

Caroline Dick

The Perils of Identity
Group Rights and the Politics
of Intragroup Difference



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Introduction

In 2008, litigation commenced by the Sawridge Indian Band of Alberta abruptly ended in the Trial Division of the Federal Court of Canada when the band announced that it would not be calling further evidence and would instead commence an appeal to challenge various rulings of the trial judge and allege judicial bias. It was the second time that this court had tried the case in a dozen years and the second time that bias had been alleged. The long, protracted, and often astonishing legal battle, which I refer to simply as the *Sawridge* dispute, engages a complex set of questions about group rights, the rights of in-group minorities, and the legitimacy of the rules of the dominant political community.

At the centre of the conflict is federal legislation known as Bill C-31, which seeks to reinstate the Indian status and band membership of Aboriginal women who were expelled from their reserve communities by the Indian Act's infamous marrying-out rule. The Sawridge Band alleges that Bill C-31 constitutes an unjustifiable limitation on its Aboriginal right to determine its own band membership, which it argues is protected by section 35(1) of the Canadian constitution. However, the band's efforts to resist the implications of Bill C-31 have not been limited to its constitutional challenge to the legislation. In 1985, the band adopted a membership code designed to exclude the women who reacquired rights pursuant to Bill C-31 from being readmitted to the band. The code does so by barring from band membership individuals who, in the band's estimation, do not have an adequate cultural affiliation with traditional Aboriginal values. Thus, the Sawridge Band argues not only that it has a constitutional right to determine its own band membership, but that Bill C-31 threatens the well-being of vulnerable Aboriginal communities by proposing to flood reserves with band members who are unfamiliar with traditional Aboriginal values and whose principal cultural affiliation lies with the dominant society and its liberal-democratic ideals.

The women who were expelled from the Sawridge Band on marrying-out challenge the legitimacy of the band's membership code and wish to assert

their right to be reinstated as band members pursuant to Bill C-31. They argue that they were wrongly excluded from their community by the operation of the marrying-out rule and challenge the band's refusal to reinstate their membership. The Canadian state, for its part, continues to assert its authority over Aboriginal peoples and defends the constitutionality of Bill C-31 while at the same time trying to rectify the blatant sex discrimination against First Nations women perpetrated by the marrying-out rule. Accordingly, the dispute operates on three levels: one involves the relationship between the minority Aboriginal community and the Canadian state; another involves the relationship between the Aboriginal community and its own internal minority – the women seeking to have their band membership reinstated; and a third involves the relationship between the Canadian state and the women whose right to band membership was revoked and later reacquired by the operation of federal legislation.

At its heart, this book is concerned with one basic question: What is the court to do? Arriving at an answer to this question requires that we engage several other questions. Specifically, how are tripartite conflicts involving the authority of the state, the assertion of group rights, and the claims of internal minorities to be resolved? What legal method can do justice to the claims advanced by all of the affected parties, and how are the rights of the group and its in-group minority to be balanced against one another and the interests of the state? Addressing these questions raises a host of contested and controversial issues, beginning with the provision of group-differentiated rights.

Calls for the provision of group-specific legal and constitutional rights have become a common part of the Canadian political landscape. From Québécois and Aboriginal peoples to feminists and gays and lesbians, group-differentiated rights and group-sensitive legal and constitutional interpretations are held out as a necessary condition of equality. However, there is significant resistance to these demands. Many Canadians reject group claims for "special treatment" on the basis that they violate the principles of universal citizenship. On this view, equality in the Canadian nation must proceed by providing individual citizens with a uniform set of rights and entitlements. Here, universal citizenship is defined in abstraction from ascriptive characteristics and social groupings, instead emphasizing the shared interests of citizens who belong to a common political order.¹

However, the classical liberal ideal that equates equality with the like treatment of individual citizens has long been the subject of criticism. Many critics focus on the various ways in which this notion of equality overlooks important social differences and ignores the ways in which benefits and burdens accrue to citizens depending on their social group memberships. From these critiques, a burgeoning "politics of difference" has developed,

forged by scholars who are interested in placing difference at the centre of their political and philosophical work. An important strand of this broadly based movement employs the discourse of identity, characterizing the claims made by contemporary collective actors for group-differentiated rights as demands for identity recognition.

Often expressed as a form of “identity politics,” this strand of difference politics figures prominently in the Canadian scholarship on minority group rights. The works of Charles Taylor, Will Kymlicka, and Avigail Eisenberg exemplify this scholarship. Each theorist invokes the importance of identity to justify the provision of group-specific rights and the differential application and interpretation of laws and policies, paying particular attention to the rights of Québécois and Aboriginal peoples. The general argument advanced in support of the rights of these national minorities is that their cultural communities deserve protection because they are constitutive of the identities of group members. Where the health of minority communities is tied to certain values, practices, and traditions, affirming the identities of community members requires that the values, practices, and traditions that constitute identity be celebrated and preserved. On this view, minority cultures deserve protection because the well-being of group members hangs in the balance. Accordingly, the focus of these theories, which I refer to as identity-driven theories, veers towards specifying the core elements of a minority community’s shared culture or identity and seeking to protect those core elements through the provision of group rights.

Identity-driven approaches to group rights that focus on naming the constitutive elements of a group’s shared culture or identity are not limited to the realm of political theory. Relying on culture and identity to justify group rights has found judicial support in the Supreme Court of Canada’s approach to the interpretation of the constitutional rights of Aboriginal peoples. Indeed, the court’s test for determining the scope and content of Aboriginal rights has taken on a decidedly cultural cast, limiting the ambit of Aboriginal rights to engage in customs, practices, and traditions to those distinctive and authentic Aboriginal practices that characterized Aboriginal cultures prior to the arrival of Europeans. More notably, in crafting its test, the court has drawn the same connections among culture, identity, and rights offered by Taylor, Kymlicka, and Eisenberg, suggesting that the purpose of Aboriginal rights is to protect Aboriginal identity by protecting the distinctive cultural practices that lie at its core.

But what capacity do identity-driven rights frameworks have to attend to the differences that operate within identity categories? Where rights theories emphasize the common identities and ways of life that group members are presumed to share, differences among individual community members are obscured. By focussing only on the differences that distinguish minority

groups from the dominant cultural community, the significance of other differentiating characteristics and the role that they play in supporting inequalities within the group are neglected. The position of women in minority cultural communities has received considerable attention in this regard, as evidenced by Susan Moller Okin's famous rejoinder: "Is multiculturalism bad for women?"² Indeed, many feminist scholars question whether group-specific rights leave women more vulnerable to discriminatory treatment and whether appeals to protect the integrity of a group's culture will be relied on to justify oppressive relations of power within the group.³

Outside of the context of ethnocultural minorities, the oppressive potential of identity politics has come under attack, with many feminists rejecting recourse to identity to express the political claims of women. The very idea of homogeneous group identities, critics argue, wrongly suppresses the differences that exist among the members of all identity categories and works to exclude nonconforming group members.⁴ In light of these difficulties, it is imperative to ask: Are the goals of difference politics best served where identity is relied on as a central organizing principle? Is identity a good candidate for grounding a theory of group-specific rights? These are serious questions for the rights frameworks of Taylor, Kymlicka, and Eisenberg; examining whether identity-driven theories can attend to in-group difference is critically important for anyone who is concerned with the recognition of difference.

This issue has special significance in the Canadian context, given the Supreme Court's adoption of its own identity-driven framework for interpreting the constitutional rights of Aboriginal peoples. Indeed, the judicial foray into identity politics and the prospect of applying identity-driven theories in the legal realm prompts its own set of questions. What are the ramifications of translating identity-driven justifications of group rights into legal method? What consequences flow from courts being asked to characterize the shared identities of the groups that appear before them or to declare certain practices and values as integral to those identities? More specifically, when faced with a conflict like *Sawridge*, how are courts to proceed where fundamental differences exist within the group? Are intragroup differences to be subsumed within a homogenized view of the group's identity or culture? If not, how are competing identities to be rated or compared?

Of course, identifying the limitations of identity-driven theories when it comes to adjudicating tripartite conflicts can only take us so far. If legal methods and theories of group rights that focus on specifying the substantive content of a group's shared identity *do* obscure differences among group members, what approach should succeed in their place? What principles, concepts, and accompanying legal method can elucidate both group and

in-group differences, while helping us to balance competing rights claims? In response to these questions, I offer a normative and conceptual framework – a “politics of intragroup difference” – as an alternative to identity-driven rights frameworks. In the simplest terms, this approach focusses on the ways in which group differences are implicated in the distribution of social, political, and economic benefits and burdens. By examining how the differences of minority groups are constructed by the dominant society and how the differences of internal minorities are constructed by the group’s most powerful members, this approach seeks to illuminate not only how differences are constructed by different communities but also who benefits from the meanings assigned to difference. In whose image are the values, standards, and practices of the dominant society or of a minority cultural community created, and how are they institutionalized in the relevant social matrix? How do social systems advantage those who constitute the norm, while oppressing those who differ from it?

By employing Seyla Benhabib’s model of concrete others and generalized others and by focussing on three central precepts – a relational conception of difference, attention to relations of power, and concern for individual autonomy – I offer the intragroup difference framework as a way to approach both intergroup and intragroup conflicts without succumbing to the impulse to specify the authentic identities that group members are presumed to share. More specifically, by attending to the construction of difference both between and within social groups, the intragroup difference framework directly engages the tripartite structure of in-group conflicts, and is mindful of the complex power relations that characterize these kinds of disputes. My claim is that the intragroup difference framework is better able than identity-driven frameworks to attend to the significance of socially constructed differences and better equipped to adjudicate disputes where both intergroup and intragroup differences are raised.

In Chapter 1, I sketch the contours of the *Sawridge* dispute by detailing the history of the marital expulsion rule and the efforts of the Canadian state to address its discriminatory effects through the enactment of Bill C-31. I also focus on the arguments advanced by the state, the band, and the women who married out, paying particular attention to the discourse of culture and identity employed by the band in support of its rights claim.

In Chapter 2, I place the band’s rights claim and its recourse to culture and identity in the broader context of identity politics and the emergence and popularity of arguments that assert a connection between identity and group-differentiated rights. Given the importance assigned to identity by Taylor, Kymlicka, Eisenberg, the *Sawridge* Band, and Canada’s highest court, it is important to understand what the organization of collective actors around identity categories such as gender and ethnicity signifies and whether

the political aims of groups are captured by identity-driven rights frameworks that focus on naming the substantive elements of group identity. I suggest that there may be good reasons to resist the creation of rights frameworks that are identity driven, especially when it comes to dealing with issues of in-group difference.

Chapters 3, 4, and 5 are dedicated to examining the group rights frameworks of Taylor, Kymlicka, and Eisenberg against the backdrop of the *Sawridge* dispute and in light of the critique of identity-driven theories offered in Chapter 2. While I treat the work of each theorist separately, my purpose in all three chapters is to critically assess how well the authors' frameworks attend to the significance of socially constructed differences both among groups and within them. I seek to determine what promise each theory offers for working through the complexities of tripartite conflicts, and I show that the problems plaguing identity politics also mark the identity-driven frameworks of each author. My contention is that by focussing on the identities and cultures that minority groups are presumed to share, Taylor's, Kymlicka's, and Eisenberg's efforts to justify group-differentiated rights serve to obscure the differences that exist among group members and the relations of power that support intergroup and intragroup oppression.

In Chapter 6, I examine how the Supreme Court of Canada's evolving approach to Aboriginal rights shares the same discourse of rights, culture, and identity relied on by Taylor, Kymlicka, and Eisenberg to justify their theories of group rights. Like the authors' identity-driven theories, the test developed by the Supreme Court of Canada for establishing a section 35(1) right proceeds from the idea that the purpose of Aboriginal rights is to protect the practices, customs, and traditions that are integral to the distinctive cultures of Aboriginal peoples and vital to Aboriginal identity. I argue that by choosing to adopt an identity-driven approach to interpreting section 35(1), the weaknesses that inhere in the theories of the three scholars also emerge in the legal method advanced by the court. As a consequence, serious doubts are raised about the ability of the court's approach to successfully adjudicate complex conflicts where both group and in-group differences are implicated.

In Chapter 7, I offer an alternative to the identity-driven frameworks that dominate the Canadian scholarship on group rights. Building on Chapter 2, this chapter provides the theoretical foundation for what I refer to as the politics of intragroup difference. The central principles I offer here serve, in turn, as a starting place for the creation of a difference-sensitive legal method that resists the urge to detail the substantive content of group cultures and identities, focussing instead on the way in which difference is constructed and the ramifications that flow from the meanings assigned to difference. This intragroup difference framework is concerned with the relations of

power in which group boundaries are drawn and meanings are assigned not only among and within groups but also by the judicial process itself. In Chapter 8, I return, again, to the *Sawridge* dispute, applying the legal method offered in Chapter 7 to resolve the conflict according to the principles of the politics of intragroup difference.

Finally, in the concluding chapter, I summarize and evaluate the arguments presented and ask why the intragroup rights framework produces such different results than do identity-driven frameworks, despite the fact that both strive to attend to difference. I also speculate about some of the practical constraints and limitations that litigation entails and the challenges they pose to implementing the legal method offered.

The chapters that follow reflect my efforts to consider the problems posed by rights conflicts that involve in-group minorities and to think through the implications of giving theories of group rights judicial form. The example that animates my discussion is an Indigenous one, and it is important to clarify why and how the *Sawridge* dispute informs my inquiry. While the *Sawridge* conflict serves as the backdrop against which the theories of group rights I examine are tested, the broader issue of Indigenous self-determination is not this work's focus, and the prior question of whether Canadian courts exercise legitimate authority over First Nations is not taken up here.

I use an Indigenous example for one simple reason: the constitutional rights of Canada's Aboriginal peoples is the area of law in which the Supreme Court of Canada has employed an identity-driven rights framework, much like those advanced by Taylor, Kymlicka, and Eisenberg. Moreover, as far as I am aware, the case law on Aboriginal rights is the only substantial body of jurisprudence where the court has taken such an approach. The *Sawridge* dispute thus emerges as an apt candidate for my project, both because the conflict has a tripartite structure and because it engages the rights of Aboriginal peoples and, by extension, the court's identity-driven rights framework. This is not to suggest that Indigenous peoples' struggle for self-determination is irrelevant to my inquiry or that I concede the Canadian state's authority over Aboriginal peoples. On the contrary, as I argue in the chapters to follow, the arguments advanced by Indigenous peoples must be understood and assessed within this context.

I proceed based on the fact that cases like *Sawridge* are brought by Indigenous claimants, who press their cases before Canadian courts yet maintain their inherent right to be recognized as First Nations. In the face of this reality, my aim is to take up the challenge of determining how tripartite conflicts like the one at issue in *Sawridge* might be addressed. At the same time, I endeavour to show how Indigenous discourses of self-government and self-determination are erased by the court's approach to Aboriginal rights and how they complicate the rights conflict. That said, my examination of

Sawridge is undertaken with a more general purpose in mind. It is intended to serve as a cautionary tale for Canadian courts by examining the ramifications of approaching any rights conflicts where intragroup differences are asserted using legal methods that are predicated on shared group identities or on the value of protecting authentic cultural practices.

1

Gender Discrimination within First Nations: The History and Nature of the *Sawridge* Dispute

When the Sawridge Indian Band of Alberta put its case before the Federal Court of Canada's Trial Division, the court was presented with a complex legal battle. On its face, the conflict involved a constitutional challenge to Bill C-31, federal legislation aimed at addressing the discriminatory effects of the Indian Act's "marrying-out" rule, which stripped Indigenous women of their Indian status and band membership on marrying non-Indian men. The goal of the legislative scheme, which was to offer reinstatement to women affected by the rule, was challenged by the Sawridge Band as a violation of its constitutionally protected Aboriginal rights. However, the *Sawridge* litigation raised much more difficult questions than those surrounding the legal issue of whether the legislation violated section 35(1) of the constitution. It raised thorny questions about the nature of group rights, the rights of intragroup minorities, and the legitimate authority of the Canadian state over Aboriginal peoples. In this chapter, I sketch the parameters of the conflict by detailing the history and demise of the marrying-out rule and exploring the positions of those affected by the litigation.

Marrying Out under the Indian Act

The *Sawridge* dispute finds its roots in federal legislation that discriminated against women in the distribution of rights and entitlements to members of Canada's First Nations. Section 12(1)(b) of the Indian Act provided that status Indian women who married non-Indians lost their Indian status on marriage, and with it, various statutory benefits.¹ No similar loss of status befell men who married non-Indian women, with section 11(1)(f) of the Indian Act providing that Indian men who married out not only retained their legal status as Indians but transmitted legal status and band membership to their non-Indian wives and any children born of the union. Also contributing to the patrilineal nature of the Indian Act was section 14, which provided that on marriage to an Indian of another tribe, an Indian woman lost her membership in her own band and became a member of her husband's band.²

The discriminatory provisions of the Indian Act were challenged by two First Nations women who alleged that the marrying-out provisions contravened section 1(b) of the Canadian Bill of Rights, which guaranteed equality before the law without discrimination based on sex.³ Jeannette Lavell, an Ojibwa woman and Wikwemikong Indian Band member, had married a non-Indian and lost her Indian status in 1970 but had not lived on any reserve for nine years prior to her marriage. Though she was unsuccessful at trial, the Federal Court of Appeal found in her favour, concluding that because section 12(1)(b) of the Indian Act created consequences for status women marrying non-Indians that it did not create for other members of the band who married out, the provision abridged the right of Indian women to equality before the law.⁴

Yvonne Bédard, a Six Nations Iroquois woman from Brantford, married a non-Indian in 1964 and moved away from her reserve. On the breakdown of her marriage in 1970, she and her two children returned to her reserve to live in a home that had been willed to her by her mother. Having no right to inherit reserve property on her loss of Indian status, Bédard had been given permission by the Band Council to live in the home for a specified period during which time she was to dispose of the property. Bédard conveyed the property to her brother and continued to live in the home. On the Band Council passing a resolution in favour of serving notice on Bédard to quit the premises, she brought suit in the High Court of Ontario, arguing that equality of the law had been denied her by reason of her sex and race. Following the precedent set in the Federal Court of Appeal in *Lavell*, Bédard was successful at trial. Section 12(1)(b) of the Indian Act was held to be inoperative.⁵ The Minister of Justice appealed both decisions, which were heard together as *A.G. Canada v. Lavell – Isaac v. Bédard* before the Supreme Court of Canada in early 1973.⁶

Politically, *Lavell* was viewed as pitting the Indigenous rights movement against advocates of gender equality, and accordingly, the Supreme Court's decision, which upheld the marrying-out provision, was characterized as a devastating blow for non-status women and a tremendous victory for Aboriginal rights.⁷ The judgment of the court's majority not only rendered the Bill of Rights guarantee against sex discrimination nugatory but flew in the face of its own prior jurisprudence.⁸ In finding against Lavell and Bédard, the court suggested that because section 12(1)(b) was enacted pursuant to the federal government's constitutional authority over "Indians and lands reserved for Indians" in section 91(24) of the BNA Act, Indian Act legislation enjoyed a sort of superiority over the Bill of Rights. In the court's view, to find otherwise would render "Parliament powerless to exercise the authority entrusted to it under the constitution of enacting legislation which treats Indians living on Reserves differently from other Canadians in relation to their property and civil rights."⁹ Regarding the

claim that Bédard and Lavell had been deprived of equality before the law, the court adopted an extremely narrow equality framework, finding that uniform discrimination within a class, in this case Indian women, satisfied the equality guarantee.¹⁰

However, the ruling of Canada's highest court did not settle the matter. Having exhausted all domestic appeal mechanisms, the issue received international attention when Sandra Lovelace, a Maliseet Indian, challenged the Indian Act marrying-out rule before the Human Rights Committee of the United Nations.¹¹ Lovelace argued that the legislation violated Articles 26 and 27 of the International Covenant on Civil and Political Rights. While Article 26 of the covenant guarantees equality before the law, prohibiting discrimination on the basis of sex, Article 27 prohibits states from denying members of ethnic, linguistic, or religious minorities the right to "be in community with the other members of their group, to enjoy their culture, to profess and practice their own religion, or to use their own language."¹²

While the Canadian government acknowledged that section 12(1)(b) required reform, it argued that the scheme of the Indian Act should be understood in light of the goal of Article 27, as a measure intended to protect Canada's Indigenous minority. Indeed, the Canadian state argued that many of the original reasons for implementing the discriminatory provisions were still valid, citing the threat to reserve lands posed by white men who might marry in to First Nations communities, the Aboriginal tradition of determining legal claims using patrilineal family lines, and the concern that legislative changes to the marrying-out provision might endanger Aboriginal communities.¹³

The committee's decision, though favourable for Lovelace, was something of a disappointment for those anticipating a pronouncement on Canada's compliance with Article 26. The committee declined to rule on the gender equality issue because Canada was not a party to the covenant at the time of Lovelace's marriage, and thus her loss of Indian status occurred at a time when Canada was not bound by the covenant's provisions.¹⁴ Instead, the case was decided on the basis of Article 27, with the committee finding that Lovelace's exclusion from the Tobique reserve and her resulting loss of cultural benefits, emotional ties, and Indian identity violated her right to enjoy her culture. While the committee did not preclude the possibility of a state party restricting reserve residency for the purpose of protecting reserve resources and the identity of its people, it concluded that Lovelace's exclusion was neither "reasonable" nor "necessary to preserve the identity of the tribe."¹⁵

With the *Lovelace* decision and the coming into force of the Canadian Charter of Rights and Freedoms, the federal government was well aware that changes to the Indian Act would have to be made. As an interim measure, individual bands were offered an exemption from the operation of section 12(1)(b), but only 95 of Canada's 577 bands had requested the exemption.

by 1984, with the number reaching 111 by January 1985.¹⁶ Legislative changes came in the form of Bill C-31, which was passed by Parliament on June 28, 1985.¹⁷ Predicated on bringing the Indian Act into line with the equality provisions of the Charter, Bill C-31 purported to end gender discrimination, restore Indian status and band membership to women who had married out, and increase band control over internal affairs.

To achieve the first two goals, the legislation provided a statutory right to certain categories of people to apply to have their legal status and band membership reinstated.¹⁸ Section 12(1)(b) women were included among these individuals with "reacquired rights."¹⁹ To achieve the last goal, bands were authorized to create their own membership codes to control band membership and reserve residency. Thus, while the federal government continued to determine who held Indian status, band membership was now placed in the hands of the bands. To address the concern that gender-based marrying-out provisions might be re-created in band membership codes to protect the status quo, Bill C-31 provided that any membership rules adopted by a band could not exclude those eligible to have their band membership restored by Bill C-31 "by reason only of a situation that existed or an action that was taken before the Band's membership rules came into force."²⁰

The government's attempt to enhance both the position of section 12(1)(b) women and the power of Aboriginal communities over community membership received substantial criticism from its intended beneficiaries. Those concerned with the position of Aboriginal women in First Nations communities criticized the bill for continuing the government's legacy of gender discrimination by conferring fewer rights on reinstated First Nations women and their children than those enjoyed by men who married out and their offspring.²¹ Bill C-31 was also met with staunch disapproval by many Indian bands. In their view, the government's efforts to secure the reinstatement of section 12(1)(b) women constituted an improper interference with the internal regulation of Aboriginal communities by unilaterally imposing new members on bands without band consent and with no consideration of the relationship between reinstated individuals and the bands, or of the particular circumstances of specific bands.

As a result of this opposition, an action was commenced in 1986 by three Alberta bands seeking declarations that the legislative provisions of Bill C-31 infringed the rights of Aboriginal peoples to control their own band membership and to veto the admission of prospective band members.²² They claimed that this right was guaranteed by section 35(1) of the Constitution Act, 1982, as both a treaty right and an Aboriginal right.²³ In the latter respect, the bands argued that section 12(1)(b) merely represented the legislative codification of the pre-existing Aboriginal custom of "woman follows man," which was used to control community membership and land use. They claimed that Aboriginal custom dictated that, on marriage, women

followed their husbands and took on their band membership, severing ties with their natal communities.²⁴

The bands were unsuccessful at trial. Justice Francis Muldoon of the Federal Court's Trial Division concluded that any right to control membership in Indian bands had been "emphatically extinguished by *The Indian Act, 1867*."²⁵ In the court's view, Parliament, rather than Aboriginal peoples, possesses the right to determine the criteria for band membership, even where some of these powers have been delegated to band councils. However, section 35(4) of the Constitution Act, 1982, was held to be definitive in disposing of the matter. This constitutional provision, which guarantees constitutional Aboriginal and treaty rights equally to men and women, was held to be conclusive, having "utterly extinguished" any right that the bands may have had to discriminate against women in the assignment of band membership.²⁶ Thus, while no Aboriginal right to control membership pursuant to section 35(1) was found to exist, any such right, if it could be established, "would be of no force and effect ... to the extent that it failed ... to guarantee membership and marital status equally to male and female persons."²⁷ The decision of the trial court would not stand for long, however. Muldoon J.'s judgment was subsequently set aside by the Federal Court of Appeal when the bands successfully alleged that the trial record disclosed a reasonable apprehension of bias on the part of the judge against the three bands.²⁸ The Federal Court of Appeal ordered a new trial in 1997, and after a decade-long and tumultuous pre-trial process, the retrial commenced in January 2007, only to be abruptly halted in January 2008, with the bands again alleging bias.²⁹

The Sawridge Dispute: Canvassing the Issues

The Aboriginal Custom of "Woman Follows Man"

At the original trial, band opposition to the repeal of the marrying-out provision was said to be motivated by a desire to ensure the survival of Aboriginal cultures by preventing state interference with ancestral Aboriginal practices, including the pre-contact Aboriginal custom of "woman follows man."³⁰ The three bands argued that Bill C-31's failure to respect the importance of this practice threatened the communities and cultural identities of their peoples.³¹ However, as Sandra Lovelace had done before the United Nations Human Rights Committee, the interveners in the first trial challenged the Aboriginal roots of the marital expulsion rule.³² The Non-Status Indian Association of Alberta, in particular, argued that the patriarchal principle of "woman follows man" was introduced into Aboriginal communities by the Indian Act.³³ Indeed, the statutory provision stripping women who married non-Indian men of their status and band membership first appeared in the Statutes of Canada of 1869.³⁴

Many argue that the rule's purpose was to counter the influence of First Nations women, whose status in Aboriginal communities was troubling to Western colonizers.³⁵ While some tribes did accord lesser status to women and their roles, in others, women occupied a special position at the centre of social, cultural, and political life.³⁶ Women acted as cultural touchstones and educators of the young and as a political check on community leaders. They enjoyed equal status with men, held the right to vote on tribal matters, and not only appointed and deposed tribal chiefs but could hold the position themselves.³⁷ Moreover, though some tribes did determine membership according to patrilineal lines of descent, most traced membership through both parents, with the second most common method using matrilineal lines of descent.³⁸ The imposition of a uniform, patriarchal system for determining legal status and band membership thus provided an effective way to assimilate Aboriginal peoples by excommunicating their most crucial members.³⁹

Challenging Bill C-31 on New Grounds

On the heels of Muldoon J.'s invocation of section 35(4) at the first trial, the Sawridge Band changed the nature of its argument against Bill C-31. Documents filed with the Federal Court in anticipation of the retrial, including an Amended Statement of Claim, revealed a shift in emphasis away from the argument that sexual discrimination in band membership is an Aboriginal custom. Instead, the band's argument was more generally cast as a right to control band membership, based on the fact that First Nations existed as "distinctive polities with their own institutions, customs and traditions," which either governed themselves by their own laws prior to European contact or governed their own band membership prior to contact.⁴⁰ Claimed both as a customary Aboriginal right and as a treaty right, the Sawridge Band contended that the right to govern its membership is "parasitic to all ... aboriginal and treaty rights" and thus constitutes "a core and even essential component of these rights."⁴¹ The band further alleged that in failing to consider the particular circumstances of affected individuals and bands, the provisions of Bill C-31 are drastically "over-inclusive, granting to many persons membership who had never before been members, and who were in essence complete strangers, in law and in fact, with no ties to the respective First Nation."⁴² For these reasons, the imposition of new band members was claimed both to interfere with the exercise of the Aboriginal right to determine band membership and to "undermine the health, well-being and stability of First Nations' communities."⁴³

Bill C-31 as a Threat to First Nations Communities

The argument that Bill C-31 places First Nations communities at risk emerged as a prevalent theme in the litigation and in scholarly commentary, with

three central arguments driving the claim. The financial ramifications of the women's reinstatement have been raised, citing the cost of paying section 12(1)(b) women their share of Indian capital and revenue that was not paid out after their loss of status and band membership, as well as their share of future distributions.⁴⁴ The limited reserve land base and lack of funding for community services, including health, education, and housing, have also been noted in this regard, as bands already struggling with funding issues fear that they will not be able to provide necessary services for an expanded reserve population.⁴⁵ This problem was compounded by the fact that the federal government had not increased funding to bands to adequately meet the potential surge in community membership.⁴⁶ Furthermore, monetary issues marked the litigation in another respect. While the desire of certain Alberta bands to protect their royalty payments from oil revenues was identified as a motivating factor in their desire to exclude women with reacquired rights,⁴⁷ the bands, in turn, accused individuals seeking reinstatement of being interested only in financial reward.⁴⁸

The second contention involved the threat to the continued existence of First Nations communities wrought by the imposition of liberal notions of individual rights. Central to this claim is the importance of protecting Aboriginal culture and identity. The general argument here is that liberal rights schemes are fundamentally inconsistent with Aboriginal ways; the two simply cannot be reconciled. The very notion of individual rights is incompatible with the more traditional, consensus-oriented methods of conflict resolution and processes of decision making practised by Aboriginal peoples.⁴⁹ As an assault on Aboriginal difference, the unilateral imposition of Western concepts such as gender equality "violates principles of cultural integrity, abrogates inherent rights of self-determination and weakens the collectivity in favour of the individual."⁵⁰ The provisions of Bill C-31 serve as a case in point. Because liberal notions of equality play no role in the lives of many Aboriginal peoples, legislative changes aimed at securing equal opportunities between men and women are deemed to be "inappropriate conceptually and culturally for First Nations women."⁵¹ In this respect, the legislation represents a threat to Aboriginal self-definition.⁵² The use of federal power to reinstate those women who married out constitutes the worst form of cultural imperialism by proclaiming Canada's federal government the final arbiter of First Nations identity.

The final way in which the reinstatement of reacquired rights women has been said to threaten the well-being of Aboriginal communities concerns the cultural commitment of the women themselves. The discourse of Aboriginal culture and identity are raised again here, with notions of Aboriginal authenticity figuring prominently in the arguments advanced. Having lived away from their reserve communities on choosing to marry non-Indian men, section 12(1)(b) women are presumed to be less concerned

with the welfare of their natal communities and less interested in preserving traditional Aboriginal values.⁵³ At the same time, these women are often depicted as agents of the dominant culture, proof of which is said to lie in the discourse of gender equality they employ and their recourse to the legal avenues of the dominant society to advance their claims.⁵⁴ Returning reacquired rights women and their children to reserve communities thus entails the conferral of band membership and reserve residency rights on individuals whose principal cultural affiliation lies with the dominant society and its liberal-democratic values.

Exclusionary Band Membership Codes

Band opposition to the reinstatement of section 12(1)(b) women has not been limited to the litigation challenging the constitutional validity of Bill C-31. Some bands, including the Sawridge Band, took the formal steps to assume control of their membership as provided in Bill C-31 and proceeded to create band membership codes that prevent section 12(1)(b) women from being restored to membership.⁵⁵ For example, the Sawridge membership rules, enacted to "protect the culture and social identity of the Band,"⁵⁶ recognize that reacquired rights individuals can apply for band membership but stipulate that such individuals must be either "lawfully resident on the reserve" or, in the judgment of the Band Council, found to have "a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band."⁵⁷

The membership rules also provide that deciding whether someone is lawfully resident on the reserve is to "be determined exclusively by the Band Council."⁵⁸ Section 6 of the code further empowers the Band Council to delete from the band list the name of any person who does not meet the reserve residency or the cultural affiliation rules. And while the band pledges to exercise its discretionary powers "in good faith, without discrimination on the basis of sex," as well as to comply with section 10(4) of the Indian Act amendment by refusing to reject an applicant for band membership "by reason only of a situation that existed or an action that was taken" before the membership rules took effect, it appears that the band's membership code and application process are being used to bar reacquired rights women from regaining band membership.⁵⁹ As the Native Women's Association of Canada has argued, "the provisions of the Sawridge Band membership code exhibit on their face an intention to override the reacquired rights provisions of Bill C-31. The features of the membership rules ... clearly demonstrate that Sawridge does not consider itself bound to honour the *Indian Act* requirements relating to reacquired rights."⁶⁰ Of the fourteen reacquired rights women seeking reinstatement in the Sawridge Band, only three were

admitted to membership voluntarily, and all of them are sisters of a former band chief.⁶¹

The Tripartite Nature of the Conflict

The *Sawridge* dispute raises a host of legal issues, including the meaning to be assigned to section 35(4),⁶² the relationship between section 35 and the Charter's equality provisions,⁶³ and the relationship between section 25 of the Charter and sections 28 and 15.⁶⁴ Also highlighted by the dispute are various sections of Bill C-31 that create uncertainty about the balance to be struck between the legislative provisions giving bands control over their own membership and the statutory rights of reacquired rights individuals.⁶⁵ This is the issue addressed in the chapters to come. The issue is a complex one, in large part because of its tripartite nature and the competing claims made by the band, the women, and the state. The *Sawridge* Band argues that it possesses a constitutionally protected right to determine its own band membership. While this aspect of the litigation engages the struggle of Indigenous peoples for self-government and self-determination, the need to protect Aboriginal culture and identity plays a significant role in the rights claim. The band argues that state interference in questions of band membership and the potential reinstatement of reacquired rights individuals not only threaten the integrity of Aboriginal culture and identity but jeopardize the very existence of Indigenous communities.

The women who married out dispute the legitimacy of the *Sawridge* Band's membership code, asserting their right to be readmitted to the band pursuant to Bill C-31. They contend that the Indian Act marrying-out rule wrongly expelled them from their community, and they challenge the band's refusal to reinstate their band membership. Countering the band's contention that their readmission to band membership threatens the community, they argue that as keepers of Aboriginal culture and tradition, it is in the community's interest to re-establish the women's attachment to the band.⁶⁶ They also claim that as members of the ethnological collective that holds Aboriginal rights, they possess "an undivided share" in any constitutional right possessed by the band, including the right to participate in defining their natal community.⁶⁷

The Canadian state, while trying to rectify past discrimination perpetrated by its marrying-out rule, continues to assert authority over Aboriginal peoples. It steadfastly defends the constitutionality of Bill C-31, contesting virtually every aspect of the band's claim.⁶⁸ Denying Indigenous claims to self-government and self-determination, the state claims exclusive authority to legislate with respect to Indians and reserve lands pursuant to section 91(24) of the Constitution Act, 1867.⁶⁹

Thus, the litigation engages three delicate and asymmetrical relationships. One involves the relationship between the minority Aboriginal community

and the Canadian state; the second involves the relationship between the Aboriginal community and its own in-group minority – the women seeking reinstatement; another involves the relationship between the state and the women whose right to band membership was revoked and later reacquired by the operation of federal legislation. The questions remain: What is the court to do? How are tripartite conflicts that involve the authority of the state, the assertion of group rights, and the claims of in-group minorities to be resolved? More specifically, how are the rights of the Indigenous group and its internal minority to be balanced against each other and the interests of the state? Finally, what should the court make of the discourse of culture and identity used by the band in support of its rights claim? What is the relationship between group rights, culture, and identity, and how are they related, in turn, to the well-being of Aboriginal communities? These questions cannot be answered without first examining the relationship between claims for group-differentiated rights and the advent of identity politics.

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