Court File No. A-552-05

FEDERAL COURT OF APPEAL

B E T W E E N:

SAWRIDGE BAND

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

NATIVE COUNCIL OF CANADA, NATIVE COUNCIL OF CANADA (ALBERTA), NON-STATUS INDIAN ASSOCIATION OF ALBERTA and NATIVE WOMEN'S ASSOCIATION OF CANADA

Interveners

A N D B E T W E E N:

TSUU T'INA FIRST NATION

Appellants

- and -

HER MAJESTY THE QUEEN

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- and -

NATIVE COUNCIL OF CANADA, NATIVE COUNCIL OF CANADA (ALBERTA), NON-STATUS INDIAN ASSOCIATION OF ALBERTA and NATIVE WOMEN'S ASSOCIATION OF CANADA

Interveners

OPENING STATEMENT OF CONGRESS OF ABORIGINAL PEOPLES

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Congress of Aboriginal Peoples

1. The Congress of Aboriginal Peoples (CAP) was founded in 1971 as the national representative of Canada's 800,000 Métis, off-reserve, and non-status Indians.[1]

2. Since inception, CAP has been a leader in the movement to end discrimination against Aboriginal people in Canada.

3. CAP was actively involved in the process to amend the *Indian Act,* which lead to the enactment of Bill C-31 in 1985. CAP:

   a) Intervened at the Supreme Court of Canada in *Attorney General of Canada v. Lavell*;[2]

   b) Presented briefs on Bill C-31 to the House of Commons Special Committee on Indian Women and the *Indian Act,* the Senate Standing Committee on Legal and Constitutional Affairs, and the House of Commons Standing Committee on Indian Affairs;[3]

   c) Provided comments on the drafting of Bill C-31 in 1985 at the request of the Minister of Indian Affairs[4];

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[1]Motion to intervene, Affidavit of Chris McCormick dated November 15, 1988, para 1, Court File No. T-66-86. CAP was founded as the Native Council of Canada; the name change dates from 1994. Tab 1, CAP Compendium of Authorities.
[2] *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349. Tab 15, Plaintiffs' Book of Authorities.
[3] Motion to Intervene, Affidavit of Chris McCormick, dated November 15, 1988, para 4 and 5, Court File No. T-66-86. Tab 1, CAP Compendium of Authorities.
[4] Motion to Intervene, Affidavit of Chris McCormick, dated November 15, 1988, para 5(d), Court File No. T-66-86. Tab 1, CAP Compendium of Authorities.

d) Prepared a report on the impacts of Bill C-31;[5]

e) Educated Aboriginal people about Bill C-31; and

f) Provided assistance to Aboriginal people to complete applications for registration as a "status Indian" under Bill C-31.[6]

Background

4. This action is set against a backdrop of over 100 years of *Indian Act* provisions aimed at the assimilation and enfranchisement of Aboriginal peoples.

5. The enfranchisement provisions fragmented aboriginal communities and discriminated against aboriginal women. These provisions stripped Indian status from aboriginal women, but not aboriginal men, on marriage to non aboriginal spouses.

6. CAP's witness, Sandra Lovelace, now a member of the Senate of Canada, personally experienced the impact of this discrimination. Senator Lovelace will testify to those experiences- highlighting not only the discrimination aboriginal women faced prior to 1985 but also the

[5] Motion to Intervene, Affidavit of Chris McCormick, dated November 15, 1988, para5(m), Court File No. T-66-86. Tab 1, CAP Compendium of Authorities.
[6] Motion to Intervene, Affidavit of Chris McCormick, dated November 15, 1988, paras 5(a), 6, Court File No. T-66-86. Tab 1, CAP Compendium of Authorities.

inaccurate stereotypes that existed regarding enfranchised women and their connection to and knowledge of culture and community.[7]

7. Sandra Lovelace brought a complaint about the enfranchisement provisions to the United Nations Human Rights Committee. The Committee criticized Canada for violating its international human rights obligations.[8]

8. Canada designed Bill-C-31 to comply with Canada's international human rights obligations and the gender equality imperatives of the newly proclaimed *Canadian Charter of Rights and Freedoms*.

9. Canada consulted with Aboriginal people regarding removal of gender discrimination from the *Indian Act*. Bill C-31 was ultimately developed around three principles: remove discrimination from the *Indian Act*, increase band control of membership, and restore rights to those who lost them under the discriminatory enfranchisement provisions.[9]

10. Aboriginal concerns were accommodated in many respects before and after the Bill became law. While the direct victims of the enfranchisement legislation (acquired rights individuals) were automatically restored to

[7] Sandra Lovelace, Will Say Statement, filed February 28, 2006
[8] *Lovelace v. Canada*, Communication No. R.6/24. UN GAOR, Supp No. 40, UN Doc. A/36/30 (1981); Tab 2, CAP Compendium of Authorities.

membership, *Indian Act* bands were left with the discretion to decide the membership of all other individuals reinstated to Indian status by Bill C-31 (conditional rights individuals).

11. The Plaintiffs remain dissatisfied with the solution. While the solution may not be a model in perfection, it does not violate the Plaintiffs' s.35(1) rights.

Overview of CAP's Position

12. The Plaintiffs cannot satisfy the onus upon them under any accepted version of an Aboriginal and Treaty rights analysis to establish a constitutionally protected right to control their own membership. CAP's position on these issues is discussed in detail in the sections that follow.

13. The Plaintiffs have put significant time and energy attempting to recast this claim as a case about generic rights, perhaps because consideration of the specifics of the claim dooms it to failure.

14. The Plaintiffs are a fragment of a community. They seek to wield Aboriginal and Treaty rights as a sword to permanently cut off another

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[9] Canada, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence*, No. 12 (7 March 1985) at 7. Tab 65, Plaintiffs' Book of Authorities.

branch of the descendants of the historic rights holding community. The communal rights protected by s.35(1) of *the Constitution Act, 1982* cannot be used in this fashion.

15. The Plaintiffs clearly had many pre-contact traditions, customs and practices. Their membership practices were fluid and flexible. The Plaintiffs cannot establish that Bill C-31 thwarts those flexible practices. The evidence will show that acquired rights individuals would have remained part of the Plaintiffs' communities, were it not for their statutory banishment.

16. The only tradition the Plaintiffs describe which could exclude acquired rights individuals is that of "women follows man". This practice cannot bring the Plaintiffs the constitutional protection they seek. Section 35(4) acts to eliminate gender discrimination from Aboriginal Rights and is a complete answer to the Plaintiffs' claim.

Usurpers and Victims

17. The Plaintiffs are acknowledged as *Indian Act* bands. Their existing membership represents a community fragmented by the historic provisions of the *Indian Act*.

18. The Plaintiffs seek to control access to *Indian Act* membership rights through the exercise of s.35(1) Aboriginal and Treaty rights. A fragmented portion of the modern community cannot make that decision, particularly not when the intention is to deprive other descendants of the historic community of their Aboriginal and Treaty rights.

19. Aboriginal and Treaty rights are communal in nature and flow from the ancestral connection to the historic rights holding community.[10] A fragment of the community cannot usurp rights which properly belong to all.

20. Bill C-31 returns statutorily banished descendants of the historic rights bearing communities to one modern manifestation of that community. The individuals returned to their communities have Treaty and Aboriginal rights which are equivalent to the rights of the members of that part of the community now forming the statutory *Indian Act* Band.

21. The returned members are victims of discrimination whose rights should never have been taken away by the Government of Canada. Doing so

[10] *R v. Powley*, [2003] 2 S.C.R. 207 at para 24 and 34. Tab 3, CAP Compendium of Authorities.

was found to be a human rights violation by the UN Human Rights Committee. [11]

22. Whatever the Plaintiffs' jurisdictional rights may be, they do not extend to offending the very nature of Aboriginal and Treaty rights as communal rights, constitutional protections against gender discrimination and Canada's international obligations.

The Courts' Prohibition on Generic Claims

23. Plaintiffs' opening statement says:

> As a consequence of this Court's Order of November 7th, 2005, the Plaintiffs do not attempt to advance a "broad" or "generic" right of self-government. Rather, the Plaintiffs' claim a right to one specific aspect of their self-government, the right to determine societal relationships or "membership". Additionally, and in the alternative, the Plaintiffs have pleaded a right to determine their own societal relations or membership as an aboriginal right in accordance with the criteria established in *R v. Van der Peet*; as a Treaty right, and as an incident of their aboriginal title in their reserve lands.[12]

24. Regrettably, this appears to be mere lip service to the Court's rulings. The Plaintiffs' Opening Statement goes on to characterize their claim as a broad right of self-government (now referred to as a "jurisdictional right", founded upon "an historical system of indigenous laws") upon which the right to determine membership is parasitic.

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[11] *Lovelace v. Canada*, Communication No. R.6/24. UN GAOR, Supp No. 40, UN Doc. A/36/30 (1981), Tab 2, CAP Compendium of Authorities.

[12] Plaintiffs' Opening Statement dated December 29, 2006, p.49.

25. The Plaintiffs have repeatedly attempted to recast their claim in this manner. A mere change in terminology does not alter the past orders of this Court.

26. The Court's orders dated June 29, 2004, November 7, 2005 and November 8, 2005, ruled that this action cannot be pursued as a broad claim to self government. The Federal Court of Appeal upheld this Court's rulings.[13]

27. This Court specifically ruled that :

> "…these proceedings are about the Plaintiffs' claim that they have a right under s.35(1) to determine their own membership in a way that has been abrogated or thwarted by the impugned Amendments to the Indian Act..."[14]

> "…this claim is not about self-government in a generic or a general sense, rather, it is about those aspects of self-government (practices, customs and traditions of governance, internal and integral to the Plaintiffs) that show the Plaintiffs deciding and controlling membership in ways that would exclude those persons reinstated to band membership pursuant to the impugned provisions of Bill C-31."[15]

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[13] *Sawridge Band v. Canada,* [2004] FC 933 (June 29, 2004), Tab 4 of CAP Compendium of Authorities; S*awridge Band v. Canada*, [2005] FC 1476 (November 7, 2005) at para 218, Tab 3, Crown's Book of Authorities/ Tab 5 CAP Compendium of Authorities; *Sawridge Band v. Canada,* [2005] FC 1501 (November 8, 2005), Tab 6, CAP Compendium of Authorities; *Sawridge Band v. Canada,* [2006] FCA 228 (June 19, 2006). Tab 7 of CAP Compendium of Authorities.

[14] *Sawridge Band v. Canada*, 2005 FC 1476 at para 307. Tab 3, Crown's Book of Authorities/ Tab 5, CAP Compendium of Authorities.

[15] *Sawridge Band v. Canada,* 2005 FC 1476 at para 308. Tab 3, Crown's Book of Authorities/ Tab 5, CAP Compendium of Authorities.

28. These rulings mirror and uphold the requirements of the Supreme Court of Canada in its aboriginal rights jurisprudence, particularly *Pamejawon*.[16] The law in Canada does not permit litigation of generic Aboriginal rights, whether for self government or otherwise.

Van der Peet Governs this Case

The Plaintiffs' Aboriginal Rights Claim.

29. The Plaintiffs allege Bill C-31 violates their Aboriginal rights in that it offends "one specific aspect of their self-government, the right to determine societal relationships or membership."[17] Put another way "the Plaintiffs claim a constitutional right to determine their own societal relationships, citizenship, or membership."[18]

30. The Plaintiffs characterize this as a "jurisdictional right". They mistakenly claim that, characterized as a jurisdictional right, the aboriginal right to determine membership is exempt from the *Van der Peet* analysis.

31. The jurisdictional characterization does not save the Plaintiffs' case. The Plaintiffs' claimed jurisdictional rights must be established by a full *Van der Peet* analysis. The Plaintiffs must demonstrate that the membership rules

[16] *R. v. Pamajewon*, [1996] 2 S.C.R. 821. Tab 25, Plaintiffs' Book of Authorities.
[17] Plaintiffs' Opening Statement dated December 26, 2006, p.49.
[18] Plaintiffs' Opening Statement dated December 26, 2006, p.51.

they allege emanate from Aboriginal legal systems, were pre-contact customs continuously exercised to the modern period in order to have force of law in Canada.[19]

32. The evidence in this case will establish that Canada, through the *Indian Act*, exercised broad discretionary powers over membership for over 100 years. Any rules relating to membership the Plaintiffs may attempt to establish from the pre contact period were completely overwhelmed and replaced by DIAND legislation and policy.

33. It would be a marked departure from the existing law to exempt the Plaintiffs from the *Van der Peet* requirements. The Supreme Court has expressly and consistently reaffirmed the *Van der Peet* requirements for establishing aboriginal rights.[20] *Van der Peet* and its progeny govern this case.[21] Canadian law allows no other way to establish an aboriginal right.

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[19] *Campbell v. British Columbia* [2000] BCJ No.1524 at paras 90 & 179, Tab 1, Plaintiffs' Book of Authorities; *Re Kitchooalik et.al. and Tucktoo, et al.* [1972] 28 D.L.R. (3d) 183 at p.488, Tab 30, Plaintiffs' Book of Authorities – this cases are distinguishable as the right at issue in these cases was not extinguished. The Supreme Court has ruled : "In so far as they can be made out under s.35(1), claims to self government are not different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard, see *R. v. Pamejawon* [1996] 2 SCR 821, para 24, Tab 25 Plaintiffs' Book of Authorities.

[20] *R. v. Powley*, [2003] 2 S.C.R. 207 at para 14: "we uphold the basic elements of the *Van der Peet* test"; and at para 18: "we accept Van der Peet as the template for this discussion", Tab 3, CAP Compendium of Authorities. See also *R. v. Sappier*, [2006] SCC 54 at para 20: "In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right: *R. v. Van der Peet*", Tab 26, Plaintiffs' Book of Authorities / Tab 8, CAP Compendium of Authorities.

[21] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Tab 29, Plaintiffs' Book of Authorities; *R. v. N.T.C. Smokehouse Ltd*., [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723, Tab 64 Crown's Book of Authorities; *R. v. Nikal*, [1996] 1 S.C.R. 1013, Tab 50, Crown's Book Authorities; *R. v Pamajewon*, [1996] 2 S.C.R. 821, Tab 25, Plaintiffs' Book of Authorities; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, Tab 18 Plaintiffs' Book of Authorities; *R. v. Powley*, [2003] 2 S.C.R. 207, Tab 3, CAP Compendium of Authorities; *R v Marshall; R v Bernard* [2005] 2 SCR 220, Tab 22, Plaintiffs' Book of Authorities; *R. v. Sappier*, 2006 SCC 54, Tab 26, Plaintiffs' Book of Authorities; Tab 8, CAP Compendium of Authorities.

34. The *Van der Peet* method requires the Plaintiffs to prove their case by establishing five elements: characterization of the right, location, time, integral to distinctive culture, and continuity of the right.[22]

35. The Plaintiffs cannot establish these five elements. Tellingly, the Plaintiffs' opening statement includes almost no discussion around the required *Van der Peet* analysis.

Specificity in Rights Characterization

36. The Trial Judge must determine the proper characterization of any Aboriginal Rights claimed by the Plaintiffs.

37. The onus remains on the Plaintiffs to provide sufficiently specific evidence of their practices, customs and traditions to enable the Trial Judge to arrive at that characterization.

38. This Court has already reminded the Plaintiffs of the standard they must meet:

> The fact is that, if the Plaintiffs cannot establish internal and integral practices, customs and traditions of controlling membership that have been thwarted or abrogated by the impugned Amendments to the Indian Act , then no claim at large to being a sovereign polity

[22] *Van der Peet, supra.*

> can assist them, at least not as I read the jurisprudence.[23]

39. The Supreme Court of Canada recently reaffirmed that Aboriginal rights claimants must characterize and prove aboriginal rights with specificity. Justice Bastarache stated:

> It is critically important that the Court be able to identify a practice that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s.35 protection.[24]

40. Proof of a generalized right to self government will not meet this standard. Claims of a general and undefined right to control membership will not meet this standard. General allegations of a jurisdictional right will not meet this standard.

41. The Plaintiffs must prove the specific pre-contact practices they allege and show how these practices were continuously exercised. They must also show that they are the modern manifestation of the original pre-contact community that exercised rights in pre contact times. The Plaintiffs cannot meet this onus. Their aboriginal rights claim must fail.

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[23] *Sawridge Band v. Canada* [2005] FC 1476 at para 305, Tab 3, Crown's Book of Authorities/ Tab 5, CAP Compendium of Authorities.
[24] *R. v. Sappier,* [2006] SCC 54 at para 22, Tab 26, Plaintiffs' Book of Authorities/ Tab 8, CAP Compendium of Authorities.

Continuity Requirement

42. The Aboriginal rights protected by s. 35(1) of the *Constitution Act,* 1982 are the rights that exist today. Those rights need not be identical to pre-contact practices, customs and traditions. A logical evolution to a modern form is permitted.[25] However, logical evolution requires continuity between the pre-contact practices and the current practices.[26]

43. The Plaintiffs boldly submit throughout their Opening Statement that their membership practices, customs and traditions not only continued during a period of over 100 years of *Indian Act* imposed rules, but that the *Indian Act* mirrored their practices and government officials were swayed by Band wishes.

44. Were such a version of history correct, perhaps Canada would not have such a "sorrowful history" in relation to its treatment of Aboriginal peoples.

45. The overwhelming majority of commentary on the historic provisions of the *Indian Act* speaks to Canada' paternalism and control of every aspect of

[25] *R. v. Sappier,* [2006] SCC 54 para 48, Tab 26, Plaintiffs' Book of Authorities/ Tab 8, CAP Compendium of Authorities.
[26] R. v. *Van der Peet,* [1996] 2 S.C.R. 507 para 65, Tab 29, Plaintiffs' Book of Authorities; *R. v. Sappier,* [2006] SCC 54 at para 49, Tab 26, Plaintiffs' Book of Authorities/ Tab 8, CAP Compendium of Authorities.

Indians' lives. Even the authorities cited by the Plaintiffs report the *Indian Act*'s longstanding goals of assimilating and civilizing Indians. [27]

46. The evidence in this case will not establish Aboriginal input and custom as the basis of the *Indian Act*. The Plaintiffs' Authorities summarize the reality:

> *"Indians have never been a party to formulating any section of the Indian Act. They were not consulted in 1869 nor have they ever, until now, been concerned in the drafting of legislation for Indians. As to the particular section penalizing women who "marry out", historical documents cited later in this paper show that from the beginning, Indians in the East, and then in the West as the treaties were being made, were strongly opposed to legal discrimination against Indian women and their children, who married non-Indians."*[28]

47. The words of the Deputy Minister of Indian Affairs in the 1920's also speaks to the true goals of the *Indian Act* regime: *"Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic…."* [29]

48. The historic provisions of the *Indian Act* imposed the surrounding non aboriginal society on Aboriginal tribes to promote their elimination as distinct peoples. Provisions of the *Indian Act* from 1876 forward reveal the

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[27] Richard H. Bartlett, *The Indian Act of Canada*, 2nd ed. (Saskatoon: University of Saskatchewan, 1998) at 3-10, Tab 37, Plaintiffs' Book of Authorities / Tab 9 CAP Compendium of Authorities.
[28] Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Supply and Services, 1978) at 13; Tab 46, Plaintiffs' Book of Authorities / Tab 10, CAP Compendium of Authorities.
[29] Plaintiffs' Book of Authorities, Tab 46, p.50.

Bands were left without any meaningful input into the composition of their communities:

a) The 1876 Act automatically enfranchised, and removed from membership, any Indian who obtained a university degree, was admitted to the practice of law or who entered holy orders. The consent of the Band was not required.[30]

b) Band decisions to accept back members who had lost membership due to being in a foreign country for over 5 years could be overridden by the Superintendent General.[31]

c) In 1887, the *Indian Act* was amended to provide: *"The Superintendent General, may, from time to time, upon the report of an officer, or other person specially appointed by him to make inquiry, determine who is or who is not a member of any band of Indians entitled to share in the property and annuities of the band; and the decision of the Superintendent General in any such matter shall be final and conclusive, subject to an appeal to the Governor in Council."*[32] The Superintendent General retained this authority until the 1985 revisions were passed.

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[30] *Indian Act*, S.C. 1876, c.18, s.86(1), Tab 92, Plaintiffs' Book of Authorities; *Indian Act*, R.S.C. 1906, c.81, s.111, Tab 93, Plaintiffs' Book of Authorities.
[31] *Indian Act*, S.C. 1876, c.18, s. 3(3)(a), Tab 92, Plaintiffs' Book of Authorities.
[32] *An Act to Amend the Indian Act*, S.C. 1887, c.33, s.1, Tab 26, Crown's Book of Authorities.

d) Band decisions to approve a transfer of an individual from another Band could be overridden by the Department.[33]

49. The evidence in this case will establish numerous instances where the Prairie Bands, including the Plaintiffs, exercised no real control over the composition of their membership. DIAND regularly refused to add members the Bands had approved and added members without Band consent.[34]

50. As to marrying out, the evidence will show that, both pre and post contact, the families and members of the community regularly permitted enfranchised women to return to live in their communities after divorce or their husband's death. [35] Their banishment was a statutory one, enforced

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[33] *Indian Act*, R.S.C. 1906, c.81, s.17, Tab 93, Plaintiffs Book of Authorities; *Indian Act*, S.C. 1951, c.29, s. 13; Tab 94, Plaintiffs' Book of Authorities; *Indian Act*, R.S.C. 1970, c.I-6, s.13, Tab 28, Crown Book of Authorities; See Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, p.89: Example where Sarcee supported the addition of Tom Labelle to their membership list and the Department refused to add him. Tab 11, CAP Compendium of Authorities.

[34] 1.) Ermineskin wanted to admit Bob Favel, a non-treaty half-breed Indian, into their community. Indian Affairs refused < Cross-examination of David Jacobs, First Trial Transcript, October 18, 1993, Vol. 16, pp.2324-5, Tab 12, CAP Compendium of Authorities; 2) In 1908, the Government transferred one Johnny Stony from Chief Alexander's Band to Chief Kinnosayo's Band without any consultation with or consent from the Band. < Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, p.85, Tab 11, CAP Compendium of Authorities; 3.) In 1932, the Band voted to add in two of three boys who wished to become members. The Department refused to approve the membership of the two boys unless the third was also accepted <Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, p.91. Tab 11, CAP Compendium of Authorities; 4.) The Blackfoot Band attempted to remove John Butterfly, a member. The Department refused. < Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, p.87, Tab 11, CAP Compendium of Authorities.

[35] Cross-examination of David Jacobs, First Trial Transcript, October 18, 1993, Vol. 12, p. 2313, re; enfranchised women who came back to Tsuu T'ina being forcibly removed by the RCMP (i..e not by the Band), Tab 12, CAP Compendium of Authorities; Direct examination of Harley Crowchild, First Trial Transcript, October 15, 1993, Vol. 15, p. 2123, line 1-7. Tab 13, CAP Compendium of Authorities; Expert Evidence of Dr. John Moore, p. 64, Tab 14, CAP Compendium of Authorities; Dr. Susan Gray, Rebuttal Report to Expert Report of Dr. John Moore,

by Indian agents or perhaps Band Councils, not by all community members.

51. This evidence is telling of the Plaintiffs' actual practices as "…The 'continuity' requirement puts the focus on the continuing practices of the members of the community, rather than more generally on the community itself…."[36]

Bill C-31 Does Not Violate Any Established Membership Practices

52. Bill C-31 creates two main categories of membership rights holders: acquired rights individuals and conditional rights individuals.

53. Acquired rights holders are automatically restored to band membership under Bill C-31.

54. All Bands had the opportunity to pass Band membership codes in order to ensure that they could decide whether or not to accept conditional rights individuals as Band members.

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p.11 and 49-59, Tab 15, CAP Compendium of Authorities ; First Trial Transcript, Barbara Charlie, December 9, 1993, Vol. 49, pg 35-36, Tab 16, CAP Compendium of Authorities.

[36]*R. v. Powley*, [2003] 2 S.C.R. 207 at para *27*, Tab 3, CAP Compendium of Authorities.

55. The Plaintiffs passed membership codes and now control their membership lists. They are fully in control of the decisions regarding conditional rights individuals' membership rights. Accordingly, these provisions of Bill C-31 cannot be said to violate any of the Aboriginal or Treaty rights the Plaintiffs allege exist in relation to control of membership.

56. The evidence will establish that the acquired rights individuals affected by this action are generally descendants of the historic rights holding community and were born and raised in the Plaintiffs' communities.

57. The evidence will show that many of these acquired rights holders had and maintained knowledge of their language, their culture, and spiritual practices during the period they were enfranchised and until the present day.

58. The evidence in this case will establish that the Plaintiffs' pre-contact membership practices were fluid and flexible. Their practices would not have excluded individuals now in the Acquired Rights category. Decisions to leave or join a band were often made by families and individuals. [37]

[37] Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, pp. 32, 33, 91 & 94, Tab 11, CAP Compendium of Authorities; Susan Gray, Rebuttal Report to Expert Report of Dr. John Moore, p.11 and 32, Tab 15, CAP Compendium of Authorities.

59. The evidence will establish that these flexible practices continued after contact. [38]

60. Dr. Von Gernet's evidence will indicate that the more inflexible practices, created by s.12(1)(b) of the *Indian Act* and its predecessors, did not exist prior Treaty 7 or 8 and were the result of post-contact influences which generated a new tradition between Indians and non-Indians.[39]

61. The Plaintiffs cannot establish continuously exercised practices, customs and traditions in relation to governing membership that are inconsistent with the provisions of Bill C-31.

62. The only evidence of a membership practice that might result in the exclusion of those reinstated under Bill C-31 is the practice of "woman follows man". As will be discussed below, to the extent Plaintiffs establish this practice, they have also established a constitutional violation of s. 35(4).

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[38] 1.) George Ermineskin described 5 examples including Alex Mackinaw following his wife, Isabelle Cattleman, from Ermineskin to Montana, Cross-examination of George Ermineskin, First Trial Transcript, October 7, 1993, Vol. 11, p.1368, Tab 17, CAP Compendium of Authorities; 2.) Dorothy Oulette, Harley Crowchild's first cousin and a Bill C-31 woman, returned to the reserve and lived there briefly. Dorothy Oulette and her children regularly visited the family on the reserve. There were no attempts by the Plaintiffs to stop her return to the community, Examination of Harley Crowchild, First Trial Transcript, October 15, 1993, Vol. 15, p.2132, lines 1-25, Tab 13, CAP Compendium of Authorities; 3.) Sam Simon's father married into Tsuu T'ina, Will Say of Sam Simon, Tab 18, CAP Compendium of Authorities;

[39] Dr. Von Gernet, Rebuttal Report to the Report of Dr. James Miller, p.3, Tab 19, CAP Compendium of Authorities.

Treaty Right to Determine Membership

63. Plaintiffs claim "a treaty right to determine their own citizenship free from the interference of the Crown."[40] As expressed in the Statements of Claim, "the treaty assumed and recognized the claimed right of the Plaintiff to determine its own band membership."[41]

64. The Plaintiffs say their witnesses will testify that the bands "did not relinquish their right to determine who belonged to their societies."[42] This is not the test for determining the existence of a treaty right.

65. In *Sioui*, aboriginal respondents submitted they had a treaty right to continue certain customs in a park because those "customs as they existed at the time of the treaty … are what the British Crown undertook to preserve." The Supreme Court of Canada rejected this argument and found:

> the treaty essentially has to be interpreted by determining the intention of the parties … at the time it was concluded. It is not sufficient to note that the treaty is silent on this point.[43]

66. Treaties guarantee only what was specifically agreed to by both parties.[44] The common intention of the parties governs.

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[40] Plaintiffs' Opening Statement dated December 26, 2006, p. 66.
[41] Tsuu T'ina Amended Fresh as Amended Statement of Claim, para 15.
[42] Plaintiffs' Opening Statement, p. 12, lines 1-3.
[43] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at para 111, Tab 27, Plaintiff's Book of Authorities/ Tab 20, CAP Compendium of Authorities.

67. The common intention of the parties may be found in the written terms of the treaty, in any oral promises exchanged and in the historical evidence.[45]

68. Silence is not sufficient and courts should not become "confused with a vague sense of after-the-fact largesse" when considering the evidence in a treaty case.[46]

69. The right to determine citizenship is not expressly mentioned in either Treaty 7 or 8. The evidence in this case will show that the right to determine membership was not an issue or a focus during treaty negotiations.[47] The evidence will show that Canada made no oral promises that Plaintiffs would be at liberty "to determine their own citizenship free from the interference of the Crown."

70. The Plaintiffs suggest that the Crown left determination of treaty privileges and membership to the Bands post treaty. In fact, the Department of Indian Affairs took its supervision of the band lists seriously and paid

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[44] *R. v. Badger*, [1996] 1 S.C.R. 771 at para 76, Tab 5, Crown's Book of Authorities, Tab 21, CAP Compendium of Authorities.
[45] *R. v. Marshall,* [1999] 3 S.C.R. 456 (*Marshall I)* at para 14, Tab 55, Crown's Book of Authorities/ Tab 22, CAP Compendium of Authorities.
[46] *R. v. Marshall*, [1999] 3 S.C.R. 456 (*Marshall 1*) at para 14, Tab 55, Crown's Book of Authorities/ Tab 22 CAP Compendium of Authorities; *R. v. Simon,* [1985] 2 S.C.R. 387 at para 24, Tab 23, CAP Compendium; *R v. Badger,* [1996] 1 S.C.R. 771 at para 76, Tab 5, Crown's Book of Authorities/ Tab 21 CAP Compendium of Authorities.

considerable attention to ensuring that treaty privileges were afforded only appropriate individuals.[48]

71. The Plaintiffs' opening statement claims "the Crown did not advise the First Nations that they would enact laws purporting to define citizenship or membership."[49] However, Treaty 7 and 8 were both signed at a time when the *Indian Act* already defined who was an "Indian" for *Indian Act* purposes.[50]

72. Treaties 7 and 8 contain the express promise that the Plaintiffs would "obey the laws of Canada". This promise included the *Indian Act, 1876*.[51]

73. Furthermore, the evidence of post treaty relations between the Crown and the Plaintiffs does not support the contention that it was the common intention of both parties that the Plaintiffs would control their own membership. The Superintendent was authorized by the *Indian Act* to "determine who is or who is not a member of any band of Indians".[52]

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[47] Rebuttal Expert Report of Dr. Alexander Von Gernet to the Expert Reports of Drs.' Moore, Binnema, & Smith, p.130, Tab 24, CAP Compendium of Authorities; Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, p.82 , Tab 11, CAP Compendium of Authorities.
[48] Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, p 84-86, Tab 11, CAP Compendium of Authorities.
[49] Plaintiffs' Opening Statement dated December 26, 2006, p.69.
[50] Treaty 7 was signed in 1877. This was nine years after Parliament had passed the *Lands and Enfranchisement Act, 1868* which defined 'Indian' for statutory benefits purposes, and one year after the passage of the *Indian Act, 1876* which contained a comprehensive definition of 'Indian' for the purposes of the Act. Treaty 8 was signed in 1899.
[51] *R. v. Badger*, [1996] 1 S.C.R. 771 at para 70: "In light of the existence of these conservation laws prior to the signing of the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation." Tab 5, Crown's Book of Authorities.
[52] *An Act to amend "The Indian Act",* S.C. 1887, c.33, s.1., Tab 26, Crown's Book of Authorities.

DIAND had final authority over membership decisions and additions or deletions from treaty pay lists.[53]

74. During this regime of government controlled membership, Treaty 8 sent a petition of grievances to the Federal government. The petition did not raise any issues regarding Band control of membership.[54]

75. The Plaintiffs' claim of a treaty promise that they would be allowed to determine membership free of Crown interference is not supported by the evidence and does not survive an analysis under accepted tests for treaty rights.

Section 35 of the Constitution Act, 1982

76. The Plaintiffs' claims of generalized Aboriginal and Treaty rights to control membership obscures the true issue in this case – the history of discrimination against Aboriginal women.

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[53] See Footnote #34 for examples. Also: 1.) In the 1940's Canada removed 12 Sawridge members from the treaty paylists, Rebuttal Expert Report of Dr. Alexander Von Gernet to the Expert Reports of Drs.' Moore, Binnema, & Smith, p.123, Tab 24, CAP Compendium of Authorities; 2.) Once deleted from treaty it was very difficult to gain readmission and it was the sole decision of the Superintendent General. *Indian Act, 1876.* S.C. 1876 c. 18. (39 Vict.), s. 3(3)(e), Tab 92, Plaintiffs' Book of Authorities; 3.) In 1879, the *Indian Act* was amended to allow half-breeds to withdraw from treaty and take scrip. Consultation with or consent from the Band the half breed was associated with was not required, *An Act to amend "The Indian Act"*, S.C. 1879, c.34, s.1

77. Both the *Charter of Rights and Freedoms* and *the Constitution Act, 1982* reflect the importance of constitutional guarantees of gender equality. Section 15 of the *Charter* guarantees equality between men and women, with limited exceptions for affirmative action. To ensure these exceptions do not jeopardize gender equality, the guarantee is reinforced by Section 28 of the *Constitution Act, 1982* which provides: "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

78. Commentators noticed that section 25 of the *Charter* could be read to dilute gender equality protections in the context of Aboriginal and Treaty rights. To ensure that gender discrimination could not reassert itself disguised as constitutionally protected Aboriginal and Treaty rights, action was taken at the 1983 Aboriginal Constitutional Conference.

79. The result was the *Constitution Amendment Proclamation, 1983* which added s. 35(4) into the *Constitution Act, 1982*. Section 35(4) provides that "Notwithstanding any other provision in this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

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[54] Rebuttal Expert Report of Dr. Ken Coates to the Expert Report of Dr. Theodore Binnema, pp.87-8, Tab 11, CAP Compendium of Authorities.

80. Section 35(4) was supported unanimously by all Aboriginal groups at the 1983 Constitutional conference.

81. The only custom, tradition or practice the Plaintiffs have asserted that has any remote possibility of excluding acquired rights women from their home communities is the alleged membership practice of ‘woman follows man’.

82. The Plaintiffs are unable to establish a practice of ‘woman follows man’ to the requirements of *Van der Peet*. Assuming, arguendo, that the Plaintiffs somehow overcome their evidentiary difficulties and satisfy the *Van der Peet* requirements, their case fatally collides with s. 35(4) of the *Constitution Act, 1982*.

83. The language of Section 35(4) unmistakably entrenches equality between males and females in all Aboriginal and Treaty rights protected by s.35(1). The Plaintiffs cannot derogate from the fundamental constitutional value of gender equality in any exercise of Aboriginal and Treaty rights.

84. In this case, the Plaintiffs seek to rely on alleged aboriginal and treaty rights to withhold band membership from forty acquired rights individuals, all of whom are women, all of whom are victims of the gender discrimination that existed in the *Indian Act* prior to 1985.

85. A central purpose of Bill C-31 was to remove that discrimination. Success for the Plaintiffs in this action would preserve the discriminatory effects of past enfranchisement provisions in the *Indian Act*. Section 15, 28 and 35(4) command that Canada can no longer tolerate such discrimination.

86. At the first trial Justice Muldoon explained that "the more firmly the Plaintiffs bring themselves into and under s.35(1), the more surely s.35(4) acts upon their alleged rights…which, therefore are modified so as to be guaranteed equally to the whole collectivity of Indian men and women."[55]

87. Justice Muldoon observed that "the marital custom, the so-called Aboriginal and treaty rights which permit an Indian husband to bring his non-Indian wife onto reserve, but which forbid an Indian woman from bringing her non-Indian husband are extinguished utterly by s.35(4). Section 35(4) exacts equality of rights between male and female persons, no matter what rights or responsibilities may have pertained in earlier times. On this basis alone, the action had to be dismissed."[56]

[55] *Sawridge Band v. Canada* (T.D.) [1996] 1 F.C. 3 at para 21, Tab 25, CAP Compendium of Authorities.
[56] *Sawridge Band v. Canada* (T.D.) [1996] 1 F.C. 3 at para 20, Tab 25, CAP Compendium of Authorities.

88. While a new trial has been ordered on other grounds, the Court of Appeal said nothing to diminish the force of Muldoon J.'s reasoning regarding s.35(4).[57]

89. Section 35(4) is a complete and sufficient answer to Plaintiffs' case.

Bill C-31 Did Not Infringe the Plaintiff's Aboriginal and Treaty Rights

90. Bill C-31 did not infringe any alleged rights the Plaintiffs may have.

91. To establish *prima facie* infringement the Plaintiffs must prove:

a) Bill C-31 is an unreasonable limit on the Plaintiffs' alleged right to control membership;

b) Bill C-31 imposes undue hardship on the Plaintiffs;

c) Bill C-31 denies the Plaintiff bands their preferred means of exercising their alleged membership rights.[58]

92. The Plaintiffs carry the onus of proof to show prima facie infringement. [59] The Plaintiffs have not and cannot discharge their onus.

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[57] *Sawridge Band v. Canada* (C.A.), [1997] 3 F.C. 580 at para 28, Tab 26, CAP Compendium of Authorities.
[58] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para 70.: "To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.", Tab 28, Plaintiffs' Authorities/ Tab 27, CAP Compendium of Authorities.

Bill C-31's Alleged Infringements are Justified under Sparrow

93. Assuming, arguendo, the Plaintiffs overcome their onus to show infringement, the infringements about which the Plaintiffs complain are justified. *Sparrow* set out a two part justification test. The Crown must show:

a) "a valid legislative objective;"[60]

b) Canada respected the honour of the Crown and upheld its fiduciary relationship with Aboriginal people.[61] The Supreme Court explained how courts should analyze the second step of the justification test.

> "within the analysis of justification there are further questions to be addressed…whether there has been as little infringement as possible to effect the desired result; whether, in a situation of expropriation , fair compensation is available; and, whether the aboriginal group in question has been consulted…"[62]

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[59] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para 70: "Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.", Tab 27, CAP Compendium of Authorities.

[60] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para 71, Tab 27, CAP Compendium of Authorities.

[61] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para 75, Tab 27, CAP Compendium of Authorities.

[62] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para 82: "Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.", Tab 27, CAP Compendium of Authorities.

Valid Legislative Objective

94. The Plaintiffs inaccurately characterize the purpose of Bill C-31's mandatory reinstatement provisions as preventing First Nations from acting "in a discriminatory manner" when exercising "jurisdiction to control citizenship.[63]

95. The purpose of Bill C-31 was to re-establish gender equality by restoring membership to Aboriginal people who were victims of discriminatory legislation. The purpose was not to prevent the Plaintiffs from determining their membership.[64]

96. The Minister of State for the Status of Women, Hon. Judy Erola, testified before Parliament:

> In 1975 the United Nations proclaimed 1976-85 the decade for women with the theme equality, development and peace…
>
> In the first five years of the decade close to 2000 Indian women lost their status. Almost 2000 Indian women were legally ostracized from their ancestral communities. With the full force of the Indian Act, these women have been exiled. They have lost their culture, their identity, their financial benefits and all other privileges of their society.

[63] Plaintiffs Opening Statement dated December 26, 2006, p.78.
[64] Canada, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence*, No. 12 (7 March 1985) at 7, see tab 65 in Plaintiffs Book of Authorities.

> Not only does such discrimination fly in the face of the goals of the United Nations Decade for Women, not only does it contravene the Canadian Charter of Rights and Freedoms, but such discrimination has also resulted in the public censure of our country in the international courts. We have been found in contravention of the United Nations International Covenant on Civil and Political Rights.[65]

97. The central objective of Bill C-31 was to respond to these concerns. CAP supports these objectives as pressing and substantial. They are certainly "valid" within the meaning of *Sparrow*.

Little Infringement as Possible

98. Bill C-31 infringes Plaintiffs' alleged rights "as little as possible" in order to achieve the objective of restoring gender equality.

99. Bill C-31 is compromise legislation. It restores rights to Aboriginal women who were victims of discrimination under the historical provisions of the *Indian Act*. It meets constitutional requirements of gender equality and Canada's international human rights obligations. At the same time, it increases band control over membership.

100. There is no lesser way to right the wrong of gender discrimination and denial of access to culture then by restoring rights to the women against whom Canada discriminated. In restoring these women to Indian status it

[65]Canada, Standing Committee, *Testimony of Hon. Judy Erola, Minister of State for the State of Women* (28 June 1984) at 19:13-19:16, Crown Legislative Fact Exhibit Book, Tab 70 / Tab 28, CAP Compendium of Authorities.

would have been unthinkable- even barbaric- to put the women to a choice between community/culture and their children. Restoring the first generation descendants of the acquired rights women was thus a necessary and inseverable part of Bill C-31's design.

101. The Plaintiffs make the unfounded claim that Bill C-31 will "have a long term dramatic devastating effect on the Indian First Nations Peoples because of political pressure from a small group of women and other pressure groups who have no knowledge, recognition and respect of our treaties and our way of life."[66]

102. The Plaintiffs' assertion is a stereotype resulting from a regime of discrimination that existed for over 100 years under the *Indian Act.* The evidence will show that many Aboriginal women who married non-Indians remained connected to their communities and have traditional knowledge of the "Indian" way of life.[67]

103. CAP's witness, Sandra Lovelace, will testify as to fluency in her native language and culture, and to her participation in her community's way of

[66] Plaintiffs Opening Statement dated December 26, 2006, p.46: Sarcee Statement prior to implementation of Bill C-31.

[67] 1.) Mary Two-Axe Early and Barbara Charlie, testified with respect to their deep commitment and connection to their culture and to the enrichment of their natal communities Examination of Mary Two-Axe Early, First Trial Transcript, December 8, 1993, Vol. 48, p.43, Tab 29, CAP Compendium of Authorities; Examination of Barbara Charlie, First Trial Transcript, December 9, 1993, Vol. 49, p.1, Tab 16, CAP Compendium of Authorities.

life. Notably, her case before the UN Human Rights Commission resulted in a finding that her exclusion from the community was not necessary to preserve the identity of the tribe.[68]

Fair Compensation

104. Canada states that it provided "compensation with respect to any infringement."[69]

105. At the first trial, the Plaintiffs' witness, David Jacobs, confirmed that the Plaintiffs had substantial and valuable assets and resources on reserve.[70]

Consultation

106. Canada consulted with Aboriginal people about Bill C-31 and modified the bill in response to expressed concerns as Bill C-31 went through the legislative process.

107. *Haida Nation* ruled that "the content of the duty to consult and accommodate varies with the circumstances."[71] There is no duty to agree

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[68] *Lovelace v. Canada*, Communication No. R.6/24. UN GAOR, Supp No. 40, UN Doc. A/36/30 (1981), para 17; Tab 2, CAP Compendium of Authorities.
[69] Canada's Opening Statement dated January 10, 2007, para 182.
[70] Cross-examination of David Jacobs First Trial Transcript, October 18, 1993, Vol 16, p.2354, Tab 12, CAP Compendium of Authorities.
[71] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 para 39, Tab 9, Plaintiffs' Book of Authorities/ Tab 30, CAP Compendium of Authorities.

nor is consent required in every case.[72] Accommodation does not give Aboriginal groups a veto over what can be done.[73]

108. The circumstances leading up to the passage of Bill C-31 included time pressures created by s.15 of the *Charter* coming into effect.[74] Canada made time to actively consult with Aboriginal groups, including CAP, about Bill C-31.[75]

109. The Plaintiffs were also consulted. They presented a brief on Bill C-31 to the Standing Committee on Indian Affairs and Northern Development.[76] Although the Plaintiffs had objections, Parliament was not required to agree.

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[72] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 para 42 & 48. Tab 9, Plaintiffs' Book of Authorities/ Tab 30, CAP Compendium of Authorities.
[73] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para 48, Tab 9, Plaintiffs' Book of Authorities/ Tab 30, CAP Compendium of Authorities..
[74] Canada, Standing Committee on Indian Affairs and Northern Development, Testimony of Hon. John Carr Munro, Minister of Indian Affairs (27 June 1984) at 17:9: "With regard, Mr. Chairman, to discriminatory provisions of the Indian Act, time is now of the essence because the coming into force of the Canadian Charter of Rights and Freedoms in April next year will render inoperative the provisions of all federal legislation that discriminates on the basis of sex. We must ensure that Indian men and Indian women are treated equally in the same circumstances and that discrimination does not continue into the future. Therefore, despite the fact that the federal government supports Indian nation's governments control of membership, we feel bound both morally and legally to act now to undo injustices resulting from federal legislation." Tab 31, CAP Compendium of Authorities.
[75]Motion to Intervene, Affidavit of Chris McCormick, dated November 15, 1988, para 4 and 5, Court File No. T-66-86, Tab 1, CAP Compendium of Authorities. 1.) Canada received CAP's various Bill C-31 briefs in the House of Commons Special Committee on Indian Women and the *Indian Act,* Senate Standing Committee on Legal and Constitutional Affairs, and House of Commons Standing Committee on Indian Affairs; 2.) Canada (the Minister of Indian Affairs) asked for and received CAP's comments on the drafting of Bill C-31; 3.) Canada accommodated CAP's analysis that secs. 6 and 11 of the *Indian Act* required remedial legislation to prevent an unintended loss of entitlement due to the date of parental deaths. Canada enacted Bill C-150 (the "Death Rule Amendments") in response to CAP's concerns; 4.) Canada funded CAP to prepare a Report on the impacts of Bill C-31.
[76] Plaintiffs' Opening Statement dated December 26, 2006, p. 81.

No Right to Determine Membership As An Incident of Holding Reserve Lands

110. The Plaintiffs claim a right to determine their own membership as an incident of Aboriginal title in their reserve lands.[77]

111. To establish Aboriginal title to their reserve lands, the Plaintiffs must satisfy the test established by the Supreme Court of Canada in *Delgamuukw* and *R*. v. *Marshall*; *R*. v. *Bernard*. [78]

112. The Plaintiffs cannot establish Aboriginal title to their reserve lands under the current test.

113. The Plaintiffs surrendered any Aboriginal title they had under Treaty 7 and 8. The Crown assigned much smaller areas as reserve lands. There was no common intention to recognize or continue Aboriginal title in the assignment of reserve lands. Indeed, the *Indian Act* in place at the time Treaty 7 and 8 were signed gave Canada control over reserve lands with the Superintendent General having sole authority to allocate reserve lands to Band members. [79]

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[77] Plaintiffs' Opening Statements, page 69

[78] *Delgamuukw v. British Columbia,* [1997] SCR 1010, para 83, Tab 5, Plaintiffs' Book of Authorities; *R.* v. *Marshall, R.* v. *Bernard*, [2005] 2 S.C.R. 220, para 39, Tab 22, Plaintiffs' Book of Authorities.

[79] *Indian Act,* S.C. 1869, c. 6, s.1, Tab 91, Plaintiffs' Authorities; .*Indian Act*, S.C. 1876, c.18, s.6, Tab 92, Plaintiffs' Authorities, *An Act to amend and consolidate laws respecting Indians,* S.C. 1880, c.28, s.17, Tab 25, Crown's Book of Authorities.

114. The Plaintiffs cite Kent McNeil's analysis on Aboriginal title to support their claim to Aboriginal title in their reserve lands.[80] A considerable amount of McNeil's analysis relates to the communal nature of Aboriginal title.

115. As noted in paragraphs 17-22 above, communal rights of this nature cannot be withheld from one portion of the rights holding community for the benefit of another portion. Attempting to use Aboriginal title in this manner offends the very nature of the right.

116. The Plaintiffs' claim is also based on a concept unsupported by the Courts in Canada. No court in Canada has ever ruled that *Indian Act* bands who surrendered Aboriginal title through the treaty process have Aboriginal title to the reserves they were assigned.

The Royal Proclamation Does Not Grant Rights to Determine Membership

117. The *Royal Proclamation*, 1763 does not apply to Rupert's land, where the Tsuu T'ina reserve is located. Nor does the Royal Proclamation apply to Sawridge reserve lands.[81] The jurisprudence is contrary to the Plaintiffs' claim. The Plaintiffs have cited nothing to overcome it.

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[80] Emerging Justice: Essays on Indigenous Rights in Canada and Australia, Kent McNeil, pg.86-90, Tab 52, Plaintiffs' Authorities.

[81] *R. v. Sikyea* (1964) 43 D.L.R. (2d) 150, *per* Johnson, JA at p. 152 (N.W.T.C.A), aff'd [1964] S.C.R. 642: "The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation, and it is doubtful, to say the least, if the Indians of at least the western part of the Northwest Territories could claim any rights under the Proclamation, for these lands at the time were terra incognita and lay to the north and not "to the

118. Even if the Proclamation did apply, there is no language in the text of the Proclamation which grants the Plaintiffs the specific right to determine membership free from Crown interference.

119. *R. v. Marshall; R. v. Bernard*[82] used precise linguistic analysis, resolving doubts in favour of the Indians, to interpret the *Royal Proclamation*. This is the correct method to analyze the Plaintiffs' claim that the Proclamation granted them a right to determine membership free from the Crown's interference.

120. There is no language in the Proclamation, ambiguous or otherwise, that remotely grants the Plaintiffs a right to determine membership free from the Crown's interference.

121. The primary purpose of the Royal Proclamation, explained in the jurisprudence based on historical evidence, was to establish governments in the newly acquired colonies. To that end the Proclamation asserted British sovereignty, protection and dominion over Aboriginal people and reserved land not held by the Crown for Aboriginals.[83]

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westward of the Sources of the Rivers which fall into the Sea from the West and North West (From the 1763 Proclamation describing the area to which the Proclamation applied)." Tab 30, CAP Compendium of Authorities.

[82] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at para 88, 90, 92, Tab 22, Plaintiffs' Book of Authorities.

[83] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at para 95, Tab 22, Plaintiffs' Book of Authorities.

122. The Proclamation had subsidiary purposes "to ensure the future security of the colonies by minimizing potential conflict between settlers and Indians by protecting existing Indian territories, treaty rights and enjoining abusive land transactions.[84]

123. None of these purposes support the Plaintiffs' claims.

Conclusion

124. The Plaintiffs are unable to establish their claim on any of the four juridical bases pleaded. Even were the Plaintiffs to overcome the insuperable evidentiary and legal obstacles, their claim is foreseen and destroyed by s. 35(4) of the *Constitution Act, 1982*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January, 2007.

JOSEPH ELIOT MAGNET **CHAMBERLAIN HUTCHISON**

PER: _____ PER: _____

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[84] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at para 95, Tab 22, Plaintiffs' Book of Authorities.