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"LEGISLATING-OUT" SEXUAL DISCRIMINATION: NATIVE WOMEN AND BILL C-31

Christine Saulnier

Mary Two-Axe Early fought for Native women's rights. She fought a federal government that revoked her right to vote on Native reserves, to send her children to school there, to inherit property and to be buried there. The government enfranchised Mary Two-Axe Early and many other Native women because they chose to marry non-Native men. The government did not, however, enfranchise Native men who chose to "marry-out." The government designed Bill C-31 to redress the discriminatory parts of the Indian Act of 1869 that allowed for enfranchisement. When Mary Two-Axe Early died on August 21, 1996, a CBC host posed this question to the executive director of the Ontario Native Women's Association: "Did Mary's fight change things?" The reply was: "No, not significantly." The executive director explained that those Native women and their families who were disenfranchised continue to be labelled as "Bill C-31 Natives," and to be marginalized.[1]

A large body of literature exists that proposes various methods of policy analysis. The methods that predominate in this literature rely on "rational," quantitative, objective ways to answer questions regarding the design, implementation and impact of a specific policy. Many critics have argued that these methods are narrow and gender-biased, and contain basic empiricist flaws. [2] In this paper I examine Bill-C-31, an "Act to Amend the Indian Act," to demonstrate how inaccuracies and problems that can arise when "rational" methods of policy analysis are employed to determine a policy's impact on its target population. In an attempt to illustrate some critical debates surrounding policy analysis, I focus on the government's own evaluation of this policy that was designed in part to remove sexual discrimination from the Indian Act of 1869.

According to the policy "experts," Bill C-31 was successful because it solved the problem it was designed to. However, the government did not or could not consider the historical complexity of this problem because it relied on insufficient indicators of policy impact. Native people's experiences and concerns were largely ignored throughout the design and implementation stages of Bill C-31. As a result, we can question whether the government's legislation perpetuated the conflict between Native sovereignty and Native women's rights. Where were the Native peoples' voices, and in particular Native women's voices, in the design and implementation stages of the policy process? Where were their voices in the government's evaluation of the policy?

To answer these questions, I first present the historical context of the issue of sexual and racial discrimination against Native women. Second, I present the flaws apparent in the design and implementation stages of a policy process in which the government was unwilling to listen to the experiences and concerns of Native people - its target population. Finally, I analyze the basis for the differences between the evaluations presented by the government and those by the Natives. This analysis demonstrates the implications of such inconsistencies for disenfranchised Native women and their family members and for all members of policy communities who are not considered "experts." I conclude this paper by showing that the epistemological assumptions that underlie the critical disjunctures in the debate about appropriate methods for policy analysis can have a detrimental affect on the goals of people directly impacted by a policy.

Policy Analysis: "Who Knows Best What Ought to be Done"

M. E. Hawkesworth contends that "the empiricist assumptions which sustain contemporary approaches to policy analysis are fundamentally flawed."[3] The flaw originates in the underlying assumption that assessments are "scientific," and "neutral" or "value-free." This flaw contributes to the division of the world between the

"experts" or the policy analysts who "know best what ought to be done,"[4] and lay people influenced by their emotions and subjective experiences. There are many instances where the government, whether federal, provincial or municipal, has developed policies with the help of "experts" who have technical knowledge of the problem but no cognition of the "other" side. Those people who are found on the "other" side are not considered "experts" but inexperienced "lay" people, although they are the ones who have experienced the problem that has been identified as needing a solution. They are also the ones who have to live with the impacts of the policy the "experts" develop to solve the problem.

The Inuit in Labrador can testify to the negative consquences of policies developed without consulting those directly affected. In the 1970s the government of Newfoundland and Labrador went ahead with a hydroelectric project that flooded the Mishikamau. This hydroelectric project might have been a success according to the "experts." But, according to one Inuit: "burial grounds, rich hunting territory that sustained us, were destroyed. Even the fish became tainted with methylmercury. There was not a word of consultation with us."[5] In 1979, the federal government allowed its allies to use the Canadian Forces base in Goose Bay, Labrador for low-level training flights. The Department of National Defence's reports spoke of this area being "ideally suited" for low-level training, because in such a vast space, there is "not one home or permanent residence."[6] As one Inuit recalls, the department contradicts all of the Inuit's observations about the impact of this policy "saying that we Innu are not the 'experts.' Yet it is not the scientists who have spent months and years on the land, it is us."[7] Underlying these statements and examples are the same empiricist flaws that Hawkesworth describes. Are these flaws apparent in the case of Bill C-31 as well? What events led up to this policy?

Background: Discrimination and the Indian Act

It was in the original *Indian Act* of 1869 that the

federal government legislated the use of the patrilineal principle to determine Native ancestry and status. Traditionally, Native people had determined Native ancestry bilaterally, where Indian status was decided equally through both parents, or through the matrilineal principle. According to Sally Weaver, Native Band Councils have become politically socialized by the patriarchal values embodied in the *Indian Act.* Many Native people even proclaim the patrilineal principle to be their customary way of determining Native ancestry.[8]

In this Act, the government also linked Indian status to marriage. With this provision the government intended to develop a more narrow criteria of who could have the Band Status and membership, which allowed Natives and their families the right to occupy Reserve lands and to have access to scarce resources. The government combined the marital status provision with the patrilineal principle to take away the legal Indian status of Native **women** who "married-out." The government allowed Native men who "married-out" to keep their status as registered Indians and extended legal Indian status to their spouses and children.

Weaver traces the government's justification for enfranchisement to what it called "the fear of intermarriage and white male dominance on reserve lands." In other words, the government only regarded white males as a threat to Band resources and not the white females who "married-in."[9] Weaver argues that these sections reflect the government's assessment of Indian status in terms of access to physical resources. If one agrees that policy analysts tend to rely on rational, quantitative methods of analysis, then it follows that they would evaluate access to physical resources, which can be quantified as opposed to cultural resources. If the government had been concerned with the continuity of cultural resources or could quantify the domination of these resources by non-Native people, then the case for exclusion of the white female spouses would merit as much consideration as the white men. As teachers, nurses, and volunteers these spouses often held stronger roles than do the

white males in the community.[10] The government drew a firm line of inclusion and exclusion; for Native women the line was drawn across race and gender lines.

While Native women (enfranchised or not) were still struggling for rights on their Reserves, they were also trying to have their concerns recognized by the Canadian women's movement. The women's movement was lobbying the federal government for women's rights but did not consider the specific situations faced by various social groups within the movement including Native women.[11] Native women's concerns included the unfair treatment they faced not just within Canadian society as a whole, but in their own communities. These women were being oppressed not only because of their sex, but their race and class.

When the federal government finally acknowledged Native women's concerns, it did not do so because it was "listening" to them. The government was under pressure from the United Nations and from various courts because of the actions of Native women, including Mary Two-Axe Early, Jeanette Corbiere Lavell, Yvonne Bedard, Sandra Lovelace, and groups like NWAC. In 1968, during the United Nations' Year of Human Rights, Mary Two-Axe Early was the first Native woman to present her case to the Canadian Royal Commission on the Status of Women (RCSW). She told the Commission that the government took away her Native status when she married a man who was not a status Indian. [12] In response to the concerns raised by Early, the RCSW recommended the more equal treatment of Native women. The government, however, failed to implement any changes to the Indian Act.[13]

Shortly after this incident, two more Native women took their cases to court, which placed further pressure on the federal government. In December 1970, Jeanette Corbière Lavell married a non-Indian man and contested those sections of the *Indian Act* that took away her status.[14] Lavell lost her case in the lower court of Ontario. The judge that brought down the ruling evidently felt that this case was a parliamentary matter. The "buck was passed" back to the government, but it refused to make a

decision at that time because it was still "studying" the Indian Act. Lavell proceeded to the Court of Appeal in Ontario and won her case. However, she won her case entirely on the specificities of her own situation; it was not a decision based on sexual discrimination in the Indian Act. As a result, she could retain her Native status but neither her son nor her husband was included in the decision rendered by the court. [15]

Yvonne Bedard was the second Native woman to bring her case of sexual discrimination to court. Bedard separated from her husband who was a non-Indian, and decided to return to her family home on a Native Reserve. The Band Council later evicted her as a non-status Indian.[16] Bedard's case was a little different from Lavell's because she was seeking not just the recognition of her Indian status but the legal right to reside on the Reserve with her children. Her case was wider in scope because it included discrimination based on sex and race. Bedard did win her case in Ontario but the court's decision was based on the terms established in Lavell judgement.[17]

In response to these two decisions the Department of Indian and Northern Development (DIAND) suspended enfranchisement and the Minister of Justice appealed these decisions to the Supreme Court of Canada. When these cases were heard, many Native communities were split. It is not that these communities were not in favour of equal rights for Native women, but they were concerned that the government would refuse to listen to their concerns and impose a solution that would solve none of their problems.

The apprehension felt by the Native people can be partially attributed to 1968-69, the last time the government attempted to amend the *Indian Act*. During this time the federal government held a round of consultations across the country to understand how the *Indian Act* should have been revised. At the end of the consultations, the government tabled a policy that proposed terminating all 'special rights' by abolishing the *Indian Act*. It justified this decision by insisting that the issue of Indian status and Band membership had attracted little

attention from Native people. In response to the few proposals that were made, the government proposed the abolishment of the Indian Act because the varying points of view led it to conclude that Native people were unable to reach a consensus on these issues and this would be the best solution.[18] Considering this history, many Native communities thought that if they supported Lavell and Bedard the government may try to repeal the *Indian Act* again and take away their only rights. As a result, the case before the Supreme Court was seen by Native people as a struggle between women's rights and Indian rights. The women were requested to subordinate their goal until the *Indian Act* was revised for the betterment of all Native people.[19] In 1973 the Supreme Court ruled that the Indian Act was not discriminatory and did not violate the Canadian *Bill of Rights*.[20] This decision sent the issue back to the political arena where the government had resumed enfranchisement.

In 1977 Sandra Lovelace took her case to the United Nations' Commission on Human Rights on the grounds that the *Indian Act* violated the *International Covenant on Political and Civil Rights*. She won her case in 1982 when the Commission ruled that Canada had contravened the international treaty because Lovelace was denied the right to live in her own cultural community.[21] This ruling was not made on the grounds of sexual discrimination, but more on the grounds that Native people have the right to determine their own status. Lovelace was not able to make her case that sections of the *Indian Act* discriminated against her on the basis on sex and marital status because she was married before 1976, which was the year Canada signed the U.N. convention.[22] As a result of these court cases Native women's fight for disenfranchisement had achieved visibility and the government was under pressure to act on the issue.

The Government's Solution: Bill C-31

Canada's international embarrassment, coupled with the imminent application of Section 15 (equality rights for men and women) of the *Canadian Charter of*

Rights and Freedoms to the *Indian Act*, worked to place pressure on the government to make revisions to the Act. The government acted not because of the conflicts that were dividing the Native community, and certainly not because of the concerns that were being raised by Native women. It could be argued that the United Nations' ruling was the main impetus behind the legislation rather than the Charter. The Charter did include the guarantee of sexual equality; therefore the Act would technically have to be brought in line with the Charter's individual rights. However, because of Section 25 and later Section 35, the collective rights of Native people and their treaty claims would take precedence over the individual rights of Native women.

There were a number of attempts to draft legislation on this issue. The federal government introduced *Bill C-47*, but it died in the Senate in July 1984 when parliament was abrogated for a general election. In September 1984 a Conservative government was elected and it proposed a six-month deadline for revisions of the *Indian Act*. The government justified its decision to act within this time frame based on the Charter's legal implications. This legislation was introduced by the Conservative Minister of Indian Affairs, David Crombie, "who was not even a moderate proponent of Indian women's rights."[23] Crombie introduced *Bill C-31* without consulting any Native groups.

Bill C-31 had three main components that would prove problematic for those Native women and their families who might choose to return to their Reserves. The first objective of the Bill was to remove the discriminatory provisions in the *Indian Act* that used marital status and sex to determine legal Indian status. Its second objective separated legal Indian status and Band membership so that Indian status would continue to be decided by the federal government, but Band Councils would determine Band Status and Reserve residency. Finally, the Bill was designed to discontinue enfranchisement and abolish the concept from the *Indian Act*.[24] *Bill C-31* became law as Section 22 of the *Indian Act* on June 28, 1985 and was back dated to April 17, 1985 (the date the Charter became law).[25] According to the government's goals, *Bill C-31* appeared to have solved the problem: the discriminatory sections of the *Indian Act* had been "legislated-out"and the DIAND guaranteed Indian status and band membership status for the 20 000 women who had been enfranchised.

Before analyzing the impact of this policy it is essential to understand the intention behind its design.[26] The government identified three main goals that served as its guide for designing *Bill C-31*. It was to first, remove discrimination from the *Indian Act*, second, to restore status and membership rights and third, to increase Native peoples' control over the Indian Band structure. The government had the choice to draft separate policies - one to eliminate discrimination and the other to increase the Band Council's power. However, the government chose to combine the two, which affected its ability to eliminate sex discrimination. If its main goal had been the elimination of discrimination based on sex and marital status, then the government had a duty to **correct** the results of the discrimination that it had written into the *Indian Act*. The second goal, the reinstatement of Indian status for Native women, affected both legal status and Band membership. Not only did the government separate these, but it complicated the situation even further. It did this through its third goal, which was to increase the control Natives had over their communities by giving Bands the right to determine Band membership.

Before *Bill C-31*, the government had the authority to guarantee the reinstatement of all of the rights and privileges that had previously been denied to certain Native women including Band membership. By providing the Bands with the right to determine membership, the government only extended the automatic Band membership to the 20,000 Native women who had been disenfranchised. It did not extend this privilege to these women's family members, nor did it guarantee the Reserves the resources they would need to accept these women back. Even the government's guarantee for the

women who had "married-out" was conditional in that these women still had to file applications and go through the same application process as the others.

While the government combined the three goals into one policy, it isolated the first goal from the others to assess the policy's impact. This decision demonstrates the government's ignorance of the broader impacts associated with its interconnected goals. The government wrote the discrimination into the *Indian Act* in 1869, and then, to rectify it, the government removed the discriminatory clauses. However, discrimination was not just existent in a clause of the *Indian Act*. The clause and its removal affected the lives of women, Reserve communities and Bands and cannot simply be legislated-out.

Implementation of Bill C-31: The Application Process

The implementation of a policy can directly affect the impact a programme has on its target group. The application process was an integral part of the implementation of Bill C-31's goal of reversing the enfranchisement of Native women. Initially, an important component of the application process is the distribution of information. According to the government, information was widely disseminated along with funding to Native organizations, to ensure that those people who were affected by this legislation were fully informed of the process.[27] The government measured the success of this part of the process by the large number of applications its department received for registration. However, Native people identified many problems related to the application itself and the process in general that the government did not recognize.

The Native Council of Canada (NCC) pointed out that the application process was lengthy, taking about 2.5 years per application. The NCC felt that information regarding what evidence would be needed for entitlement was poorly developed. Most of these applicants were without the necessary documents needed. As a result of low investment in government personnel and resources to

aid the applicants, as many as one-third of the applications had not been completed at the time of this government's assessment. [28] As for the funding provided to the Native organizations, the government initially allocated these monies but eventually cut its spending in this area. The NCC for example, lost its funding in the Fall of 1986 and the other monies for one-time grants were depleted quite quickly. In effect, there was a significant lack of grass roots assistance for Native people.[29]

The Native Women's Association of Canada (NWAC) also presented its concerns regarding this part of the process to the House of Commons Standing Committee. This association's mandate was distinct from the national male dominated organizations like the NCC. It is mandated to voice the concerns of Native women. Furthermore, while it is fighting for Native Women's rights to legal Indian Status, its membership is based on self-identification of Native identity rather than on legal criteria, which many other Native associations use.[30] The NWAC described the implementation process of Bill C-31 as "arbitrary, [and] insufficient with infinite delays."[31] According to this group, there was evidence that applications that required additional research were processed first. Furthermore, during the application process the onus was on the individual to know what the process entailed. For example, although the government had set certain processing priorities for the elderly, the ill and for students, the government did not inform these groups of these provisions unless they asked whether there were any or complained. The application process was ornerous because it sometimes called for a full-scale genealogical search that extended as far back as the mid-1800s. The government could have alleviated some time and effort this part of the process took because it had much of the information the Native women needed in their DIAND files. However, the department seemed unwilling to help; for example, it would not even cross-reference applications from extended families.[32]

The government realized that there was potential for there to be a drain on the Reserves' resources, when

or if the newly registered people were successful in their applications and decided to move to Reserve communities. The government evaluated this possibility by examining the applications it had received for funding from the Bands and individuals. It concluded that since only a small number made such requests the reinstatees must be staying off-Reserve and therefore there was no problem.[33] However, according to the Native people, the low numbers are linked with the low number of completed applications for registration and entitlement. For Natives to be able to make a funding request they had to be registered. Even if someone was successfully registered, s/he would face another implementation problem in that the government did not coordinate among its departments for entitlement to registration, benefits and rights. The principal departments involved were Health and Welfare, Fisheries, and Revenue Canada, all of which had inconsistent policies and dates for their programs to come into effect.[34]

The question that remains is whether *Bill C-31* really solved the problem or merely displaced it onto the Native communities. One way to answer this is to evaluate the policy and its impact. The next section will examine the different conclusions reached by the government, the Bands and Native women in their respective evaluations of *Bill C-31*. I survey the assessments of *Bill C-31's* impact, concentrating on the two-year period following the implementation of *Bill C-31* because "it is now commonplace for Indians to view the period between June 28, 1985 and June 28, 1987 as one of tremendous anxiety, frustration and confusion."[35] It was during this time that Bands were to assume control of membership status by developing their own membership codes. Although these groups present immensely different points of view on the situation what they can agree on are the general reasons why a policy's impact should be analyzed: policy impact evaluations can determine whether the policy has enhanced the satisfaction of some need, value or opportunity and whether it resolved the initial problem.[36]

The Parameters of Policy Impact Evaluation

Policy impact can be analyzed by many different bodies; by those who deliver the program, by an evaluation unit, by temporary staff, by an external evaluation or by the funding or legislative body itself. *Bill C-31* was evaluated by the government. It stipulated in the legislation that it would table a report on the impacts of the Bill within two years of its implementation. However, the government evaluated the policy only according to its direct impact. This evaluation was based on the postulate that dominates empiricist policy analysis: the greater the distance between the goal and the real impact, the greater the failure of the policy or its design.[37] The policy is thus assessed for efficiency, or by using cost-benefit analysis, for example. To evaluate *Bill C-31*, the government chose to use more "objective" indicators compiled by using its Department's data. However, because Native organizations were more concerned with the experiences of Native people they evaluated how the policy impacted on their lives and communities. For Native people *Bill C-31* would institute the biggest change to the Indian Act in thirty years, and therefore, they tend to assess the policy more broadly for its "indirect" impact. The policy impact definition that was most closely aligned to the Native people's evaluative frame is a broad one: "Policy impact is an actual change in behaviour or attitudes that result from a policy output."[38]

Many Native groups were critical of the evaluation undertaken by the government for the following reasons. First, DIAND monitored the policy without the involvement of Native people. Second, the department tabled its findings and concerns in a House of Commons Standing Committee. Native organizations felt the government should have established a special joint committee, which unlike a standing committee allows for the participation of Indian representatives *ex officio*. [39]

The government's initial assessment focussed mainly on policy outputs, resources and goods for the target groups and their direct impact. The government examined the changes to the status of Native women who had "married-out," and to the Band's control over Band

membership, lands and resources.[40] The department's 1987 report concentrated on education, housing, employment, economic resources, health and social assistance. It presented numbers that the department considered to be adequate indicators of direct impact. The government used many indicators based on its preprogram and postprogram evaluative comparisons to determine if resources were being depleted. The department measured education by changes in school enrollment, housing by the number of applications for housing units or for infrastructure funding, and employment by comparing the employment rates and access to training and lending programs. The Report concluded that, concerning the first goal, the discriminatory clauses were removed. It also claimed that progress had been made concerning the other two goals for restoration of status and for the control of Band membership by the Bands. Finally, it stated that the "real" impacts would take time to surface and that another report needed to be tabled in three years (in 1990).[41]

Those who criticize such a narrow evaluation question the heavy reliance on objective indicators and the quantification of impact. Deborah Stone contends that there must be a recognition that these "numbers" only represent a part of the picture. She defines numbers as "metaphors, symbols and stories."[42] The lack of consultation with Native people and lack of acknowledgment of the partiality and fallibility of rational investigations resulted in the government's ignorance of the full impact on Native women and on Reserve communities. The interpretation by Native people of the impact of this Bill holds witness to Hawkesworth's contention that policy analysts "cannot accord themselves unwarranted authority on the basis of depth of understanding, superior insight, or technical expertise."[43]

In contrast to the government's report, Native people felt that the demographic impacts were largely underestimated by DIAND. Although the department professed to be meeting the additional cost posed by the return of Native women to the Reserves, this was not

suffient according to the Native people. This Bill resulted in a 'real' resource problem for the Reserves. There was a lack of resources for the Native people who were disenfranchised and for other Band members who felt they were being denied benefits (scarce resources) because of the demands of Native women.[44] While Native people acknowledged that the housing problem was not created by *Bill C-31*, they maintained that it was intensified by it; Native people saw an increase in the demands for housing units, the persistence of poor quality housing and an increase in the number of people per dwelling.[45]

Native women responded to the government's assessment in the following way: "blatant discrimination against Indian women has been removed from the Act, [however] the effects of that discrimination persist and new areas of inequality arise."[46] Native women drew attention to the unequal treatment of male and female siblings who married non-status Indians. Women who lost their status and had it restored cannot pass their status to successive generations. Their brother's non-Indian spouse already gained status and therefore their children automatically received status and Band membership whereas the sister's children can only acquire status. Native women who "marry-out" are still discriminated against because of this "second generation cut-off," affecting the Indian population over several generations.

The "second generation cut-off" means that Native women who are children of Native women who married Non-Native men will pass fewer benefits onto their descendants than will their male siblings - despite having the same degree of Indian ancestry. Those registered under Section 6(2) of the *Indian Act* only have one parent who is eligible to be registered as a Status Indian. Those Natives who are registered under Section 6(1) have both parents who are or were eligible for Indian status under *Bill C-31*. They can marry a non-status Indian and still pass on this status. If a child was registered under Section 6(2) and married a non-status Indian they are not able to pass on their status to the second generation. Thus the "second generation cutoff" affects the grandchildren

of Native women who marry-out.[47]

The policy also has implications for the family of Native women who "married-out." It is not clear about who could return to the Reserve - dependent children, independent children or spouses.[48] Continued discrimination against the "illegitimate" children of single mothers still exists as well. For these women's children who were born out of wedlock to be considered for status, the unmarried women must disclose the natural father's name and the father must acknowledge paternity in writing, otherwise the father is presumed to be white. If the father is considered white then the children are subject to the second generation cutoff under Section 6(2).[49]

The elimination of discrimination and the restoration of status is a "procedural right" that allows for a process by which decisions must be made, but it does not guarantee the actual entitlement.[50] This means that the government guaranteed the restoration of the status and membership of the women who lost it, but did not apply this to their families. The government's guarantee of automatic membership is also problematic because it gives Native Bands the power to determine Band membership but also institutes these exceptions in which the Bands have no input, which has created rifts in the communities between those who have their roots in the Reserves (the "traditional" Native people), and those who were forced to live in urban areas when they initially lost their status (the "Bill C-31" Native people).[51]

There are no simple solutions, as each type of policy solution might be seen as a way of constructing and maintaining boundaries that determine the direction of change that can take place. One such strategy for change focusses on those who make the decisions, empowering a different set of people to exercise jurisdiction.[52] The government used this strategy and returned to the Band the right to determine eligibility for Band membership. By doing this it ignored the historical lack of Native women's rights. The government remains uncritical of the power and privilege it has given to men in the Bands, and thus perpetuates the gendered nature of

the conflict. The way that *Bill C-31* was designed represented of the *Indian Act* as an issue of self-government, absent were any politics around gender.

Another oversight by the government in its narrowed evaluation of the policy was the clarification of the allocation of Band resources. Bands who were given responsibility for membership faced problems because of the confusion over the allocation of resources for the reinstatees. As a result, only a few of those women who have been reinstated have been welcomed back to Reserves, because Band Councils do not want to and cannot bear the costs of programs and services for them due to land and housing shortage.[53] If the Band Council did not register a Band membership code, the Native people who were reinstated would be given automatic Band membership by the government. However, if the Bands developed membership codes within the two-year deadline they could discriminate against the reinstatees in quite creative ways. The result was a stampede of Bands that adopted restrictive memberships - over 230 bands submitted codes in June 1987 alone.[54]

The political nature of the rules can include or exclude, unite or divide by defining different treatments or placing people in different categories.[55] In this case study, the amendments to the Indian Act not only redefined who was and was not a Native person, but introduced two other 'types' of Native people so that there are now four: those who have status with Band membership, non-status without Band membership, status without Band membership, and non-status with Band membership. Before *Bill C-31*, the government automatically gave those who had Indian status the right to Band membership. *Bill C-31* gave Band Councils the right to decide Band membership and Reserve residency, but the government retained the right to determine legal Indian status. While this is a positive step toward Native self-government it ignores the implications this division had for Native women's rights.

Many normative choices were made when the government designed *Bill C-31* to divide legal status

determined by the government and Band membership eligibility by Bands. This decision illustrates how "the dominant groups in every society inculcate values and attitudes that help preserve their position."[56] The result was to link Band membership control and the discrimination issue. This was seen by the government as a compromise between the Bands and those Native people who wanted reinstatement as a first step toward self-government.[57] However, Native people on Reserves saw it as a compromise between colonialism and self-government. Bands would only admit those Native people who fit into the categories DIAND provided, but the Bands could exclude anyone according to their membership codes. The bottom line was that the government retained the ability to determine Indian Status.

In further evaluations of *Bill C-31* the government did listen to the concerns of Native people. In the Standing Committee in 1990, for example, the government acknowledged the many problems facing Native people. It recommended that the new evaluation process should include a National Aboriginal Inquiry on the impacts of *Bill C-31*, jointly chaired by the Assembly of First Nations, NWAC and NCC. Furthermore, a survey of the registrants, of selected bands and of communities should supplement the internal government evaluation.[58] At this time, the government concluded that housing was the greatest single program affected because of *Bill C-31*. However, this report still concluded that the major impacts have not yet been felt.[59]

Again, the aboriginal response to this report was that many impacts have been felt; social and economic factors led to the disruption in community life and the competition for scarce resources, creating alienation and hostility within their communities. Furthermore, a new class of Native people was created and there existed ongoing residual discrimination within the *Indian Act*.[60]

This brings to light a new tension that was partially created by the government's inability to take full responsibility for the elimination of discrimination, not just in Indian status but in Band membership. While on the one

hand, Native people are fighting for self-government, on the other hand, many Native women are fighting discrimination. *Bill C-31* displaced this problem onto the Band councils. These women are afraid that Band Councils will gain more power and allow for more opportunities to discriminate against them. The NWAC supports women's individual rights, but this stand conflicts with others who advocate for Native sovereignty, self-government and collective rights.[61] It is probable, given that individual Native people do not own the Reserve property they live on, that the Bands will continue to make decisions such as not accepting Native women who "marry-out" back to the Reserve. As of 1990, only 9300 of those Native women reinstated were living on Reserves. Since 77% of the 73,554 applicants who had their status restored were women, this means 47,337 of these women are not living on Reserves.[62] Though it is not definitive that the reason so few have returned is that of discrimination, there are examples that lend themselves to such a conclusion.

In 1994, the Kahnawake reserve Band Council expelled thirteen families. Its justification for doing so was that the families were partly Native in ancestry, but did not have Indian Status. They invoked *Bill C-31* as evidence that the Band Council reserves the right to expel those people who are non-status Indians. Just as the *Indian Act* (1869)'s patrilineal ancestry was adopted as custom, the *Bill C-31* status was adopted by this Band that justified the expulsion on the grounds of "genetic quality control."[63] Before *Bill C-31* Indian Status was decided through parentage and culture. *Bill C-31* used racial percentage of one-half Native ancestry to determine status and this allowed for the continued discrimination against Native women who "married-out" and their families. Given this example and others, it is understandable that many Native women felt that the Charter of Rights and Freedoms or a similar Indian rights charter should be applied to Band membership codes and review processes so that women and men are treated equal. Bands might be in a better position to accept new members (whether male or female) if they were guaranteed

ongoing funding to be able to accommodate them.[64]

Clearly there are real problems in trying to analyze impact no matter what method is employed. In this case study, I have tried to show that the government analysis of direct impact tended to oversimplify the policy process as a 'rational' one and to neglect the subjective experience of the Native people at all stages of the policy process. Had the government employed a more participatory model when designing this policy and continued to consult Native people and Native women in particular some negative implications of this Bill might have been avoided. Moreover, the policy might have been designed to deal with both Native women's rights and the concern of Native self-government. I would agree with Hawkesworth that the "nature of policy analysis should be determined by a political contest rather than a rational investigation."[65] But, as this author and others have pointed out, this would entail a complete rethinking of the epistemological premises the government's evaluative model is based upon. This shift in emphasis, from an institution-oriented to a client-oriented model, would entail the continued assignment of value to the process of policy evaluation or its product but with a different focus.[66] The focus would no longer require the division of the world into empirical, non-empirical, quantitative and qualitative or objective and subjective. These types of divisions or dichotomies most often result in the valorisation of one side over the other: the experts over the non-experts. These divisions are themselves discriminatory and cannot deal with nor solve the problem of discrimination Native women experienced and continue to experience.

Feminists have raised many concerns regarding the inability of policy analysts to recognize the gendered nature of issues except as "women's issues," and then only within a very narrow, liberal framework of equality of opportunity, without recognizing systemic, patriarchal social arrangements.[67] The impact of such policies is a perpetuation of discrimination or (continued) marginalization. In this case, the government helped to create the context in which Native women were discriminated against and did not succeed in legislating it out.

Native women have fought long and hard for their rights as Native women. Their fight has been waged in many spheres, including the women's movement, their Reserve communities, various levels of government, and the judiciary. As they continue to fight, they face decisions about what sphere is most appropriate for what they require. Policy will continue to be developed, implemented and assessed with or without their involvement. Their knowledge and experience should be valued by the policy-makers but for reasons including the choice of methodologies and their epistemological assumptions they are excluded. The government did not "legislate-out" discrimination because their "experts" did not include people like Mary Two-Axe Early.

Notes

1. Michael Enright, *As it Happens* (Toronto: CBC Radio, 22 August 1996).

2.For some of the authors who have critically analyzed policy analysis see Hawkesworth, Fischer, and Stone.

3. M. E. Hawkesworth, *Theoretical Issues in Policy Analysis* (Albany: State University of New York, 1988) 2.

4. Hawkesworth 192.

5. Napes Ashini, "Nitassinan: Caribou and F-16s," *Nation to Nation: Aboriginal Sovereignty and the Future of Canada,* Diane Engelstad and John Bird, Eds. (Concord, Ontario: Anansi, 1992) 121.

6. Quoted in Ashini 123.

7. Ashini 124.

8. Sally Weaver, "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict," in

Changing Patterns; Women in Canada, 2nd Edition. Eds. S. Burt, L. Code and L. Dorney (Toronto: McLelland and Stewart Inc., 1993) 95-96.

9. Sally Weaver, "The Status of Indian Women," *Two Nations, Many Cultures, 2nd Edition* Ed. Jean L. Elliott (Scarborough; Prentice-Hall, 1983) 58-59.

10. Weaver "The Status of Indian Women" 60.

11. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict," 92.

12. James S. Frideres and Ernestine Krosenbrink-Gelissen, *Native Peoples in Canada: Contemporary Conflicts, 4th Edition* (Scarborough: Prentice-Hall, 1993) 336.

13. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict" 97.

14. Frideres and Krosenbrink-Gelissen 339.

15. Weaver "The Status of Indian Women"65.

16. Frideres and Krosenbrink-Gelissen 340.

17. Weaver "The Status of Indian Women" 66.

18. Weaver "The Status of Indian Women" 63.

19. Frideres and Krosenbrink-Gelissen, *Native People in Canada* 342.

20. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict" 100.

21. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict" 104.

22. Weaver "The Status of Indian Women" 72.

23. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict" 115.

24. Besides the provision that allowed the government to revoke Native women's rights for marrying non-Natives, there had also been a provision for voluntary enfranchisement.

25. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict" 120.

26. Brian W. Hogwood and L.A. Gunn, *Policy Analysis for the Real World* (Oxford: Oxford UP, 1984) 222.

27. Canada, DIAND, *Report to Parliament: Implementation of the 1985 Changes to the Indian Act.* (Ottawa: DIAND, June 1987) 3.

28. Native Council of Canada (NCC), "Broken Promises: A Report to Parliament on Bill C-31 and the New Indian Act," in *House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Minutes of Proceedings and Evidence* (December 10, 1987) No.26: A17.

29. NCC A17.

30. Frideres and Krosenbrink-Gelissen 336.

31. NWAC, "Presentation on Bill C-31." in *House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Minutes of Proceedings and Evidence,* February 23, 1988, No.33, 6.

32. Shirley Joseph, "Assimilation Tools: Then and Now," *BC Studies* (No.89, Spring 1991),72-73.

33. *Canada Report to Parliament* 15.

34. NCC A28-29.

35. NCC A15.

36. William N. Dunn, *Public Policy Analysis: An Introduction. 2nd Edition* (New Jersey: Prentice Hall,1994) 342.

37. Leslie Pal, *Public Policy Analysis: An Introduction, 2nd Edition* (Scarborough: Nelson Canada, 1992) . 182.

38. Dunn 396.

39. NCC A2.

40. Weaver "First Nations Women and Government Policy: 1970-1990: Discrimination and Conflict," 118.

41. Canada, *Report to Parliament* 23.

42. Deborah A. Stone, *Policy Paradox and Political Reason.* (New York: Harper Collins, 1988)146.

43. Hawkesworth 192.

44. Joseph 76.

45. Frideres and Krosenbrink-Gelissen 195.

46. Joan Holmes, *Bill C-31: Equality or Disparity? The effects of the New Indian Act on Native Women* (Ottawa: Canadian Advisory Council on the Status of Women, March 1987) 40.

47. Holmes, 22.

48. Frideres and Krosenbrink-Gelissen, 37-38.

49. Joseph, 74.

50. Stone, 268.

51. Frideres and Krosenbrink-Gelissen,36.

52. Stone, 290.

53. NWAC, "Aboriginal Women and the Constitutional Debates: Continuing Discrimination," *Canadian Woman Studies* (1992) 12(3):14.

54. NCC, A24.

55. Stone, 233.

56. Stone, 257.

57. Joseph, 75.

58. Joseph, 70.

59. Canada, DIAND, *Summary Report: Impacts of the 1985 Amendments to the Indian Act (Bill C-31)* (Ottawa: DIAND, 1990) 33.

60. Joseph, 78.

61. NWAC, 14.

62. Canada *Summary Report* iix.

63. "A Reservation on Self-Government," Editorial, *The Globe and Mail,* 19 March 1994: A18.

64. Holmes, 40.

65. Hawkesworth, 35.

66. Frank Fisher, *Politics, Values and Public Policy: The Problem of Methodology* (Boulder, Colorado: Westview Press, 1980) 27.

67. Sandra Burt, "The Several Worlds of Policy Analysis: Traditional Approaches and Feminist Critiques," *Changing Methods: Feminsts Transforming Practice.* Sandra Burt and Lorraine Code, Eds. Peterborough: Broadview Press, 1995: 368.

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RATIONALITY AND FREEDOM (UN)FULFILLED: RESEMBLANCE AND DISSONANCE IN ROUSSEAU AND HEGEL

By Nadine Changfoot

J-J Rousseau and G. W. F. Hegel offer insight into problems associated with the concept of the individual. Each thinker's respective understanding of the individual reveals a paradox of simultaneous human desire for freedom and rationality, on the one hand, and creation of 'unfreedom' and irrationality, on the other. An examination of Rousseau and Hegel reveals that the rational subject gives rise to irrationality. Rousseau is highly critical of the general Enlightenment assumption that reason is historically self-improving and expanding in knowledge for the betterment of society.[1] It is the historical transformation of human reason, for Rousseau, that confounds the actualization of freedom. Through his concept of the general will, Rousseau attempts a corrective to the problem of rationality but inadvertently reveals the impossibility of the goal of realizing freedom given the very 'perfectibilite'-- subjective rationality -- of humans themselves. Political society, for Rousseau, remains a lie of its own promise of freedom.

The ugliness of political society that discomfits Rousseau permeates even Hegel's putative progressive and developmental view of human rationality. The Hegelian Idea effects the same symptom of irrationality as identified by Rousseau. It appears in Hegel's thought within the system of need in civil society. Need is manifest as poverty for some. While Hegel does not condone the condition of deprivation, he does not consider it irrational either. This does not represent a problem, for Hegel, since rationality requires acceptance of imperfections in society ironically as aspects of its own rational self-development. The Hegelian conception of rationality is more forgiving of injustices since it renders these as necessarily symptomatic, not threatening, of its own formation.

Hegel criticizes Rousseau's understanding of ratio-