equal to the rights of Indians born with Indian status. Since at least the 1982 committee hearings, the government has insisted that "acquired rights" must be protected. An alternative would be to limit the "acquired rights" of white wives to rights for themselves alone, and not in relation to their children. A provision could be added stating that in calculating the status of children (and only for that purpose) a woman who gained status by marriage will be treated as not having Indian status or band membership.

C-10. STRENGTHS

1. There is no inequality of descent rules between individuals with band membership before April 17, 1985 and people restored to band membership by C-31. This reduces greatly any Charter arguments against the reform.

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