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Looking Forward from C-3: Historic and Continuing Discrimination in Status Rules under the *Indian Act*

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I have no doubt that every member of the House stands opposed to discrimination based on gender. Despite this conviction, I expect that all members appreciate that equality between men and women is difficult to achieve at times.

Hon. John Duncan, M.P., Parliamentary Secretary to the Minister of Indian Affairs and Northern Development[1]

Gender discrimination is not resolved if only some people get to benefit. One cannot even say that gender discrimination is partially resolved. There is no such thing. Gender discrimination is either eliminated or it is not.

Senator Sandra Lovelace Nicholas[2]

Introduction[3]

In 1985, the equality rights provision in section 15 of the Canadian Charter of Rights and Freedoms came into force. That event obliged Parliament to make the most significant amendments to the status rules in the Indian Act since 1869, amendments commonly-known as Bill C-31 (referred to in this text as "the *1985 Act*").[4]

A generation later, in 2010, Parliament was forced to consider the continuing gender discrimination its earlier work had created and to attempt a correction on the basis of the British Columbia Court of Appeal's judgment in the *McIvor* case. The resulting legislation has not put an end to the issue.

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[1] Sponsor's speech at 2nd reading of Bill C-3, House of Commons, *Hansard*, 40th Parliament, 3rd Session, Number 018, 26 March 2010.

[2] Response speech at 2nd reading of Bill C-3, *Debates of the Senate (Hansard)*, 3rd Session, 40th Parliament, Volume 147, Issue 70, 25 November 2010. Thirty years earlier, Senator Lovelace Nicholas had been the successful complainant to the United Nations Human Rights Committee in *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166, (1981), [1982] 1 C.N.L.R. 1, a decision which held that when she lost her status upon marriage to a non-Indian in 1970, the result was an unjustifiable denial of her rights under the *International Covenant on Civil and Political Rights*.

[3] The author was counsel for the two Abenaki communities of Québec and their tribal council as interveners in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, [2009] 2 C.N.L.R. 236 (hereinafter, "*McIvor* (B.C.C.A.)". His partner Paul Dionne is counsel for the Abenaki plaintiffs in *Descheneaux et al. v. Canada*, Qué. S.C. (Montréal) 500-17-048861-093, an action addressing continuing discrimination under the *Indian Act*'s status rules.

[4] *Act to Amend the Indian Act*, S.C. 1985, c. 27.

The stated purpose of the 1985 Act was to abolish the "married out rule" – under which Indian women lost their status by marrying non-Indian men – for the future and to undo its effects from the past. In fact, the 1985 Act did this by creating an artificial "blood quantum" of 50 per cent as the requirement for status. The status rules created a blood quantum because no-one with fewer than two status grandparents was meant to be entitled to status. [5] The quantum was artificial because (among other anomalies) the status grandparents could include women with no Indian ancestry and who had only obtained their status by marriage before 1985.

The 1985 Act therefore had the following discriminatory effect. All the grandchildren of an Indian man who had married a non-Indian woman before 1985 would always have status based on their two Indian grandparents: the Indian grandfather and the married-in grandmother. Yet the grandchildren of a married-out Indian woman would only have status if her son-in-law or daughter-in-law was also an Indian because otherwise, those grandchildren could only count a single Indian grandparent – their married-out grandmother.

Sharon McIvor waited through most of the next quarter-century for a decision on her challenge to the discriminatory effect of the 1985 Act on her children and, eventually, her grandchildren: her case was filed in 1989[6] and the final appeal judgment was rendered in 2010.[7] Her victory forced Parliament to adopt Bill C-3 in 2010, a statute whose full name is *An Act to promote*

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[5] When the federal Cabinet was considering Bill C-47 in 1984 (the predecessor to Bill C-31 which became the *1985 Act*), the documents before it explicitly described the proposed new rules as a blood quantum. The only issue was whether to adopt a one-half or a one-quarter quantum: Memorandum to Cabinet, 10 May 1984, *McIvor* Appeal Record (hereinafter, "A.R."), vol. 18, pp. 3404-3405; Record of Cabinet decision, 29 May 1984, A.R. vol. 18, pp. 3500-3501; Memorandum to Cabinet, 9 February 1984, A.R. vol. 41, pp. 7836-37. In the event, Cabinet decided not to "[e]xtend the reinstatement and first-time registration program to 'one-quarter' blood": Memorandum to Cabinet, 10 May 1984, A.R., vol. 18, p.3405.

[6] See: *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2007 BCSC 827, [2007] 3 C.N.L.R. 72 (hereinafter, "*McIvor v. Canada* (B.C.S.C.)"), para. 103.

[7] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 338 (Supplementary Reasons, Second Further Extension of Suspension of Declaration of Invalidity).

gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs).[8]

The amendments added some 45,000 individuals to the Register of Indians,[9] most of them the grandchildren of the married-out women whose status had been restored in 1985. These grandchildren received status under the 2010 amendments for the first time. Nevertheless, Sharon McIvor told Parliament: "I do not like the bill, and I do not think it should pass as it is because it is a piece of garbage, as far as I am concerned."[10]

The fact is that even for the beneficiaries of the 2010 amendments, the interaction of pre- and post-1985 status rules means the earlier discrimination has merely been pushed forward a generation. The descendants of men and women who married out still do not enjoy the same status: if the men married out before 1985, their great-grandchildren will all have status no matter what, but the great-grandchildren of their sisters who married out will not have status unless the grandchildren parent with other Indians. This paper will describe this effect and other sources of continuing discrimination in the *Indian Act*'s status rules, particularly the fact that brothers and sisters of the same parents can have different status.

Why status still matters

For over a century, the federal government's power to determine who was an Indian had also included the power to decide who was a member of each band recognized by the government. Those whose names were removed from the band list were usually also removed from the

[8] S.C. 2010, c. 18; in force as of January 31, 2011.
[9] DIAND, "Estimates of Demographic Implications from Indian Registration Amendment - *McIvor v. Canada*", March 2010 <http://www.ainc-inac.gc.ca/eng/1100100032515>.
[10] Parliament of Canada, *Proceedings of the Standing Senate Committee on Human Rights*, Issue 8 – Evidence, 6 December 2010.

reserve where their relations lived.[11] A additional effect of the *1985 Act* was to give bands have the right to adopt membership codes,[12] allowing them to establish rules which can be more or less inclusive than the status rules under the *Indian Act*.

But as the Department of Indian Affairs and Northern Development[13] (DIAND) admitted recently, it maintains the exclusive power to determine status in order to maintain the exclusive power to decide on the beneficiaries of federal funds:

> From both points of view, many maintain that Canada's legislative definition of who is an "Indian" is detrimental to First Nations identity and autonomy, and that First Nations themselves should be responsible for such definitions. Since 1985, about 40% of First Nations have established their own membership codes, but registration has remained a responsibility of the federal Government. Such a role remains appropriate as long as status is a key factor in determining eligibility for Government programs designed for First Nations.[14]

The result is that even if a band adopts a membership code which includes individuals on the band list who do not have status,[15] the band will not received federal funding for services to those non-status members.[16] For instance, non-status members have the right to occupy land on

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[11] Report of the Royal Commission on Aboriginal Peoples (hereinafter, "RCAP Report"), Volume 1, *Looking Forward Looking Back,* Part Two, *Assumptions and a Failed Relationship,* Chapter 9, "The Indian Act", text corresponding to fn. 110.
[12] *Indian Act*, R.S.C. 1985, c. I-5, s.10, as am.
[13] The official name pursuant to the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6, s. 2(1).
[14] DIAND, "Discussion Paper: Changes to the Indian Act affecting Indian Registration and Band Membership *McIvor v. Canada*", August 2009 <http://www.ainc-inac.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/mci_1100100032488_eng.pdf>.
[15] Note, however, that out of 232 bands with their own membership codes, a researcher found only 84 with rules markedly more generous than the *Indian Act*, that is, where eligibility rules only required "that a person have at least one parent who is a member, regardless of the person's entitlement to Indian registration": Stewart Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities*, Indian Affairs and Northern Development, February 2005, pp. 5, 12.
[16] Parliament of Canada, House of Commons, *Fifth Report of the Standing Committee on Aboriginal Affairs and Northern Development on Consideration of the Implementation of the Act to Amend the Indian Act as Passed by the House of Commons on June 12, 1985*, 33rd Parl., 2nd Sess., Issue No. 46, 28 June 1988, p.46:36.

reserve,[17] but their bands receive no funding for building their housing, nor for educating their children.

Moreover, for the 60 per cent of bands whose membership lists are maintained by DIAND, there is no difference between membership and status. Without membership, for instance, children of status Indians who do not have status themselves may legally live on reserve only as long as they are dependent on their parents.[18] They cannot inherit their parents' homes. [19]

Finally, as the trial judge recognized in the *McIvor* case, Indian status has become an important aspect of cultural identity for Indians.[20] Even if they are recognized under membership codes, members without status will often be considered "less Indian" than others.

In short, for an Indian, status always determines eligibility for services, often determines the entitlement to the other attributes of band membership and always confirms cultural identity.

The new forms of status after 1985

What Parliament faced in 1985 was the legacy of more than a century of gender discrimination in the status rules in the *Indian Act*. From 1869 onwards, Indian women "marrying anyone other than an Indian" lost their status and their children never acquired it.[21] On the other hand, when Indian men married non-Indian women, their wives were given status and their children had status at birth.[22] The *1985 Act* gave status back to the women who had lost it and provided that

[17] *Indian Act*, ss. 4.1, 20 and 22 to 25.
[18] *Indian Act*, s.18.1.
[19] *Indian Act*, ss.18(1), 28(1).
[20] *McIvor v. Canada* (B.C.S.C.), para. 7.
[21] *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c.6, s. 6, amending S.C. 1868, c. 42, s. 15; continued by R.S.C. 1970, c. I-6, s. 12(1)(b).
[22] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42, s. 15(3); continued by R.S.C. 1970, c. I-6, s. 11(1)(f).

from then on, no-one would lose or acquire status by marriage: instead, status would become purely a question of ancestry.

To this end, the amendments created two categories of status Indians. Those registered under s. 6(1) of the *Indian Act* are those with two status parents and they will always pass on status to their children. However, those with only one status parent are registered under s. 6(2) and will only pass on status if they conceive or adopt a child with another parent who also has status.

TABLE 1
TRANSMISSION OF STATUS UNDER THE INDIAN ACT SINCE 1985[23]

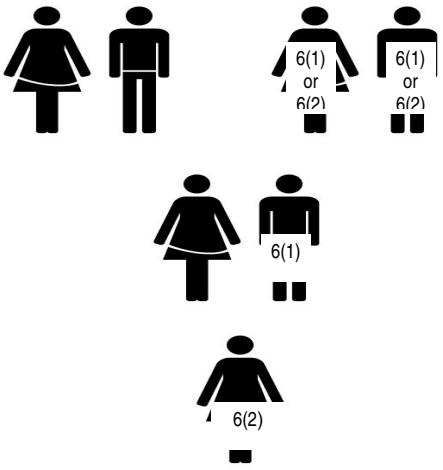
6(1) parent + 6(1) parent ⇩ 6(1) child	6(1) parent + 6(2) parent ⇩ 6(1) child	6(1) parent + non-status parent ⇩ 6(2) child
6(2) parent + 6(2) parent ⇩ 6(1) child		6(2) parent + non-status parent ⇩ non-status child

The federal government prefers to describe the effect of the *1985 Act* as a "second-generation cut-off rule": status is lost after the second generation of intermarriage with non-Indians. It is more accurate, as Prof. Grammond points out, to say that the rules always require a minimum of two status grandparents[24] (subject to the exceptions created by Bill C-3 in 2010).

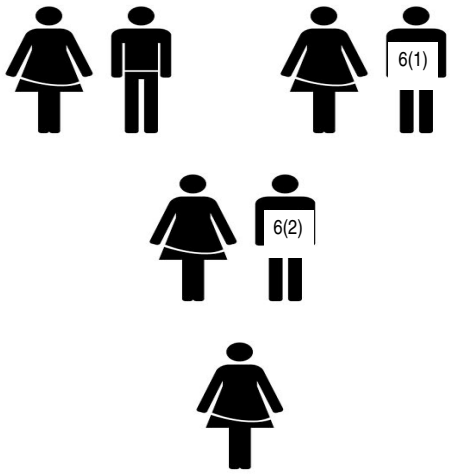
[23] This table is adapted from Figure 9.1 in the RCAP Report, Volume 1, Part Two, Chapter 9, "The Indian Act".
[24] S. Grammond, "Disentangling 'Race' and Indigenous Status: The Role of Ethnicity", (2008) 33 Queen's L.J. 487, text corresponding to fn. 84.

TABLE 2
ANCESTRY REQUIREMENTS FOR TRANSMISSION OF STATUS UNDER THE 1985 ACT

The 50% blood quantum



Or the second generation cut-off



Essentially, the *Indian Act* gives the best treatment to the child of two status Indians: any combination of parents with status will always produce a child entitled to be registered under s. 6(1) and therefore produces grandchildren who will always be registered.

But at least two grandparents must have status for a grandchild to be entitled. This is why a person registered under s. 6(2) cannot have a child with status unless the other parent also has status: otherwise, the child would have only one status grandparent on one parent's side. Similarly, a parent registered under s. 6(1) will always have a child entitled to be registered at least under s. 6(2): even with a non-Indian parent, the child will have at least two status grandparents on the Indian parent's side (subject to the exceptions created by Bill C-3 in 2010).

The "cousins rule" before 2010

The discrimination in the *1985 Act* lies in the fact that Indian grandfathers and grandmothers have never been treated equally under the law. Grandfathers who gave their non-Indian wives status by marriage before 1985 are counted as being married to status grandmothers, but grandmothers who married non-Indian men before 1985 are counted as the only Indian grandparent.

The result is that relatives sharing the same grandparents and with the same number of ancestors born as Indians can nevertheless have different status, a discriminatory effect referred to as the "cousins rule".

The *1985 Act* provided that children of a brother who married out before 1985 are counted as having two status parents, are registered under s. 6(1) and the brother's grandchildren would have status no matter with whom his children started a family. Even if his sons married out, they would have produced grandchildren registered under s. 6(1) so long as the marriages were before April 17, 1985 or grandchildren registered under s. 6(2) if the marriage or relationship began later.

Yet if this man's sister married out before 1985, her children would have only one parent with status, would have been registered under s. 6(2) before 2010 and her grandchildren could have only acquired status before 2010 if the other parent was also a registered Indian.

Sharon McIvor has pointed out that the judgments in her case refer to a "hypothetical brother"[25] but that her brother is very real and that his children and grandchildren are beneficiaries of the cousins rule:

[25] *McIvor* (B.C.S.C.), para. 232; *McIvor* (B.C.C.A.), para. 44.

> If you look at this stuff, they call him my hypothetical brother, but my hypothetical brother's name is Ernest Bernard McIvor. He was born May 28, 1953. His mother is Susan Blankinship and his father is Ernest Dominic McIvor. He got married. His first wife, Audrey, was a White woman, and he has a son Jody McIvor who was born in 1974. His second wife was also a White woman, Kim, and they have a daughter, Jenee, who was born in 1980, and a son, Ernest, who was born in 1983.
>
> He was entitled at birth. He is entitled to 6(1)(*a*) status. His wife is entitled to 6(1)(*a*) status. His sons and his daughter are entitled to 6(1)(*a*) status. I got 6(1)(*c*) and my son has 6(2), and all of my brothers' grandchildren are entitled to status just with that finding.
>
> …
>
> I was born in 1948 and my mother is Susan Blankinship and my father is Ernest Dominic McIvor. I have 6(1)(*c*) status, and my son has 6(2) status and my grandchildren do not have status.[26]

[26] Parliament of Canada, *Proceedings of the Standing Senate Committee on Human Rights*, Issue 8 – Evidence, 6 December 2010.

TABLE 3 **CONTINUING GENDER DISCRIMINATION AFTER 1985:** **APPLICATION OF THE "COUSINS RULE" BEFORE BILL C-3 (2010)**	
Father Born with status under pre-1985 Act	Mother Status by birth or marriage
<u>Brother</u> Born with status Marries non-Indian woman before April 17, 1985 and confers status on her under pre-1985 Act Retains status under s. 6(1)(a)	<u>Sister</u> Born with status Marries non-Indian man before April 17, 1985 Loses status upon marriage but regains status under s. 6(1)(c) of 1985 Act
Child Status under s. 6(1), regardless of date of birth Marries or has children with non-Indian	Child Status under s. 6(2), regardless of date of birth Marries or has children with non-Indian
Grandchild of brother Status under s. 6(1), if male child marries before April 17, 1985 or has a male grandchild out of wedlock before April 17, 1985 Status under s. 6(2) if male or female grandchild is by a marriage entered into after April 17, 1985 or born out of wedlock after April 17, 1985 or if granddaughter born before April 17, 1985	Grandchild of sister No status, regardless of date of birth

This was the effect that the trial judge in the *McIvor* case held was a breach of the equality right protected by s. 15 of the *Canadian Charter of Rights and Freedoms* and which Madam Justice Ross ruled could not be justified in a free and democratic society under s. 1 of the *Charter*.[27] She declared that the resulting discrimination in favour of descendants in the male line was unconstitutional.[28]

When the British Columbia Court of Appeal heard the federal government's appeal, it had relatively little trouble agreeing with the trial judge that the discrimination in the cousins rule

[27] *McIvor v. Canada* (B.C.S.C.), para. 343.
[28] Supplementary reasons on remedy, 2007 BCSC 1732.

was a breach of the equality right under s. 15 of the *Charter*,[29] but it was far less inclined to agree that this result could not be justified in a free and democratic society under s. 1.

The cousins rule arises from the fact that the non-Indian women who "married in" before 1985 kept their Indian status under the new rules: the children of a brother or a sister who each married out are treated differently primarily because of a benefit given to the non-Indian wives before the *1985 Act* came into force.[30] The government chose to preserve the rights these women acquired under the former legislation, while eliminating that benefit for women who married Indian men in the future and giving status back to the Indian women who had lost it.[31]

The British Columbia Court of Appeal held that the discrimination suffered through their grandchildren by the women who regained their status in 1985, as compared to those of their brothers, was an extraordinary result of preserving the acquired rights of non-Indian women who had married in.

In the court's view, the differing status given to the cousins by the *1985 Act* was a reasonable and inevitable consequence of choosing not to deprive women who had married in of the rights the old legislation had given them in the past. Justice Groberman wrote that the federal government could not be criticized for choosing "to avoid the disruption and hardship to individuals that would have resulted from depriving them of Indian status."[32]

The discriminatory effect on the grandchildren of women who had married out met the government's pressing and substantive objective of limiting the "significant increase in the number of people entitled to Indian status in Canada" which could have been caused by the *1985 Act*. More particularly, the court held that the government was entitled to respond to "widespread

[29] *McIvor* (B.C.C.A.), para. 91-93, 117.
[30] Discrimination arising earlier cannot be challenged under the *Charter* because s. 15 only came into force on April 17, 1985.
[31] *McIvor v. Canada* (B.C.C.A.), para. 123.
[32] *Id.*, par. 127.

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." [33]

Under the circumstances, the British Columbia Court of Appeal upheld the government's new rule "that having a single Indian grandparent should not be sufficient to accord Indian status to an individual," a principle it noted it was in keeping with the "double mother rule" from before 1985 (discussed below).[34]

The old "double mother rule" and the unjustifiable discrimination created by its repeal

After upholding the cousins rule, however, the British Columbia Court of Appeal noticed an additional peculiarity of the *1985 Act* for which it could find no justification.

Before 1985, it was not only women who married out who could lose their status. When Parliament created the Indian Register in 1951, it also imposed the double mother rule: if an Indian's mother and his or her father's mother had both acquired their status by marriage, he or she would lose his or her own status at the age of 21.[35]

According to the Royal Commission on Aboriginal Peoples, "[t]he logic seemed to be that after two generations in which non-Indian women had married into an Indian community, any children of the second generation marriage should be removed on the basis of their mixed culture and blood quantum."[36] A judge of the Supreme Court of Canada explained that by the double mother rule, Parliament had "sought to promote the preservation of purity of Indian blood." [37]

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[33] *Id.*, para. 128-129.
[34] *Id.*, para. 130.
[35] *Indian Act*, R.S.C. 1970, c. I-6, s. 12(1)(a)(iv).
[36] Royal Commission on Aboriginal Peoples, *Report*, Volume 4, *Perspectives and Realities*, Chapter 2, "Women's Perspectives", §3 "Aboriginal Women and Indian Policy: Evolution and Impact", text corresponding to fn. 31.
[37] *Martin v. Chapman* at 379 (*per* Lamer J., dissenting on other grounds).

After 1985, it was as if the double mother rule had never existed. However this result troubled the British Columbia Court of Appeal because far from preserving their "acquired rights" under the old legislation, the *1985 Act* was the source of a new preferred status for those previously subject to the double mother rule.

The children of an Indian woman who married out before 1985 could only ever be registered under s. 6(2) under the *1985 Act* and her grandchildren would not have status without another status parent.

By contrast, the sons of an Indian man who married out before 1985 were born with status but if those sons had also married out before 1985, the man's grandchildren would have lost status at age 21 under the double mother rule. The *1985 Act*'s repeal of the double mother rule meant that the Indian man's grandchildren obtained at least s. 6(2) status.[38] Its validation of the pre-1985 exemptions meant that in most cases, the grandchildren would actually have s. 6(1) status.

[38] *McIvor* (B.C.C.A.), para. 137.

TABLE 4
DISCRIMINATORY EFFECT OF REPEALING THE DOUBLE MOTHER RULE IN 1985 BEFORE 2010 AMENDMENTS

STATUS IF 1951 LEGISLATION REMAINED IN EFFECT		**STATUS UNDER 1985 ACT**	
<u>Brother</u> Born with status Marries non-Indian and gives her status Maintains his own status	<u>Sister</u> Born with status Marries non-Indian Loses status under 1951 Act	<u>Brother</u> Born with status Marries non-Indian woman before 1985 and gives her status Maintains his own status	<u>Sister</u> Born with status Marries non-Indian Loses status but regains it under s. 6(1)(c) of 1985 Act
Child – entitled to status at birth Male child marries a non-Indian woman (the "Double Mother"), gives her status and has children after September 4, 1951	Child – not entitled to status Child has children with a non-Indian	Child born before 1985 - entitled to status at birth *Scenario 1:* Male child marries a non-Indian woman (the "Double Mother") before April 17, 1985, gives her status and has children *Scenario 2:* Male or female child has children with a non-Indian out of wedlock after April 17, 1985 or by a marriage entered into after April 17, 1985	Child born before 1985 - not entitled to status at birth Obtains status under s. 6(2) of 1985 Act Child has children with a non-Indian
		1985 Act repeals Double Mother Rule	
Grandchild by brother's male child – born with status but would lose it at age 21 under the Double Mother Rule (unless Band was exempted)	Grandchild of sister not entitled to status	*Scenario 1:* Grandchild by brother's male child regains status under s. 6(1)(c) or, if Band was exempted, retains status under ss. 4(2.1) and 6(1)(a) or, if born after April 17, 1985, has status under s. 6(1)(f) at birth *Scenario 2:* Grandchild by any of brother's children has status at birth under s. 6(2)	Grandchild of sister not entitled to Indian status

The *1985 Act* gave a new status to the grandchildren of Indian men who had married out, based on that descent, though they would have lost their status under the double mother rule without the amendments. At the same time, the *1985 Act* denied status to the grandchildren of Indian women who married out if that woman was their only status ancestor. In the words of Justice Groberman, "the 1985 legislation appears to have given a further advantage to an already advantaged group."[39]

For the Court of Appeal, the *1985 Act* created a new form of discrimination in favour of the male line which could not justified in the name of preserving acquired rights. According to Justice Groberman:

> The legislation would have been constitutional if it had preserved only the status that such children had before 1985. By according them enhanced status, it created new inequalities, and violated the *Charter*.[40]

The British Columbia Court of Appeal preferred not to direct Parliament on the appropriate remedy to the unjustifiable discrimination it had identified, namely, that ss. 6(1)(a) and 6(1)(c) of the *Indian Act* "violate the *Charter* to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(a)(iv) of the former legislation." Instead, the Court simply declared ss. 6(1)(a) and 6(1)(c) "to be of no force and effect" but suspended that declaration "for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional."[41]

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[39] *McIvor* (B.C.C.A.), para. 140.
[40] *Id.*, para. 155.
[41] *Id.*, para. 161.

The federal government chose not to appeal this decision. Ms. McIvor applied without success to the Supreme Court of Canada for leave to appeal on the grounds that the Court of Appeal's decision granted a much more limited remedy than the trial judgment. [42]

Bill C-3: The 2010 amendments

Parliament ultimately adopted Bill C-3, the so-called *Gender Equity in Indian Registration Act*, in December 2010, after the federal government had obtained two further extensions from the British Columbia Court of Appeal, suspending the judgment till January 31, 2011.[43]

The Department of Indian and Northern Affairs expected the amendments would increase the number of status Indians by 44,983 individuals in 2009,[44] amounting to roughly five per cent of the existing status population.[45] The government said that in light of the Court's deadline, it would leave for another day the more fundamental issue of whether Parliament should define who is an "Indian" or whether the decision should belong to First Nations themselves.[46]

In a nutshell, the amendments grant Indian status under s. 6(2) to the grandchild of a woman who lost status due to marrying a non-Indian, provided certain key family events took place while the double mother rule was in effect. The conditions are: that a grandchild's status will only change if her parent or one of her aunts or uncles on the Indian side was born after 1951, when the

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[42] *Sharon Donna McIvor and Charles Jacob Grismer v. Registrar, Indian and Northern Affairs Canada and Attorney General of Canada*, 2009 CanLII 61383 (SCC). Sharon McIvor subsequently,filed a petition to the United Nations Human Rights Committee dated November 26, 2010: <http://www.fafia-afai.org/files/MCIVORPETITIONSIGNEDGENEVAforSenateprep_2.pdf>.
[43] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 338. This appears to be the reason that the amendments come into force on January 31, 2011: SI/2011-5, 2 February 2011 (*Canada Gazette*, Pt. I, Vol. 145, No. 3).
[44] DIAND, "Estimates of Demographic Implications from Indian Registration Amendment - *McIvor v. Canada*", March 2010 <http://www.ainc-inac.gc.ca/eng/1100100032515>
[45] DIAND, "Discussion Paper", p. 8.
[46] *Id.*, pp. 6-7.

double mother rule came into effect; and only if the grandchild's parents were married before 1985, when the double mother rule was repealed.

The amendments are complex, first of all, because they accomplish their goal not by changing the grandchildren's status directly, but by changing their Indian parents' status from s. 6(2) to s. 6(1)(c.1). With a s. 6(1) parent, the grandchildren then become eligible for registration under s. 6(2), even if they have a only single status grandparent.

The C-3 amendments are doubly complex because they make status dependant not simply on a person's grandparents – like the rest of the status rules – but also on whether and when a person's parents, or her aunts or uncles, produced the grandchildren of a married-out woman.[47]

As in so much of life, timing is everything for descendants of a woman who married out before 1985: if all her grandchildren were born before September 4, 1951, her children remain registered under s. 6(2) and none of her grandchildren will be guaranteed status. The grandchildren of a woman who married out a century ago might all be born before 1951 and have no status, while the grandchildren of her younger sister who married out in the 1920s could all have status if even only a single one of them was born after September 4, 1951.

Continuing inequality after the 2010 amendments

The stated intention behind the 2010 amendments was to eliminate discrimination as between the grandchildren of men or women who married out while the double mother rule was in effect. The

[47] Speaking on behalf of the Canadian Bar Association, Christopher Devlin of the National Aboriginal Law Section pointed out that "requiring people in [Sharon McIvor's son] Jacob Grismer's situation to have a child before their own status is improved from a 6(2) to a 6(1) seems frankly to be a bit silly": House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 3rd Session, 40th Parliament, 15 April 2010.

Director of the Resolution and Individual Affairs Sector at DIAND, Roy Gray, assured senators that for the hypothetical brother and sister who each married out between 1951 and 1985, the amendments would "result in the equitable treatment of the grandchildren of both the brother and the sister." [48]

But giving s. 6(2) status to the grandchildren of women who married out between 1951 and 1985 will not place the grandchildren on an equal footing with the grandchildren of men who married out during the same period. The continuing inequality stems from the federal government's incorrect description of the both the way in which the double mother rule was applied, as well as the effects of its repeal.

The government's description of the potentially discriminatory effects of repealing the double mother rule was premised on grandsons who would have lost status at age 21 and who married after 1985: they would produce great-grandchildren registered under s. 6(2). [49] But the double mother rule began taking effect at the end of 1972, when the first males born after it took effect reached the age of 21. For over a decade, this cohort of Indian men married and had children.[50]

Many communities reacted negatively to the idea of depriving these members of status and the federal cabinet responded by granting individual bands an exemption: for 311 out of 580 bands, the Governor in Council simply declared that the double mother rule would not apply.[51]

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[48] Standing Senate Committee on Aboriginal Peoples, *Evidence*, 17 March 2010.
[49] Note that DIAND has studiously ignored the discriminatory effect of pre-1985 marriages: DIAND, "Discussion Paper: Changes to the Indian Act affecting Indian Registration and Band Membership *McIvor v. Canada*", p. 5.
[50] Many of them would have married because coincidentally, the average age at first marriage for men in Canada reached a twentieth-century low of 24.9 years in 1972 and was still only at 26.8 years in 1985: Human Resources and Skills Development Canada , "Indicators of Well-being in Canada: Family Life — Marriage" <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=78>. One can presume that in many Aboriginal communities, the average age at first marriage would have been even younger.
[51] *McIvor v. Canada* (B.C.C.A.), para. 30. When a band was exempted from the double mother rule, the relevant order simply provided "that subparagraph 12(1)(*a*)(iv) of the Indian Act shall not apply": e.g., *Proclaiming Certain Indian Bands Exempt from Portions of the Act*, SOR/82-84, Canada Gazette II (21 December 1981), p. 288.

In addition, the application of the double rule was far from consistent. In practice, the loss of status was conditional, not automatic: an Indian could remain on the register after turning 21, if the Registrar of Indians took no action. For instance, in one reported case, an Indian man subject to the double mother rule only lost status at the age of 22 when he asked for his non-Indian wife to be registered. The evidence in his case showed that in other bands, Indians subject to the double mother rule simply remained on the register.[52]

Moreover, real doubt also existed as to whether the Governor in Council could legally exempt Indians from the effects of the double mother rule: [53] after all, Parliament had specifically meant to exclude those individuals from status. The *1985 Act* included a provision meant to give those in exempted bands a new security: Parliament adopted s. 4(2.1) specifically in order to put the validity of the exemption orders beyond question.[54]

For all those included on the old register despite the fact that the double mother rule should have excluded them, the *1985 Act* contained an additional benefit: s. 5(2) provided that new register would be made up of all those included in the Indian Register immediately prior to April 17, 1985. The courts have held that, as a result, the *1985 Act* gave status to all those "who were registered as of the cut-off date, whether or not they were otherwise entitled to be registered as of that date."[55]

Indian men who would have been subject to the double mother rule therefore gained new advantages from the *1985 Act* beyond the preservation of any acquired rights. They were now deemed never to have ceased to be status Indians. If they married non-Indian women who had

[52] *Re Giasson* (1979), [1982] C.N.L.R. 66 (Qué. S.C.) at 67-68, 73.
[53] *McIvor v. Canada* (B.C..C.A.), para. 138; Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence* ,18 April 1985; *Etches v. Canada (Registrar, Department of Indian Affairs and Northern Development)*, [2008] 2 C.N.L.R. 35 (Ont. S.C.J.), para. 52 (rev'd. on other grounds [2009] 2 C.N.L.R. 152 (Ont. C.A.)).
[54] Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence* ,18 April 1985.
[55] *Marchand v. Canada (Registrar, Indian and Northern Affairs)* (2000), [2001] 2 C.N.L.R. 106 (B.C.C.A.), para. 38.

been given status and added to the register before 1985,[56] their wives' status could no longer be questioned once the *1985 Act* came into force; their children would be counted as having two status parents and would be registered under s. 6(1).

The 2010 amendments effectively shifted the application of the cousins rule forward one generation. The grandchildren of a woman who married out before 1985 will at best obtain s. 6(2) status, unless her children parent with Indians, whether they started families before or after 1985; her great-grandchildren will not have status based only on her. However, the grandchildren of her brother who married out before 1985 will have s. 6(1) status if they are by his sons who married out before 1985; his great-grandchildren by those grandchildren will all have s. 6(2) status based only on descent from him.

This man's grandchildren would have had no status at all if both he and his own father married out under the 195 rules. When the *1985 Act* repealed the double mother rule, it did not simply preserve acquired rights, but instead left his descendants much better off than they were before: this is the result the British Columbia Court of Appeal ruled was discriminatory in *McIvor*. The 2010 amendments leave the grandchildren in the male line with s. 6(1) status if they are born of pre-1985 marriages, while the grandchildren of women who married out have s. 6(2) status. Descendants in the male line are still better off after the 1985 and 2010 amendments, which is the reason Sharon McIvor's lawyer told a Senate committee the 2010 amendments do not even remedy the discrimination identified in the judgment. [57]

[56] This could have happened in a number of ways: the marriage took place before April 17, 1985 and before the Indian man turned 21; the man was a member of a band with an exemption order; or the Registrar of Indians simply failed to notice that the double mother rule applied to the man and registered his wife.
[57] *Proceedings of the Standing Senate Committee on Human Rights*, 6 December 2010.

<table>
<tr><th colspan="3">TABLE 5
EFFECTS OF GENDER ON STATUS AFTER BILL C-3 (2010):
THE MODIFIED "COUSINS RULE"</th></tr>
<tr><td colspan="2">Brother
Status Indian
Marries non-Indian woman before April 17, 1985
and gives her status
Maintains his own status</td><td>Sister
Status Indian
Marries non-Indian before April 17, 1985
Loses status upon marriage but regains it
under s. 6(1)(c) of 1985 Act</td></tr>
<tr><td colspan="2">Child born after marriage –
entitled to status at birth
Maintains status under 1985 Act</td><td>Child born after marriage

Obtains status under s. 6(2) of 1985 Act</td></tr>
<tr><td>Scenario 1:
Male child marries a non-Indian woman before April 17, 1985 (the "Double Mother") and gives her status</td><td>Scenario 2:
Male or female child has children with a non-Indian out of wedlock for the first time after April 17, 1985 or by a marriage entered into after April 17, 1985</td><td>Child has at least one child with a non-Indian after September 4, 1951

Child's status changed to s. 6(1)(c.1) as of January 31, 2011</td></tr>
<tr><td>Scenario 1:
Grandchild born after the marriage and between September 4, 1951 and April 17, 1985

Grandchild loses status at age 21 under the Double Mother rule (unless Band exempted) under pre-1985 Act

Grandchild of brother by his son regains status under s. 6(1)(c) of 1985 Act
or, if Band was exempted, retains status by virtue of ss. 4(2.1) and 6(1)(a)
or, if born after April 17, 1985, has status under s. 6(1)(f) at birth</td><td>Scenario 2:
Grandchild of brother entitled to status at birth under s. 6(2)</td><td>Grandchild of sister obtains status under s. 6(2) as of January 31, 2011</td></tr>
</table>

The effects of the new status on band membership

As discussed above, the *1985 Act* created the possibility for bands to adopt membership codes either more or less restrictive than the *Indian Act* status rules, if they chose to take over responsibility for maintaining band lists from the Registrar of Indians. [58] However, the possibility for a band to set membership rules was subject to certain limits.

The *1985 Act* required bands to accept back as members the women who had lost their status by marriage before 1985.[59] If they did not adopt their own membership codes within the two years after Bill C-31 was adopted, they had to accept all those whose names the *1985 Act* added to their band lists and which therefore included the children of the women who had lost their status by marriage.[60] (Even then, no rule stopped bands from adopting codes after 1987 that excluded some descendants of current members born after the codes came into effect.)

But for the period between 1985 and 1987, Parliament created a strange two-year "window" for bands to adopt especially restrictive membership codes. Until June 28, 1987,[61] bands could adopt codes excluding the children of women who had regained their status, even if those children would have been added to band lists if the Registrar of Indians had maintained them. Bands rushed to use the possibility the *1985 Act* briefly offered to them and researchers working for

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[58] *Indian Act*, s.10. Professor Pamela D. Palmater of Ryerson University has published all the membership codes she was able to obtain through an access to information request made to DIAND: <http://www.nonstatusindian.com/identity/membership/codes.html >.
[59] *Indian Act*, ss. 10(4) and 11(1). See: *Scrimbitt v. Sakimay Indian Band Council* (1999), [2000] 1 F.C. 513, [2000] 1 CNLR 205 (T.D.); *Sawridge Band v. Canada*, [2004] 3 F.C.R. 274, [2004] 2 C.N.L.R. 316 (C.A.).
[60] *Indian Act*, s. 11(2). From 1985 to 1987, bands could also exclude former members who had lost their status due to voluntary enfranchisement but band lists had to include all those who were involuntarily enfranchised.
The greatest number of those involuntarily enfranchised before 1985 were women enfranchised upon marriage to non-Indian men, as well as wives and children of Indian men who were involuntarily enfranchised when their husbands or fathers chose enfranchisement: RCAP Report, Vol. 4, *Perspectives and Realities*, Chapter 2, "Women's Perspectives", §3 "Aboriginal Women and Indian Policy: Evolution and Impact", text corresponding to fn. 17 to 20, 29 to 34.
[61] This date is two years after the *1985 Act* received Royal Assent.

DIAND have determined that at least 86 bands adopted codes excluding those registered under s. 6(2).[62]

Concretely, the exclusionary membership codes left out those with status under s. 6(2) by one of two methods, neither of which explicitly exclude Indians registered under s. 6(2) but both which produce that effect. Most adopted the pre-1987 membership as the base – usually defined as individuals entitled to be registered under certain sub-paragraphs of s. 6(1)[63] – and required that those admitted in the future have two such members as parents. Some bands actually made eligibility for membership dependent on "the amount of 'Indian blood' that person possesses in relation to a minimum standard," but where "Indian blood" was also determined by pre-1987 membership.[64]

As discussed above, where a membership code is more generous than the *Indian Act*, adding non-status members to a band list will not entail federal funding for services to that individual. On the other, a membership code that excludes certain status Indians will leave those individuals entitled to certain federal benefits funded without reference to residence,[65] yet without the right to live on their ancestors' reserves[66] and therefore also without any access to the federally-funded services which are only available on reserve.[67]

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[62] Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities*, fn. 5 and pp. 5, 16.
[63] Those set out in s. 11(1) of the *Indian Act*.
[64] Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities*, pp. 5-6.
[65] One such program is the Non-Insured Health Benefits (NIHB) Program of the First Nations and Inuit Health Branch (FNIHB) of Health Canada. See: *Non-Insured Health Benefits Program - Annual Report 2008/09* (2010), pp. 5, 7.
[66] Only a member of a band is an Indian in lawful possession of land on its reserve: *Indian Act*, s. 24.
[67] Only status Indians resident on reserve are eligible for primary and secondary education benefits dispensed by the band with federal funds. See: *Micmac First Nation v. Canada (Indian Affairs and Northern Development)*, 2007 FC 1036, 316 FTR 130. For status Indians without band membership, it is not clear to me what becomes of services such as funding for post-secondary education, which is delivered to Indians both on and off reserve by their bands: DIAND, "Post-Secondary Student Support Program (PSSSP)" <http://www.aadnc-aandc.gc.ca/eng/1100100033682>.

The 2010 amendments make clear that those children of women who married out before 1985 and who receive the new s. 6(1)(c.1) status will be included on the band lists maintained by the Registrar of Indians.[68] But by themselves, the amendments will not give any individual with Indian status entitlement to membership in a band that is governed by its own code. More particularly, in a band that adopted a code between 1985 and 1987 requiring a child to have two parents who are members in order to be eligible for membership, registration under ss. 6(1)(c.1) or 6(2) as a result of the 2010 amendments will still not entail membership in the band.[69]

For women who married out and regained their membership in one of the dozens of bands that excluded their descendants, the 2010 amendments will therefore change the status of their children and grandchildren but without giving them a band to which to belong.[70]

The siblings rule

The federal government also chose to ignore other discrimination in the *1985 Act*. In particular, the change from pre-1985 to post-1985 rules actually gives different status to sons born out of wedlock to Indian fathers and non-Indian mothers than it does to daughters.

As long ago as 1988, when the House of Commons Standing Committee on Aboriginal Affairs and Northern Development was considering the implementation of the *1985 Act*, it recommended that s. 6(2) "be amended before the end of the current session of Parliament in

[68] *Indian Act*, s.11(3.1).
[69] Since 1951, the Registrar of Indians has kept a "General List" of Indians with status but without membership in any particular band: RCAP Report, Volume 1, Part Two, Chapter 9, text corresponding to fn. 118; *McIvor* (B.C.S.C.), para. 27, 83.
[70] Note that Sharon McIvor and Jacob Grismer explicitly chose not to litigate the issue of band membership, but only status for purposes of registration: *McIvor* (B.C.S.C.), para. 1.

order to eliminate discrimination between brothers and sisters."[71] Almost a quarter-century later, the federal government chose to do nothing about this discrimination when Indian status rules were back before Parliament in the form of Bill C-3.

Different treatment of brothers and sisters – sometimes referred to as the "siblings rule" – arises because under the pre-1985 legislation as interpreted by the courts, sons born out of wedlock to an Indian man and a non-Indian woman before 1985 were entitled to status.[72] After 1985, these men were registered under the new s. 6(1). However, daughters born out of wedlock to an Indian man and a non-Indian woman were not entitled to be registered until the *Indian Act* was amended in 1985. Since they had only one status parent, these women were registered under s. 6(2).[73]

Sharon McIvor pointed out that victims of the siblings rule had been forgotten by Parliament in 2010:

> The illegitimate daughters of Indian men are being missed, and I do not know whether you understand that concept. There was a court case[74] in the late 1950s or early 1960s that said if you are a male descendant of an Indian man and you are illegitimate, you are entitled to status. If you are the female descendant, you are not entitled [under the pre-1985 Act].
>
> I have a niece and a nephew, the boy born in April of 1979 and the girl born in June of 1980. The mother is non- Indian; the father is status Indian. My nephew got status at birth. My niece did not get status until after April 17, 1985, Bill C-31. She has 6(2) status and he has 6(1)(*a*) status. They have identical parents; the only difference is male and female. It stays that way. She cannot pass her status on her own right like her brother can, because she is female.[75]

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[71] Canada, Parliament, House of Commons, *Bill C-31 - Fifth Report of the Standing Committee on Aboriginal Affairs and Northern Development on Consideration of the Implementation of the Act to Amend the Indian Act As Passed by the House of Commons on June 12, 1985*, 33rd Parl., 2nd Sess. (1988), Chapter III, "Legal Issues".
[72] *Martin v. Chapman*, [1983] 1 S.C.R. 365 at 370.
[73] *Bill C-31 - Fifth Report of the Standing Committee on Aboriginal Affairs and Northern Development*, pp. 46:34-46:35.
[74] The case referred to is *Martin v. Chapman*.
[75] Parliament of Canada, *Proceedings of the Standing Senate Committee on Human Rights*, Issue 8 – Evidence, 6 December 2010.

TABLE 6 **OPERATION OF THE "SIBLINGS RULE"**	
Indian father Born with status under pre-1985 Act	Unmarried non-Indian mother No status
<u>Brother</u> Born out of wedlock with status under pre-1985 Act Retains status under s. 6(1)(a) of 1985 Act Has child with non-Indian	<u>Sister</u> Born out of wedlock without status under pre-1985 Act Obtains status under s. 6(2) of 1985 Act Has child with non-Indian
Child *Born before 1985* If parents married, has status under pre-1985 Act and retain status under s. 6(1)(a) If parents unmarried, son has status under pre-1985 Act at birth and retains it under s. 6(1)(a); daughter has status under s. 6(2) as of 1985 *Born after 1985* If parents married before 1985, obtains status under s. 6(1)(f) If parents unmarried or married after 1985, obtains status under s. 6(2)	Child No status under either Act, regardless of date of birth

It is difficult to see how the discrimination suffered by female victims of the siblings rule is very different from rules in the *Citizenship Act* which allowed children born abroad to a Canadian father before 1977 to be granted citizenship on application, but required a security check and an oath of loyalty from those born abroad to a Canadian mother. The Supreme Court of Canada

decided in the *Benner* case that such a difference in entitlement to citizenship based purely on gender was contrary to the *Charter*.[76]

The Supreme Court of Canada also held in *Benner* that the *Charter* guarantee of equality rights can apply to discrimination occurring after 1985 (the year when s. 15 came into effect) even if it is based on a status acquired before, such as being born abroad to a Canadian mother before 1977.[77] Similarly, the Indian women who are caught by the siblings rule were born without status under the old Act because they are female, but it is the *1985 Act* which continues to make that the basis for denying them a status they can pass on to their children, which their brothers continue to enjoy.

Two other rules which gave different status to the children of the same parents

Children of the same parents can also have different status either due to the pre-1985 treatment of children born out of wedlock to Indian women, or the effects of repealing all enfranchisements in the *1985 Act*.

Once the Register of Indians was created in 1951, illegitimate children of Indian women could only be denied status if "the Registrar [wa]s satisfied that the father of the child is not an Indian." As of 1956, the Registrar could only render that decision on the basis of a protest filed within 12 months of including the child's name on the Register.[78] The children who lost status under this provision are referred to as having been "protested out". However, successful protests became

[76] *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, para. 89.
[77] *Id.*, para. 56.
[78] S.C. 1951, c.29, s. 11(e); S.C. 1956, c.40, s.3(2), amending R.S.C. 1952, c.149, s. 12(1(a); repealed S.C. 1985, c.27, s. 4.

less frequent after the courts held that the Registrar needed "strict proof" in order to conclude a child's father was not an Indian.[79]

In practice, therefore, an Indian woman's illegitimate children by a non-Indian man were rarely denied status after 1951 if the mother did not declare his identity. Even if a protest was filed within a year of the child acquiring status, the Registrar would have difficulty obtaining sufficient evidence to uphold it. If they were registered before 1985, an Indian woman's children born of out wedlock who had not been protested out acquired s. 6(1) status under the *1985 Act*.[80]

But if the same woman later married her child's non-Indian father or declared his paternity, the couple's subsequent children would only be registered under s. 6(2) of the *1985 Act*, no matter when they were born (if born before, they would have had no status under the pre-1985 Act). The result is that children with the same parents can have different status.

[79] *In the Matter of John Phalman McNeil* (1956), 5 C.N.L.C. (B.C. Co. Ct.) 273 at 278.
[80] The application of the *1985 Act* now produces almost the opposite result: where an Indian woman does not state the father's identity, the Registrar of Indians will assume he is not an Indian and will register the child under s. 6(2). See: Michelle M. Mann, *Indian registration: unrecognized and unstated paternity* (Status of Women Canada, Research Directorate, June 2005) <http://dsp-psd.pwgsc.gc.ca/Collection/SW21-120-2005E.pdf>.

TABLE 7

THE EFFECT OF PRE-1985 UNSTATED PATERNITY

Unmarried Indian mother	Non-Indian father	
1st child Paternity unstated upon birth out of wedlock before April 17, 1985 and without protest as to registration Status at birth under pre-1985 Act and maintains status under s. 6(1)(a) of 1985 Act		
Mother marries father Before April 17, 1985: loses status but regains s.6(1)(c) status After April 17, 1985: retains status under s. 6(1)(a) or Mother remains unmarried and retains status under s. 6(1)(a) but states paternity for 2nd child		
		2nd child Obtains status under s. 6(2) of 1985 Act, regardless of date of birth

Another way in which children of the same parents can possess different status is if an Indian man married out and he and his wife were later voluntarily enfranchised. The *Indian Act* allowed Indians over the age of 21 to apply to have their status removed, an application the Minister would recommend to the Governor-in-Council if he believed the Indians requesting enfranchisement could support themselves and their dependants.[81] Thousands of Indians chose voluntary enfranchisement in the late 1950s and early 1960s to escape the marginalization of status, at a time when Indian were legally prohibited from drinking alcohol or even voting in federal and provincial elections. [82]

[81] *Etches v. Canada*, (Ont. S.C.J.), para. 14.
[82] RCAP Report, Volume 1, Part Two, Chapter 9, "The Indian Act", § 9.6 "Liquor Offences" and § 9.12 "Indian Voting Rights". Between 1955 and 1965, there were 2,276 voluntary enfranchisements of men and women, including children enfranchised along with them: *Id.*, fn. 80.

When the status rules changed in 1985, all enfranchisements were repealed retroactively by the *1985 Act*, with one exception: a woman who had acquired her status by marriage to an Indian man and whose name had been "omitted or deleted from the Indian Register" before 1985 could not have her name entered again.[83]

The wife's changing status produces the following result for a family where a man married out, had children, and sought enfranchisement along with his wife before 1985, if he later had more children through the same marriage. The children born before enfranchisement are considered to have had two status parents at birth and, once the enfranchisement was repealed in 1985, they were registered under s. 6(1). However the children born after enfranchisement have only a father with status, since their mother's status was never restored, and they are registered under s. 6(2).

TABLE 8

THE EFFECTS OF ENFRANCHISEMENT

Father Born with status	Mother Born without status Obtains status upon marriage before April 17, 1985	
1st child Obtains status at birth		
Parents and child obtain enfranchisement before April 17, 1985		
Father and child regain status under 6(1)(d) of 1985 Act; mother prohibited from regaining status by s. 7(1)(a)		
		2nd child Born after enfranchisement Status under s. 6(2), whether born before or after 1985 Act

[83] *Indian Act*, ss. 6(1)(c) and (d), 7(1)(a).

These anomalous effects of the *1985 Act* within the same family are partly the result of timing: they are caused by the date in relation to her children's birth when an unmarried Indian woman declared their father's identity, or the date before 1985 when the non-Indian wife of an enfranchised Indian man gained or lost her status. The federal government has argued that any difference in treatment between Indians that was based solely on the date they acquired status would not be discrimination forbidden by s. 15 of the *Charter*, but the British Columbia Court of Appeal did not decide this issue in its judgment in *McIvor*.[84]

Conclusion

The cousins rule

Unequal consequences arose from the 1985 repeal of the rules that Indian women lost their status by marrying non-Indian men and that non-Indian women acquired status by marrying Indian men.

As a result of the *1985 Act*, all the grandchildren of an Indian man who had married a non-Indian woman before 1985 would always have status because they could count two Indian grandparents: the Indian grandfather and the married-in grandmother who acquired her status before 1985. Yet the grandchildren of an Indian woman who had married a non-Indian man before 1985 would only have status if her son-in-law or daughter-in-law was also an Indian: otherwise, those grandchildren could only count a single Indian grandparent, their married-out grandmother whose status was restored in 1985.

This result is known as the cousins rule because first cousins with the same number of ancestors born with Indian status have differing ability to pass on their status, depending on whether they inherited it from their fathers or their mothers.

[84] *McIvor* (B.C.C.A.), para. 235, 237.

The British Columbia Court of Appeal acknowledged in *McIvor* that the cousins rule is discriminatory, but held that the discrimination was a limit on the equality right which could be "demonstrably justified in a free and democratic society" and therefore saved by s. 1 of the *Charter*. Since the cousins rule arises from the fact that women who acquired status by marriage before 1985 did not lose it through the amendments, the court ruled it is the extraordinary result of Parliament's ordinary concern for preserving acquired rights whenever it amends legislation.

The discriminatory effect of the double mother rule

However the British Columbia Court of Appeal did find unjustifiable discrimination in the *Indian Act* status rules as amended in 1985: certain cousins in the male line ended up not only with better status after 1985 than their cousins in the female line, but with better status under the *1985 Act* than if it had never been adopted.

Between 1951 and 1985, the double mother rule provided that where an Indian's mother and his father's mother had both acquired their status by marriage, that Indian would lose his or her status at the age of 21. When the *1985 Act* repealed the double mother rule, the result was to give full status to individuals who would otherwise have lost status at age 21 or who had actually lost their status already, as well as to their descendants.

Before 1985, the grandchildren of an Indian man who married a non-Indian woman would lose status at age 21 if they were born after 1951 to a son who also married a non-Indian woman (the double mother). After 1985, the grandchildren of every Indian man who married a non-Indian woman before 1985 were guaranteed status at least under s. 6(2). If his sons married before 1985, the grandchildren they produced would automatically have status under s. 6(1) and his great-grandchildren by that son would automatically have status under s. 6(2). This situation remains unchanged.

The 2010 amendments: pushing the cousins rule forward

The change made by the 2010 amendments to the *Indian Act* is that if an Indian woman lost her status by reason of marriage before 1985, if any of her grandchildren was born after 1951 (when the double mother rule came into effect), all of them will at least obtain status under s. 6(2), so long as her children were born after her marriage to a non-Indian. Before the amendments adopted as a result of the *McIvor* judgment, the same woman's grandchildren could not have status unless her children parented with another Indian.

Parliament was assured by DIAND officials in 2010 that Bill C-3's amendments would provide the same status to grandchildren of a sister and brother, each of whom married non-Indians before 1985. Yet this is demonstrably untrue: the sister's grandchildren are only on an equal footing if the brother's sons married after 1985. While the grandchildren born after 1951 to women who married out before 1985 will obtain s. 6(2) status under the amendments, the grandchildren born to men who married out before 1985 will have s. 6(1) status if their sons also married out before 1985.

A crucial aspect of the status rules created by the *1985 Act* is the difference between being registered under s. 6(1) or s. 6(2). Those registered under s. 6(1) will always have children with status at least under s. 6(2), even if the other parent is not an Indian. Those registered under s. 6(2) will not have status unless the other parent is also an Indian.

The real result of the 2010 amendments is to push the effects of the cousins rule forward by one generation: great-grandchildren of men who married out before 1985 will have s. 6(2) status if they are descended from his sons who also married out before 1985 and even if the great-grandchildren have no other ancestors born with Indian status. However the great-grandchildren

of Indian women who married out before 1985 will never have status unless her children or grandchildren parent with other status Indians.

Moreover, the 2010 amendments have not eliminated the new benefits the *1985 Act* gave to men who would otherwise have been subject to the double mother rule. Before the 1985 amendments, two generations of men marrying out would have deprived the grandchildren born after 1951 of all status at age 21; after the amendments, no matter with whom they parent, grandchildren by a pre-1985 marriage to a non-Indian woman will produce great-grandchildren with status. Yet a woman who married out before 1985 cannot transmit her status further than her grandchildren, no matter when her children marry; they or the grandchildren will need to parent with status Indians to produce great-grandchildren with status. This is a failure to eliminate the unjustifiable post-1985 discrimination identified in the *McIvor* case.

Other sources of continuing discrimination

As strange as it may seem, the 1985 amendments can give different status to brothers and sisters born to the same parents: some will have s. 6(1) status they can pass on to their children, others will have s. 6(2) status that is not transmitted unless the other parent is also an Indian.

One clearly discriminatory difference in the treatment of brothers and sisters arises because under the pre-1985 legislation as interpreted by the courts, sons born out of wedlock to an Indian man and a non-Indian woman before 1985 were entitled to status. After 1985, these men were registered under the new s. 6(1). However, daughters born out of wedlock to an Indian man and a non-Indian woman were not entitled to be registered until the *Indian Act* was amended in 1985. Since they had only one status parent, these women were registered under s. 6(2).

The resulting discrimination between brothers and sisters, based solely on gender, is sometimes referred to as the siblings rule. The House of Commons Standing Committee on Aboriginal

Affairs and Northern Development recommended in 1988 that such discrimination be eliminated as soon as possible, but even a generation later, Parliament failed to use the opportunity presented by Bill C-3 to correct the injustice.

The *1985 Act* can also give different status to brothers and sisters of the same parents for other reasons. An Indian woman who had children out of wedlock with a non-Indian man could usually register them before 1985, if the father's identity was not declared and they would acquire s. 6(1) status after 1985. If she had other children by the same father and identified him,, the later children would be registered under s. 6(2).

The difference can also arise where an Indian man who gave status to his wife through marriage and had children with her subsequently sought enfranchisement (official loss of Indian status) before 1985. The *1985 Act* repealed his enfranchisement and that of his children, but did not give back status to his married-in wife. As a result, his children born before enfranchisement are counted as having two status parents and are registered under s. 6(1) but if he later had more children by the same woman, they are counted as having only an Indian father and are registered under s. 6(2).

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